ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, DC 20210

CHRISTOPHER BALA, Complainant, v. PORT AUTHORITY TRANS-HUDSON CORPORATION Respondent.	ARB Case No. 12-048 ALJ Case No. 2010-FRS-00026

BRIEF FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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INTRODUCTION

Pursuant to 29 C.F.R. 1982.108(a)(1), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief as amicus curiae to assist the Board in determining whether section 20109(c)(2) of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109(c)(2), protects employees from discipline for following work restrictions ordered by their treating physician as a result of an off-duty injury. The Assistant Secretary is responsible for implementing the employee protections of FRSA and has a significant interest in ensuring that section 20109(c)(2) is interpreted correctly.

The ALJ in this case properly held that Christopher Bala ("Bala") engaged in activity protected by 49 U.S.C. 20109(c)(2)

when he was absent from work pursuant to doctor's orders after he injured his back at home, and that Port Authority Trans-Hudson Corporation ("PATH") violated FRSA when it disciplined him for his absence. In so concluding, the ALJ properly applied and interpreted 49 U.S.C. 20109(c)(2). For the reasons set forth more fully below, the Assistant Secretary, therefore, respectfully urges the Board to affirm the ALJ's conclusion that section 20109(c)(2) protects the complainant in this case.

STATEMENT OF THE ISSUE

Whether the ALJ properly held that PATH's application of its absenteeism policy to the complainant in this case, who was absent pursuant to doctor's orders for an off-duty injury, violated FRSA section 20109(c)(2)'s prohibition on disciplining an employee for following the orders or treatment plan of a treating physician.

STATEMENT OF THE CASE

A. Statement of Facts and Procedural History[1]

Bala was an employee of PATH. ALJ D & O at 8. He worked as a signal repairman in PATH's Power, Signals and Communications Division. *Id.* PATH is a railroad carrier that operates a rapid transit commuter railroad between New York and New Jersey. *Id.*

[1] This statement of relevant facts and procedural history is primarily derived from the February 10, 2012 Decision and Order of the ALJ. That decision is referred to herein as "ALJ D & O."

On October 17, 2006 and April 2, 2008, Bala suffered on-duty, lower back injuries. ALJ D & O at 8. In both instances, PATH's Office of Medical Services ("OMS") referred him to an orthopedic doctor who ordered him out of work for 86 and 50 days, respectively. *Id.*

On June 22, 2008, Bala suffered an off-duty back injury when he experienced a sharp pain in his lower back while lifting boxes at home. ALJ D & O at 8. Bala subsequently called-out sick for work that evening and visited his family physician the next morning. *Id.* Bala's family physician evaluated him and ordered him out of work until July 30, 2008. *Id.* Bala informed Brian Hodgekinson ("Hodgekinson"), his supervisor, of his physician's orders, and Hodgekinson consulted with Frederick Childs ("Childs"), superintendent of the Power, Signals and Communications Division about Bala's absence. *Id.* at 5, 7, 8, 12. Hodgekinson ordered that Bala be evaluated by Dr. Ronda Whitley ('Whitley"), an OMS physician. *Id.* at 7, 8. Whitley evaluated Bala and agreed with his family physician that he was not fit for duty. *Id.* at 8. She further recommended that he obtain an orthopedic evaluation. *Id.* Bala hand-delivered Whitley's medical evaluation to Childs' office. *Id.* at 6, 8.

On July 14, 2008, Childs issued a disciplinary letter to Bala, charging him with violating its attendance policy as a result of multiple absences from work. ALJ D & O at 8. The

letter specifically referenced Bala's absences in 2007 and 2008, including the days he was absent as result of his June 22, 2008 injury. *Id.* at 4. PATH's attendance policy allows employees six "frequencies" (or blocks of time where an employee is absent from work) per year before issuing disciplinary charges. *Id.* at 3. It further states that PATH will "institute disciplinary action at its discretion for attendance violations of any length, frequency, or pattern." *Id.* PATH held a disciplinary hearing on January 8, 2009. *Id.* at 9. At the request of Childs, who was the sole management witness in the matter, Childs' subordinate, Radomir Bulayev ("Bulayev"), assistant superintendent of PATH's Power, Signals, and Communications Division, presided over the hearing. *Id*. at 7, 9. As a result of the hearing, PATH suspended Bala for six days (with three days to be held in abeyance for one year) for violating its attendance policy. *Id.* at 9.

