No. 17-3083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GRAND TRUNK WESTERN RAILROAD COMPANY,
Petitioner,

v.

U.S. DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD,
Respondent,

WEBSTER WILLIAMS, JR.,
Intervenor.

On Petition for Review of the Final Decision and Order of the U.S. Department of Labor's Administrative Review Board (ARB Case Nos. 14-092 & 15-008)

BRIEF OF RESPONDENT SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal can be resolved based on the parties' briefs.

STATEMENT OF JURISDICTION

This case arises under the employee protection provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary of Labor had subject matter jurisdiction over this case based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Webster Williams against his employer, Grand Trunk Western Railroad Company ("Grand Trunk"), pursuant to 49 U.S.C. 20109(d)(1).

On December 5, 2016, the Department of Labor's Administrative Review Board ("Board") issued a Final Decision and Order affirming the decision of an Administrative Law Judge ("ALJ") that Grand Trunk terminated Williams in violation of FRSA.[1] Grand Trunk filed a timely Petition for Review of that final agency action in this Court on January 27, 2017. *See* 49 U.S.C. 20109(d)(4) (providing that a "petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor"). This Court has jurisdiction to review the Board's decision because the alleged violation occurred in Michigan. *See id.* (providing that review of the Secretary of Labor's final order

[1] The Secretary has delegated to the Board the authority to issue final agency decisions resolving claims under section 20109(c). *See* Dep't of Labor, Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. 1982.110(a).

may be obtained in the court of appeals for the circuit in which the FRSA violation allegedly occurred); *see also* 49 U.S.C. 42121(b)(4); 29 C.F.R. 1982.112(a).

STATEMENT OF ISSUES

1. Whether by prohibiting a railroad carrier from disciplining an employee for "following orders or a treatment plan of a treating physician," 49 U.S.C. 20109(c)(2), without including language indicating that such orders or treatment must arise because of an injury that occurred "during the course of employment," FRSA protects only an employee whose doctor's instructions result from an on-duty injury or also an employee who suffers from an off-duty condition that his doctor determines impairs his ability to work safely.

2. Whether substantial evidence in the administrative record supports the Board's conclusion that Grand Trunk violated FRSA by terminating Williams's employment based on his absences from work in December 2011, which Grand Trunk knew Williams took based on his doctor's instruction not to work when his health condition, and the prescription medication that alleviated it, made doing so unsafe.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

FRSA's employee protection provision prohibits employers of railroad employees from discharging or otherwise discriminating against such employees

for engaging in specified activities. 49 U.S.C. 20109(a)-(c). These protected activities include an employee's "following orders or a treatment plan of a treating physician." 49 U.S.C. 20109(c)(2).

An employee who believes that his employer has retaliated against him in violation of FRSA may file a complaint with the Occupational Health and Safety Administration ("OSHA"). *See* 49 U.S.C. 20109(d); 29 C.F.R. 1982.103. After an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. The employee or employer may then file objections to OSHA's determination and request a hearing before an ALJ. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106. The ALJ's decision is subject to discretionary review by the Board, and any opinion issued by the Board constitutes the final order of the Secretary. *See* 29 C.F.R. 1982.110.

To prove a violation of FRSA's employee protection provision, an employee must show by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew or suspected that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* 49 U.S.C. 42121(b); 29 C.F.R. 1982.104(e)(2); *Consol. Rail Corp. v. U.S. Dep't of Labor*,

567 F. App'x 334, 337 (6th Cir. 2014) (citing *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013)). If an employee makes this showing, the employer prevails only if it can demonstrate, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of" the protected activity.

49 U.S.C. 42121(b)(2)(B)(ii).

B. Statement of Facts

Grand Trunk employed Webster Williams, Jr. as a locomotive engineer, *i.e.*, a person who drives a train, in Michigan from 1995 to 2011. A3.[2] This position required that Williams "be able to pay close attention, be constantly alert, concentrate, and have a clear head, without which the safety of the train is affected." A21. Williams suffered from anxiety, depression, and migraines—conditions that predated his employment at Grand Trunk—and, starting in late 2010 and pursuant to a prescription from his doctor, he took Xanax to relieve his symptoms. A3, A29. Williams's doctor advised him, in person and on more than one occasion, that he should not work when his illnesses and medication interfered with his ability to safely perform his job, circumstances that could arise because

[2] Citations to documents in the administrative record are designated by reference to page numbers in the Appendix filed with Petitioner's opening brief and appear with the prefix "A." Citations to Grand Trunk's brief are labeled "Pet'r's Br.," and those to the brief of the Association of American Railroads are labeled "AAR Br."

the symptoms of anxiety, depression, and migraines as well as the side effects of Xanax can disrupt an individual's vision and ability to focus. A3, A6 (Board's findings that Williams's doctor understood that Williams's "condition interfered with his job duties" and that Williams had "a good faith belief that it was unsafe to operate a locomotive given his condition and the medication prescribed"); A42-43 (ALJ's findings that Williams's doctor knew of the symptoms of depression and anxiety, as well as the side effects of Xanax, understood that the "inability to concentrate, focus, and perform well … would be a cause for concern for the operation of railroad equipment as required by [Williams's] engineer position," and therefore had advised Williams repeatedly before December 2011 not to work "if he felt he could not do so safely because he was having an episode"); *see also* A211-14, 220, 226, 239, 244, 254, 280 (doctor's testimony for ALJ hearing describing his advice to Williams and its rationale). Consistent with his doctor's instructions, Williams called in sick from work when experiencing symptoms of his illnesses and treating them with Xanax. A3, A24. In 2010 and 2011, he typically used leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.*—as certified by his doctor and approved by Grand Trunk—in these circumstances, but on six days in December 2011, he did not do so. A3. A22.[3]

[3] Evidence in the record indicates why Williams did not use his FMLA-protected

Grand Trunk informed Williams that it was investigating his non-FMLA, December 2011 absences and held a hearing on January 13, 2012 to that end. A5, A348-411 (investigatory hearing transcript and exhibits). At the hearing, Williams testified and provided documentation related to his health conditions. Specifically, Williams explained that he was absent on certain days in December 2011 due to "my sickness" and provided forms his doctor had completed in 2010 and 2011 certifying his need for FMLA leave based on his illnesses as well as Grand Trunk's approvals of those requests in 2011. A31, A34, A35; *see also* A3 (Board's finding that at Grand Trunk's investigatory hearing, Williams "provided documentation that he was absent pursuant to his physician's treatment plan" and that his condition interfered with his job duties). Williams also submitted to Grand Trunk a note he obtained from his doctor after learning that he might be subject to discipline for his absences, which stated that Williams was "under [the doctor's] care" on certain dates in December 2011. A35.[4] On January 24, 2012, Grand

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leave on the dates at issue in this case: in late 2011, Williams received a letter from Grand Trunk regarding recertification of his FMLA leave that he understood to mean he could not use more FMLA leave at that time. *See* A22, A34 (ALJ's description of the letter and Williams's testimony about it).

[4] As Grand Trunk notes repeatedly in its opening brief, *see* Pet'r's Br. 13, 16, 19, 46, 48, 50, 53, 55, the dates on the note Williams's doctor wrote and the dates Williams was absent from work do not all match. *See* A35. The ALJ explained the reason for this discrepancy: on the advice of his union representative, Williams asked his physician for a note excusing his absences on the dates identified on the notice of investigation Williams received from Grand Trunk, and Williams did so

Trunk terminated Williams's employment for "failure to work on a regular basis." A3.

C. The ALJ's Decision and Order

In March 2012, Williams filed a complaint with OSHA alleging that Grand Trunk had violated FRSA by firing him because he followed the orders or treatment plan of his physician, *i.e.*, for engaging in activity designated as protected by section 20109(c)(2). A2, A14. Because Williams's absences were not related to doctor's instructions following an injury Williams suffered while on duty with Grand Trunk, OSHA believed that Williams's absences did not constitute protected activity, and it dismissed his claim. A2, A14.

