No. 16-15999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BEN WINCH,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
EDWARD C. HUGLER, ACTING SECRETARY OF LABOR,

Respondent,

CSX TRANSPORTATION, INC.,

Intervenor - Respondent.

On Petition for Review of the Final Decision and Order of the
United States Department of Labor's Administrative Review Board

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BRIEF FOR RESPONDENT THE ACTING SECRETARY OF LABOR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Local Rules 26.1 and 27-1(a)(9), counsel for Respondent U.S. Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

Administrative Review Board, U.S. Department of Labor;

Brand, Jennifer, Associate Solicitor, Fair Labor Standards Division, Office of the Solicitor, U.S. Department of Labor;

Brown, Courtney B., Burge & Burge (Counsel for Petitioner);

Burge & Burge, P.C., Law Firm (Counsel for Petitioner);

Burge, Sr., F. Tucker, Burge & Burge (Counsel for Petitioner);

Corchado, Luis A., Former Administrative Appeals Judge, Administrative Review Board, U.S. Department of Labor;

CSX Corporation ("CSX"), a publicly traded corporation (CSX Transportation, Inc.'s parent);

CSX Transportation, Inc., a corporation ("CSXT");

Desai, Anuj C., Former Administrative Appeals Judge, Administrative Review Board, U.S. Department of Labor;

Director, Whistleblower Protection Programs, U.S. Department of Labor;

Geale, Nicholas C., Acting Solicitor of Labor, U.S. Department of Labor;

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Guenther, Megan E., Counsel for Whistleblower Programs, Fair Labor Standards Division, Office of the Solicitor, U.S. Department of Labor;

Henley, Stephen R., Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor;

Hugler, Edward C., Acting Secretary of Labor, U.S. Department of Labor (Respondent);[1]

Igasaki, Paul M., Chief Administrative Appeals Judge, Administrative Review Board, U.S. Department of Labor;

Johnson, Ronald M., Jones Day (Counsel for CSXT);

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Kenny, Claire E., Attorney, Office of the Solicitor, U.S. Department of Labor (Counsel for Respondent);

Lesser, William C., Deputy Associate Solicitor, Fair Labor Standards Division, Office of the Solicitor, U.S. Department of Labor;

Regional Administrator, Region IV, OSHA, U.S. Department of Labor;

Regional Solicitor, Region IV, United States Department of Labor;

Rosenow, Patrick M., Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor;

Urban, James S., Jones Day (Counsel for CSXT); and

[1] Acting Secretary of Labor Edward C. Hugler is substituted for former Secretary of Labor Thomas E. Perez pursuant to Fed. R. App. P. 43(c)(2).

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Winch, Ben (Petitioner).

Date: March 30, 2017

Respectfully submitted,

s/ Claire E. Kenny
Claire E. Kenny
Attorney

STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Acting 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 may be resolved based on the briefs submitted by the parties.

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STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(b), the Acting Secretary of Labor ("Secretary") agrees in large part with Petitioner Ben Winch's ("Winch") statement of jurisdiction. In the interest of completeness, however, the Secretary states the following. This case arises under the employee protection provisions of the Federal Railroad Safety Act ("FRSA" or "Act"), 49 U.S.C. 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary had subject matter jurisdiction over this case based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Winch against his employer, CSX Transportation Inc. ("CSXT"), pursuant to 49 U.S.C. 20109(d)(1).

On July 19, 2016, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order reversing the decision of the Administrative Law Judge ("ALJ") that CSXT terminated Winch in violation of FRSA.[2] Winch filed a timely Petition for Review in this Court on September 15, 2016. This Court has jurisdiction to review the ARB's decision because Winch resided in Alabama on the date of the alleged violation. *See* 49 U.S.C. 20109(d)(4) (review of Secretary's final order may be obtained in the court of appeals for the

[2] The Secretary has delegated authority to the ARB to issue final agency decisions under the employee protection provisions of FRSA. *See* Sec'y's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012); 29 C.F.R. 1982.110(a).

circuit in which the alleged violation occurred or the complainant resided on the date of the violation); 29 C.F.R. 1982.112(a).

STATEMENT OF THE ISSUE

Whether the Board correctly determined that, as a matter of law, Winch did not establish that he engaged in protected activity under 49 U.S.C. 20109(b)(1)(A) or (B), which prohibit a railroad carrier from retaliating against an employee for reporting a hazardous condition or, if certain conditions are met, refusing to work when confronted by a hazardous condition, when he called in sick to his employer and did not say his coming to work would be a safety concern or describe the nature or severity of his illness prior to his absence.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

This case arises under the anti-retaliation provisions of FRSA that prohibit an employer from discriminating against an employee for engaging in protected activity under the Act. *See* 49 U.S.C. 20109. Winch filed a complaint with OSHA on June 8, 2012, alleging that CSXT retaliated against him in violation of FRSA when CSXT fired him for violating its minimum availability policy by being absent on January 20, 2012. R41 at 1, 28.[3] OSHA issued its decision on October

[3] References to the record are indicated by the abbreviation "R" and the document's number as listed in the Corrected Certified List, followed by the page

17, 2012, finding that CSXT did not violate the anti-retaliation provisions of FRSA. *Id.* at 1. Winch timely objected to OSHA's findings and requested a hearing before an ALJ. *Id.* Following a hearing, the ALJ issued a Decision and Order on December 4, 2014, holding that CSXT violated FRSA's anti-retaliation provisions and granting judgment in favor of Winch. *Id.* at 31-33. CSXT petitioned for review by the ARB. R61 at 2. The Board issued a Final Decision and Order on July 19, 2016, reversing the ALJ's decision and holding that Winch failed to establish, as a matter of law, that he engaged in protected activity under FRSA. *Id.* at 9. Winch timely filed a petition for review of the ARB's decision with this Court.

