**In the Matter of:**

**CHRISTOPHER BALA,** **ARB CASE NO. 12-048**

**COMPLAINANT,** **ALJ CASE NO. 2010-FRS-026**

**v.** **DATE: September 27, 2013**

**PORT AUTHORITY TRANS-HUDSON CORP.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Charles C. Goetsch, Esq.; *Cahill, Goetsch & Perry, P.C.*; New Haven, Connecticut**

***For the Respondent:***
**James M. Begley, Esq.; New York, New York**

***For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae*:**
**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther, Esq.; Ashkea Herron McAllister, Esq., *U.S. Department of Labor*, Washington, District of Columbia**

***For the Association of American Railroads as Amicus Curiae*:**
**Ronald M. Johnson, Esq.; Donald J. Munro, Esq.; *Jones Day LLP*, Washington, District of Columbia and Louis P. Warchot, Esq., *Association of American Railroads*, Washington, District of Columbia**

***For the National Whistleblowers Center as Amicus Curiae*:**
**Richard R. Renner, Esq.; Stephen M. Kohn, Esq., *National Whistleblowers Legal Defense and Education Fund*, Washington, District of Columbia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge***

## FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson/West Supp. 2013), as implemented by federal regulations at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A. On June 2, 2008, Christopher Bala filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Port Authority Trans-Hudson Corp. (PATH), violated FRSA by suspending him for three days due to his absence from work pursuant to orders from his doctor. OSHA dismissed the complaint.

Bala objected and requested a hearing before an Administrative Law Judge (ALJ). Following an evidentiary hearing, the ALJ issued a Decision and Order on February 10, 2012, determining that PATH violated the Act and granting relief. [1] PATH petitioned for review. We affirm.

### BACKGROUND

#### *A. Facts*

PATH is a rapid transit railroad serving metropolitan Northern New Jersey and New York City. Bala has worked as a signal repairman at PATH since 1990 in the Power, Signals, and Communications Division. In that capacity, he is responsible for maintaining, installing, and repairing the signal system along PATH's railroads. On October 17, 2006, Bala injured his lower back at work when he attempted to lift railroad equipment. D. & O. at 8 (citing Hearing Transcript (Tr.) at 15, JX 6). He reported his injury to the company's Office of Medical Services (OMS), and was referred to Dr. Joel Goldstein for an orthopedic evaluation. Dr. Goldstein administered a series of epidural shots and ordered Bala out of work for three months while undergoing treatment. Bala returned to work in January 2007.[2]

Bala re-injured his lower back on April 2, 2008, while lifting himself onto a train at work. OMS referred Bala to Dr. Goldstein for further evaluation, and Bala was ordered out of work until May 21, 2008. D. & O. at 8 (citing JX 14). Bala returned to duty on May 22, 2008. Tr. at 153. On June 22, 2008, Bala experienced sharp lower back pain while lifting boxes at home. He called in sick and the next morning was evaluated by his family physician, Dr. Thomas Lozowski, who ordered him out of work until July 30, 2008. D. & O. at 8 (citing Tr. at 34-36,

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[1] *Bala v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS-026 (Feb. 10, 2012) (D. & O.).

[2] The record shows Bala's attendance record from 1991 through 2007. Bala was absent 234 days from 1991 to 2001. He was out sick for 274 days total in 2002, 2003, 2004, and 2007. See D. & O. at 3 (citing JX 3). During 2008, Bala was absent 153 total days – 19 vacation days, two personal days, 96 sick days, and 36 days from an on-duty injury. *Id*. (citing JX 4).

JX 26). Bala informed PATH supervisor Brian Hodgekinson about the injury and the doctor's orders. D. & O. at 8 (citing Tr. at 36). Hodgekinson directed Bala to be evaluated by Dr. Ronda Whitley, a company physician with OMS. After the evaluation, Dr. Whitley confirmed that Bala was not fit for duty and directed him to schedule an orthopedic evaluation with OMS's Dr. Goldstein. D. & O. at 8 (citing Tr. at 36-39, JX 25). Bala delivered Dr. Whitley's medical disposition slip to the office of Frederick Childs, superintendent of PATH's Power, Signals, and Communications Division. *Id.* (citing Tr. at 309, 228; JX 25).

