**IN THE UNITED STATES OF AMERICA**
**DEPARTMENT OF LABOR**
**ADMINISTRATIVE REVIEW BOARD**
**WASHINGTON, D.C.**

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| In the Matter Of:<br><br>CHRISTOPHER BALA,<br><br>COMPLAINANT<br><br>v.<br><br>PORT AUTHORITY TRANS-HUDSON CORPORATION,<br><br>RESPONDENT. | ARB Case No. 12-048<br>ALJ Case No. 2010-FRS-026 |

# *AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS

## Statement of Interest

The Association of American Railroads ("AAR") has a substantial interest in this case because it implicates critical attendance and absenteeism policies for employees in the rail industry.[1] Those employment policies are essential to the efficient and timely transportation of passengers and freight by rail throughout the United States.

[1] As explained in the AAR's motion for leave to file an amicus brief, the AAR is a trade association whose membership includes freight railroads that operate approximately 77 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 94 percent of rail employees of all railroads in the United States. The AAR's members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. In matters of common interest to its members, the AAR frequently appears before Congress, the courts, and administrative agencies on behalf of the railroad industry.

The Administrative Law Judge ("ALJ") in this case interpreted Section 20109(c)(2) of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C.§ 20109(c)(2), to apply to absences resulting from a physician's treatment plan or orders arising from ***non***-workplace injuries and illnesses. This interpretation would allow a railroad employee to claim, in effect, a statutorily protected right to unlimited, unpaid sick leave through the expedient of a doctor's note. Congress did not intend such a result when it amended Section 20109(c) in 2008. Employees in no other industry enjoy such a right. Indeed, courts interpret other federal statutes protecting employee rights, such as the Americans with Disabilities Act ("ADA") and Family and Medical Leave Act ("FMLA"), to allow employers to enforce absenteeism policies even when absences are for a circumstance protected by the statute.

As explained in Part I of this amicus brief, the AAR respectfully submits that the ALJ's statutory interpretation, in this case of first impression, is contrary to the language, structure and purpose of Section 20109 as a whole. In addition to being legal error, this interpretation is not necessary to further any policy under the employee protection provisions of Section 20109. There is no relationship between absences arising from non-workplace injuries and illnesses and the FRSA regulatory scheme of which Section 20109 is a part. Moreover, as explained in Part II of this brief, the ALJ's erroneous interpretation would adversely affect railroad attendance policies. Under those policies – which have been upheld many times in labor arbitrations – employees may not be excessively absent, even if for legitimate reasons. As we show below, the ALJ's decision would effectively substitute employees' doctors' judgments for rail management's when it comes to enforcement of absenteeism rules.

The AAR does not take any position on the specific facts of this case. Rather, the AAR is addressing only the ALJ's erroneous conclusion that Section 20109(c)(2) applies to non-workplace injuries and illnesses, and the impact that the incorrect interpretation would have on the railroad industry.

## Argument

### I. THE ALJ'S INTERPRETATION OF SECTION 20109(C)(2) IS LEGAL ERROR

The plain meaning, context, purpose, and legislative history of the FRSA make clear that Section 20109(c)(2) applies only to medical treatment plans or orders arising from on-the-job injuries and illnesses.

#### A. The Plain Meaning And Purpose Of Section 20109(c)(2) Limit It to Treatment Plans and Orders Arising From On-The-Job Injuries and Occupational Illnesses

In reaching her conclusion that Section 20109(c)(2) "applies equally to treatment plans arising out of on-duty and off-duty injuries," the ALJ reasoned as follows: (1) Section 20109(c)(1) includes the phrase "during the course of employment"; (2) Section 20109(c)(2) includes the phrase "orders or a treatment plan of a treating physician" but omits the phrase "during the course of employment"; (3) therefore, Section 20109(c)(2)'s reference to treatment plans must include plans that arise from both on-duty and off-duty injuries. *See* Decision & Order at 11. In addition, the ALJ found that a contrary interpretation would "subvert congressional intent." *Id.* In doing so, the ALJ relied primarily on the "canon of construction" that Congress generally acts intentionally in the disparate exclusion and inclusion of language. *Id.*

The ALJ's reasoning is fundamentally flawed on multiple levels. First, with respect to the ALJ's reliance on canons of construction, as the Supreme Court put it more than fifty years ago, "[h]owever well these rules [of statutory construction] may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943). Even in *Russello v. U.S.*, 464 U.S. 16 (1983), which the ALJ cites, the Supreme Court did not rely on a single canon or single phrase in the statute. The Court looked at the structure of the statute as a whole and its legislative history. *Id.* at 22-27. By placing inordinate emphasis on a single rule of construction and a single phrase in a single subsection and ignoring the overall structure and purposes of Section 20109, the ALJ arrived at an interpretation of Section 20109(c)(2) divorced from those broader purposes and contrary to congressional intent.