B. Statutory and Regulatory Background

FRSA was enacted in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. 20101. FRSA's anti-retaliation provision, added to the statute in 1980 and amended in 2007 and 2008, protects railroad employees from discharge or other discrimination for engaging in protected activity under the Act, which includes reporting a

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number within the document. Throughout the Statement of Facts, because the facts in this case are largely not in dispute, the Secretary primarily relies upon the facts as stated in the ALJ's December 4, 2014 Decision and Order (R41), and upon which the Board's Final Decision and Order (R61) relies. R61 at 2 n.2. The ALJ's and the Board's decisions, as well as all other record documents cited in this brief, are included in Petitioner's Appendix to Opening Brief.

hazardous safety or security condition, refusing to work when confronted by a hazardous safety or security condition, and following orders or a treatment plan of a treating physician. *See* 49 U.S.C. 20109; Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 419, 122 Stat. 4848, 4892; Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444; Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815.

The Act charges the Secretary with investigating and determining the validity of any complaints of retaliation. *See* 49 U.S.C. 20109(d)(1), (2). The Secretary's implementing regulations direct individuals to file complaints with OSHA. *See* 29 C.F.R. 1982.103. Following 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. Either the complainant or the respondent may file objections to OSHA's determination and seek a hearing before a Department of Labor ALJ. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106. Either party may seek review of an ALJ decision by the Board, which issues the Secretary's final order on a FRSA complaint. *See* 29 C.F.R. 1982.110(a); Sec'y's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012). Final orders of the

Secretary are reviewable only in the U.S. courts of appeals under the standards in the Administrative Procedure Act. *See* 49 U.S.C. 20109(d)(4); 29 C.F.R. 1982.112(a), (b).

FRSA proceedings are governed by the rules and procedures, as well as the burdens of proof, set forth in Wendell H. Ford Aviation Investment & Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121(b). *See* 49 U.S.C. 20109(d)(2). An employee must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action, and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Majali v. U.S. Dep't of Labor*, 294 F. App'x 562, 566 (11th Cir. 2008) (unpublished); *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334, 337 (6th Cir. 2014) (unpublished) (citing 29 C.F.R. 1982.109(a)); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). A "contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Araujo*, 708 F.3d at 158 (internal quotation marks omitted); *see Majali*, 294 F. App'x at 566. Once the employee makes this showing, to prevail the employer must demonstrate "'by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.'" *Consol. Rail Corp.*, 567 F. App'x at 337 (quoting 29 C.F.R. 1982.109(b)); *see Majali*, 294 F. App'x at 566-67.

C. Statement of Facts

CSXT is a railroad carrier within the meaning of the FRSA. R41 at 2. Winch began working for CSXT in 2004. *Id.* at 2. He worked as a conductor and remote control operator in CSXT train yards in Birmingham and Decatur, Alabama. *Id.* at 6-7. Employees in the train yards work to process railroad cars, build trains, and prepare the trains to leave the yard and deliver and pick up loads from customers. *See id.* at 12, 26; R30 at 66. Remote control technology allows employees on the ground to control and move railroad cars in train yards by using a belt pack around their waist. R41 at 11; R30 at 65. The work involves riding on the side of moving train cars and walking or jogging alongside train cars while looking out for and avoiding obstacles. R41 at 7, 12; R30 at 67, 154.

Winch had a history of problems complying with CSXT's work availability requirements. R41 at 2, 7. CSXT's policy, recorded in System Notice 108, requires employees have no more than one unexcused uncompensated absence in a rolling four week period. *Id.* at 27; R24 at 42 (Winch's Ex. 2).[4] CSXT will excuse an uncompensated absence due to illness or injury if the employee presents documentation showing that he or she was hospitalized or sought treatment at an emergency room or urgent care facility. R41 at 19, 27. CSXT will not

[4] For document R24, consisting of Winch's Exhibits 1 through 8, the page numbers cited in this brief refer to the Bates numbering on the bottom of the exhibits.

automatically excuse an absence if the employee has a physician's note rather than documentation from the hospital or urgent care facility. *Id.* at 27. In the case of a physician's note, CSXT management has discretion whether to excuse the absence or not, and will consider the note along with the employee's complete attendance and work history and any extraordinary issues that may relate to the particular instance of absenteeism. *Id.* at 20-22, 27. In deciding whether to excuse the absence based on a physician's note, CSXT management generally focuses on the employee's entire attendance history rather than whether or not the doctor's visit and illness were legitimate. *Id.* at 22, 26. They rarely excuse an absence supported by a physician's note. *Id.* at 15, 16, 19, 23. Winch testified that he was never notified that he had to seek medical care from either an emergency room or an urgent care center if he wanted to be certain that an absence due to illness was excused. *Id.* at 9.