On June 2, 2009, Bala filed a complaint with OSHA in which he alleged that PATH violated FRSA by suspending him for engaging in protected activity. ALJ D & O at 1. Specifically, Bala asserted that PATH suspended him for violating its attendance policy, when he was only absent because he followed the orders of his family physician after suffering an off-duty back injury. *Id.* OSHA investigated the complaint, determined that PATH violated FRSA, and issued Secretary's findings on May

5, 2010. *Id.* at 2. PATH timely appealed and requested a hearing before an Administrative Law Judge ("ALJ"). *Id.*

On February 10, 2012, the ALJ found that PATH violated FRSA when it disciplined Bala for following the orders of his family physician. ALJ D & O at 15. The ALJ found that section 20109(c)(2) of FRSA applies equally to on-duty and off-duty injuries. *Id.* at 11. Further, the ALJ found that Bala engaged in protected activity when he did not report to work after his family physician ordered him out of work and the OMS physician concluded that he was unfit for duty as a result of his June 22, 2008 injury. *Id.* at 11-12. The ALJ found that Childs was aware that Bala's treating physician ordered him out of work. Specifically, the ALJ noted that a series of emails between Childs and the Hodgekinson establish that Childs was informed that complainant had been ordered out of work, and that subsequently complainant was ordered to undergo an evaluation by Dr. Whitney that confirmed that he was unfit for duty. *Id*. at 12. Bala's decision to follow his treating physician's orders was a contributing factor in his suspension. *Id.* at 13. The disciplinary charge letter issued by Childs explicitly stated that the complainant's absence on June 23, 2008 factored into the decision to charge him with violations of PATH's attendance policy. *Id*. at 13. Moreover, the ALJ rejected PATH's argument that it suspended Bala for violating its attendance policy and

not because he followed the orders of his treating physician. *Id.* at 13. In doing so, the ALJ stated that PATH put forth no evidence that it planned to discipline Bala prior to his absence that occurred after his June 22, 2008 injury. *Id.* at 14. Moreover, the ALJ stated that while she was "sympathetic to [PATH's] desire to develop policies aimed to curb excessive absences," she could not uphold the application of the policy where it ran afoul of federal law. *Id.* at 13. This appeal followed.

ARGUMENT

I. FRSA SECTION 20109(C)(2) PROTECTS EMPLOYEES WHO ARE ABSENT PURSUANT TO DOCTOR'S ORDERS RESULTING FROM OFF-DUTY INJURIES.

A. The Language of FRSA Section 20109(c)(2) is Plain and Unambiguous.

FRSA Section 20109(c)(2) provides, in relevant part:

> A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or *for following orders or a treatment plan of a treating physician*. . . .

49 U.S.C. 20109(c)(2)(emphasis added).

The first step in interpreting any statute is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

The Supreme Court has repeatedly stated that where a statute's language is plain and unambiguous, it must be applied according to its own terms. *See, e.g.*, *Dodd v. United States*, 545 U.S. 353, 359 (2005) (quoting *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The courts presume that the legislature "says in a statute what it means and means in a statute what is says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted). Accordingly, where a statute is plain and unambiguous, all judicial inquiry into its meaning is complete. *Id.* at 254; *Robinson*, 519 U.S. at 340.

Here, whether Bala's absence from work constitutes protected activity turns on whether treatment plans made as a result of off-duty injuries fall within section 20109(c)(2) of FRSA. The phrase "following orders or a treatment plan of a treating physician" does not include any qualifiers or limitations that exclude off-duty injuries, or any other injuries. *See* 49 U.S.C. 20109(c)(2). Rather, by the ordinary meaning of its terms, the phrase applies to any and all orders or treatment plans of a treating physician. On its face, section 20109(c)(2) means exactly what it says and offers no ambiguities that require further judicial inquiry.