The proper starting point in construing a statute is, of course, the language of the statute itself. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). The whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. As the Supreme Court has long recognized, "statutory construction," above all else, "is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Indeed, statutory language "cannot be construed in a vacuum." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356-57

(2012) ("contextual and structural considerations" are important to make a disputed term "a working part of the statutory scheme"). Thus, a statute's "plain meaning can best be understood by looking to the statutory scheme as a whole," *United States v. Gayle*, 342 F.3d 89, 93 (2d Cir. 2003), and "[t]he meaning of a particular section [or subsection] in a statute [should] be understood in context . . . by appreciating how the sections [or subsections] relate to one another," *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002). "In other words, the preferred meaning of a statutory provision is one that is consonant with the rest of the statute." *Id.*

In this case, Section 20109(c) – entitled "Prompt medical attention" – contains two related subparagraphs, "Prohibition" and "Discipline." The "Prohibition" subparagraph prohibits rail carriers from "deny[ing], delay[ing], or interfere[ing] with the medical or first aid treatment of an employee who is injured during the course of employment." 49 U.S.C. § 20109(c)(1). The "Discipline" subparagraph, in turn, prohibits rail carriers from "disciplin[ing], or threaten[ing] discipline to, an employee" for requesting that same "medical or first aid treatment" referenced in (c)(1) or for following the corresponding "orders or a treatment plan of a treating physician" relating to such treatment. 49 U.S.C. § 20109(c)(2).

When read together, these subparagraphs create a coherent whole by prohibiting rail carriers from denying, delaying, or interfering with the medical or first aid treatment of an employee injured ***on the job***, and from disciplining the employee for requesting that treatment or for following any ***resultant*** medical orders or treatment plans. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 355 (1999) (recognizing "the legal need to interpret

subsections of a single statute as creating a single coherent whole") (Breyer, J., concurring in part and dissenting in part). Because (c)(2) refers back to the same "medical or first aid treatment" referenced in (c)(1) and the two parts are to be read together, Congress did not need to repeat the phrase "during the course of employment" in (c)(2).[2]

Section 20109(c)'s exclusive focus on workplace injuries and illnesses is further confirmed by the provision's title, "Prompt medical attention," which demonstrates the subsection's basic thrust. *See, e.g., See INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189-90 (1991) ("In other contexts, we have stated that the title of a statute or section can aid in resolving an ambiguity in the legislation's text."); *United States v. Buculei*, 262 F.3d 322, 335 (4th Cir. 2001) ("the statute's title sheds light on [its] meaning"). The title "Prompt medical attention" obviously refers to medical treatment related to workplace incidents; no one contends that rail carriers have a duty to ensure treatment for injuries or illnesses that an employee suffers at home. The only way that Section 20109(c)(2)'s prohibition of discipline for following medical "orders or a treatment plan" makes any sense in a statutory provision entitled "Prompt medical attention" is if the phrase relates back to the workplace injuries and illnesses that rail carriers must promptly address. Thus, the ALJ's construction would render Section 20109(c)'s title a nullity by expanding Section 20109(c)(2)'s scope to matters – medical treatment plans arising from non-work related injuries – that have no conceivable connection to a rail carrier's duty to ensure "[p]rompt medical attention."

[2] This interpretation is supported by the overall structure of Section 20109, which relates exclusively to matters in the railroad work environment, and the legislative history of Section 20109(c)(2). The AAR also notes that the ALJ in *Santiago v. Metro-North Commuter Railroad Co.*, Case No. 2009-FRS-011 at 21 (2010), pet. for review pend'g, ARB Case No. 10-14, after carefully analyzing the purpose and structure of Section 20109(c) as a whole, reached this same interpretation.

### B. The Overall Purpose of Section 20109 Shows That Subpart (c)(2) Is Limited to Workplace Injuries and Illnesses

Whistleblower provisions do not exist in a vacuum. They protect activity that furthers the regulatory purpose of the statute in which such provisions appear. In this case, the purpose of Section 20109 is to help ensure that the broader purposes of the FRSA are realized. Those broader purposes relate exclusively to the railroad work environment, not safety in the homes of railroad employees.

To be sure, the ALJ quotes the FRSA's general statement of purpose, which is "to 'promote safety in *every* area of railroad operations and reduce railroad-related accidents and incidents (emphasis added).'" Decision & Order at 11 (quoting 49 U.S.C. § 20101). However, while emphasizing the word "every," the ALJ ignored the rest of this same congressional statement of purpose, which expressly states that the FRSA is concerned only with "railroad operations" and "railroad related accidents and incidents."

The fact that Section 20109(c)'s "Prompt medical treatment" provision was passed as an amendment to the FRSA is significant, given that the regulatory scheme under the FRSA, as implemented by the Federal Railroad Administration ("FRA"), is limited to injuries and illnesses arising exclusively in the railroad work environment. For example, the FRA has extensive regulations requiring that railroads report ***workplace*** injuries and illnesses:

> The purpose of this part is to provide the [FRA] with accurate information concerning the hazards and risks that exist on the Nation's railroads. FRA needs this information to effectively carry out its regulatory responsibilities under 49 U.S.C. chapters 201-213. FRA also uses this information for determining comparative trends of railroad safety and to develop hazard information and risk reduction programs that focus on preventing railroad injuries and accidents.