CSXT uses a progressive discipline policy to enforce its minimum availability and safety requirements. R41 at 13, 21, 27. The first and second minimum availability violations subject the employee to coaching. *Id.* The third and fourth violations subject the employee to a two-day overhead suspension (held in abeyance and not executed) and a five-day actual suspension, respectively. *Id.* The fifth violation in a three-year period subjects the employee to discipline up to and including dismissal. *Id.* With respect to safety policies, three serious

violations within a three-year period make the employee subject to discipline up to and including dismissal. *Id.* at 13. When an employee is accused of a violation, CSXT either conducts an investigation and hearing to determine if the violation occurred, or the employee may agree to sign a document waiving the hearing and admitting the violation in exchange for a lesser suspension. *Id.*

CSXT terminated Winch in May 2006 for violating CSXT's minimum availability policy, but reinstated him in November 2006. R41 at 7, 26. Winch signed a leniency reinstatement letter admitting the minimum availability violations and acknowledging that future violations of the same nature may result in his termination. *Id.* Between March 2009 and January 2010, Winch was charged with four minimum availability violations. *Id.* at 7, 26. For each violation, Winch waived his right to receive a hearing and admitted the violation in exchange for a lesser suspension. *Id.* After the last of these four violations, he was told that he progressed to the third and final step of the absenteeism progressive discipline policy, and that any further absenteeism violations may result in dismissal. *Id.* at 7, 13, 26. He missed several weeks of work in 2011 due to a dirt bike accident, but CSXT approved the absence and it did not count as a violation. *Id.* at 7.

Winch was scheduled to work as a remote control operator on January 20, 2012, with his shift starting roughly at 6:30 a.m. R41 at 8. Winch testified that the

day before that he was feeling sick, with symptoms of nausea, diarrhea, vomiting, body aches, chills and fatigue. *Id.*; R30 at 156. At about 8:15 p.m. on January 19, 2012, Winch called CSXT to request that he be marked off sick for his next scheduled work day on January 20, 2012. R41 at 8. He called CSXT's crew caller, who is the person employees call to mark off from work. *Id.* at 8, 18. The only information Winch provided to the crew caller was his name, identification number and a statement along the lines of "I'm sick, mark me off," or "I need to be marked off sick." *Id.* at 8; R30 at 202-04. Winch did not provide a description of his symptoms, or state that his coming to work would be a safety concern or would put himself or others at risk. R41 at 8; R30 at 203. Winch testified that the crew caller just wants the employee's name, ID, and the type of mark off the employee requests, so that they can fill the vacancy. R41 at 8; R30 at 204.

Around 8:00 a.m. on January 20, 2012, Winch saw his family physician, Dr. Stacey Horsley. R41 at 8; R25 at 11-12. She obtained a history of Winch's symptoms, conducted a physical examination and administered a blood test. R41 at 8; R25 at 13-14. She diagnosed him with acute gastroenteritis, prescribed him anti-nausea medication, and told him to drink plenty of fluids and take off work for two days. R41 at 8, 24; R25 at 16-17. Winch was not scheduled to work on January 21, 2012 and so there was no need for him to mark off for work that day. R41 at 20, 29 n.61.

In the hope of having his absence on January 20 excused, Winch contacted Brian Killough, the chairman of the local union and who serves as an employee representative in hearings and investigations about rule violations. R41 at 8, 12. Winch asked Dr. Horsley to fax information to Killough. *Id.* at 8, 15. Killough faxed Dr. Horsley's treatment notes to David Toth, a crew availability specialist for CSXT, on January 20, 2012. *Id.* at 15; R24 at 4-5 (Winch's Ex. 1-A). Killough later obtained and faxed to Toth a "Certificate to Return to School or Work" from Dr. Horsley that says that Winch was under her care on January 20 and 21, 2012 and could return to work on January 22, 2012. R41 at 16, 20; R24 at 7 (Winch's Ex. 1-A).

Since Winch was not hospitalized and did not go to an emergency room or urgent care clinic, Toth could not automatically excuse the absence. R41 at 19. Instead, CSXT management had discretion as to whether to excuse the absence. Toth did not immediately send Dr. Horsley's notes to management for review because the January 20, 2012 absence would only become a violation of the minimum availability policy if Winch had a second uncompensated absence within four weeks. *Id.* at 20.

On February 7, 2012, Winch was accused of a third serious safety violation. R41 at 27, 29.[5] On February 9, 2012, during a shift, Winch told Terry Wrather, the senior foreman, that he was nauseous, nervous, and distracted due to the pending investigation for his safety violation and, therefore, did not feel like he could work safely. *Id.* at 8, 25. Winch told his foreman that he was not sick, did not need to go to the doctor, and wanted to be marked off for a personal or vacation day instead of a sick day. *Id.* at 25. Wrather told Winch that since CSXT's policy does not allow an employee to take a personal or vacation day mid-shift, he would have to mark Winch off as sick. *Id.* Wrather told Winch not to work around moving equipment and to go home. *Id.* at 8, 25.

This second absence resulted in Winch having two uncompensated absences within a four-week period. CSXT sent Winch a letter on February 17, 2012, charging Winch with failing to meet the minimum availability requirements during the four-week period from January 16 to February 12, 2012. R41 at 27. On April 3, 2012, CSXT held a hearing on the availability violation. *Id.* Peter Burrus, CSXT's relevant Division Manager at the time, reviewed the hearing transcript and exhibits, as well as Winch's work history, and decided not to excuse the uncompensated absence on January 20, 2012, for purposes of CSXT's minimum

[5] Winch was later assessed 30 days actual suspension for this February 7, 2012 safety violation. R41 at 27.

availability policy. *Id.* at 23. The dismissal was based primarily on Winch's extensive absenteeism record. *Id.* In a letter dated May 3, 2012, CSXT informed Winch that he was terminated for violating the minimum availability requirement. *Id.* at 9, 27.

On June 8, 2012, Winch filed a complaint with OSHA alleging that he was following his physician's orders when he was absent on January 20, 2012 and that CSXT violated FRSA's prohibition on retaliating against an employee for following his physician's orders or treatment plan, codified at 49 U.S.C. 20109(c)(2). R41 at 1, 28. CSXT's answer argued that 49 U.S.C. 20109(c)(2) does not apply to cases where the treatment was not connected to a work-related illness or injury and that CSXT would have taken the same action even in the absence of Winch's following his physician's orders. R41 at 28. On October 17, 2012, OSHA issued its decision, finding no violation because CSXT had a legitimate non-retaliatory basis for the termination. *Id.* at 1, 28.