On July 14, 2008, while Bala was on medical leave, Childs charged Bala with violating PATH's attendance policy set out in the company's Book of Rules. D. & O. at 8-9 (citing JX 8). Rule J.1 of the PATH Book of Rules states: "Employees must maintain a satisfactory attendance record. PATH has the discretion in establishing the length of time an employee may be absent due to injury or illness before disciplinary action is taken." Rule J.3 of the Rule Book reads: "Unexplained or unauthorized absences, repeated or excessive absenteeism, lateness or making a false report of injury or illness will be cause for disciplinary action."[3] The charges were triggered by Bala's absence from work beginning June 23, 2008, one day after his off-duty back injury occurred. See D. & O. at 9; see also JX 8 at 1.

Radomir Bulayev, assistant superintendent of the Power, Signals, and Communication Division, presided over a company division hearing on the attendance charges on January 8, 2009. On January 26, 2009, Bulayev entered a decision sustaining the charges and issued a six-day suspension, with three days held in abeyance for one year. D. & O. at 9 (citing JX 10).

### *B. ALJ Decision*

The ALJ held that the FRSA's employee protection provisions, 49 U.S.C.A. § 20109(c)(2), protect employees from being disciplined "for following orders or a treatment plan of a treating physician" that arise "out of on-duty and off-duty injuries." D. & O. at 11. The

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[3] PATH's attendance policy, dated October 1, 2006, reads:

> PATH will continue to evaluate an employee's entire attendance record and will institute disciplinary action at its discretion for attendance violations of any length, frequency or pattern. The following is a reminder of the general guidelines for administration of counseling and formal discipline for frequencies of absenteeism in any 12 month period (subject to any limits set forth in an applicable collective bargaining agreement):
>
> > 4 frequencies in 12 months – Warning Letter
> > 5 frequencies in 12 months – Counseling Session With Division Superintendent/ Manager
> > 6 or more frequencies in 12 months – Disciplinary Hearing
>
> Absence due to "sick" . . . is counted as a frequency.

JX 1.

ALJ stated that Section 20109(c)(2) "exists not only to encourage employees suffering on the job injuries to report unsafe conditions to their superiors without fear of reprisal, but also to discourage sick or injured workers from returning to duty while their impairment poses a threat to safety of railroad passengers and fellow employees." *Id.*

The ALJ rejected the company's contention that Childs did not know that Bala was on a medical treatment plan when he issued the charging letter on July 14, 2008. The ALJ cited a "series of emails" between "Childs and Complainant's Supervisor indicat[ing] that Childs spoke with Complainant on June 23, 2008 and was informed that Complainant had been ordered out of work." *Id.* at 12. Based on this and other record evidence, the ALJ determined that Childs was aware that a treating physician had ordered Bala out of work. *Id.*

The ALJ determined that Bala had suffered an adverse action (the disciplinary suspension), and that his adherence to the treatment plan contributed to that action. The ALJ found that the "disciplinary charge letter issued by Frederick Childs explicitly states that Complainant's absence on June 23, 2008, factored into Respondent's decision to charge Complainant for violations of PATH's attendance policy." D. & O. at 13. Finally, the ALJ concluded that the company failed to present clear and convincing evidence that it would have taken the same action against Bala absent the protected activity. The ALJ found that the company "put forth no evidence or argument indicating that PATH was preparing to discipline Complainant prior to his absence on June 22, 2008." D. & O. at 14.

The ALJ awarded Bala backpay in the amount of $1,101.00 for the three days he was suspended, expungement of his personnel file, litigation costs, and reasonable attorney's fees.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority to the ARB to issue final agency decisions under the FRSA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012); 29 C.F.R. Part 1982. We review the ALJ's factual findings for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1982.110(b); *Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 10 (ARB Mar. 29, 2013).

## DISCUSSION

### *A. Statutory And Regulatory Framework*

The FRSA's employee protection provisions prohibit a railroad carrier from retaliating against an employee who engages in protected activity, such as reporting an injury or illness. 49 U.S.C.A. § 20109(a). The statute specifically contains a section addressing medical attention. That provision, 49 U.S.C.A. 20109(c), states:

(c) Prompt medical attention.–

> (1) Prohibition.–A railroad carrier or person covered under this section 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.
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> (2) Discipline.–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, except that a railroad 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 refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "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.