Williams requested review of OSHA's determination by an ALJ. A2. The ALJ held a hearing at which Williams and Grand Trunk submitted witness testimony, including from Williams, his doctor, and the Grand Trunk manager who fired Williams, as well as documentary evidence. The ALJ concluded, in an August 11, 2014 opinion, that Grand Trunk had violated FRSA. A13-57. The ALJ explained that under the Board's decision in *Bala v. Port Authority Trans-Hudson Corp.*, No. 12-048, 2013 WL 5773495 (ARB Sept. 27, 2013), which provided the Secretary of Labor's interpretation of the FRSA provision at issue in Williams's

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without checking whether that notice listed the correct dates. A22-23. Importantly, as explained below, the Board did not rely on this note in concluding that Williams had proved his claim of a FRSA violation.

case, an employee's absence based on a physician's orders or treatment plan is protected activity under FRSA regardless of whether it results from an on-duty or off-duty condition. A41. The ALJ further held that Williams's absences were based on the orders or treatment plan of a treating physician, because Williams's doctor had prescribed Xanax for Williams's illness and instructed him "*on multiple occasions prior to the specific absences in December* that if Williams could not perform his duties safely then he should not work." A43 (emphasis in original) (including seven citations to the deposition of Williams's doctor entered into evidence). Based in part on testimony of the railroad manager who fired Williams, who acknowledged that he knew when he made that decision that Williams's doctor had instructed Williams not to work when his conditions and medication made doing so unsafe, A6 (Board's finding); A46-47 (ALJ's finding); *see also* A66, A72 (manager's testimony), the ALJ further held that at the time of Williams's termination, Grand Trunk knew both of Williams's doctor's orders and that Williams was following those orders when absent from work in December 2011. A19, A46-47. Grand Trunk fired Williams for the absences and offered no evidence that it would have terminated Williams's employment had he not been absent pursuant to his physician's treatment orders. A48.

D. The Board's Final Decision and Order

Grand Trunk sought review of the ALJ's decision, A11-12, and on December 5, 2016, the Board affirmed. A1-8. The Board acknowledged that since the ALJ had issued his opinion, the Third Circuit had, in *Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor* ("*PATH*"), 776 F.3d 157 (3d Cir. 2015), overturned *Bala*, the Board's earlier decision reading section 20109(c)(2) to protect absences based on a doctor's instructions related to an off-duty injury. A5. But the Board disagreed with, and therefore declined to follow, *PATH*. A5.[5] Relying on its discussion of the issue in *Bala*, the Board instead reiterated its position that a plain reading of the relevant statutory text, as well as consideration of the legislative history of and congressional intent behind FRSA, leads to the conclusion that absences pursuant to a doctor's instructions can be protected activity even if they are related to off-duty conditions. A5-6. The Board also rejected Grand Trunk's other arguments in support of reversal of the ALJ's opinion. In particular, it concluded that Williams's doctor's instructions "amounted to a 'treatment plan'" under Board precedent regarding the meaning of that statutory term. A6. It also found, relying on the ALJ's credibility

[5] As the Board noted, it was not bound by the decision of one Circuit Court in litigation arising in another jurisdiction. A6 n.21 (citing, *inter alia*, *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993), *vacated on other grounds*, 511 U.S. 1103 (1994)).

determination, that Williams was absent from work based on "a good faith belief that it was unsafe to operate a locomotive given his condition and the medication prescribed." *Id.* Finally, the Board determined that Grand Trunk knew at the time it terminated Williams's employment of the reason for his absences. *Id.*

Grand Trunk now seeks review of the Board's order in this Court.

SUMMARY OF THE ARGUMENT

This Court should affirm the Board's final decision and order, which is based on sound legal reasoning and undisputed evidence in the record.

First, the Board correctly concluded that section 20109(c)(2) of FRSA prohibits railroad employers from disciplining employees who are ordered out of work by a treating physician as a result of an off-duty condition. The plain language of the statute does not limit protected activity to absences resulting from on-duty injuries, and the purposes of the statute are best served by ensuring that all railroad employees whose doctors conclude they are unable to work safely, regardless of where the relevant condition arose, avoid posing risk to themselves, other railroad employees, and the public. To the extent the statutory language is ambiguous with regard to whether absences due to a doctor's instructions regarding off-duty injuries can constitute protected activity, the Board's interpretation is entitled to deference. And contrary to Grand Trunk's arguments, ensuring that FRSA's safety purposes are served with respect to a broad set of

physician-ordered absences does not give employees unlimited permission to call in sick.

Second, substantial evidence supports the Board's determination that Grand Trunk violated FRSA. Based on witness testimony and documents in the record, the Board appropriately found that, at the time it fired Williams, Grand Trunk knew of Williams's doctor's instructions to take prescription medication and not work while unable to do so safely, which under Board precedent and a common sense understanding of the statute constituted an order or treatment plan.

ARGUMENT

Judicial review of the Board's final decision is governed by the Administrative Procedure Act, 5 U.S.C. 706(2). *See* 49 U.S.C. 20109(d)(4); 49 U.S.C. 42121(b)(4)(A). Under this standard, the Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A), (E); *see also, e.g.*, *Steeltech, Ltd. v. U.S. EPA*, 273 F.3d 652, 655 (6th Cir. 2001). As this Court has noted, although it reviews the "purely legal conclusions reached by an agency *de novo*," in general, this standard of review is "highly deferential." *Belt v. U.S. Dep't of Labor*, 163 F. App'x 382, 386 (6th Cir. 2006) (quoting *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998) and

citing *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1294 (6th Cir. 1998)).

I. SECTION 20109(C)(2) OF FRSA PROTECTS EMPLOYEES WHO ARE ABSENT FROM WORK PURUSANT TO A PHYSICIAN'S ORDERS OR TREATMENT PLAN RELATED TO AN OFF-DUTY CONDITION

A. The Plain, Unambiguous Language of Section 20109(c)(2) Is Not Limited to Orders and Treatment Plans That Result From On-Duty Injuries

1. Statutory interpretation begins, of course, with the text. As the Supreme Court has explained, the first step in interpreting any statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (noting that in cases involving statutory construction, a court "assum[es] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose" (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009))); *United States v. Detroit Med. Ctr.*, 833 F.3d 671, 673 (6th Cir. 2016) ("In construing legislation, courts begin with the language of the statute. That approach, quite rightly, confirms the centrality of the text to statutory interpretation."). Here, section 20109(c)(2) provides that a "railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or

first aid treatment, or for following orders or a treatment plan of a treating physician." 49 U.S.C. 20109(c)(2). The question is whether an employee's physician-ordered absence from work resulting from a condition that did not arise at or because of his employment with a railroad carrier constitutes "following orders or a treatment plan of a treating physician." Based on a simple reading of the relevant text, which does not include language indicating that it refers only to orders or a treatment plan that results from an on-duty injury, the answer must be yes. The plain language indicates that coverage depends on the existence of a physician's order or treatment plan, not the origin of the injury.

2. The absence of language in section 20109(c)(2) limiting "orders or a treatment plan" to doctors' instructions relating to on-duty injuries is particularly meaningful given the presence of such language in other parts of FRSA's employee protection provision. Most notably, section 20109(c)(1), which of course is the provision immediately preceding section 20109(c)(2), prohibits a railroad carrier from "deny[ing], delay[ing], or interfer[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) (emphasis added). It further provides that if "an employee who is injured *during the course of employment*" requests transportation to a hospital, the railroad must arrange such transportation. *Id.* (emphasis added). Again, section 20109(c)(2) provides that an employer may not

discipline an employee "for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician" *without* including the phrase "during the course of employment" or any other limiting text.