Winch filed objections to OSHA's findings and requested a hearing before an ALJ. R41 at 1, 30. The ALJ issued a Scheduling Order on December 12, 2012 ordering Winch to file a new complaint detailing each alleged protected activity. R61 at 5. In response, on December 20, 2012, Winch filed a complaint with two counts. Count I alleged that CSXT violated the FRSA by taking adverse action, in whole or in part, due to Winch's (1) "reporting, in good faith, his illness . . . as a

hazardous safety condition and refusing to work . . . when so ill that it was not safe for him to do so," seemingly in reference to 49 U.S.C. 20109(b)(1)(A) and (B). R61 at 5 (internal quotation marks omitted). Count II alleged that CSXT violated FRSA by taking adverse action, in whole or in part, due to Winch's "seeking medical care and for following his treating physician's orders and treatment plan by not working on January 20, 2012," seemingly in reference to 49 U.S.C. 20109(c). R61 at 5 (internal quotation marks omitted).

D. The ALJ's Decision and Order

After a formal hearing on May 6, 2014, the ALJ held that Winch had engaged in protected activity under FRSA and that the protected activity was a contributing factor in his termination. R41 at 31. The ALJ further found that CSXT had failed to prove by clear and convincing evidence that it would have taken the same actions absent the protected activity, and so the ALJ granted judgment in favor of Winch. *Id.*

Regarding protected activity, the ALJ determined that Winch did not engage in protected activity under section 20109(c)(2) by following his doctor's orders. R41 at 30. The ALJ concluded that since Winch had not yet seen a doctor or received doctor's orders when he requested on January 19, 2012, that he be marked off work the next day, he could not possibly have been following his doctor's orders or treatment plan at that point. *Id.* The ALJ noted that while the case was

before OSHA, neither CSXT nor Winch appeared to be aware of the significance of the fact that Winch did not see his doctor or receive her orders until after he had already marked off. *Id.*

The ALJ then considered whether Winch engaged in protected activity under section 20109(b) by marking off sick. R41 at 31. The ALJ first addressed CSXT's argument that Winch had failed to exhaust his administrative remedies with respect to this claim since he had only mentioned the section 20109(c)(2) following doctor's orders claim in his complaint to OSHA. R41 at 30. The ALJ concluded that Winch was allowed to advance this new legal theory because the new claim was reasonably within the scope of his OSHA complaint since it was based on the same facts and because CSXT's ability to litigate the case was not prejudiced to any significant degree. *Id.* at 31. The ALJ next addressed CSXT's argument that Winch did not consciously go through a risk assessment to decide whether it would be safe to go to work when he was sick. *Id.* The ALJ noted that "no one suggested that [Winch] was malingering or that in any event it would have been safe to go work with his symptoms" and "[t]he weight of the evidence shows that it was reasonable for [Winch] to conclude that it would have been unsafe to go to work." *Id.* The ALJ then simply concluded that "[t]herefore, marking off sick was a protected activity under §20109(b)." R41 at 31. The ALJ did not specify whether marking off sick was protected under section 20109(b)(1)(A) (reporting a

hazardous condition) and/or section 20109(b)(1)(B) (refusing to work when faced with a hazardous condition).

The ALJ then discussed whether CSXT succeeded in establishing that it would have fired Winch even in the absence of the protected activity. R41 at 31. The ALJ noted that the weight of the record supported CSXT's claim that Winch's "record exclusive of his [January 19, 2012] mark off more than justified his termination[.]" *Id.* The ALJ reasoned, however, the weight of the record also supported the conclusion that there would not have been termination "but for" the mark off and that the mark off was the "precipitating factor that resulted in his firing[.]" *Id.* Thus, the ALJ concluded that it was "impossible for [CSXT] to establish by a preponderance, much less clear and convincing evidence, that it would have fired him even in the absence of the mark off." *Id.*

The ALJ granted judgment in Winch's favor. He ordered that Winch be reinstated and his employment records be corrected so that they no longer reflected he was terminated. R41 at 32. The ALJ awarded $8000 for emotional distress and $5000 in punitive damages. *Id.* at 33. The ALJ denied Winch back pay because the evidence showed Winch did not engage in a diligent search for employment to mitigate his damages. *Id.* 32-33.

E. The Board's Final Decision and Order

On July 19, 2016, the Board issued a Final Decision and Order in which it reversed the ALJ's Decision and Order. R61. The Board summarized and took no issue with the facts as laid out by the ALJ. *Id.* at 2-5. But the Board concluded that Winch had not established that he engaged in protected activity. *Id.* at 7-9.

The Board noted that, on appeal, section 20109(b) was the sole legal basis for Winch's claim that he engaged in FRSA-protected activity when he called in sick on January 19, 2012. R61 at 7. It first examined Winch's claim that he reported a hazardous condition under section 20109(b)(1)(A). *Id.* at 8. The Board noted that "[a]lthough Winch testified he believed working when sick to be a safety issue, he explicitly stated that the only information he reported on January 19, 2012, was his name, identification number, and his request to be marked off sick." *Id.* The Board explained that "[e]ven the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the 'hazardous condition' at the railroad." *Id.* It concluded that "[a]s a matter of law, the extremely limited information Winch reported falls short of 'reporting . . . a hazardous . . . condition.'" *Id.* (ellipsis in original).