Section 20109 of 49 U.S.C.A. incorporates the procedures enacted under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which contains whistleblower protections for employees in the aviation industry. 49 U.S.C.A. § 20109(d)(2)(A); see also AIR 21, 49 U.S.C.A. § 42121(b)(2)(B)(iii) (Thomson/West 2007); *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 6 (ARB July 25, 2012). To prevail, a complainant must establish by a preponderance of the evidence that he or she: (1) engaged in protected activity, (2) suffered an unfavorable personnel action, and (3) the protected activity was a contributing factor in the unfavorable action. *Id.*

### *B. Subsection (c)(2) Of 49 U.S.C.A. § 20109 Affords Railroad Employees Protection From Discipline When Following Treating Physicians' Orders That Stem From Off-Duty Injuries*

PATH's principal arguments relate to the scope of coverage under Section 20109(c). It is well established that when construing a federal statute, the "task is to give effect to the will of Congress." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). Because "Congress's intent is most clearly expressed in the text of the statute, we begin our analysis with an examination of the plain language of the relevant provision." *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012) (citation and internal quotation marks omitted); *see also Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute."). "When the words of a statute are unambiguous, then, this first

canon [of statutory interpretation] is also the last: judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). With this framework in mind, we turn to the language of the FRSA.

### *1. The plain language of subsection (c)(2) protects railroad employees from discipline for following a physician's orders for off-duty injuries*

Subsection (c) of 49 U.S.C.A. § 20109 contains two distinct provisions designed to address the prompt medical needs of railroad employees that the FRSA whistleblower provision protects from unlawful discrimination. 49 U.S.C.A. § 20109(a); see also Rail Safety Improvement Act of 2008, Pub. L. 110-432, Sec. 419 (Oct. 16, 2008). The two distinct provisions fall under the label "Prompt medical attention." Subsection (c)(1), subtitled "Prohibition," prohibits railroad carriers from denying, delaying, or interfering with medical treatment of an employee who is injured during the course of employment. This subsection also requires railroad carriers to "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.A. § 20109(c)(1). Subsection (c)(2), subtitled "Discipline," states, inter alia, that railroad carriers may not discipline or threaten to discipline 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.A. § 20901(c)(2) (emphasis added).

PATH argues that the use of the term "course of employment" in subsection (c)(1) applies as a prerequisite for employees to be afforded protection from unlawful "discipline" under subsection (c)(2), even though the term is not set out in that subsection. Brief (Br.) at 15-18. It is well established, however, 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) (internal quotations and citation omitted); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) (holding that the "absence of any cross-reference to the limitations provision in either the fees provision, [42 U.S.C.] § 300aa-15(e)(1), or the instructions for initiating a compensation proceeding, § 300aa-11(a)(1), indicates that a petition can be 'filed' without being 'in accordance with [the limitations provision].'"); *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (holding that the "inclusion of an express presentment requirement in [False Claims Act, 31 U.S.C. 3729] subsection (a)(1), combined with the absence of anything similar in subsection (a)(2), suggests that Congress did not intend to include a presentment requirement in subsection (a)(2).").

In *Russello*, the Supreme Court examined the use of the term "interest" under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1980, 18 U.S.C.A. § 1963(a)(1), (2).[4] The Court observed that subsection (a)(1) of

[4] Section 1963 (a) of Title 18 (RICO) reads:

§ 1963. Criminal penalties

Section 1963 "speaks broadly of 'any interest . . . acquired," while subsection (a)(2) reaches "only 'any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted or participated in the conduct of, in violation of section 1962." Based on the plain language of Section 1963(a), the Court stated that the "argument for a narrow construction of § 1963(a)(1) is refuted by the language of the succeeding subsection (a)(2)." *Russello*, 464 U.S. at 23.

Applying the same analysis in this case, the use of the term "during the course of employment" in Section 20109(c)(1) does not limit the scope of protection afforded for employees "following [doctor's] orders or a treatment plan of a treating physician" under subsection (c)(2). While PATH insists that we should presume the incorporation of the term "course of employment" into subsection (c)(2), it is clear that "Congress did not write the statute that way," *Russello* , 464 U.S. at 23, quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979), and we will "'ordinarily resist reading words or elements into a statute that do not appear on its face,'" *Dean v. United States*, 556 U.S. 568, 572 (2009) (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). Had Congress intended to limit railroad employee protection from discipline for following doctor's orders only in circumstances stemming from injuries that occurred during the "course of employment" or on-duty injuries, "it presumably would have done so expressly as it did in the immediately [preceding] subsection [(c)(1)]." *Russello*, 464 U.S. at 23. Consistent with *Russello*, we "refrain from concluding here that the differing language in the two subsections has the same meaning in each[,] [and] [w]e would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.*