49 C.F.R. § 225.1 At least four other FRA regulations likewise define "accidents" and "injury" as ***on-the-job*** events:

> (1) Section 225.5 (2) defines "Accident/incident" to include "[a]ny event arising from the operation of a railroad . . . ."
>
> (2) Section 225.5 (4) defines "Accident/incident" to include "Occupational illness of a railroad employee."
>
> (3) Section 225.5 (4) defines "Accountable injury or illness" to mean "any condition, not otherwise reportable, of a railroad worker that is associated with an event, exposure, or activity in the work environment that causes or requires the worker to be examined or treated by a qualified health care professional."
>
> (4) Section 225.25 (a) requires that "[e]ach railroad shall maintain either the Railroad Employee Injury and/or Illness Record . . . of all reportable and accountable injuries and illnesses of its employees that arise from the operation of the railroad . . . ."

The FRA also requires that railroads adopt and maintain an Internal Control Plan "declaring the railroad's commitment to complete and accurate reporting of all ***accidents, incidents, injures, and occupational illnesses arising from the operation of the railroad*** . . . ." 49 C.F.R. § 225.33(a) (emphasis added). As this review shows, the FRA regulatory scheme is concerned with the proper reporting of workplace injuries and occupational illnesses.

Given that the focus of FRA regulation is on safety in railroad operations, the railroad workplace, and occupational illness, it stands to reason that Section 20109 only addressees protected activities related to such matters. For example, when the whistleblower rules in FRSA were amended in 2007, Congress extended the definition of "protected activity" to employee reports of a "work-related personal injury or work-related illness." 49 U.S.C.§ 20109(a)(4). There is no indication of any similar congressional concern about a need to report non-workplace injuries and illnesses.

The other subsections of Sections 20109(a) and (b), as amended in 2007, are likewise only concerned with matters relating to safety or security in the railroad work environment. For example, Section 20109(a)(1) protects the reporting of "conduct" by the railroad which the employee believes violates federal regulation "relating to railroad safety or security . . . ." Section 20109(b) protects the reporting of "hazardous safety conditions." Obviously, these safety concerns can only arise in the railroad workplace.

Nonetheless, the ALJ was motivated by the belief that Congress was concerned that railroads would threaten employees with discipline to force a premature return from non-workplace injuries and illnesses. *See* Decision & Order at 11. In fact, Section 20109(c)(2) does not reflect that concern. To the contrary, it expressly allows railroads to refuse to allow an employee to return to work if the railroad is not satisfied that he or she is fit for duty. *See* 49 U.S.C. § 20109(c)(2) ("a carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the recusal is pursuant to [FRA] medical standards for fitness for duty or, if there are no pertinent [FRA] standards, a carrier's medical standards for fitness for duty."). This language shows that Congress was not concerned about railroads forcing ill or injured employees to return to work when not fit for duty; rather, Congress wanted to ensure that railroads could continue to ***prevent*** injured or sick employees from returning to work before fit for duty. Congress was aware that railroads have the right to prevent physically unfit employees from returning to work.[3]

[3] If there is a dispute whether an employee is fit to return to duty, there is typically an arbitral mechanism to resolve such disputes, in which a neutral doctor makes the final determination. *See, e.g., Guenther v. San Diego, A. & E. Ry. Co.*, 382 U.S. 257 (1965). As the representative arbitration awards attached in the Appendix show, more often than not it is the employee trying to return when the railroad does not believe he or she is fit for duty.

The ALJ also erred in concluding that "Section 20109(c)(2) exists . . . to discourage sick or injured workers from returning to duty while their impairment poses a threat to the safety of railroad passengers and fellow employees. . . ." Section 20109(c)(2) has nothing to do with encouraging employees "to report unsafe conditions to their superiors." As explained above, it is Section 20109 (b) that protects the act of reporting hazardous conditions. Section 20109(a)(1) also protects reports of conduct that the employee reasonably believes violates a federal rule or order "relating to railroad safety or security." Both Sections 20109 (a) and (b) are limited to conditions in the railroad work environment. In addition, as noted above, Congress was not concerned that railroad employees were being coerced by railroads into returning prematurely from non-workplace illnesses and injuries.

Finally, the ALJ relied on the general proposition stated in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980), that "safety legislation is to be liberally construed to effectuate the congressional purpose." *See* Decision & Order at 11. However, this statement does not justify a statutory interpretation that is untethered from the statute's context, purpose and legislative history. In *Whirlpool*, the Supreme Court only arrived at its interpretation after first considering "the Act's language, structure, and legislative history" and whether the regulation "conforms to the fundamental objective of the Act." 445 U.S. at 11. The Supreme Court also had to satisfy itself that the regulation "appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme." *Id.* at 13. Here, as we have explained, the ALJ's interpretation does not further FRSA's regulatory scheme because FRSA is not concerned with non-workplace injuries and illnesses.

### C. The Legislative History of Section 20109(c)(2) Also Confirms That It Applies Only To Workplace Injuries and Occupational Illnesses

The ALJ states that she reviewed the Act's "text and purpose," Decision & Order at 11, but she does not cite or refer to any legislative history of Section 20109(c) itself. This legislative history confirms that Congress did not intend to apply Section 20109(c)(2) to non-work related injuries or illnesses.