Notwithstanding PATH and the Association of American Railroads' ("AAR") arguments to the contrary (PATH Br. at 18 and

AAR Br. at 6), the plain reading of section 20109(c)(2) to include treatment plans for off-duty injuries is in no way undermined by the title of section 20109(c), "Prompt Medical Attention." The phrase "Prompt Medical Attention" itself says nothing about whether the medical attention results from an on-duty or off-duty injury. As the Supreme Court has cautioned, such titles "are of use only when they shed light on some ambiguous word or phrase." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 528-29 (1947). "[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text." *Id.*; *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004); *Demore v. Kim*, 583 U.S. 510, 535 (2003). FRSA section 20109(c)(2) is plain and unambiguous; there is no need to look to the title to resolve any uncertainties regarding its meaning.

B. The Phrase "During the Course of Employment" that Appears in Section 20109(c)(1) of FRSA Does Not Extend to Section 20109(c)(2).

A comparison to section 20109(c)(1), which was added to FRSA at the same time as section 20109(c)(2), bolsters the conclusion that 20109(c)(2)'s protection from discipline extends to all treatment plans, not just those resulting from on-duty injuries. Section 20109(c)(1) provides, in relevant part:

> A railroad carrier . . . may not deny, delay, or interfere with the medical or first aid treatment of an employee who is

> injured *during the course of employment*. If transportation to a hospital is requested by an employee who is injured *during the course of employment*, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

49 U.S.C. 20109(c)(1) (emphasis added). Despite PATH and AAR's assertion that the two sections must be read together, and thus the phrase "during the course of employment" must be read into section 20109(c)(2), it is well established that "where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to conclude that the differing language in the two subsections of the Racketeer Influenced and Corrupt Organizations Act involving forfeiture had the same meaning); *see also Hardt v. Reliance Standard Life Insurance Co*, 130 S. Ct. 2149, 2156 (2010)(internal citations omitted)("[W]e begin by analyzing the statutory language, 'assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.'"); *Barnhart,* 534 U.S. at 452; *Duncan* v. *Walker,* 533 U.S. 167, 173–74 (2001); *Hohn* v. *United States,* 524 U.S. 236, 249–50 (1998). Such negative implications are strongest where, as here, Congress considered the two statutory

provisions simultaneously. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)).

For example, in *Hardt v. Reliance Standard Life Insurance Co.*, the Court rejected the argument that 29 U.S.C. 1132(g)(1), the provision in the Employee Retirement Income Security Act ("ERISA") allowing an award of attorney's fees to "either party", requires that the party be a "prevailing party" in order to receive an award of fees. 130 S. Ct. at 2156. Noting that section 1132(g)(1) differs from section 1132(g)(2), which explicitly states that in actions to recover delinquent contributions to a multiemployer plan, plaintiffs may only recover fees if there is a "judgment in favor of the plan," the court stated that "[t]he contrast between the two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees." *Id.* In the Court's view, adding the term "prevailing party" where it was "conspicuously absent more closely resembles 'invent[ing] a statute rather than interpret[ing] one.'" *Id.* (quoting *Pasquantino v. United States*, 544 U.S. 349, 359 (2005)(internal quotation marks omitted)).

So too here, Congress' use of the phrase "during the course of employment" twice in 20109(c)(1), and not at all in 20109(c)(2) makes clear that Congress intended 20109(c)(2) to

prohibit discipline or threats of discipline to employees who follow the treatment plan of a treating physician, even if the injuries for which they were being treated did not arise "during the course of employment."

C. The Legislative History of Section 20109(c) and Congress' Purpose in Enacting FRSA Support a Broader Interpretation of Section 20109(c)(2).

The legislative history of 49 U.S.C. 20109(c) provides further evidence of Congress' intent to protect employees from retaliation for following the treatment plan of a treating physician following any injury, not just an on-duty injury. The Congressional Committee responsible for passing section 20109(c) of FRSA stated that its language was "similar to state laws in Minnesota and Illinois," which were overturned by the courts as pre-empted by the Federal Railroad Administration's ("FRA") regulations prohibiting intimidation and harassment of employees seeking to report or obtain treatment for workplace injuries. *See Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. On Transportation and Infrastructure,* at 9 (October 22, 2007) [hereinafter *Impact*]. Both state statutes provided protection from discipline or threats of discipline to employees seeking medical care under circumstances covered by the statutes. Both state statutes explicitly limited these protections to employees injured during employment. The

committee noted that "[b]oth states were concerned by the large number of reports of rail carriers denying medical treatment or interfering with medical treatment of injured employees." *Id.* However, the committee did not state that its purpose was identical. *See id.* Nor did Congress repeat either the Illinois[2] or the Minnesota[3] statute verbatim in 20109(c), which it certainly could have done had it intended the protections to be identical to those under the overturned state statutes.