The Board next examined Winch's claim that he engaged in a protected refusal to work under section 20109(b)(1)(B). The Board explained that since section 20109(b)(2) makes reporting a hazardous condition essential to a claim of

protected refusal, Winch's protected refusal claim also fails as a matter of law. R61 at 8; *see* 49 U.S.C. 20109(b)(2)(C) (requiring, where possible, notification to the employer of the safety hazard in advance of advance of a protected work refusal). The Board further explained that the FRSA clearly does not protect every refusal to work, and that the hazardous condition must be such that a reasonable individual would conclude there is an imminent danger of death or serious injury. R61 at 8-9 (citing 49 U.S.C. 20109(b)(2)(B)(i)). The Board noted that the ALJ made no finding, and that it sees "no evidence in the record, showing that Winch reported to or notified [CSXT] that his condition presented an imminent danger of death or serious injury." R61 at 9. The Board again explained that a refusal to work is only protected if the "'employee, where possible, has *notified* the railroad carrier of the existence of the hazardous condition and the intention not to perform further work[.]'" *Id.* (quoting 49 U.S.C. 20109(b)(2)(C)) (emphasis in ARB decision). Since "there is no ALJ finding nor record evidence showing, that he 'notified' [CSXT] of the existence of a 'hazardous' condition when Winch called in sick on January 19, 2012[,]" the ARB concluded that "as a matter of law, Winch failed to establish FRSA-protected activity under section 20109(b)(1)(B)." R61 at 9.

The ARB explicitly limited its ruling "to the narrow facts of this case." R61 at 9. The decision "does not address whether a railroad employee 'reporting' being

sick might satisfy the requirements under section 20109(b) to establish protected activity under the FRSA in a different case where more sufficient details are reported to the railroad employer." *Id.*

F. Standard of Review

Judicial review of the Board's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706. *See* 49 U.S.C. 20109(d)(4) ("The review shall conform to chapter 7 of title 5."); *DeKalb Cty. v. U.S. Dep't of Labor*, 812 F.3d 1015, 1020 (11th Cir. 2016); *Maverick Transp., LLC v. U.S. Dep't of Labor*, 739 F.3d 1149, 1153 (8th Cir. 2014). Under this standard, the Court sustains the ARB's decision unless it is unsupported by substantial evidence or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. 706(2)(A), (E); *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012). The factual findings underlying the Board's decision are sustained unless unsupported by substantial evidence on the record as a whole. *See Dekalb Cty.*, 812 F.3d at 1020 (citing 5 U.S.C. 706(2)(E) (APA standard for formal adjudications)).

The Board's legal conclusions are reviewed de novo, but this Court applies "due deference to the Secretary of Labor's interpretation of the statutes which he administers" in accordance with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Gale v. U.S. Dep't of Labor*, 384 F.

App'x 926, 928 (11th Cir. 2010) (unpublished); *see Fields v. U.S. Dep't of Labor*, 173 F.3d 811, 813 (11th Cir. 1999) ("Appropriate deference must be given to statutory interpretation by the ARB."). The Board's construction of whistleblower statutes is due appropriate deference and the Secretary's reasonable interpretation should be accepted absent a clear and unambiguous indication of congressional intent to the contrary. *See Maverick Transp.*, 739 F.3d at 1154 (applying *Chevron* deference to the Board's application of the statute of limitations under the Surface Transportation Assistance Act ("STAA")); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1131-32 (10th Cir. 2013) (according *Chevron* deference to the ARB's interpretation of the whistleblower provision of the Sarbanes-Oxley Act); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932-33 (11th Cir. 1995) (granting *Chevron* deference to the ARB's interpretation of the Energy Reorganization Act of 1974 whistleblower provision). Such deference reflects the "Secretary's expertise in employee protection." *Bechtel Constr.*, 50 F.3d at 933.

SUMMARY OF THE ARGUMENT

This Court should affirm the Board's decision in this FRSA whistleblower case. The facts of this case are largely not in dispute and the question presented is a legal one. The Board properly rejected the ALJ's legal conclusions that Winch established that he engaged in the protected activities of "reporting, in good faith, a

hazardous safety or security condition" and "refusing to work when confronted by a hazardous safety or security condition[.]" 49 U.S.C. 20109(b)(1)(A), (B). The ALJ made several legal errors in reaching these conclusions.

First, the ALJ did not analyze whether Winch reported a hazardous condition within the meaning of section 20109(b)(1)(A) and focused instead on whether it was reasonable for Winch to conclude that going to work ill would be unsafe. The Board rightly concluded that Winch failed to establish that he reported a hazardous condition when he called CSXT on January 19, 2012 to request that he be marked off sick for his shift on January 20, 2012. Winch's vague statement that he was sick or needed to be marked off sick was insufficient to give CSXT any kind of notice that there was a hazardous condition at the railroad, as the Board properly noted when it stated that "the extremely limited information Winch reported falls short of 'reporting . . . a hazardous . . . condition.'" R61 at 8 (ellipsis in original). In this regard, the Board's decision was fully consistent with its precedent requiring that protected reports be sufficiently detailed to provide the employer notice that the employee is engaging in protected conduct.

The Board did not err in focusing on what Winch reported to his employer at the time of his absence without examining the information he later provided prior to his termination. Winch acknowledges that he was fired for his January 20 absence but contends that his termination based on the absence was unlawful

because he reported a hazardous safety condition. In advancing this theory, Winch is effectively claiming that his absence is a protected report of a hazardous safety condition. To evaluate the validity of Winch's claim therefore, the ARB had to evaluate whether the absence along with the information that CSXT had at the time of the absence because of the January 19 call were sufficient to notify it of a hazardous safety condition.