Section 20109 was amended in August 2007 to expand employee protections relating to the railroad workplace. Pub. Law No. 110-53, Title XV, § 1521 (Aug. 3, 2007). At that time there were allegations that railroads were underreporting and discouraging employees from reporting workplace injuries and illnesses.[4] A House Committee Report explained that a purpose of the 2007 amendment of Section 20109's anti-discrimination provisions was to address purported carrier policies that allegedly had the consequence of discouraging employee reporting of workplace incidents and accidents. *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, 110th Cong. 84 at 3-5 (Oct. 25, 2007). Thus, Section 20109 was amended in 2007 to make employee reporting of a workplace injury or illness a "protected activity." 49 U.S.C. § 20109(a)(4).

The language that would become 49 U.S.C. § 20109(c) was not in the 2007 amendment, but was added by a 2008 amendment to the FRSA. What became the present Section 20109(c) was first introduced in the House as Section 606 of H.R. 2095 on May 1, 2007. As reported by

[4] The railroad industry disagreed that there was such underreporting.

the House Committee, Section 606 proposed that the "prompt medical treatment" provision be added to 49 U.S.C. § 20162, not to Section 20109.

On August 1, 2008, the Senate passed an amended version of H.R. 2095, which contained a slightly different worded version of the prompt medical treatment provision and placed it in Section 20109. Section 411 of the Senate version treated employee requests for prompt medical treatment as a category of protected activity by adding a new subsection to Section 20109 (a):

> (5) to request that a railroad carrier provide first aid, prompt medical treatment, or transportation to an appropriate medical facility or hospital after being injured during the course of employment, or to comply with treatment prescribed by a physician or licensed care professional . . . .

H.R. 2095, EAS at 91-92. On September 24, 2008, the House voted to accept the Senate bill with some amendments. These amendments included language substantially identical to Section 606, except the House agreed that the prompt medical attention provision should be in Section 20109. H.R. 2095, 100th Cong. (2008). The House's final amended version, entitled "Prompt medical attention" was enacted into law in October 2008 as the present Subsection 20109(c). P.L. 110-432, § 419, 122 Stat. 4848.

In the markup of Section 606, the House Committee made clear that the "Prompt medical attention" provision related exclusively to the workplace. It explained that it "strengthens whistleblower protections . . . [and] requires railroads to provide rail workers with immediate medical attention when the workers are injured ***on the job***." H.R. Comm. on Transp. & Infrastructure, Subcomm. on R.Rs., Summ. of Markup of H.R. 2095, the Fed. R.R. Safety Act of 2007 at 3 (May 21, 2007) (emphasis added). The Committee also stated that the bill's purpose was to allow injured employees "immediate medical attention free from railroad interference."

Summ. of Subj. Matter, Hearing on "The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of America's Railroads" at 9 (Oct. 22, 2007). To that end, the two subparagraphs of the provision "[p]rohibit[] railroads from denying, delaying, or interfering with the medical or first aid treatment of injured workers, and from disciplining ***those*** workers that request treatment." H.R. 2095, Congressional Record (Oct. 17, 2007) p. H11672 (describing Section 606) (emphasis added). The Committee further explained that "Section 606 is similar to state laws in Minnesota and Illinois that were struck down as preempted." *Id.* As explained in PATH's Brief (at 10-14), these state laws were limited to workplace injuries and illnesses. This history confirms that Congress was addressing workplace injuries and illnesses.

The only support offered by the ALJ for her belief that Congress was concerned that employees might be pressured to return to work prematurely from off-duty injuries and illness was a statement in a 1980 House Committee Report. The ALJ decision notes that "[i]n enacting the FRSA, Congress stated that 'employees should not be forced to choose between their lives and their livelihoods.'" Decision & Order at 11, quoting from H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980).[5] However, the statement quoted by the ALJ has nothing whatsoever to do with Section 20109(c)(2), which was enacted 30 years later, or non-workplace illnesses or injuries. The FRSA, as originally enacted in 1970, did not contain any employee protection provision. The Act's employee protective provisions, which later became Section

[5] The quoted 1980 House Committee Report states: "Similarly, the legislation would forbid a railroad from discriminating against an employee who refused to work in hazardous conditions presenting an imminent danger of death or serious injury. The Committee strongly believes employees should not be forced to choose between their lives and their livelihoods." *See* H.R. Rep. No. 1025, 96th Cong., 2d Sess. at 8 (1980).

20109, were added in 1980. *See* 45 U.S.C. § 441 (later recodified as 49 U.S.C. § 20109). When originally enacted, Section 441(b) allowed an employee to refuse to work without fear of discipline if that employee reasonably believed he or she was "confronted by a hazardous condition related to the performance of the employee's duties."[6] The sentence in the 1980 House Report quoted by the ALJ related to Section 10(b) of H.R. 7104, which became Section 441(b).

Thus, the employee choice with which Congress was concerned was not the choice of either coming to work while still suffering the effects of a non-workplace illness or injury or facing discipline. Rather, it was the choice whether to continue working when confronted by a serious hazard in the railroad workplace that posed an immediate threat of serious bodily injury or death. When Section 20109 was amended in 2007, Section 441(b) was carried forward in Section 20109(b). Not only does the 1980 legislative history quoted by the ALJ fail to support her statutory interpretation, it shows yet again that Congress in Section 20109 is only concerned with matters arising in the railroad work environment.