In addition, section 20109(a)(4), another portion of FRSA's employee protection provision describing a category of protected activity, refers to injuries and illnesses with qualifying language that makes explicit that conditions that arise off-duty are not included. Specifically, it prohibits an employer from discriminating against a railroad employee because he "notif[ied], or attempt[ed] to notify, the railroad carrier … of a *work-related* personal injury or *work-related* illness of an employee." 49 U.S.C. 20109(a)(4) (emphasis added). It is clear that where Congress intended to restrict protected activity under FRSA to acts involving conditions that first arose at or because of work, it explicitly did so. Section 20109(c)(2) contains no such restriction; the operative limit is a doctor's instruction not to work rather than the source of the condition underlying that instruction.[6]

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[6] Grand Trunk's focus on another provision of FRSA addressed in *PATH*, 49 U.S.C. 20109(b)(1), is misplaced. *See* Pet'r's Br. 25-26; *PATH*, 776 F.3d at 166. Section 20109(b)(1)(A) prohibits disciplining an employee for "reporting, in good faith, a hazardous safety or security condition," and section 20109(b)(1)(B) prohibits disciplining an employee for "refusing to work when confronted by a hazardous safety or security condition *related to the performance of the employee's duties*." 49 U.S.C. 20109(b)(1) (emphasis added). Because the qualifying language "related to the performance of the employee's duties" does not appear in subsection (b)(1)(A), Grand Trunk asserts that the Board's logic regarding section

3. The Supreme Court and this Court have previously resolved questions of statutory interpretation in circumstances in which one provision of the relevant law contains language that could be read more broadly than other, similar provisions in the same act. The resulting precedent weighs in favor of concluding that a comparatively broad term has a comparatively broad meaning. In *Russello v. United States*, 464 U.S. 16 (1983), the Supreme Court explained that "[w]here 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." *Id.* at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (reading the term "interest" in a provision of the Racketeer Influenced and Corrupt Organizations Act broadly where other provisions include different, narrower language following the word and explaining that if Congress had intended to limit the meaning of "interest" in the provision at issue, "it presumably would have done

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20109(c) would require reading section 20109(b)(1) to mean that protected activity under subsection (b)(1)(A) includes reporting hazards wholly unrelated to work. This argument both calls for interpretation of a statutory provision not at issue in this case and suggests that the Board's reasoning extends to interpretations that are inconsistent with common sense. Reporting hazards unrelated to the operation of a railroad does not advance railroad safety. As explained above, permitting employees to be absent from work when a physician has determined that an injury, regardless of how it occurred, makes it unsafe for an employee to perform his job, is related to railroad safety—that is, it fulfills the purposes of the statutory provision under consideration.

so expressly as it did in the immediately following subsection"). The Supreme Court has repeatedly applied this intuitive, longstanding principle. *See, e.g.*, *Hardt*, 560 U.S. at 252 (noting the contrast between language used in two consecutive provisions of the Employee Retirement Income Security Act in reading one to have broad meaning); *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 671 (2008) (explaining that where one provision of the False Claims Act contains a requirement that is not mentioned in the subsequent provision, the requirement does not apply to that second section).

This Court has also applied this reasoning in analogous contexts. For example, in *Moses v. Providence Hospital & Medical Centers, Inc.*, 561 F.3d 573 (6th Cir. 2008), the Court considered whether the term "any individual" in the enforcement provision of an act meant to ensure that hospital patients receive adequate treatment refers only to harmed patients or instead to any aggrieved person. *See id.* at 579-80. Looking to other provisions in the statute that refer to an "individual" but include additional language limiting to which persons the text applies—in particular, "an 'individual' who 'comes to the emergency department'" and "an 'individual' who 'comes to a hospital'"—this Court concluded that the different language had significance, and "any individual" should be understood broadly rather than to have an implied limit. *Id.* at 580-81 (noting that "[t]his differing language indicates that Congress did not intend [the statute]'s entire

statutory scheme to apply to the same 'individual' in every part of the statute" and that "the fact that the statute expressly limits the individual" in some places "further indicates that the breadth of the civil enforcement provision was no accident").

Similarly, in *United States v. Detroit Medical Center*, 833 F.3d 671 (6th Cir. 2016), this Court addressed the meaning of the word "corporation" in a provision of the tax code. *See id.* at 673-74. It rejected an argument that the term should be construed to exclude non-profit organizations based in part on other provisions in the code that refer more precisely to (for-profit) "C corporations," reasoning that Congress deliberately included different terms to indicate different meanings. *See id.* at 678 (citing *Russello*, 464 U.S. at 23).

Other examples of this Court's invoking and applying this principle when faced with questions of statutory interpretation are plentiful. *See, e.g.*, *N. Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 741 (6th Cir. 2012) (quoting *Russello*'s statement that "[w]e refrain from concluding here that the differing language in the two subsections has the same meaning in each," 464 U.S. at 23, in assessing whether a statutory term is ambiguous); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 779 (6th Cir. 2008) (citing *Russello*, 464 U.S. at 23, in explaining that "explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in

the second"); *Walton v. Hammons*, 192 F.3d 590, 596 (6th Cir. 1999) (citing *Russello*, 464 U.S. at 23, in concluding that narrow language in one provision has a different meaning than broader language elsewhere in the same statute).

4. Relying heavily on the Third Circuit's reasoning in *PATH*, Grand Trunk and *amicus curiae* the Association of American Railroads ("AAR") nevertheless argue that the Board should not have relied on the principle articulated in *Russello* here. *See* Pet'r's Br. 26-28 (citing *PATH*, 776 F.3d at 163); AAR Br. 13-14 (same). Grand Trunk and AAR adopt the Third Circuit's view that section 20109(c)'s two provisions are entirely interrelated: subsection (c)(1) provides a substantive protection for employees injured during the course of employment to receive prompt medical treatment and subsection (c)(2) provides an anti-retaliation protection that serves solely to support that substantive protection. In other words, they argue that section 20109(c)(2) provides retaliation protections only for the purpose of bolstering section 20109(c)(1)'s right to prompt medical attention for employees who suffer on-duty injuries. Grand Trunk and AAR assert, consistent with *PATH*, that this connection between the provisions means that section 20109(c)(2) implicitly "incorporate[s] language from" section 20109(c)(1) limiting protection to employees who suffer on-duty injuries, and Congress' failure to repeat the phrase "injured during the course of employment" in section 20109(c)(2) is immaterial. *PATH*, 776 F.3d at 164. Interpreting the statute without this

implicit limit, in their view, would result in protections for employees that are inconsistent with the purposes of the statute. *See, e.g.*, Pet'r's Br. 26-27.

The Secretary agrees that sections 20109(c)(1) and (c)(2) are related. Congress, in passing section 20109(c), was principally concerned with providing both a substantive right to prompt medical treatment for employees who were injured on the job and supporting that right with protection against retaliation for employees who receive medical attention. Nonetheless, the provisions are not so wholly intertwined as Grand Trunk, AAR and *PATH* suggest.

First, there are textual differences between the two provisions. Most importantly, unlike in subsection (c)(1), there is no explicit language in subsection (c)(2) limiting the protection to "an employee who is injured during the course of employment." Furthermore, neither the words "orders or a treatment plan of a treating physician" nor the concept of following a physician's instructions appear in section 20109(c)(1). And Congress did not include any reference in subsection (c)(2) to subsection (c)(1); had Congress meant for "orders or a treatment plan of a treating physician" to mean only those doctor's instructions related to an employee whose initial need for medical attention is addressed by subsection (c)(1), it could easily have said so.

Second, as discussed below, tying subsections (c)(1) and (c)(2) so tightly together narrows the effect of the provision in a manner that is inconsistent with

FRSA's central purpose. The Board's reading of section 20109(c) as providing distinct protections for employees injured at work and those whose medical conditions interfere, according to their doctors, with their ability to perform work safely, applies *Russello* to interpret FRSA's employee protection provision such that it advances FRSA's goal of promoting railroad safety.

B. Reading Section 20109(c)(2) as Protecting Absences Related to Off-Duty Conditions That Create Safety Risks is Consistent With the Context in Which the Section was Enacted and Fulfills the Purposes of FRSA's Employee Protection Provision

FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. 20101. In furtherance of this purpose, Congress passed the Rail Safety Improvement Act, which amended FRSA in part by adding current section 20109(c). Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 419, 122 Stat. 4848, 4892-93 (2008). The legislative history of the Rail Safety Improvement Act, which reflects the safety-focused purposes of the statute, does not support limiting protection from retaliation to only those employees whose doctors' instructions relate to on-duty injuries.