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> (a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--
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> (1) any interest the person has acquired or maintained in violation of section 1962;
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> (2) any--
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> (A) interest in;
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> (B) security of;
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> (C) claim against; or
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> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The language of Section 20901(c)(2), on its face, does not foreclose an employee from protection from discipline for following a treating physician's orders that stem from off-duty injuries, and the statute's legislative history underscores this interpretation. Section 20109(c) was enacted as part of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, Sec. 419 (2008 Act). The evolution of the statute supports that Congress did not intend the "course of employment" prerequisite to be applied to section (c)(2) where railroad employees seek to adhere to their treating physician's orders or treatment plans when they are injured.

On May 1, 2007, Representative Oberstar introduced the Federal Railroad Safety Improvement Act of 2007 (House Rep. No. 2095), which contained a stand-alone section (Section 606) entitled "Prompt medical attention."[5] Section 606 set out two distinct protections afforded railroad employees needing medical attention: a prohibition against railroad employers interfering with the medical needs of employees who are injured in the course of employment and a prohibition against disciplining railroad employees who request medical aid or follow orders or a treatment plan of a treating physician. Section 606 was reported by the House Committee on Transportation and Infrastructure (See H. Rep. No. 110-336 (Sept. 19, 2007)), and passed on October 17, 2007.

The Senate re-wrote Section 606's prompt medical attention provision in Section 419 of Senate Rep. No. 110-270 but retained the two distinct protections afforded railroad employees under Section 606.[6] This Senate version applied the "course of employment" prerequisite to a

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[5] Sec. 606. Prompt medical attention.
Amendment – Subchapter II of chapter 201 of Title 49, United States Code, as amended by this Act, is further amended by adding at the end of the following new section:

Sec. 20162. Prompt medical attention

> (a) Prohibition – A railroad or person covered under this title shall 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 medically appropriate hospital.
> (b) Discipline – A railroad or person covered under this title shall 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. For purposes of this subsection, discipline means to bring charges against any person in a disciplinary proceeding, suspend, terminate, place on probation, or make not of reprimand on an employee's record.

[6] The Senate's version of the prompt medical attention provision was reported on March 3, 2008, in Senate Rep. No. 110-270, and read as follows:

railroad employee's request for first aid, prompt medical attention or transportation to a medical facility but *not* to an employee's efforts to comply with treatment prescribed by a physician or licensed health care professional.

The prompt medical attention provision that passed the House of Representatives, House Rep. No. 2095 (Oct. 17, 2007) essentially became the final version of the prompt medical attention provision of the 2008 Act. Neither Section 606 of House Rep. No. 2095 nor Section 419 of Senate Rep. No. 110-270 incorporated a "during the course of employment" prerequisite in the subsection on discipline. This measure was clearly intended by Congress. At a hearing held before the House Committee on Transportation and Infrastructure, Chairman Oberstar stated:

> I will affirm that our Section 606 in the Rail Safety Bill goes a long way to addressing the issue of harassment, gives new authority to the Federal Railroad Administration. It was language that was not adopted idly or easily. It was thoroughly discussed, debated, negotiated with the minority on the Committee, and we have a consensus bill. That is why it passed with such an overwhelming vote in the House. I hope the Senate will act upon it.

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SEC. 419. PROMPT MEDICAL ATTENTION.

> (a) In General.–Section 20109 is amended–
> (1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and (2) by inserting after subsection (b) the following:
>
> ``(c) Prompt Medical Attention.--
> ``(1) Prohibition.–A railroad carrier or person covered under this section 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.
> ``(2) Discipline.–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, except that a railroad 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 refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty . . . .