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[6] 45 U.S.C. § 441(b) stated as follows:

(b) Refusal to work under hazardous conditions

(1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any way discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if –

(A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;

(B) the hazardous condition is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that –

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory channels; and

(C) the employee, where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately.

Substantially similar language is now found in 49 U.S.C.§ 20109(b)(1) and (2).

The legislative history of Section 20109 in general and of Subsection 20109(c) in particular is also significant for what it does not include. Absent from the committee reports and hearings is ***any*** indication that Congress was concerned with non-work related injuries or illnesses. Nor is there any suggestion anywhere in the legislative history that Congress intended to prohibit or restrict the right of rail carriers to enforce attendance policies with respect to an employee who is unable or unwilling to work.

### D. The ALJ's Construction of Section 20109(c)(2) Leads to Incongruous Results Which Congress Could Not Have Intended

The logic of the ALJ decision is that, as long as the employee produces a note suggesting that his or her absence is a result of following a doctor's orders, no disciplinary action (as defined by Section 20109(c)) can be taken against that employee, even if the employee is excessively absent. The effect of the ALJ's application of Section 20109(c)(2) is that an employee can claim unlimited sick leave as long as he can show a doctor's note excusing him from work. This is not what Congress intended.

Employees' rights under other statutes have been interpreted by courts to take into account the employer's legitimate expectation that employees will regularly report to work. For example, the Americans with Disabilities Act ("ADA") has consistently been interpreted to permit an employer to discipline or even terminate an employee who has irregular attendance even if the absences are attributable to a condition protected by the ADA. As the Ninth Circuit explained in a recent case under the ADA:

> It is a 'rather common-sense idea . . . that if one is not able to be at work, one cannot be a qualified individual.' Both before and since the passage of the ADA, a majority of circuits have endorsed the proposition that in those jobs where

> performance requires attendance at the job, irregular attendance compromises essential job functions. Attendance may be necessary for a variety of reasons. Sometimes, it is required simply because the employee must work as 'part of a team.' Other jobs require face-to-face interaction with clients and other employees. Yet other jobs require the employee to work with items and equipment that are on site. * * * [Thus,] [e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work cannot perform any of his job functions, essential or otherwise.'

*Samper v. Providence St. Vincent Medical* Center, 2012 U.S. App. LEXIS 7278 (9th Cir. April 11, 2012) (internal citations omitted). *See also, e.g., Waggoner v. Olin Corp.*, 169 F.3d 481, 483 (7th Cir. 1999) ("It should not require saying that generally attendance is a requirement of a job. Not surprisingly, courts are in agreement on this point."). Just as exemption from attendance rules is not reasonable under the ADA, it is not reasonable under the FRSA.

Similarly, the FMLA balances the rights of employees to medical leave and the rights of railroads and other employers to enforce absenteeism policies. *See* 29 U.S.C. § 2601(b)(1) ("It is the purpose of this Act to balance the demands of the workplace with the needs of families."); *id.* § 2612. For example, the Department of Labor's 2008 amendments to its FMLA regulations clarified that employees can ordinarily be required to comply with notice requirements in an employer's attendance policy when requesting FMLA leave. *See* 29 C.F.R. § 825.302(d); *see also* Dep't of Labor Wage & Hour Opinion Letter FMLA 2009-1-A (Jan. 6, 2009). Likewise, courts also interpret the FMLA to allow employers to enforce absenteeism policies. *See, e.g., Brown v. Auto. Components Holdings, LLC*, 622 F.3d 685 (7th Cir. 2010) (employer "was well

within its rights (at least for FMLA purposes) to terminate [employee's] employment according to its standard leave procedures").[7]

In short, nothing suggests that Congress, in enacting Section 20109(c), intended that railroad employers, unlike all other employers, would be hamstrung in their enforcement of reasonable attendance policies, or that railroad employees would, in effect, have a statutory right to unlimited sick leave.

## II. INTERPRETATION OF SECTION 20109(C)(2) TO APPLY TO ABSENCES RELATING TO NON-WORKPLACE INJURIES AND ILLNESSES THREATENS TO UNDERMINE REASONABLE ATTENDANCE POLICIES

Railroads provide their employees with substantial paid and unpaid leave. However, like all employers, railroads expect employees to report to work on a regular basis. Railroads have long had in place reasonable attendance policies to help assure regular and predictable attendance, while respecting employees' need to take leave for legitimate reasons. The ALJ's ruling threatens to undermine the ability of railroads to enforce these attendance policies vis-a-vis employees who are excessively absent.

[7] *See also, e.g., Estrada v. Cypress Semiconductor Inc.*, 616 F.3d 866, 871 (8th Cir. 2010) (upholding termination of employee as employee was fired for habitual violation of attendance policies, and not for exercise of rights under the FMLA); *Phillips v. Quebecor World RAI, Inc.*, 450 F.3d 308, 312 (7th Cir. 2006) (affirming employee's termination for violation of absenteeism policy, and noting that "[r]equiring employers to determine whether leave is covered by FMLA every time an employee was absent because of sickness would impose 'a substantial and largely wasted investigatory burden on employers.'" (internal citations omitted); *Taylor v. Smith's Food & Drug Ctrs., Inc.*, 127 Fed. Appx. 394, 395 (10th Cir. 2006) (upholding termination of employee where employer demonstrated that employee would have been fired regardless of her request for FMLA leave for failing to comply with company absenteeism policy); *Callison v. City of Philadelphia*, 430 F.3d 117, 121 (3d Cir. 2005) ("Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave, particularly those who enter leave while on the employer's Sick Abuse List.").