1. Early versions of section 20109(c) reflect that Congress never indicated that protected activity under subsection (c)(2) would be limited to absences arising from doctors' instructions related to injuries incurred "during the course of employment." From its inception, the provision that became section 20109(c)

contained two separate provisions: one prohibiting interference with an employee's seeking medical care, which included language limiting its scope to injuries that occur at work, and the other prohibiting punishment for an employee's seeking medical care, which plainly applies when the doctor's orders or treatment plan interferes with work but includes no limit to conditions that first arise on the job.[7] The Chairman of the House of Representatives committee responsible for the bill said specifically about these provisions that their language "was not adopted idly or easily. It was thoroughly discussed, debated, [and] negotiated." *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads* ("*Impact Report*"): Hearing before the H. Comm. on Transp. & Infrastructure, 110th Cong. 69 (2007) (statement of Rep. James Oberstar, Chairman). The enacted version of section 20109(c) incorporates changes introduced in the Senate—moving the new text to FRSA's existing employee protection provision and adding a safe harbor for employers who do not allow an employee to return to work if the employee does not meet fitness for duty standards, *see* S. Rep. No. 110-270, 2008 WL 572156, at 35 (2008)—but the

[7] These provisions were first introduced as section 606 of H.R. 2095. *See* H.R. Rep. No. 110-336, 2007 WL 2745328, at 20 (2007). Section 606 included one section (titled "Prohibition") that prohibited railroad interference "with the medical or first aid treatment of an employee who is injured during the course of employment," and a separate section (titled "Discipline") that made it unlawful to discipline "an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician." *Id.*

language at issue in this case remained the same. *See* Rail Safety Improvement Act, § 419, 122 Stat. at 4892.

2. Comparing the language of section 20109(c) with state whistleblower statutes that predated it suggests that Congress knowingly omitted a limit to on-duty injuries in subsection (c)(2). The House committee responsible for the bill that became the Rail Safety Improvement Act published a memorandum that included an explanation of the origin of the language ultimately adopted in section 20109(c). *Impact Report* at v-xv. The memo referred directly to Minnesota and Illinois statutes that addressed the problem of railroads denying medical care to injured employees, noting that the new proposed provision was similar to those laws. *Id.* at xiii. Unlike the proposed provision, however, both the Illinois and Minnesota laws expressly limited protection under both the interference and retaliation provisions to employees "injured during employment."[8] Despite

[8] The Illinois statute provided:

> 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(b) (emphases added), *held preempted in BNSF Ry. Co. v. Box*, 470 F. Supp. 2d 855 (C.D. Ill. 2007).

explicitly referring to these statutory models, Congress did not adopt, as it easily could have, text that similarly included an "injured during employment" limitation in section 20109(c)(2). Instead, it modified the language on which the provision is plainly modeled such that no such limitation appears.

3. The central purpose of FRSA and its employee protection provision is best fulfilled by the Board's interpretation of section 20109(c)(2). Although Grand Trunk and AAR are correct that much of the legislative history discusses on-duty injuries, *see* Pet'r's Br. 34-35; AAR Br. 14-23—which is not surprising, given that section 20109(c)(1)'s protection is, for obvious reasons, explicitly limited to circumstances involving such injuries—the legislation and Congress's statements about it also repeatedly and emphatically indicate a broad interest in improving railway safety, a goal best realized by a broad reading of section 20109(c)(2). The

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The Minnesota statute provided:

> 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. Ann. § 609.849(a) (emphases added), *held preempted in BNSF Ry. Co. v. Swanson*, 533 F.3d 618 (8th Cir. 2008).

Rail Safety Improvement Act was intended "to prevent railroad fatalities, injuries, and hazardous materials releases." Preamble to Rail Safety Improvement Act, 122 Stat. at 4848. To meet this goal, the legislation contained numerous provisions aimed at ensuring the safety of railroad employees and the general public, in particular by focusing on reducing accidents resulting from human factors. *See, e.g.*, Rail Safety Improvement Act, § 102(a)(1), 122 Stat. at 4851 (requiring the Federal Railroad Administration ("FRA") to develop a strategy to achieve goals including the reduction of "accidents, incidents, injuries, and fatalities involving railroads including train collisions, derailments, and human factors"); § 103, 122 Stat. at 4853-56 (requiring the Secretary of Transportation to mandate that railroad carriers develop safety risk reduction programs and fatigue management programs); § 108, 122 Stat. at 4860-66 (reforming the hours-of-service requirements for railroad employees); § 401, 122 Stat. at 4883 (requiring the Secretary of Transportation to set minimum training standards for certain employees).

Statements from Rail Safety Improvement Act hearings also convey a broad, overarching interest in railroad safety that transcends merely encouraging workers to report on-duty injuries. At the hearing of the House's Committee on Transportation and Infrastructure, Representatives stressed the importance of creating a "culture of safety" in the railroad industry, and the FRA Administrator

cited the importance of decreasing accidents from "human factor causes," such as fatigue. *See Impact Report* at 6-7, 10-11, 17, 142. The Chair of the House's Rail Subcommittee testified that it had "concentrated on safety in the rail industry, and that includes the safety and well being of railroad employees." *Id.* at 5. House and Senate Reports reiterated these concerns. *See, e.g.*, H.R. Rep. No. 110-336, at 30 ("Human factors are responsible for nearly 40 percent of all train accidents."); S. Rep. No. 110-270, at 3 ("Human-factor caused accidents represent the largest percentage of railroad accidents.").

By not including the phrase "during the course of employment" in section 20109(c)(2), Congress wrote a provision that promotes railroad safety by ensuring that workers are not pressured by discipline or threats of discipline to return to work prematurely when a doctor directs that a health condition, regardless of its source, interferes with the an employee's ability to safely perform his duties. Employees who cannot safely work because of off-duty conditions that require treatment place themselves, their co-workers, and the public at risk just as surely as workers who sustain on-duty injuries.[9] Reading section 20109(c)(2) to protect

[9] Indeed, protections for other transportation industry workers prohibit employers from applying an absenteeism policy to discipline employees who are too sick or fatigued to work safely without regard for the origin of the illness. The Surface Transportation Assistance Act, 49 U.S.C. 31100 *et seq.*, prohibits a commercial motor carrier from applying its absenteeism policy to a driver who refuses to work if the employee reasonably believes that driving would violate federal carrier regulations prohibiting driving while impaired because of illness, fatigue, or any

employees, such as Williams, who are ordered out of work by a physician based on an off-duty condition gives railroad employees the crucial ability not to work when impaired, which furthers FRSA's fundamental purpose of ensuring safety for workers and the public. Limiting protection to treatment for on-duty injuries, on the other hand, is incompatible with Congress's desire to prevent railroad accidents caused by human factors.

4. This interpretation of section 20109(c)(2) is appropriate even if, as Grand Trunk and AAR assert, *see* Pet'r's Br. 34-38; AAR Br. 14-22, Congress did not fully consider the implications of the broad language it included in the statutory text. In two cases addressing the meaning of provisions in the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd, this Court held that the plain language of the statute controlled even in the absence of an indication that Congress was attuned to not having included terms limiting the statute's scope to the circumstances on which Congress was focused in passing the legislation. *See*

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other cause, without restriction to conditions arising while at work. *See* 49 U.S.C. 31105(a)(1)(B)(i); 49 C.F.R. 392.3; *Scott v. Roadway Express, Inc.*, No. 99-013, 1999 WL 563368, at *8-9 (ARB July 28, 1999), *aff'd in part*, 6 F. App'x 297, 301 (6th Cir. 2001). The employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 *et seq.*, protects pilots who refuse to fly because they are too ill or fatigued, even when the illness is not work-related. *See* 49 U.S.C. 42121(a)(1); 14 C.F.R. 61.53; *Furland v. Am. Airlines, Inc.*, No. 09-102, 2011 WL 3307577 (ARB July 27, 2011). These restrictions are reasonable and the trucking and airline industries function within their parameters. The safety concerns that arise when a railroad employee involved in operating a train is ill are directly analogous.