"The Impact of Railroad Injury, Accident, And Discipline Policies On The Safety Of American's Railroads," Hearing Before The House Comm. on Transportation and Infrastructure (110-84), 110th Cong., 1st Sess. (Oct. 25, 2007), at 69 (House Hearing (Oct. 25, 2007)) (remarks by Chairman Oberstar). As we explained in *Santiago*, ARB No. 10-147,

> Section 606 created an affirmative duty on the part of railroads to refrain from interfering with the medical treatment of injured employees. Section 606 was reported by the House Transportation and Infrastructure Committee, and passed on October 17, 2007. However, the Senate rewrote the provision to expressly protect requests for medical attention and employee efforts to comply with treatment plans and placed it within the railroad anti-retaliation provisions at 49 U.S.C. 20109(a), in effect turning the substantive prohibition into a protected act in a whistleblower claim. The Senate apparently preferred to address the problems associated with medical treatment of injured employees in the context of anti-retaliation law. The House, in turn, rejected the Senate language, largely restored the original House language from the stand-alone prohibition, but concurred in its placement, as in the Senate version, squarely within the whistleblower provisions at 49 U.S.C. 20109. This version became law.

*Id.* at 13-14.

PATH argues that the provision's title, "Prompt medical attention," limits the scope of the statute's coverage to on-duty injuries only. Br. at 18. However, the provision's title does not place such a limitation; indeed the title makes no reference to the employee's duty status, whether on or off-duty when injured, as a prerequisite to the section's protection. The term "prompt medical attention" is fairly read to mean "'punctual' and 'without delay'" making the title "consistent with both (c)(1) and (c)(2)." *Santiago*, ARB No. 10-147, slip op. at 12.

Nevertheless, it is well established that the "title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). "For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Brotherhood of R.R. Trainmen*, 331 U.S. at 529; see also *Yeskey*, 524 U.S. at 212. "Congress did not create section 20109(c) in a vacuum." *Santiago*, ARB No. 10-147, slip op. at 15. Here, the provision heading does not resolve any doubt about the plain meaning of subsection (c)(2), as the title, on its face, does not limit protection to railroad employees suffering on-duty injuries only.

PATH argues that Section 20109(c) was modeled after similar statutes enacted by the States of Illinois and Minnesota, and that limitations set out in those state statutes should apply to the federal statute. Br. at 10-16. This argument, however, lacks merit because the state statutes are written differently than Section 20109(c). While the legislative history of the Rail Safety Act

of 2008, Pub. L. No. 110-432, recognized the legislative measures taken by these states to ameliorate railroad injuries, see House Hearing (Oct. 25, 2007) at xiii, Congress did not adopt the identical statutory language set out in those state provisions. More specifically, unlike Section 20109(c), the Illinois and Minnesota statutes expressly incorporate the "injured during employment" language in both the prohibition against interfering with medical treatment or first aid *and* in the prohibition against disciplining employees for requesting medical treatment or following doctor's orders or physician treatment plans. See Illinois Railroad Employees Medical Treatment Act, 610 Ill. Comp. Stat. 107/10; Minn. Stat. § 609.849.[7] Certainly the express use of the "injured during employment" language in both prohibitions set out in the state statutes, and the absence of that or similar language in subsection (c)(2) of Section 20109, underscores that the federal legislation does not place that same on-duty-injury prerequisite in the subsection pertaining to unlawful discipline.

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[7] The Illinois statute, in pertinent part, reads:

> Section 10. Railroad Employee Access To First Aid Or Medical Treatment.
> . . .
> (b) It is unlawful for a railroad or person employed by a 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.
> . . .

610 Ill. Comp. Stat. 107/10.

The Minnesota statute, in pertinent part, reads:

> Section 609.849. Railroad that obstructs treatment of an injured worker.
> (a) 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.

### *2. The legislative history of the Rail Safety Improvement Act of 2008 shows Congress's broad interest in enhancing safety at the nation's railroad sites, including ensuring medical treatment for all injured employees*

Section 20109(c)'s legislative history reflects Congress's broad concerns over railroad employee safety. The FRSA's statutory purpose is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C.A. § 20101. Section 101 of the 2008 Act states as the Federal Railroad Administration's duty, "safety as highest priority," and that in "carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation." Pub. L. 110-432, 122 Stat. 4848, Tit. I, Sec. 101. The safety goals set out in the 2008 Act include: "reducing the number of accidents, incidents, injuries, and fatalities involving railroads including . . . human factors." *Id.* at Sec. 102.