### A. Rail Employees Have Extensive Paid and Unpaid Leave

As a threshold matter, it is important to understand that railroad employees have multiple options for taking time off. The details vary from railroad to railroad, but in general, employee leave includes the following:

*(1) Paid Contractual Leave*: By virtue of collective bargaining agreements, unionized employees on most railroads have up to five weeks of paid vacation and up to eleven paid personal leave days based on seniority.[8] This compensated time off may be taken in small blocks or single day increments throughout the year to accommodate any personal or medical need without loss of pay. Likewise, non-operating unionized employees have comparable paid vacation and a number of paid holidays. Some non-operating employees also receive paid sick leave and/or paid personal leave in addition to vacations and holidays. (In this case, for example, Mr. Bala apparently received at least 25 paid days off per year.)

*(2) Family and Medical Leave Act ("FMLA")*: On top of leave allowed by collective bargaining agreement, qualified employees also have a statutory right to take up to twelve workweeks of unpaid leave for family or medical reasons. 29 U.S.C. § 2601 *et seq.* Employees' use of FMLA leave is in addition to their contractual leave, meaning that an employee could take more than 19 weeks of paid and unpaid leave in any given twelve month period. FMLA leave may be taken on either a "block" or "intermittent" basis, allowing employees who have been certified for FMLA leave to be absent with little notice on a recurring basis.

[8] Approximately 90% of the total rail industry workforce is unionized, and so this overview focuses primarily on the leave rights of unionized workers. Non-union employees also enjoy significant leave opportunities for injury or illness.

*(3) Unpaid Leave*: In addition to contractual and FMLA leave, most unionized employees on many railroads can take additional unpaid leave. More specifically, operating employees who are on-call to crew trains may ask to "mark off" or "lay off," meaning that they temporarily remove themselves from the list of available employees. Employees lay off for various reasons, including personal business, sickness, and sickness in family. On most railroads, the employees typically do this by calling crew management and requesting permission to be unavailable for a certain period of time. The employee then "marks back up" when he or she is again available for work.[9] Likewise, non-operating employees can also request unpaid leave through a supervisor. These forms of unpaid leave are, however, generally qualified by and subject to the attendance policies discussed below.

As a result of this combination of different forms of leave, all railroad employees have the ability to take substantial time off for legitimate reasons.

### B. The Problem of Excessive Absenteeism

As in other industries, a minority of railroad employees are unable or unwilling to report to work on a regular basis. It should be unsurprising that excessive absenteeism can cause substantial problems.[10] For example, when a significant number of operating employees lay off, a railroad cannot efficiently staff its trains. Crew shortages mean that trains must be parked in yards or sidings until sufficient rested crew members can be located. When even a few trains are

[9] This system is subject to collectively bargained rules and generally applies to through-freight operating employees who are organized into "pools." In general, the names of employees in a pool are maintained on a rotating list or "board." When an employee's name comes to the top of the board, he or she will be called to crew the next train. If the employee is "marked off" when his or her name comes up, the next employee is called and the absent employee's name is placed at the bottom of the list.

[10] It is well documented that excessive absenteeism imposes significant costs on businesses of all kinds. *See, e.g.*, Mercer, The Total Financial Impact of Employee Absences (Oct. 2008).

delayed, the delays can ripple throughout the railroad's system. For example, the carrier may have to use employees who were called to staff other trains to crew the delayed train. Connections may be missed, causing further delays. Excess trains in yards cause congestion, further exacerbating delays.

These delays impose substantial costs on both railroads and the customers they serve. Aside from extra labor costs (in the form of overtime and additional penalties or costs for diverted crews), a railroad incurs additional costs in fuel, car hire expenses, per diem costs for foreign road cars, and extra capital costs. The rail carrier may also suffer penalties for late deliveries in shipper contracts, and, at worst, may lose customers if delays are too frequent.

### C. The Railroads' Attendance Policies

In part to address these problems, essentially every major freight and passenger railroad in the country has, for many years, like other employers in the public and private sector, maintained policies governing employee attendance. The details of these policies vary to some degree from railroad to railroad, but in general, most railroads require their employees to work on a full-time basis. Railroad attendance policies are similar to those found in other unionized industries. For the most part, violations of these attendance policies are not triggered by any individual absence. Rather, most railroad attendance policies generally call for some examination of the frequency or pattern of absences.

Accordingly, it is generally not a violation of an attendance policy simply to call in sick. Nor is it ordinarily a violation, by itself, to call in sick on a weekend or holiday workday or for an employee to be absent on a recurring basis if he or she provides adequate justification for the

absences. Rather, for the most part, employees will run afoul of attendance rules only when they are ***excessively*** absent, or when they always happen to be absent on certain days (such as Fridays) or in a suspicious pattern that, unless the employee offers a credible explanation, reasonably allows an inference of abuse.