While section 20109(c) certainly was intended, at least in part, to address concerns such as those set forth in the legislative history of the Illinois and Minnesota statutes, specifically "the large number of reports of rail carriers denying medical treatment or interfering with medical treatment

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[2] The Illinois statute states, in relevant part: "It is unlawful for a railroad or person employed by the railroad to: (1) deny, delay, or interfere with medical treatment or first aid treatment to an employee of that railroad who has been injured *during employment*; or (2) discipline or threaten discipline to an employee of a railroad who has been injured *during employment* for (i) requesting medical or first aid treatment or (ii) following the orders or treatment plan of his or her treating physician." Illinois Railroad Employees Medical Treatment Act, 610 ILCS 107/10 § 10(b) (emphasis added).

[3] The Minnesota statute provides, in relevant part, "It shall be unlawful for a railroad or person employed by a railroad to intentionally (1) deny, delay, or interfere with medical treatment or first aid treatment to an employee of a railroad who has been injured *during employment*; or (2) discipline, harass, or intimidate an employee to discourage the employee from receiving medical attention or threaten to discipline an employee who has been injured *during employment* for requesting medical treatment or first aid treatment." Minn. Stat. § 609.849(a)(emphasis added).

of injured employees," (*Impact* at 9), the 2008 amendments to FRSA, of which 20109(c) is a part, fulfilled broader purposes. The Rail Safety Improvement Act of 2008 ("RSIA") was enacted "to prevent railroad fatalities, injuries, and hazardous materials releases, to authorize the Federal Railroad Safety Administration, and for other purposes." Preamble to Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (2008). The RSIA includes numerous provisions, in addition to 49 U.S.C. 20109(c), aimed at ensuring the safety of both railroad employees and the general public, such as mandates to develop railroad safety risk reduction and fatigue management programs (*id*. § 103, 122 Stat. 4853-4856); reforms to the hours-of-service requirements for railroad employees (*id*. § 108, 122 Stat. 4860-4866), and a requirement that the FRA set minimum training standards for certain railroad employees (*id.* § 401, 122 Stat. 4883). Against this backdrop, the most logical conclusion is that by not including the phrase "during the course of employment" in section 20109(c)(2), Congress signaled its intent to promote the broader purposes of rail safety by ensuring that rail employees were not pressured by discipline or threats of discipline to return to work prematurely following any injury, not just an on-the-job injury. Workers who cannot safely work because of an off-duty injury place themselves,

their coworkers and the public at risk just as surely as workers injured on duty do.

Indeed, based on this same principle, the employee protections available to other transportation industry workers prohibit employers from applying an absenteeism policy to discipline an employee who is too sick or fatigued to work safely. For example, under the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. 31105, a commercial motor carrier may not apply its absenteeism policy to an employee driver who refuses to work because of non-work-related illness, if the employee reasonably believes that driving would violate federal motor carrier regulations prohibiting driving while impaired because of illness, fatigue or any other cause. *See Assistant Secretary of Labor & Ciotti v. Sysco Foods Co.*, ARB No. 98-103, ALJ No. 97-STA-30, slip op. at 8 (ARB July 8, 1998); *see also Johnson v. Roadway Express, Inc*., ARB No. 99-11, ALJ No. 1999-STA-5, slip op. at 16 (ARB Mar. 29, 2000); *Scott v. Roadway Express, Inc.,* ARB No. 99-013, ALJ No. 98-STA-8, slip op. at 11, (ARB July 28, 1999) (noting that the company's absentee policy presented ill driver with "untenable choice" between violating its illness rule or receiving a warning letter). Similarly, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121, protects pilots who refuse to fly because they are ill or