Second, the ALJ overlooked and failed to analyze several requirements that the statute imposes for a refusal to work to constitute protected activity under section 20109(b)(1)(B). The FRSA makes clear that only specific types of refusals to work are protected: (1) the refusal must be made in good faith and no reasonable alternative to the refusal must be available to the employee; (2) the employee must have reasonably determined that the hazardous condition presents an imminent danger of death or serious injury and that the urgency of the situation does not allow sufficient time to eliminate the danger without the refusal; and (3) the employee, where possible, must have notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately. As the ARB recognized, the ALJ made no finding as to whether Winch's refusal to work met these requirements and so did not conduct a proper analysis. The ALJ instead simply decided that since "[t]he weight of the evidence shows that it was reasonable for [Winch] to conclude

that it would have been unsafe to go to work[,]" Winch's "marking off sick was a protected activity under §20109(b)." R41 at 31. The statute, however, unambiguously required more of Winch than to simply reasonably conclude it would be unsafe to work on a particular day. In particular, Winch had to provide, where possible, prior notice of the hazardous condition. As previously noted, Winch's bare statement that he needed to be marked off sick did not provide any notice to CSXT of the nature of the alleged hazardous condition. Winch furthermore failed to show that it was not possible for him to provide such notice. Therefore, the Board correctly concluded that Winch's absence on January 20, 2012 was not a protected refusal to work under FRSA.

ARGUMENT

I. THE BOARD PROPERLY DETERMINED, AS A MATTER OF LAW, THAT WINCH FAILED TO ESTABLISH THAT HE ENGAGED IN THE PROTECTED ACTIVITY OF REPORTING A HAZARDOUS SAFETY CONDITION

The Board properly decided that, as a matter of law, Winch did not engage in the protected activity of "reporting, in good faith, a hazardous safety or security condition" when he marked off sick on January 19, 2012. 49 U.S.C. 20109(b)(1)(A). The Board's analysis correctly "beg[a]n with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). Section

20109(b)(1)(A) requires a report of a hazardous condition. In other words, an employee must inform his employer of the existence of a risky or dangerous situation. *See* Merriam-Webster's Collegiate Dictionary 533 (10th ed. 2001) (defining "hazardous" as "involving or exposing one to risk (as of loss or harm)"), 990 (defining "report" as "to give an account of: RELATE"). As ARB phrased it, "[e]ven the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the 'hazardous condition' at the railroad." R61 at 8.

The ARB recognized that the record contained no evidence showing that Winch informed his employer of a risky or dangerous situation when he called in sick. Winch admitted that the only information he gave to the crew caller on January 19, 2012 was his name, identification number, and a simple statement along the lines of: "I need to be marked off sick" or "I'm sick, mark me off." R30 at 203. A worker suffering from an illness or injury does not necessarily create a hazardous condition even when the worker is in a safety sensitive position. The illness or injury may not be the kind of impairment that would, or be serious enough to, impair the worker's ability to do the job safely. As the ARB noted, Winch did not inform CSXT of his symptoms, *see* R41 at 8, meaning CSXT could not make its own inference as to whether Winch's illness was of a kind that impaired his ability to work safely. Further, if Winch's statement was simply that

he "need[ed] to be marked off sick," R30 at 203, this would not even put CSXT on notice that Winch himself was ill if, for example, healthy employees could take sick leave to care for ill relatives. Therefore, the ARB properly concluded that the "extremely limited information Winch reported falls short of 'reporting . . . a hazardous . . . condition.'" R61 at 8 (ellipsis in original).

In finding Winch's absence was not a report of a hazardous safety condition, the ARB did not improperly import an employer knowledge requirement into the analysis of whether a report is protected, nor did it require a level of detail that improperly burdens employees in making protected reports of safety hazards, as Winch suggests. *See* Pet'r Br. 17-21. Rather, the ARB's observation that "[e]ven the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the 'hazardous condition' at the railroad" is consistent with the standard the ARB and the courts apply under all of the whistleblower protection statutes that a protected report to the employer must at a minimum be sufficiently specific to put the employer on notice that the employee is raising a protected concern. R61 at 8. For example, both the ARB and the courts under the Sarbanes-Oxley Act ("SOX") whistleblower provision, 18 U.S.C. 1514A, have found an employee does not engage in protected activity under SOX when he raises concerns about violations of foreign or state laws without relating those concerns to the violations listed in SOX. *See, e.g.*, *Nielsen v. AECOM Tech. Corp.*,

762 F.3d 214, 222-23 (2d Cir. 2014) (finding no SOX protected activity because employee's allegations that employer failed to properly review fire safety designs did not involve violation of any federal statute or regulation, fraud, or securities violation); *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 105 (5th Cir. 2014) (finding no SOX protected activity where "Villanueva did not provide information regarding conduct that he reasonably believed violated one of the six provisions of *U.S.* law enumerated in § 806; rather, he provided information regarding conduct that he reasonably believed violated *Colombian* law" (emphases original)); *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, 2016 WL 1389927, at *5 (Mar. 30, 2016), *appeal docketed sub nom. Cypress Semiconductor Corp. v. Admin. Review Bd.*, Nos. 16-9523, 16-9529, & 16-9534 (10th Cir. argued Jan. 18, 2017) ("[A]n allegation of a violation of state wage laws is, by itself, insufficient to constitute protected activity under SOX's whistleblower provision without some allegation of a knowing misrepresentation or concealment of a material fact."). Winch's bare statement that he "need[ed] to be marked off sick," R30 at 203, simply was not sufficient based on common notions of what it means to report a hazardous condition to put CSXT on notice of his safety concerns.