Most attendance policies allow employees an opportunity to explain a series of absences; if the explanation is adequate and the absence is not excessive, the employee will not face any consequence. Moreover, in assessing absenteeism, most attendance policies exclude from consideration approved or legitimate absences, including pre-scheduled paid leave, FMLA-covered absences, and any absences relating to or arising from on-duty injuries or occupational illnesses.

If a violation occurs, most attendance policies provide for progressive disciplinary consequences. Employees usually receive only non-punitive warnings in cases of first and second offenses, and thus have multiple opportunities to correct their behavior. It is usually only after warnings and then usually three (or more) proven violations that the employee may be subject to dismissal. Any discipline assessed for absenteeism is also subject to review by a neutral arbitrator under the Railway Labor Act ("RLA").

Indeed, these attendance policies have been repeatedly upheld by arbitration boards under the RLA.[11] Arbitration awards show that it is well-settled that railroads may establish and maintain reasonable attendance policies. More particularly, it is well-settled that railroads may

[11] Binding arbitration if disputes arising under collective bargaining agreements is statutorily required by the Railway Labor Act. It is not a creature of contract. RLA awards are final and binding and enforced in federal district courts under the RLA. *See generally, e.g., Union P. R.R. Co. v. Bhd. of R.R. Locomotive Engineers and Trainmen,* 130 S.Ct. 584 (2009).

discipline employees who are excessively absent (even if some of the absences were for good cause) or who otherwise exhibit a pattern of abuse in the exercise of leave privileges.

One representative example of an arbitration award that addresses these issues is *IAMAW v. So. Ry. Co.*, NRAB 2nd Div. 11366 (1987), an award by the National Railroad Adjustment Board ("NRAB"), which is an arbitration board established by Section 3 of the RLA, 45 U.S.C. § 153.[12] The NRAB rejected an argument that discipline for excessive absenteeism was improper because the employee had "good cause" for being absent. The Award provides as follows:

> [M]ore importantly, perhaps, the problems facing the Claimant, even assuming their validity, do not constitute "good cause" when these excuses are presented on a frequent and continuing basis. It is a well-established principle among all four divisions of the National Railroad Adjustment Board that ***the employee has an obligation to report for work regularly and on time***; this is considered a fundamental aspect of the employment relationship. Carrier can hardly be expected to run its operation efficiently if it condones erratic attendance. See, e.g., Second Division Awards 6710, 5049 and 7348.

*Id.* at 5 (emphasis added).

Another example is *UTU v. Detroit, Toledo and Ironton R.R. Co.*, PLB 2991, Award 1 (1983) (Peterson), which is an award by a public law board.[13] That Award provides as follows:

> It is well settled that a Carrier has the right to make reasonable rules in the furtherance of the orderly and efficient conduct of its business, so long as such rules are not inconsistent with or in violation of the collectively bargained agreements it has entered into with labor organizations. ***In this connection, it is obvious that Carrier has a right to make reasonable rules and regulations regarding employee attendance at work***. . . . Even absent explicit or implied rules and regulations on the subject, it has many times been held that an employee

[12] Copies of cited railroad arbitration awards are provided in the Appendix attached hereto.

[13] A public law board is another type of arbitration board that can be established by a rail carrier and union under Section 3 of the RLA. That Act gives awards of a PLB are given the same legal effect as awards of the NRAB.

> has an obligation to report for work with a high degree of regularity. It can hardly be said, therefore, because a more liberal or tolerant past policy had permitted one to mark off with great frequency, that this represents justifiable grounds for continued absences from work where, as here, there was an announced change in policy and sufficient warning of an intent to monitor mark off as an element of absenteeism had been made known to Claimant.

*Id.* (emphasis added).[14]

The concept that an employer can discipline employees for excessive absenteeism, regardless of the reason for any particular absence, is not unique to the railroad industry. It is the norm in virtually all industries that employees are expected to show up to work regularly and may be subject to discipline if they do not do so, as arbitration awards from other industries show.[15]

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[14] *See also, e.g., BLET General Committee of Adjustment v. Union Pacific*, Special Board of Adjustment (2011) (explaining that the "carrier has an inherent right to control the attendance of its employees"); *BNSF v. BLET & UTU*, PLB 6264, 6265 (upholding policy requiring full-time employment); *TCU v. Springfield Terminal Ry.*, NRAB 3rd Div. 37284 at 3(2004) (When the employee's absences become excessive, even if the absences are for legitimate reasons, "precedent is clear that the Carrier may" discipline the employee under absenteeism policy); *UTU v. Burlington Northern R.R.*, PLB 4121, Award 6 (1987) (noting "management's right to establish reasonable procedures to regulate laying off by employees"); *UTU v. Norfolk & Western Ry.*, PLB 5107, Award 18 (1992) (upholding policy requiring employees to be available for work at least 70 percent of the time, and at least 85 percent on weekends); *Firemen and Oilers v. Consolidated Rail Corp.*, PLB 2720, Case 82 (1988) (noting "carrier's inherent managerial right to insist on a reliable work force); *BLET v. Union Pacific*, NRAB 1st Div. 26836 at 3 (2009) ("excessive absenteeism, even for legitimate reasons, need not be accepted"); *IAMAW v. Western P. Ry. Co.*, NRAB 2nd Div. 9705 at 6 (1983) (noting that the "Carrier has a right to expect employees to be at work on time on a regular basis"); *SMWIA. v. Chicago and Nw. Trans.*, PLB 4870, 1 (1990) (noting that "there is a point at which even the most legitimate [recurring] absences can become excessive."); *UTU v. Union Pacific*, PLB 6764, 104 (2006) (refusing to modify discipline where "the record shows a proclivity for laying off sick when close to being called"); *BRC. v. Southern Ry.*, NRAB 2nd, 10400 (1985) ("It is beyond cavil that the obligation is on the employee to protect the Carrier's service on the days he is assigned to work, and failure to do so is sufficient grounds for discipline, including dismissal."); *BLET v. Union Pacific*, PLB 6885, Award 8 (2007) (upholding Union Pacific TY&E attendance policy); *UTU v. Union Pacific*, PLB 7003, Awards 8 and 13 (2007) (same); *UTU v. Union Pacific*, PLB 5082, Award 7 (1992) (same).