Congress heard much testimony prior to enactment of the 2008 Act, laying out a broad concern for safety in the railroad industry beyond encouraging workers to report workplace injuries. See House Hearing, *supra*, generally; see also *Santiago*¸ ARB No. 10-147, slip op. at 12 ("A series of hearings in the 110th Congress signaled increasing public and Congressional concern with rail safety, including chronic under-reporting of rail injuries . . . and interference with medical treatment of injured employees." ).[8] Members of Congress made clear that railroad industry safety was the paramount underpinning for the 2008 legislation. Representative Shuster stated at the House Hearing that "rail safety is a subject that has been examined many times in the past couple of years by this Congress, and each time we found that our rail safety programs have made significant positive impact and progress." House Hearing (Oct. 25, 2007) at 3-4. Representative Brown stated that the "Railroad Subcommittee has concentrated on safety in the rail industry, and that includes the safety and well-being of railroad employees" (*id*. at 5), and expressed the Committee's interest in "creat[ing] a culture of safety in the railroad industry so that both the management and workers can safely handle the significant increased workload that is predicted for America's railroads" (*id.* at 6). See also *id.* at 7 (reading into congressional record a letter from Minnesota Attorney General "urg[ing] the Congress to act to ensure that rail workers throughout the nation, not just Minnesota, are provided prompt medical care and not subjected to harassment and intimidation."). Chairman Oberstar observed that the importance of instituting safety policies is important in the rail industry, and in all transportation industry sectors. House Hearing (Oct. 25, 2007) at 10-11 (Chairman Oberstar stating: "With every mode of transportation, safety begins in the boardroom, in the corporate boardroom. Safety is not the primary responsibility of the Federal Railroad Administration or of the FAA or the Federal Motor Carrier Administration. Safety is the primary responsibility of the company itself. And

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[8] See *Santiago*, ARB No. 10-147, slip op. at 12 n.4 (citing Reauthorization of the Federal Rail Safety Program: Hearing Before the House Comm. On Transportation and Infrastructure, 110th Cong., 1st Sess. (Jan. 30, 2007); Fatigue in the Rail Industry: Hearing Before the H. Comm. On Transportation and Infrastructure, 110th Cong., 1st Sess. (Feb. 13, 2007); Rail Safety Legislation: Hearing Before the H. Comm. On Transportation and Infrastructure, 110th Cong., 1st Sess. (May 8, 2007); House Hearing (Oct. 25, 2007)).

the reason we have government oversight agencies is to keep them honest and to help employees train and develop their own culture of safety.").

Members also heard from witnesses discussing railroad safety, including Federal Rail Administrator Joseph Boardman who testified about the impact of railroad discipline on the safety of the country's rail system. The Administrator stated:

> From 2002 to 2006, the vast majority of train accidents resulted from human factor causes or track causes. Accordingly, human factors and track have been our primary focus to bring about further improvement in the train accident rate. Overall the Action Plan includes initiatives intended to: Reduce train accidents caused by human factors; Address fatigue.

House Hearing (Oct. 25, 2007) at 142, Supp. A (Statement of Administrator Boardman). See also Federal Railroad Safety Improvement Act of 2007, House Report 110-336, 2007 U.S.C.C.A.N. 2146 ("Human factors are responsible for nearly 40 percent of all train accidents, and the FRA reports that fatigue plays a role in approximately one of four accidents caused by human factors."); see also House Hearing (Oct. 25, 2007) at 107, 112 (Statement of Chairman Oberstar) ("Simply pronouncing an accident due to 'human factors' or 'human error' sheds very little useful light on *why* an accident occurred. . . . Finding out why a mistake happened by openly looking at *all* the factors at play is the right answer. That is not happening often enough in today's railroad safety culture.").

Various railroad executives who testified at the hearing stated their interests in ensuring safety at the nation's railroad sites. Ed Hamberger, President of the American Association of Railroad, testified that "[r]ailroads are currently at the forefront of advancing safety from a technology standpoint as well as an operational standpoint . . . ." House Hearing (Oct. 25, 2007) at 70. Hamberger recognized the "need to establish a culture of safety through cooperative relationships with . . . employees and not a command and control environment." *Id.* at 71. Various other company and employee witnesses discussed the importance of safety and ensuring that employees receive appropriate medical attention without harassment or discipline. See House Hearing (Oct. 25, 2007) at 72-73 (testimony of David Brown); *id.* at 74-75 (testimony of Mark Schulze) ("All employees in BNSF are empowered to take responsibility for their own safety and the safety of their colleagues . . . . They are expected to take that initiative to stop work processes when they feel safety may be compromised, and they do."); *id*. at 76-77 (testimony of Charles Wehrmeister) ("It is also about prevention. Even before an injury occurs, our goal is to prevent incidents and injuries by being proactive rather than reactive."). *Id.* at 78 (testimony of Bob Grimaila) ("At Union Pacific, safety is our first priority. This means that ensuring every one of our 53,000 employees does their job in a safe manner and returns home safely every day.").