A. The ARB Properly Evaluated Whether Winch's January 19, 2012 Call Alone Was Sufficient to Put CSXT on Notice that He Was Reporting a Hazardous Condition

The ARB was also correct in analyzing whether the January 20, 2012 absence was protected as a report of a hazardous safety condition based on the January 19, 2012 call, without regard to further information that Winch provided about his absence after January 20, 2012 but prior to his termination. Winch acknowledges that he was fired because of his absence from work and not because of anything he reported about his illness after the absence. *See* Pet'r Br. 2 ("[CSXT] terminated Ben Winch for violating its attendance policy. In doing so, CSXT penalized Winch for his absence on January 20, 2012."), 8 ("CSXT penalized Ben Winch for not working on January 20, 2012."); *see also* R41 at 30 n.62 (ALJ noting that CSXT "specifically discounted [Dr. Horsley's] note in deciding to discipline [Winch]" and that "[i]ndeed, [Winch] does not even make [the] argument" that the note played a role in his termination). He contends nevertheless that CSXT could not terminate him for the absence because he reported a hazardous safety condition. Such a claim relies on the premise that his absence amounted to, or at least was intertwined with, a protected report of a hazardous safety condition. *See* Pet'r Br. 25 (concluding that CSXT "had no basis for taking the adverse action once Winch's *absence* on January 20, 2012, is properly deemed protected by FRSA" (emphasis added)).

For the absence to have been a protected report of a hazardous condition, the circumstances at the time of the absence would have to be sufficient to put CSXT on notice of the potential hazard. Thus, Winch is incorrect in contending that the Board erred in "[f]ocusing solely on what Winch said to the crew caller on the night of January 19, 2012" and "discount[ing] entirely the additional details he provided about his illness thereafter." Pet'r Br. 16-17. Winch cannot rely on the fact that he later provided more information to CSXT in order to retroactively transform his January 20, 2012 absence into a report of a hazardous safety condition. To determine whether a railroad employee reported a hazardous safety condition, the factfinder must necessarily focus on the communication made to the employer at the time of the report, as the ARB did in this case.

Additionally, the Board's focus on the communications Winch made prior to the absence was correct because it ensured that FRSA's specific requirements for work refusals to be protected were not circumvented. The statute clearly requires that refusals meet certain criteria to be protected, including that the employer receive notice of the hazardous condition prior to the absence where possible. *See* 49 U.S.C. 20109(b)(2)(A)-(C); 126 Cong. Rec. 27,056 (1980) (statement by Sen. Howard Cannon) (explaining that "[a] refusal to work would be valid once three specific criteria are met"). An employee should not be permitted to avoid these refusal requirements (as Winch attempts to do here) by: being absent without

giving prior notice of the hazardous condition causing the absence; telling his employer of the alleged hazardous condition that caused his absence at some point afterward; and then claiming he cannot be disciplined for the absence because he later reported a hazardous condition related to the absence. If an employee could in this way receive FRSA protection under section 20109(b)(1)(A) for a refusal to work instead of under section 20109(b)(1)(B), then the specific refusal criteria in the statute could always be circumvented and so would become void and meaningless. This would violate "one of the most basic interpretative canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and alterations omitted). Therefore, the ARB appropriately applied the statute by not examining the statements about the hazardous condition that Winch made after his absence.

B. The ARB's Decision Does Not Conflict with Its Decision in *Williams v. Grand Trunk Western Railroad Co*.

The Board's decision here is not inconsistent with its decision in *Williams v. Grand Trunk Western Railroad Co.*, ARB Nos. 14-092, 15-008, 2016 WL 7742872 (ARB Dec. 5, 2016), on which Winch relies. Winch argues that the Board's requirement in this case that the employer have concurrent knowledge that an absence constituted a report of a hazardous safety condition was squarely rejected in *Williams*. *See* Pet'r Br. 18-19. However, the *Williams* case is easily

distinguished because the complainant in that case alleged he was terminated for "following orders or a treatment plan of a treating physician[.]" 49 U.S.C. 20109(c)(2). Since there is no requirement in the physician's order provision that an employer receive contemporaneous notice of the physician's orders, Williams was engaging in protected activity whether the employer learned of the doctor's orders before or after he called in sick. *See Williams*, 2016 WL 7742872, at *2. Winch alleged the protected activity of reporting a hazardous safety condition. To determine whether an action is a protected report, the factfinder must necessarily focus on what the employer communicated to the employer in making the report. There is therefore no inconsistency in the Board's examining what Winch told his employer prior to his absence and deeming unimportant what Williams told his employer prior to his absence.

II. THE ARB PROPERLY FOUND THAT WINCH'S JANUARY 20, 2012 ABSENCE WAS NOT A PROTECTED WORK REFUSAL

The Board also properly determined that Winch did not establish that he met the statutory requirements for his absence from work on January 20, 2012 to be a protected work refusal under section 20109(b)(1)(B). As the Board explained, the FRSA makes clear that not every refusal to work when confronted by a hazardous condition is protected, and one of the requirements is that "the 'employee, where possible, has *notified* the railroad carrier of the existence of the hazardous condition and the intention not to perform further work[.]'" R61 at 9

(quoting 49 U.S.C. 20109(b)(2)(C)) (emphasis in ARB decision). The notification requirement clearly requires that the employer be given notice of or informed in some way of the existence of a risky or dangerous condition. *See* Merriam-Webster's Collegiate Dictionary 793 (defining "notify" as "to make known," "to point out[,]" or "to give notice of or report the occurrence of"). The statute unambiguously requires, by using the present perfect form of notify ("has notified"), that the employee must, where possible, notify the employer at some point *prior* to his refusal to work of the hazardous condition prompting his absence from work. *See Stokes v. Se. Pa. Transp. Auth*., 657 F. App'x 79, 82 (3d Cir. 2016) (unpublished) (describing section 20109(b)(2)(C) as "contemplating advanced notice to the railroad carrier that could allow the hazardous condition to be 'corrected' before work stoppage takes place").