Cleland v. Bronson Health Care Grp., Inc., 917 F.2d 266, 270 (6th Cir. 1990); *Moses*, 561 F.3d at 581. In the first case, this Court considered whether the protections created by the statute applied to any patient where "there is nothing in the legislative history showing that Congress had any concern about the treatment accorded any patients other than the indigent and uninsured" but "Congress wrote a statute that plainly has no such limitation on its coverage." *Cleland*, 917 F.2d at 269. This Court interpreted the provision in question according to its plain meaning, reasoning that "a result considerably broader than one might think Congress should have intended, or perhaps than any or all individual members of Congress were cognizant of" was appropriate; indeed, the Court explained, it would have been wrong for the Court to rewrite the statute, which still had the effect Congress intended in addition to its broader application. *Id.* at 270; *see also id.* at 269 ("[T]here is no principle of construction that Congress may not … write a statute that is far broader than any area of concern that it has conceived of or has had brought to its attention."). In the second case, in concluding that the set of individuals who can bring enforcement actions under the statute is not limited to hospital patients, this Court again reasoned that although "our interpretation of the civil enforcement provision may have consequences for hospitals that Congress may or may not have considered or intended," the Court's "duty is only to read the statute as it is written." *Moses*, 561 F.3d at 581.

The Court can apply directly analogous reasoning to this case. Even if the Court believes Congress only considered protecting physicians' treatment of on-duty injuries, or that Congress would have been wise to limit the scope of section 20109(c)(2) in that way, it should not create such a limit itself. Interpreting subsection (c)(2) to include all injuries, not excluding off-duty conditions, is faithful to the provision as it is actually written. Moreover, this reading provides the protections Congress indisputably intended for employees injured during the course of employment and fulfills additional safety purposes by protecting employees who are absent pursuant to orders or the treatment plan of a treating physician for conditions that, although they arose outside of work, pose a safety risk to the employee, other workers or the public.

C. An Inclusive Reading of Section 20109(c)(2) Is Still Limited Such That it Does Not Lead to Absurd Results

Grand Trunk and AAR attempt to paint the Board's interpretation of section 20109(c)(2) as leading to the "absurd" result of "unlimited sick leave." Pet'r's Br. 38-40; AAR BR. 5-11. These concerns are grossly overstated.

1. An employee's absences are only protected by section 20109(c)(2) if they are pursuant to the orders or treatment plan of a treating physician. This requirement creates meaningful limits on the scope of section 20109(c)(2). For one thing, only serious conditions require a doctor to instruct a patient not to work. For example, here, Williams had recurring, severe symptoms for which he was

prescribed medication that had side effects that affected his ability to work. A "simple cold or a hangnail," Pet'r's Br. 39, would not under normal circumstances justify an absence from the job (or even call for attention from a doctor). Furthermore, a physician's orders or treatment plan are not rationalizations devised after absences have already occurred. *See* Pet'r's Br. 39. Although in this case Williams obtained a note from his doctor after his December 2011 absences, that note is not the physician's instruction that led the Board to conclude that Williams was following orders or a treatment plan; instead, discussions between Williams and his doctor that occurred on several occasions before December 2011—about which testimony and documentary evidence was provided to Grand Trunk and the ALJ, *see infra* Arg. II.A—contained the relevant instructions not to work while symptomatic and taking medication such that working would be unsafe.

2. Importantly, protected activity under FRSA, like under analogous employee protection statutes, must be undertaken in good faith. *See* A6, A44-45 (finding that Williams acted in good faith when he was absent from work in December 2011);[10] *see also*, *e.g.*, *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013)

[10] Grand Trunk does not and could not reasonably dispute the ALJ's assessment, adopted by the Board, that Williams acted in good faith during his absences, that is, that he was genuinely ill and taking prescription medication on the relevant days and believed it was appropriate to follow his doctor's advice not to work under those circumstances. *See* A6 (Board's reliance on ALJ's determination that Williams credibly testified he was sick during the relevant absences); A45 (ALJ's finding that Williams's testimony was credible and he "was acting in good faith

(premising Sarbanes-Oxley whistleblower protection in part on an employee's establishing a good faith belief that his employer committed a violation); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 480 (3d Cir. 1993) (affirming Secretary's "holding that all *good faith* intracorporate allegations are fully protected from retaliation" under the Clean Water Act's whistleblower provision (emphasis added)); *Ciotti v. Sysco Foods*, No. 98-103, 1998 WL 379879, at *8 & n.8 (ARB July 8, 1998) (noting that although the Surface Transportation Assistance Act protects truck drivers who miss work because of illness, the Board was "not holding that employers cannot take action against employees who feign illness" and "[the Act] does not preclude an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive"). In other words, a railroad worker's claim that he is missing work pursuant to a physician's orders or treatment plan must be made in good faith to receive protection. Any deliberate misrepresentation of the employee's condition or a doctor's instructions (by the employee alone or with the cooperation of an unscrupulous physician) would not satisfy this requirement, curtailing opportunities for abuse of FRSA's employee protection provision. Indeed, railroad employers are permitted to make an

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and following the orders or treatment plan of his treating physician" during his December 2011 absences from work).

informed assessment of whether an employee acted in good faith. Here, for example, Grand Trunk's ability to investigate the reasons for Williams's December 2011 absences is not called into question.

3. Additionally, FRSA protects only the activity described in the statute, not other behavior engaged in by an employee. That is, although Grand Trunk was not permitted to terminate Williams's employment because of his December 2011 absences, FRSA does not prohibit firing him for other reasons (if they exist), such as poor performance or fraud. Specifically, under FRSA's burdens of proof, an employer is not liable under FRSA if it shows by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *See* 49 U.S.C. 20109(d)(2)(A)(i) (incorporating 49 U.S.C. 42121(b)(2)(B)(ii)).[11]

In other contexts, the Board has held that where the protected activity and the employer's proffered reason for the adverse action are intertwined, as they are in this case, an employer may be able to meet its burden by showing that it would have taken the same action based on factors extrinsic to the protected activity. *See, e.g.*, *Smith v. Dep't of Labor*, 674 F. App'x 309, 316 (4th Cir. 2017) (affirming the Board's decision in *Smith v. Duke Energy Carolinas, LLC*, No. 14-027, 2015 WL 1399692 (ARB Feb. 25, 2015), which applied the Board's

[11] Grand Trunk makes no argument in this case that Williams would have been fired in January 2012 for reasons other than his December 2011 absences.

framework for analyzing the affirmative defense to a claim under the analogous employee protection provision of the Energy Reorganization Act ("ERA") where the employee's protected activity and the employer's reason for an action are intertwined as set forth in *Speegle v. Stone & Webster Constr., Inc.*, No. 13-074, 2014 WL 1758321 (ARB Apr. 25, 2014)). The application of this principle to the facts of Williams's case was not raised before the ALJ or the Board, and cannot be raised now. Nonetheless, in future cases, limits on section 20109(c)(2)'s protections may emerge based on this principle. For example, under certain circumstances, if FRA or railroad rules prohibit employees from operating equipment while taking certain medication and clear and convincing evidence establishes that an employee is likely to be permanently taking medication that makes it impossible for him to perform his job, the Board might find that the railroad can meet FRSA's affirmative defense.

Similarly, under section 20109(c)(2), an employer need not return an employee to work if the employee does not meet the FRA's or the railroad's medical standards for fitness for duty. 49 U.S.C. 20109(c)(2) (prohibiting discipline "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 example, if the condition Williams's doctor was treating was an eye disease that left Williams's visual acuity below the required thresholds for locomotive engineers, *see* 49 C.F.R. 240.121(b), (c), Grand Trunk would have been permitted under FRSA to refuse to return him to work. The inability to return him to work might provide a legitimate reason extrinsic to Williams's protected activity for the railroad to terminate him.