PATH suggests that this application of (c)(2) interferes with a railroad company's ability to discipline employees for excessive absenteeism. Br. at 18. However, nothing in Section 20109 precludes an employer from disciplining an employee for excessive absences. The only limitation set out in (c)(2) is that an employee cannot be disciplined because he/she is complying

with the orders or treatment plan of a treating physician. See also D. & O. at 13 n.5 (stating that in view of Bala's frequent absences "PATH was in an equally difficult position. . . . Nevertheless, where Complainant was absent from work secondary to a physician's orders (and in this case, PATH's own physician); PATH could not discipline him 'for following orders . . . of a treating physician.' 49 U.S.C. 20109(c)(2).").

The express statutory language set out in Sections 20109(c)(1) and (2), as well as the legislative history reflecting Congress's broad concern over safety in the railroad industry and protection of injured railroad workers, makes clear that Congress did not intend to foreclose from protection railroad workers who "follow[] orders or a treatment plan of a treating physician" even when the injury they are being treated for occurred off-duty. *Santiago*, ARB No. 10-147, slip op. at 15 (stating that Congress's passage of amendments to the FRSA represents a "progressive expansion of anti-retaliation measures in an effort to address continuing concerns about railroad safety and injury reporting.").[9]

### *C. Substantial Evidence Supports The ALJ's Liability Determination*

Substantial evidence fully supports the ALJ's decision that Bala's reporting and adherence to his physician's medical orders were protected under FRSA, that his protected activity contributed to his discipline, and that PATH presented no clear and convincing evidence that Bala would have suffered the same discipline absent the activity. See D. & O. at 12-13. The ALJ's legal conclusions as to liability are in accordance with law.

PATH argues, however, that the ALJ erred because Bala failed to prove he was disciplined for following his doctor's orders. Br. at 19. This contention is belied by substantial evidence in the record.

Bala testified that he suffered severe back pain on June 22, 2008, at his home while moving boxes. Tr. at 34. Bala was scheduled to work the night shift that evening, from 11:00 pm to 7:00 am. *Id.* After his injury, he promptly called the company's communications phone line to inform the office that he would not be able to report to duty that night. *Id.* The next morning, Bala saw his family physician, Dr. Thomas Lozowski to seek treatment for the severe pain he was experiencing. *Id.* Dr. Lozowski wrote a note ordering that Bala stay out of work from June 22, 2008, until July 30, 2008, and instructed Bala to see an orthopedic physician. Tr.

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[9] For several reasons, PATH's argument that interpreting Section 20109(c)(2) to protect treatment for off-duty illness or injury will preclude a railroad from disciplining employees for excessive absences is also meritless. First, an employee may be disciplined when absences are not associated with a medical treatment plan. Second, an employee's claim to be following a physician's treatment plan must be in good faith to be protected under the statute. FRSA does not preclude an employer from ascertaining whether an absence is legitimate. *See, e.g., Johnson v. Roadway Express*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 9 (ARB Mar. 29, 2000) ("Moreover, where a driver's claim of illness is not legitimate, a refusal to drive is not protected activity."). Finally, an employer may avoid liability if it can show by clear and convincing evidence that it would have taken the same action in the absence of protected activity.

at 36; see also JX 26. The note is titled "Return to Work," and is signed by Dr. Lozowski and stamped with the name of his practice, office address, and phone number. JX 26.