fatigued, even when their illness is not work-related. *See, e.g.*, *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-014, slip op. at 8-11 (ARB Sept. 30, 2009); *see also Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11, slip op. at 7 (ARB July 27, 2011); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 5-6 (ARB June 29, 2006). Reading section 20109(c)(2) to protect employees, such as Bala, who are absent pursuant to doctor's orders for an off-duty injury simply gives railroad employees and those who depend on the safety of the railroads the same protections that are available in other transportation industries. In so doing, section 20109(c)(2) furthers FRSA's fundamental purpose to "promote safety in *every* area of railroad operations and reduce railroad-related accidents and incidents" and fulfills Congress' intent in enacting FRSA's employee protections that "employees should not be forced to choose between their lives and their livelihoods." 49 U.S.C. 20101 (emphasis added); H.R. Rep. No. 1025, 96th Cong., 2d Sess., at 8 (1980).

II. INTERPRETING SECTION 20109(C)(2) TO PROTECT TREATMENT FOR AN OFF-DUTY INJURY DOES NOT UNDERMINE RAILROADS' REASONABLE ABSENTEEISM POLICIES OR CONFLICT WITH OTHER LAWS.

PATH and the AAR argue that applying section 20109(c)(2) to off-duty injuries will undermine reasonable employer absenteeism

policies, and will allow employees to claim unlimited sick leave as long as they can produce a doctor's note that excuses them from work. *See* PATH Br. at 17 and AAR Br. at 15. These concerns are overstated. Section 20109(c)(2) does not create a right to unlimited, unpaid sick leave for any employee who can obtain a doctor's note. Two important limitations preserve railroads' legitimate applications of absenteeism policies.

First, protected activity under FRSA and other analogous whistleblower statutes must be undertaken in good faith. *See Charles v. Estes Express Lines*, ARB No. 03-133, ALJ No. 2003-STA-15, slip op. at 4 (ARB Aug. 26, 2004) ("[T]o be protected under whistleblower law, the complainant must have a reasonable, good faith belief that a violation exists"). Thus, a railroad worker's claim to be following the treatment plan of a treating physician must be in good faith in order to be protected under section 20109(c)(2). *See Johnson*, slip op. at 8 ("[W]here a driver's claim of illness is not legitimate, a refusal to drive is not protected activity."); *Scott*, slip op. at 13 n.9 ("[I]ssuing the disciplinary letter violated the STAA because Roadway did not take any steps to ascertain whether Scott's claim of illness was bona fide."). In *Ciotti*¸ where a truck driver called out from work because of non-work-related illness, the Board was careful to note that it was "not holding that employers cannot take action against employees who feign

illness" and that "STAA does not preclude an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive." *Ciotti*, slip op. at 8 & n.8. Similarly, applying FRSA section 20109(c)(2) to off-duty injuries does not preclude a railroad from establishing reasonable methods to ensure that claimed injuries are legitimate, as PATH did here when it required Bala to go to OMS.

Second, FRSA's burdens of proof allow an employer to escape liability if it can show by clear and convincing evidence that it would have taken the same action in the absence of protected activity. 49 U.S.C. 20109(d)(2)(A)(i), incorporating 49 U.S.C. 42121(b)(2)(B). As the ALJ recognized, PATH might have fulfilled that standard if it had put forward evidence that it was planning to discipline Bala before his June 23, 2008 absence. ALJ D & O at 13-14. Thus, interpreting 20109(c)(2) to protect employees who follow their doctor's treatment plan following an off-duty injury does not unduly infringe on railroads' legitimate interest in curbing excessive absences. Instead, as the ALJ correctly recognized, this interpretation merely ensures that railroad absenteeism policies may not be applied where they run afoul of federal law. *See Scott*, slip op. at 11 ("To permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily

protected activity would permit the employer to accomplish what the law prohibits.").

In addition, contrary to AAR's arguments (AAR Br. at 15-17), interpreting section 20109(c)(2) to protect employees' good faith efforts to follow their doctors' treatment plans for any injury, work-related or not, is not inconsistent with the protections of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.* or the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 *et seq.* Under those statutes, as here, courts have taken into account an employer's legitimate expectation that an employee will report to work and upheld applications of attendance polices that are consistent with those laws.