In any event, whether an employee's condition rendering him unable to perform his job permanently or, although intermittently, indefinitely gives rise to an affirmative defense under FRSA is not a question the Court need resolve in this case. (Indeed, that question is quite distinct from the question of whether a treatment plan arising from an off-duty injury is included within the meaning of section 20109(c)(2). A treatment plan arising from an on-duty injury could raise similar questions about the limits on the number or duration of absences considered to be protected activity.) Such limits do exist in other statutes, albeit with different elements required to prove violations. *See, e.g.*, *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) (noting that making out a *prima facie* case under the Americans with Disabilities Act requires showing that the employee "is qualified, that is, with or without reasonable accommodation which he must describe, he is able to perform the essential functions of the job"

and explaining that "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA" (citing *White v. York Int'l Corp*., 45 F.3d 357, 360 (10th Cir. 1995), and quoting *Tyndall v. Nat'l Educ. Ctrs. Inc.*, 31 F.3d 209, 2013 (4th Cir. 1994))). Although it may be appropriate for the Board to apply such limitations to FRSA in future cases, there was no finding by the ALJ or the Board (nor does it appear there could have been based on the evidence in the record) that Williams's condition would permanently remain as severe as it was in December 2011 or that Williams would have a future need to be absent in excess of what is permitted under the FMLA.

4. Moreover, although AAR correctly notes that section 20109(c)(2) applies to any railroad employee, not just those in positions designated as "safety-related," AAR Br. 6, it may be reasonable to understand the scope of protected activity to nevertheless be limited by safety concerns such that it furthers FRSA's purpose of promoting railroad safety. In other words, where following a doctor's orders or treatment plan has no bearing on any safety issue, any resulting absence would not be protected activity. In this case, Williams works as a locomotive engineer and his inability to concentrate could lead directly to an accident. This connection to safety issues was inherent in Williams's doctor's instructions, which were not to work when symptoms and the effects of medication made working unsafe. The

Court is only called upon here to determine whether Williams's absences, which are undisputedly safety-related, were protected activity. It need not, therefore, answer the question whether in other circumstances—such as if Williams instead worked as an accountant for the railroad and any errors his condition caused would be unlikely to put himself, other employees, passengers, or the general public in physical danger—his absences would constitute protected activity under section 20109(c)(2). A decision in this case need not foreclose the possibility that a claim of a FRSA violation on those facts would fail. *Cf. Sigmon Coal Co.*, 534 U.S. at 450 (explaining that statutory interpretation calls for resolving the meaning of the text that affects "the particular dispute in the case" (quoting *Robinson*, 519 U.S. at 340)).

5. Finally, judicial concerns about the outer limits of FRSA protections should not lead this Court to eliminate protections for all employees whose doctors' instructions not to work are related to off-duty conditions. *See PATH*, 776 F.3d at 162 n.7 (reasoning in interpreting section 20109(c)(2) as limited to treatment for on-duty injuries that even though railroads can discipline employees who take leave in bad faith or for other unprotected reasons, some employees would still be able to take "indefinite sick leave" based on the Board's reading of the provision). It is for Congress, not the courts, to weigh the safety risks of railroad employees' working contrary to doctors' orders against the inconvenience

of railroads having to schedule around employees who are absent pursuant to such orders. There is no dispute that had Williams's inability to focus while operating a train arisen from a condition that was caused by his job, Grand Trunk would not be permitted to discipline him for missing work pursuant to his doctor's instructions, perhaps even if the treatment lasted for an extended period. The best reading of the statutory language is that regardless of the source of Williams's health issue, if his doctor's orders call for his occasional absence from work, he should not be punished for following that advice, because the safety risk to Williams and others is not affected by how the health condition arose. Even if this Court believes that Congress should have made a different policy decision, it must give effect to the statute as Congress wrote it. *Cf. Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 492 (6th Cir. 2005) (explaining that Congress may amend a statute to better serve the safety purposes it is intended to advance if it wishes).

AAR places significant weight on some railroads' generous paid leave policies, suggesting that railroad employees should not receive additional leave from FRSA. *See* AAR Br. 7-9. But an employer's time off policies should not affect the congressionally mandated protections for employees provided by section 20109(c)(2). Similarly, that employees may have additional legal protections under different, more broadly applicable statutes, such as the FMLA and the Americans with Disabilities Act, should not detract from the protections Congress

created specifically for railroad employees with the tailored goal of promoting railroad safety. FRSA serves its own unique purpose and should be given full effect regardless of other voluntary policies or legal requirements with which railroads comply.

Holding that FRSA protects Williams's December 2011 absences follows the plain language of section 20109(c)(2), gives effect to Congress's intent to promote railroad safety, and avoids forcing employees to choose between compromising railroad personnel, passengers, and public safety by working despite a doctor's orders not to and risking their jobs by violating employer attendance policies.

D. If Section 20109(c)(2) Is Ambiguous, the Board's Interpretation Is Entitled to *Chevron* Deference

1. For the reasons explained above, the Court should hold that section 20109(c)(2) unambiguously includes absences resulting from following the orders or treatment plan of a treating physician regardless of whether the condition being treating first arose at work. However, if this Court believes that the absence of language limiting treatment to work-related injuries reflects an ambiguity in section 20109(c)(2), it should defer to the Board's reasonable interpretation of the provision. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (setting forth the two-step *Chevron* analysis: first, consider whether the statute is ambiguous and second, if so, consider whether the agency's

interpretation is permissible); *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002) ("This interpretation of the ambiguous text of [a provision in a statute the agency enforces], in the context of formal adjudication, is entitled to deference if it is reasonable." (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001)); *Mid-Am. Care Found. v. NLRB*, 148 F.3d 638, 642 (6th Cir. 1998) ("[W]hen an agency adopts a particular interpretation of a statute through an adjudication …, that interpretation normally would be entitled to *Chevron* deference."); *see also Tenn. Valley Auth. v. U.S. Dep't of Labor*, 59 F. App'x 732, 736 (6th Cir. 2003) (explaining that *Chevron* applies to a Board decision regarding a complaint under the ERA); *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1294 (6th Cir. 1998) (same).[12]

The Secretary of Labor is charged with adjudicating complaints of violations of FRSA's employee protection provision. *See* 49 U.S.C. 20109(d)(1), (2); 49 U.S.C. 42121(b). Exercising that authority necessarily includes interpreting section 20109(c). *See, e.g.*, *Zandford*, 535 U.S. at 819-20 (acknowledging that an agency charged with enforcing a statute through formal adjudication interprets that

[12] Contrary to Grand Trunk's suggestion, Pet'r's Br. 21, the fact that the Department of Labor has not engaged in notice-and-comment rulemaking regarding the meaning of section 20109(c) does not diminish the deference due to the Board's interpretation. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (explaining that notice-and-comment rulemaking is not a prerequisite to *Chevron* deference (citing *Mead*, 533 U.S. at 229-31)).

statute). The Board has done so reasonably: section 20109(c)(2) does not specify the source of the condition to which the orders or treatment plan of a physician must relate in order for an employee's absence to be protected. In keeping with that plain text as well as FRSA's goal of promoting railroad safety, the Board declined to narrow the provision to exclude treatment for off-duty injuries. Even if the Board could have read the statutory provision differently, this Court is bound to defer to the Board's interpretation. *See Battle Creek Health Sys. v. Leavitt*, 498 F.3d 401, 408-09 (6th Cir. 2007) ("[The court] 'need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction.'" (quoting *Jewish Hosp., Inc. v. Sec'y of HHS*, 19 F.3d 270, 273-74 (6th Cir. 1994), and citing *Chevron*, 467 U.S. at 844)).