As the ARB recognized, the record contained no evidence showing that Winch informed his employer of a hazardous condition prior to his absence on January 20, 2012. *See* R61 at 9. For the reasons explained above, Winch's call to the crew caller on January 19, 2012 did not in any way inform CSXT of the existence of a hazardous condition. Nor did Winch allege or submit evidence proving that it was not possible for him to notify CSXT of the alleged hazardous condition prior to his absence on January 20. Therefore, the Board properly concluded that, as a matter of law, Winch did not satisfy the statutory requirements

for his absence on January 20 to constitute a protected refusal under the FRSA. *See id.*

III. WINCH'S ARGUMENTS REGARDING FRSA'S LEGISLATIVE HISTORY AND PURPOSE DO NOT OVERCOME THE SHORTCOMINGS IN HIS READING OF STATUTORY LANGUAGE

Winch's arguments regarding the FRSA's legislative history and purpose fail to overcome the clear implications of section 20109(b)'s plain language discussed above. *See* Pet'r Br. 21-25. While Winch is correct that remedial legislation should be broadly construed to effectuate its purpose, "'vague notions of a statute's "basic purpose" are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration.'" *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661 (2016) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) (emphasis in original)); *cf. Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) (expressing caution about the canon on construing statutes to effectuate their purposes as "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be"). Winch cannot refute the plain language of the statute by referring to FRSA's general purpose of protecting workers and Congress's "long history of protecting railroad workers like Winch" evidenced in its passing of legislation about the

safety of train service employees. *See* Pet'r Br. 22-24. While Congress no doubt desired to protect railroad workers, the statutory provisions clearly indicate that Congress did not intend to protect employees who skip work without providing notice to their employer of the connection between their absence and a legitimate safety concern. *See* 49 U.S.C. 20109(b)(2); *cf. Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 81 (2d Cir. 1994) (noting that protecting firms "from unjustified work refusals certainly was clearly of concern to Congress" in passing the STAA).

Nor can Winch refute the plain language of the statute by asserting that Congress must have intended FRSA to provide railroad workers with the same protections afforded to other transportation workers and then relying on cases brought under other whistleblower statutes. *See* Pet'r Br. 24-25. Winch attempts to argue that his actions must be protected because the Board has consistently held that absences of drivers and pilots are protected under AIR 21 and STAA when they are too sick to work. *See id.* (citing *Furland v. Am. Airlines, Inc.*, ARB Nos. 09-120, 10-130, 2011 WL 3307577 (ARB July 27, 2011); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, 2000 WL 35593006 (ARB Mar. 29, 2000); *Ciotti v. Sysco Foods*, ARB No. 98-103, 1998 WL 379879 (ARB July 8, 1998)). The cases cited by Winch involve claims brought under provisions of AIR 21 and STAA that do not mirror the interlocking protections for reports of hazardous conditions and work refusals under FRSA.

Furland involved a commercial aircraft pilot who determined that he was unfit to fly in accordance with various regulations that grant a pilot broad authority for ensuring the safe operation of an aircraft. *See* 14 C.F.R. 1.1, 61.53, 91.3, 121.533(d), 121.663; *Furland*, 2011 WL 3307577, at *5. The pilot informed his employer of his illness that made him unfit to fly under the regulations and complained to his employer about how its pressuring pilots to fly when sick violated Federal Aviation Administration ("FAA") regulations. *Furland*, 2011 WL 3307577, at *5. The ARB determined that he engaged in protected activity under AIR 21 by providing information to his employer relating to a violation of a provision of federal law relating to air carrier safety. *See* 49 U.S.C. 42121(a); *Furland*, 2011 WL 3307577, at *5-6. This AIR 21 provision does not have the contemporaneous reporting requirements in FRSA's refusal provision. *See* 49 U.S.C. 42121(a).

Winch's attempt to draw support from the fact that the Board has consistently held that absences of sick drivers are protected under STAA's anti-retaliation provisions applicable to motor carriers is equally unavailing. *See* Pet'r Br. 24-25 (citing *Johnson*, 2000 WL 35593006; *Ciotti*, 1998 WL 379879). The *Ciotti* and *Johnson* cases involved truck drivers who refused to drive because they would have violated a federal regulation prohibiting a driver from operating a commercial motor vehicle when the driver's ability is so impaired through illness

as to make it unsafe for him to operate the motor vehicle. *See* 49 C.F.R. 392.3; *Johnson*, 2000 WL 35593006, at *8; *Ciotti*, 1998 WL 379879, at *4. They were found to have engaged in protected activity under the STAA, which protects refusing to operate a vehicle when doing so would violate a provision of law relating to commercial motor vehicle safety. *See* 49 U.S.C. 31105(a)(1)(B)(i); *Johnson*, 2000 WL 35593006, at *8; *Ciotti*, 1998 WL 379879, at *5. Both drivers did inform their employers of the nature of their conditions before their absences. However, unlike FRSA, the STAA provision that protected them contains no express requirement that the employee provide information to his employer prior to the refusal to drive. Nor were the drivers claiming protection for a "report" of a hazardous condition as Winch is in this case. The *Johnson* and *Ciotti* cases have no application here.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court affirm the Board's Final Decision and Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed R. App. P. 32(f), this brief contains 8,054 words.

This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type-style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word 2010 using plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on March 30, 2017. I certify that the following are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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