[15] *See, e.g., Am. Airlines, Inc. v. Transport Workers Union*, Area Bd. of Adjustment, Case No. S-0906-10 (Dec. 16, 2010) (upholding termination of employee for excessive absences including for sickness); *Medco Health Solutions.*, 128 LA 1734 (Dec. 6, 2010) (employer has "[t]he right to terminate employees for excessive absences, even where they are caused by illness . . . . "); *Whirlpool Corp.*, 121 LA 272 (Feb. 28, 2005) (recognizing that employer had just cause to terminate employee who was absent after exhausting FMLA leave).

Employees and railroads may sometimes dispute the application of these attendance policies in individual cases, but the general expectation of regular attendance – as well as the attendant risk of discipline in the event of excessive absenteeism – is a well-recognized aspect of every railroad employee's working life.

### D. An Overbroad Reading of Section 20109(c)(2) Would Immunize Employees From Legitimate Discipline for Excessive Absenteeism

The ALJ ruled that Section 20109(c)(2) prohibits disciplining any employee for excessive absenteeism – conceivably regardless of how many days the employee missed – so long as the absences in question arise from a doctor's orders or treatment plan concerning any off-duty injury or illness. The ALJ's conclusion that Section 20109 does not permit a distinction between disciplining an employee for following the treatment plan of a physician and for being unable to comply with a basic aspect of any job – *i.e.* regular attendance – defies common sense and is certainly not required by the text of Section 20109(c)(2), as explained in Part I *supra*. Nor is it required by any statute protective of employee rights of which the AAR is aware. The ALJ's analysis does not appear to permit any consideration of the pattern, frequency or total number of absences, any history of other absenteeism by the employee, or similar factors. Rather, as a practical matter, it appears that so long as an employee is able to secure a doctor's note prescribing "time off," he or she can be absent with impunity.

Aside from the lack of statutory support for that result, the practical consequences for railroads would be extreme and unreasonable. Consider the following example:

> An employee has a history of extensive absenteeism, including a recurring pattern of calling in "sick" a day before his rest days and holidays. In doing so, he has exhausted all of his FMLA leave. He has progressed through the warning stages

> under the railroad's attendance policy and now faces discipline up to termination if his pattern of absences continues. But while off work, the employee claims to have injured his back, or come down with intermittent migraine headaches, or developed some other reoccurring condition that is difficult to validate medically. Each time the employee wants time off, the employee visits his family physician and obtains a note specifying the need to be off work because the condition is present. Under the ALJ's ruling, the employee could then continue his same pattern of flouting the attendance requirements with impunity.

Such an outcome obviously undercuts the railroad's legitimate attendance policies, diminishes the efficiency of rail operations, increases the burden on other railroad employees, and encourages similar abuse by others. Indeed, even in an arguably less extreme case – one in which the employee is legitimately sick but excessively absent – the same outcome would hold true under the ALJ's reasoning. A railroad should not and cannot be forced to employ an individual who simply cannot make it to work on a regular basis. In short, the ALJ decision is directly contrary to the well-settled principle that "excessive absenteeism, even for legitimate reasons, need not be accepted." *See, e.g., BLET v. Union Pacific*, NRAB 1st Div. 26836 at 3 (2009).

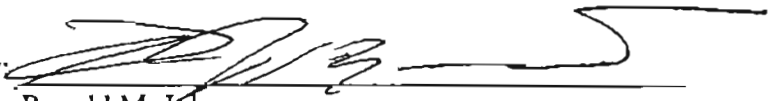
In the statute where Congress specifically addressed employee medical leave rights, the FMLA, Congress found that twelve weeks unpaid leave is a reasonable balance between the needs of employees and the needs of employers. As previously explained, there is simply no indication in Section 20109, the broader purposes of the FRSA regulatory scheme of which Section 20109 is a part, or its legislative history, that Congress intended *sub silentio* that railroad employees would now have unlimited, unpaid sick leave rights in addition to their existing paid and unpaid leave rights.

## Conclusion

For the foregoing reasons, the AAR urges the Board to find that the scope of Section 20109(c)(2) is limited to workplace injuries and illnesses.

Respectfully submitted,

Dated: May 15, 2012.

By: 

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## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2012, a true and correct copy of the foregoing was sent to the following:

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