For example, under the FMLA "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies." 29 C.F.R. 825.220(c); *see, e.g.*, *Hunter v. Valley View Local Schools*, 579 F.3d 688, 692-93 (6th Cir. 2009) (noting that employer's testimony that she placed employee on involuntary leave in part because of excessive absenteeism, where most absences were due to FMLA leave, was direct evidence of impermissible motive under 29 C.F.R. 825.220(c)); *Phillips v. Quebecor World RAI, Inc.*, 450 F.3d 308, 310 (7th Cir. 2006)

("FMLA qualifying leave may not be counted against an employee under an employer's 'no-fault' attendance policy."). However, the FMLA allows employers to require employees to provide advance notice of their need for FMLA leave where practicable, and employers may take advantage of the statute's anti-abuse provisions by requiring second opinions in certain circumstances. 29 C.F.R. 825.302; 29 C.F.R. 825.303; 29 C.F.R. 825.307(b). Where an employee fails to give timely notice, the employer may delay leave and take action based on any unauthorized leave. 29 C.F.R. 825.304. If the employee lies about his medical condition, the leave would not be FMLA protected. 29 C.F.R. 825.216(d)("An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions"). These rules simply codify the commonsense policy that "where an employer's internal policies conflict with the FMLA, the FMLA controls and the employee need only comply with the requirements of the Act to invoke its protection." *Callison v. City of Philadelphia*, 430 F.3d 117, 121 (3d Cir. 2005).

Similarly, under the ADA, granting unpaid leave may be required as a reasonable accommodation of an employee's disability unless the leave request would impose an undue hardship on the employer. 42 U.S.C. 12112; 29 C.F.R. 1630.2(o)(2); *see, e.g.*, *Brannon v. Luco Mop Co.*, 521 F.3d 843,

849 (8th Cir. 2008) ("While allowing a medical leave of absence might, in some circumstances, be a reasonable accommodation . . .[a]n employer is not required by the ADA . . . to provide an unlimited absentee policy") (internal citations and quotations omitted); *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 671 (3d Cir. 1999)(affirming district court's holding that indefinite leave would not be a reasonable accommodation and would impose undue hardship on the employer). Additionally, in order to qualify for protection under the ADA, an employee must show, *inter alia*, that he is qualified to perform the essential functions of a job with or without reasonable accommodation. *See* 42 U.S.C. 12111(8); *Samper v. Providence Saint Vincent Medical Center*, No. 10-35811, 2012 U.S. App. LEXIS 7278, *8 (9th Cir. Apr. 11, 2012). An employee is not qualified – and there is no ADA violation - where an employer disciplines an employee for irregular attendance when regular on-site attendance is an essential function of the job. *See, e.g.*, *Samper*, 2012 U.S. App. LEXIS at *18-19; *Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999). Thus, enforcement of an attendance policy under these circumstances does not run afoul of the law because there is no ADA violation.

Neither the ADA nor the FMLA permit enforcement of attendance polices where doing so would violate federal law, but

allow such policies to be applied where they do not. By adopting the ALJ's reading of section 20109(c)(2) to protect Bala in this case, the Board would be doing nothing more than extending the same commonsense principle to FRSA -- namely that railroad employers may apply absenteeism policies to employees who are absent with a doctor's note for any injury (on duty or off duty) only where application of the policy is consistent with federal law.

Finally, the AAR's arguments (AAR Br. At 20-23) regarding prior Railway Labor Act arbitration awards carry no weight. First, the arbitration decisions that AAR cites all predated the enactment of section 20109(c)(2), and did not consider the question presented here -- whether the application of an absenteeism policy to an employee following a physician's treatment plan for an off-duty injury runs afoul of section 20109(c)(2). In any event, these arbitrators' decisions are not binding in FRSA whistleblower cases because National Railroad Adjustment Board proceedings involve contractual disputes under collective bargaining agreements made pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.*, whereas FRSA proceedings involve separate federal statutory rights. *See Mercier v. Union Pacific Railroad Co.*, ARB Nos. 09-101, 09-121, ALJ Nos. 2008-FRS-3, 4 (ARB Sept. 29, 2011). Under the analogous whistleblower protections in AIR21, 49 U.S.C. 42121,