2. Grand Trunk and AAR's arguments to the contrary should not persuade this Court. Grand Trunk and AAR both note that the Department of Transportation has authority over and expertise in railway safety. Pet'r's Br. 21-22; AAR Br. 23-25. But Congress authorized the Secretary of Labor, rather than the Secretary of Transportation, to enforce FRSA's employee protection provision. *See* 49 U.S.C. 20109(d); *see also Araujo*, 708 F.3d at 156. This choice was a logical one: the Secretary of Labor has expertise in and authority over administering the employee protection provisions of numerous statutes. *See Lawson v. FMR LLC*, 134 S. Ct. 1158, 1163 (2014) ("Congress has assigned whistleblower protection largely to the

Department of Labor…, which administers some 20 United States Code incorporated whistleblower protection provisions." (citing 78 Fed. Reg. 3,918 (Jan. 17, 2013)); *see also* Dep't of Labor, OSHA, The Whistleblower Protection Programs, Statutes Enforced by OSHA, *available at* https://www.whistleblowers.gov/statutes_page.html (last visited June 26, 2017) (listing 22 employee protection provisions, found in as many statutes, enforced by the Secretary of Labor). The FRA has acknowledged that section 20109 is not within its purview. *See* Dep't of Transp., FRA, Railroad Accidents/Incidents: Reports Classification, and Investigations, 74 Fed. Reg. 14,091, 14,092 (Mar. 30, 2009) (Notice of Interpretation) (stating that guidance regarding railroad officials' response to accidents "is not intended to address or impact statutory provisions contained in 49 U.S.C. 20109 …, as enforcement and application of those provisions fall within the jurisdiction of the U.S. Department of Labor").

Numerous courts, including this one, have deferred to the Secretary of Labor's interpretations, arrived at through adjudication, of analogous employee protection provisions. *See Demski*, 419 F.3d at 491 (granting *Chevron* deference to the Board's interpretation of the term "employee" under the ERA's employee protection provision); *see also, e.g.*, *Wiest*, 710 F.3d at 131 (granting *Chevron* deference to the Board's interpretation under the Sarbanes-Oxley Act's employee protection provision); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d

1121, 1131-32 (10th Cir. 2013) (same); *but see Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 809 (6th Cir. 2015) (declining to reach the issue in the context of the Sarbanes-Oxley Act and noting that the Supreme Court similarly did not decide the question in *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 n.6 (2014)).

3. Grand Trunk and AAR also contend that the Board's decision is not entitled to deference because the Board interpreted section 20109(c) inconsistently in *Bala*, this case, and *Santiago v. Metro-North Commuter Railroad*, No. 10-147, 2012 WL 3255136 (ARB Mar. 19, 2013). *See* Pet'r's Br. 31-33; AAR Br. 25-28. But these decisions do not reflect any inconsistency.

Santiago raised the question of whether section 20109(c)(1)'s requirement that an employer "not deny, delay, or interfere with the medical or first aid treatment of an employee" is limited to protecting requests for medical or first aid treatment made shortly after a workplace injury occurred. *See Santiago*, 2012 WL 3255136, at *4-6. The Board concluded that no such limitation exists, relying on the plain language of the provision, which includes no temporal limitation, as well as the legislative history demonstrating that the provision's purpose included preventing ongoing delay, denial or interference with the treatment of injured railroad employees. *Id.* at *6-9.

Santiago did not interpret section 20109(c)(2), let alone the language at issue here. And by indicating that subsection (c)(1) can be better understood by looking

to subsection (c)(2), *see Santiago*, 2012 WL 3255136, at *7 ("[I]t would make little sense for Congress to prohibit railroads from disciplining employees for following the orders of a treating physician, yet at the same time allow railroads to interfere with medical visits from which treatment plans are created."), *Santiago* is actually consistent with *Bala* and this case. *See Bala*, 2013 WL 5773495, at *6 (comparing section 20109(c)(2) to section 20109(c)(1) and finding a difference in the text of each meaningful); A5 (same). Moreover, in *Santiago*, *Bala*, and this case, the Board declined to read a limitation into FRSA where the text does not include that limit and the statute's purposes are more fully realized without it. *Compare Santiago*, 2012 WL 3255136, at *6-9 *with Bala*, 2013 WL 5773495, at *6-11; A5. *Santiago* therefore should not call into question whether the Board's interpretation of section 20109(c)(2) is owed *Chevron* deference.[13]

[13] At a minimum, the Board's reading of section 20109(c)(2) is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See, e.g.*, *Rhineheimer*, 787 F.3d at 809 (noting the *Skidmore* deference is appropriate even when *Chevron* deference is not "in light of agency expertise and the value of uniformity in interpreting of the law" (citing *Mead*, 533 U.S. at 234)). The Board's decision in this case is based on careful consideration of the statutory text and legislative history, gives effect to FRSA's purposes, and is consistent with the Board's decision in *Bala*.

II. THE BOARD'S CONCLUSION THAT GRAND TRUNK VIOLATED FRSA IS BASED ON FACTUAL DETERMINATIONS SUPPORTED BY SUBSTANTIAL EVIDENCE

Grand Trunk also challenges some of the Board's factual findings. *See* Pet'r's Br. 40-56. In reviewing the Board's final decision, this Court must affirm all factual determinations "if they are supported by substantial evidence, which is more than a scintilla, but less than a preponderance, of the evidence." *Consol. Rail Corp.*, 567 F. App'x at 337 (quoting *Ind. Mich. Power Co. v. U.S. Dep't of Labor*, 278 F. App'x 597, 602 (6th Cir. 2008)); *see also Sassé v. U.S. Dep't of Labor*, 409 F.3d 773, 778 (6th Cir. 2005) (explaining that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (quoting *ITT Auto v. NLRB*, 188 F.3d 375, 384 (6th Cir.1999))). "The substantial evidence standard is highly deferential, meaning this Court 'must uphold the [Board's] findings … even if the court would justifiably have made a different choice had the matter been before it de novo.'" *Consol. Rail Corp.*, 567 F. App'x at 337-38 (quoting *Yadav v. L-3 Commc'ns Corp.*, 462 F. App'x 533, 536 (6th Cir. 2012)); *see also Belt*, 163 F. App'x at 386 (explaining that this Court "defer[s] to the inferences that the Secretary derives from the evidence" (quoting *Varnadore*, 141 F.3d at 630)).

To make out a violation of section 20109(c), an employee must prove: (1) he engaged in protected activity; (2) the employer knew or suspected that he

engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* 49 U.S.C. 42121(b); 29 C.F.R. 1982.104(e)(2); *Consol. Rail Corp.*, 567 F. App'x at 337. Grand Trunk challenges the Board's findings as to the first two prongs: that Williams engaged in protected activity and that Grand Trunk knew he had done so. *See* Pet'r's Br. 40-56.

A. Substantial Evidence in the Record Supports the Board's Finding That Williams Was Absent Pursuant to the Orders or Treatment Plan of His Doctor

Grand Trunk argues that even if absences pursuant to a doctor's instructions resulting from off-duty injuries can constitute protected activity under section 20109(c)(2), Williams's absences were not based on "orders or a treatment plan of a treating physician" at all. Pet'r's Br. 40-47. This Court should not accept this argument, which both the ALJ and the Board rejected. *See* A41-45; A6.

As a preliminary matter, to the extent Grand Trunk's argument raises the legal question of what constitutes "orders or a treatment plan" for purposes of section 20109(c)(2), that question is not, as Grand Trunk proposes, properly answered by reference to unrelated regulations, the arbitrary addition to FRSA of an undefined requirement that a treatment plan relate to "areas of medical

significance," or a witness's use of the word "advice." *See* Pet'r's Br. 40-42.[14] In addressing this issue, the Board relied on a common sense understanding of the term "treatment plan," which it had expressed in an earlier opinion: "the term 'treatment plan' is generally defined as the management and care of a patient to combat disease or injury and is 'commonly used to include not only medical visits and medical treatment, but also physical therapy and daily medication, among other things.'" A6 (quoting *Santiago*, 2012 WL 3255136, at *7). That approach was entirely appropriate. *See, e.g.*, *Detroit Med. Ctr*., 833 F.3d at 674 ("In the absence of any statutory definition to the contrary, courts assume that Congress adopts the customary meaning of the terms it uses." (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952))); *Moses*, 561 F.3d at 580 ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary,