That morning Bala informed PATH supervisor Brian Hodgekinson of his physical condition. Tr. at 36-37. Hodgkinson ordered Bala to see OMS physician Dr. Ronda Whitley. Tr. at 37. Bala met with Dr. Whitley later that same day, and told her that the pain he was experiencing was identical to the pain he experienced in October 2006 and April 2008, when he injured his back while performing duties at work. *Id.*; see also Tr. at 35 (Bala stating that "[i]t was identical. Identical pain, stabbing pain, couldn't stand straight up. It was the identical pain."). Dr. Whitley reviewed Dr. Lozowski's "Return to Work" order, and she agreed that Bala was unfit for work. Tr. at 37. Dr. Whitley testified that she saw Bala for back pain on June 23, 2008. Tr. at 153. She testified that after examining him, she wrote in her notes as follows:

> Employee in medical for a follow-up of an absence since calling off this a.m. Employee complained of low back pain radiating to bilateral lower extremities after he says he was moving boxes in his shed over the weekend. Employee said the boxes could not have been more than 30 pounds. Employee says prior to his incident he was feeling well, without any pain in his lower back. Employee has a history of a recent alleged injury-on-duty to his lower back, and successfully finished a series of epidurals on May 15, 2008.

Tr. at 153-154 (testimony of Dr. Whitley). The note that Dr. Whitley reviewed from Dr. Lozowski, stated that Bala would be able to return to work on July 30, 2008, with no restrictions. JX 26; Tr. at 156. PATH suggests that more evidence is required to substantiate the legitimacy of Dr. Lozowski's note. Br. at 19. However, as the ultimate fact-finder, the ALJ admitted Dr. Lozowski's Return to Work note into evidence. Given Bala's testimony that he met with Dr. Lozowski the morning after his June 22 injury (coupled with Dr. Whitley's order rendering him unfit for duty), substantial evidence supports the ALJ's finding that Bala could not be disciplined for "following orders . . . of a treating physician." 49 U.S.C.A. § 20109(c)(2). The disciplinary charge letter issued by company supervisor Childs states that Bala's absence on June 23, 2008, triggered the disciplinary proceeding for violating PATH's attendance policy. See JX 8 (PATH Disciplinary Charging letter dated July 14, 2008) (stating that "you again notified PATH on June 23, 2008 that you would be on sick-absence from work."). Thus, substantial evidence fully supports the ALJ's finding that Bala was disciplined for following the orders of Dr. Lozowski and Dr. Whitley in violation of FRSA Section 20109(c)(2).[10] The ALJ's determination that

[10] The ALJ determined that PATH violated Section 20109(c)(2) by disciplining Bala for following the orders of his treating physicians for an injury that occurred off-duty. D. & O. at 11. The ALJ did not make a factual finding as to whether Bala's June 22, 2008, off-duty injury was exacerbated by, or an extension of, his prior back injuries that occurred while on duty in April 2008 and October 2006. *Id.* (ALJ stating that "while the parties bicker over whether Complainant's injury occurred off-duty or was an aggravation of a prior on-the-job duty, that distinction is irrelevant."). While the issue is not presented to us, there is evidence in the record that may support a finding that Bala's June 22, 2008, off-duty back injury stemmed from his prior on-duty back problems. Dr.

PATH presented no clear and convincing evidence that it would have disciplined Bala absent that protected activity is also substantially supported by the evidence. D. & O. at 13-14.

### *D. Application Of Section 20901(c)(2) Presents No Issue of Retroactivity*

PATH argues that Bala's Disciplinary Charge Letter (dated July 14, 2008) (JX 8) preceded Section 20109(c)(2)'s enactment, *e.g.,* October 16, 2008, and thus the statute cannot be applied retroactively. This is not a case involving retroactive application of a statute. While the charging letter informing him of disciplinary proceedings was dated July 2008, Bala did not experience an adverse action until January 2009, when PATH suspended him immediately following a disciplinary hearing. 49 U.S.C.A. § 20109(a); *DeFrancesco v. Union R.R. Co.,* ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012) (suspension constitutes an adverse action under FRSA). Since Bala was not disciplined until three months after the statute was enacted, there is no issue in this case pertaining to retroactivity.

## CONCLUSION

The ALJ's decision is **AFFIRMED.**

**SO ORDERED.**

**LISA WILSON EDWARDS**
**Administrative Appeals Judge**

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**
**Administrative Appeals Judge**

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Whitley wrote in Bala's file that "Employee has a history of a recent alleged injury-on-duty to his lower back, and successfully finished a series of epidurals on May 15, 2008." Tr. at 154. Dr. Whitley also wrote in an August 1, 2008, note to the file directing Bala to "follow with orthopedic" and indicated that during the examination Bala told her that "the injuries related to the alleged injury-on-duty . . . ." Tr. at 164. This evidence may suggest that the more recent off-duty injury stemmed from the back injuries he suffered on duty.