the ARB has recognized that no conflict exists where proceedings under collective bargaining agreements made pursuant to the RLA and whistleblower claims under AIR21 "could potentially have varying outcomes . . . because the actions have independent causes and purposes." *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, 10-015, 10-016, ALJ Nos. 2009-AIR-15, 16, 17, slip op. at 7 (ARB Sept. 16, 2011). Like AIR21, FRSA and NRAB proceedings involve different causes of action with independent purposes, such that there is no conflict between the two. *See Mercier*, ARB No. 09-101, slip op. at 7-8 (relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52-53 (1974)). The cited NRAB decisions are due no weight in determining the meaning of section 20109(c)(2) of FRSA.

III. PATH DISCIPLINED BALA AFTER THE EFFECTIVE DATE OF SECTION 20109(C) OF FRSA.

Applying section 20109(c)(2) in this case does not give the statute impermissible retroactive effect. Section 20109(c)(2) became effective upon enactment on October 16, 2008. Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 419, 122 Stat. 4848 (2008); s*ee, e.g.*, *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ALJ No. 2009-FRS-11, slip op. at 15 (Sept. 14, 2010)(finding that section 20109(c) of FRSA does not apply retroactively). Section 20109(c)(2) prohibits discipline or threats of discipline against an employee for following the

treatment plan of a treating physician. Under section 20109(c)(2), "'discipline' means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record." 49 U.S.C. 20109(c)(2). PATH suspended Bala on January 26, 2009. This fact alone should end the inquiry into whether applying section 20109(c)(2) would be improperly retroactive. Nonetheless, PATH argues that the "critical date" here is July 18, 2008, the date that the disciplinary hearing was originally scheduled to be held. Even ignoring the troubling implications of this argument, that Bala's suspension was a foregone conclusion prior to the hearing and that PATH lacked discretion to drop its disciplinary charges upon discovering they were illegal, PATH's argument has no merit. The statute is clear; discipline means bringing disciplinary charges or suspending an employee. It does not require the Board to choose between the more "critical" of the two.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT PATH VIOLATED FRSA WHEN IT SUSPENDED BALA AS A RESULT OF HIS ABSENCE DUE TO AN OFF-DUTY BACK INJURY.

In cases arising under FRSA, the Board reviews the ALJ's findings of fact under the substantial evidence standard. 29 C.F.R. 1982.110. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Here, substantial evidence supports the ALJ's findings and refutes PATH's arguments that it did not know of Bala's protected activity and that Bala's protected activity was not a contributing factor in PATH's suspension decision. *See* PATH Br. at 20-23. The ALJ properly found that the treatment plan at issue was rest and absence from work. ALJ D & O at 12. That Childs and Bulayev did not know more details about the specifics of Bala's treatment plan is irrelevant. The evidence demonstrates Childs, the relevant decision-maker, knew that Bala was absent from work under doctor's orders as a result of his July 22, 2008 off-duty back injury. *Id.* PATH's OMS department concurred with Bala's family physician that Bala needed to remain off work. *Id*. Further, the evidence shows that PATH took adverse employment action against Bala by suspending him as a result of his June 23, 2008 absence, which was specifically referenced in the charge letter. *Id.* at 13. Childs made the decision to bring the charge, appointed his subordinate as hearing examiner, served as the sole witness against Bala, and admitted that he had the discretion to drop the charge against Bala at any time. ALJ D & O 7, 8, 9, 13 and Tr. 225. There is no evidence to support PATH's assertion that it would have suspended Bala for excessive absences despite the absence that followed his July 22, 2008 injury. ALJ D & O at 14. Based on

these facts, which are supported by substantial evidence in the record, the ALJ was correct in finding that PATH violated FRSA when it suspended Bala for following the orders of his treating physician after suffering an off-duty back injury.

CONCLUSION

The Assistant Secretary respectfully requests the Board to hold that section 20109(c)(2) of FRSA applies to treatment plans of treating physicians that arise from off-duty injuries and affirm the ALJ's decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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