[14] The cases Grand Trunk cites in support of its arguments on this issue, *see* Pet'r's Br. 41, 43 (citing *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010); *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399 (6th Cir. 2009)), arose in different contexts subject to different statutory regimes and raise questions—unrelated to the one posed here—of weighing evidence presented by different witnesses. *See Bastien*, 599 F.3d at 1303-05 (addressing the relevance of the medical opinion of a non-medical expert in an appeal of a veterans' benefit claim); *Blakley*, 581 F.3d at 406 (addressing the "reason-giving requirement" in reviewing an ALJ's decision regarding a Social Security disability benefits claim).

contemporary, common meaning.'" (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997))).[15]

The Board's determination that Williams's physician's instructions that Williams "take the prescription medication Xanax, and not work" when Williams "experienced symptoms from his anxiety, depression, and migraines" constituted "orders or a treatment plan" on which Williams's absences were based, *see* A6, is not only legally, but also factually, sound, because substantial evidence in the record supports this finding. Williams's treating physician testified in a deposition submitted to the ALJ that he advises patients not to work if doing so would not be safe and had told Williams as much on the occasions when he prescribed Xanax to him. A28, 29, 211-14, 226. Williams testified before the ALJ that during his December 2011 absences, he was experiencing anxiety, so he took Xanax and did not go to work "pursuant to the directions and the advice that [he] had received from" his doctor on several occasions. A22, 88, 90. Even the supervisor who fired Williams testified that he "knew that when Williams'[s] 'condition flared up or whatever when he was experiencing the symptoms of the condition, his physician

[15] That the Board's understanding of "orders or a treatment plan" as including Williams's doctor's instructions to take Xanax and not work if doing so would be unsafe is consistent with the customary meaning of those terms is additionally apparent from the dictionary definitions of "plan" and "orders" included in Grand Trunk's brief. *See* Pet'r's Br. 41 (citing MERRIAM WEBSTER DICTIONARY (New ed. 2004)).

had indicated that he shouldn't go to work and perform – and he couldn't safely perform any of his job functions.'" A19 (citing A72). This evidence is more than sufficient to require this Court, applying the substantial evidence standard of review, to affirm the Board's finding that Williams was absent pursuant to his doctor's instructions.

Other evidence in the record does not call into question whether the Board's finding meets the "highly deferential" substantial evidence standard of review. *Consol. Rail Corp.*, 567 F. App'x at 337. Grand Trunk places great weight on the fact that Williams's doctor suggested that Williams see a psychiatrist in addition to taking Xanax for his symptoms, *see* Pet'r's Br. 43-44, asserts that the contents of forms justifying Williams's use of FMLA leave do not themselves constitute a treatment plan, *see* Pet'r's Br. 44, and emphasizes that Williams obtained a note from his doctor regarding the absences at issue after they occurred, *see* Pet'r's Br. 44-47. None of the evidence underlying these statements contradicts the evidence on which the Board relied in concluding that Williams was following his doctor's treatment plan when he was absent from work in December 2011. As explained above, Williams and his doctor testified that the physician instructed Williams, before the relevant absences, not to work when taking Xanax if doing so would be unsafe. That testimony constitutes substantial evidence from which the ALJ and the Board could conclude that Williams was following his physician's treatment

plan. Additional instructions or certifications of Williams's condition are therefore not relevant. Even if the evidence to which Grand Trunk points could support a finding other than the one the Board reached, this Court would be bound to affirm the Board. *See Steeltech*, 273 F.3d at 656-57 (explaining in affirming an ALJ's factual findings that "our review of the ALJ's factual determinations is limited to determining whether those determinations are supported by substantial evidence on the record as a whole—not whether there was substantial evidence in the record for a result other than that arrived at by the ALJ" (citing *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 900 (6th Cir. 1996))).

B. Substantial Evidence in the Record Supports the Board's Finding That Grand Trunk Knew Williams's Absences Were Pursuant to the Orders or Treatment Plan of His Doctor

Grand Trunk also argues that it did not have notice that the absences for which Williams was fired resulted from his following his doctor's orders or treatment plan, *see* Pet'r's Br. 47-55, that is, that it did not know that Williams had engaged in protected activity. But testimony and documentary evidence in the record support the Board's finding that Grand Trunk did have the requisite knowledge.

In particular, analogizing to FMLA's notice requirements, Grand Trunk asserts that a note provided by Williams's doctor to Williams, which Williams in turn submitted to Grand Trunk, was insufficiently specific to alert Grand Trunk

that Williams was absent because he was following orders or a treatment plan. *See* Pet'r's Br. at 47-50. This argument is legally flawed, because the FMLA regime is wholly distinct from FRSA. *Compare* 29 C.F.R. 825.302-.304 (explaining in detail the notice requirements for FMLA leave) *with* 29 C.F.R. 1982.104(e)(2) (including as a requirement for a *prima facie* case of a FRSA violation that the employer "knew or suspected that the employee engaged in the protected activity" without creating any particular requirements for how the employer learned about such activity),. It is also factually misguided because the Board's finding was not based on the doctor's note. *See* A6.

Instead, the Board explained that Grand Trunk had previously received FMLA leave forms for Williams from his doctor related to the conditions at issue here and that at the time of Williams's termination—that is, after Grand Trunk conducted an investigation into Williams's absences—Grand Trunk knew that Williams had been absent on the relevant dates in December 2011 for the same reasons he needed FMLA leave: he was sick, taking prescription medication, and following his doctor's orders to stay home when working would be unsafe because of his symptoms and the treatment's side effects. A6. This finding is amply supported by substantial evidence in the record. The Grand Trunk supervisor who fired Williams testified before the ALJ that during the investigation of Williams' absences, he knew that Williams's doctor had prescribed medication and told

Williams not to go to work if he couldn't safely perform his job. A19; *see also* A365, 373-75 (transcript of Grand Trunk investigative hearing before Williams's termination, noting submission into evidence of FMLA forms and including testimony of Williams that he was absent on the days in question for the same sickness that justified his FMLA leave).[16] This direct evidence of actual knowledge exceeds the showing required under FRSA. *See Consol. Rail Corp.*, 567 F. App'x at 338 (noting that as to the second prong of proving a FRSA violation, "a 'plaintiff is not required to have direct evidence [of knowledge and] may [produce] circumstantial evidence to establish this element of her claim'" (quoting *Brown v. VHS, Inc.*, 545 F. App'x 368, 374 (6th Cir. 2013)) (alterations in original)).[17] Therefore, the Court should affirm the Board's determination that Grand Trunk knew of Williams's protected activity when it fired him.

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[16] Contrary to Grand Trunk's suggestion that the information Williams submitted regarding his need for FMLA leave all post-dated his December 2011 absences, *see* Pet'r's Br. 51, the record of Grand Trunk's investigative hearing includes medical certifications supporting FMLA leave requests dated October 2010 and February 2011, A423-41, approval of Williams's FMLA leave request dated September 2, 2011, A446-47, and testimony regarding the question of whether Williams had used all of his FMLA leave at the time of the absences for which he was terminated, A374-75.

[17] Furthermore, contrary to Grand Trunk's assertion, *see* Pet'r's Br. 53-55, the Board's finding is not called into question by the Board's lack of focus on the note Williams obtained from his doctor after his absences. The note does not contradict the evidence on which the Board and ALJ explicitly relied, *i.e.*, the testimony of a Grand Trunk manager that he knew about Williams's doctor's instructions by the time he made the termination decision. A6, 47. Even if the note could support a

CONCLUSION

For the foregoing reasons, this Court should uphold the Board's Final Decision and Order concluding that Grand Trunk's termination of Williams violated FRSA's employee protection provision.

Respectfully submitted,

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different factual determination than the one the Board made, this Court is bound to affirm the Board's conclusion. *See, e.g.*, *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995) ("[A]s long as the ALJ's conclusion is supported by the evidence, we will not reverse, even if the facts permit an alternative conclusion." (citing *Neace v. Director, OWCP*, 867 F.2d 264, 267 (6th Cir. 1989))).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limit.

This brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 12,432 words long (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f)).

This brief also complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(4), (5) and (6). This brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font in text and footnotes, and all page margins are one inch.

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing Brief of Respondent with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

s/Sarah Marcus
Sarah Kay Marcus