

No. _____

In the Supreme Court of the United States

WEBSTER WILLIAMS, JR.,
Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

Robert B. Thompson
Counsel of Record
Harrington, Thompson, Acker &
Harrington, Ltd.
One N. LaSalle Street, Suite 3150
Chicago, IL 60602
(312) 332-8811
htah@harringtonlaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the court below erroneously ignored the plain language of 49 U.S.C. § 20109(c)(2) and improperly rewrote the statute by inventing language limiting the protection of 49 U.S.C. § 20109(c)(2) to only those conditions which originate with an on duty injury.
2. Whether the court below's narrow interpretation of 49 U.S.C. § 20109(c)(2) frustrates Congressional intent and places public safety at risk.

PARTIES TO THE PROCEEDING

Petitioner

Webster Williams, Jr., Intervenor below.

Respondent

Grand Trunk Western Railroad Company, Petitioner
below.

United States Department of Labor, Administrative
Review Board, Respondent, below.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	4
PROCEEDINGS BELOW	6
A. Proceedings Before The Administrative Law Judge	6
B. Proceedings Before the Administrative Review Board	6
C. Proceedings in The Sixth Circuit Court of Appeals	7
REASONS FOR GRANTING THE WRIT	9
I. Contrary to Well Established Supreme Court Precedent the Court below Erroneously Ignored the Plain Language of 49 U.S.C. § 20109(c)(2) and Improperly Rewrote the Statute by Inventing Language Limiting the Protection of 49 U.S.C. § 20109(c)(2) to Only Those Conditions Which Originate with an on Duty Injury	10
II. The Court Below’s Narrow Interpretation of 49 U.S.C. § 20109(c)(2) Frustrates Congressional Intent and Places Public Safety at Risk	15

CONCLUSION	19
APPENDIX	
Appendix A Opinion of the United States Court of Appeals for the Sixth Circuit (November 20, 2017)	App. 1
Appendix B Final Decision and Order of the U.S. Department of Labor, Administrative Review Board (December 5, 2016)	App. 24
Appendix C Final Decision and Order of the U.S. Department of Labor, Office of the Administrative Law Judges (August 11, 2014)	App. 36

TABLE OF AUTHORITIES

CASES

<u>Allison Engine Co. Inc. v. United States ex rel. Sanders</u> , 533 U.S. 662 (2008)	11
<u>Bala v. Port Authority Trans-Hudson Corp.</u> , No. 12-048, 2013 WL 5872050 (Admin. Rev. Bd. Sept. 27, 2013)	6, 7
<u>Brizendine v. Cotter and Co.</u> , 4 F.3d 457 (7th Cir. 1993), <i>vacated on other grounds</i> , 511 U.S. 1103 (1994)	7
<u>Burlington Northern v. White</u> , 548 U.S. 53 (2006)	12, 14
<u>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</u> , 467 U.S. 837 (1984)	12
<u>Conn. Nat’l Bank v. Germain</u> , 503 U.S. 249 (1992)	11
<u>Port Authority Trans-Hudson Corp v. Sec’y, U.S. Dept of Labor</u> , 776 F.3d 157 (3d Cir. 2015)	7, 10
<u>Russello v. United States</u> , 464 U.S. 16 (1983)	8, 11
<u>Sandifer v. U.S. Steel Corp.</u> , 134 S. Ct. 870 (2014)	11
<u>Sebelius v. Cloer</u> , 133 S. Ct. 1886 (2013)	11
<u>Sullivan v. Everhart</u> , 494 U.S. 83, 110 S. Ct. 960, 108 L.Ed.2d 72 (1990)	13

STATUTES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2106	1
49 U.S.C. § 20101	1, 18
49 U.S.C. § 20102	1, 2
49 U.S.C. § 20109	2, 3, 5
49 U.S.C. § 20109(c)(1)	8, 10, 11, 14
49 U.S.C. § 20109(c)(2)	<i>passim</i>
Pub. L. 110-432, 122 Stat. 4848, Title I, Section 101.	18

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 875 F.3d 821 (6th Cir. 2017). A copy of the Opinion is set forth in the Appendix hereto (App. 1-23). The Department of Labor Administrative Review Board's Opinion is not officially reported but is available at 2016 WL 7742872 (Administrative Rev. Bd. Dec. 5, 2016) and is set forth in the Appendix hereto (App. 24-35). The August 11, 2014, Final Decision And Order of the Administrative Law Judge is set forth in the Appendix hereto. (App. 36-115).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit on November 20, 2017, granted Respondent's Petition for Review of an order entered by the United States Department of Labor, Administrative Review Board. This Petition for Writ of Certiorari is filed within 90 days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

STATUTORY PROVISIONS

Federal Railway Safety Act of 1970

49 U.S.C. § 20101 Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad related accidents and incidents.

49 U.S.C. § 20102. Definitions

In this part-

(1) "railroad"-

(A) means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including -

(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979;

and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

49 U.S.C. § 20109. Employee Protections

(A) In general. A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done or perceived by the employer to have been done or about to be done...

(C) Prompt medical attention

(1) Prohibition. - A railroad carrier or person covered under this section may not deny, delay, or interfere with medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline. - A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment should not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

STATEMENT OF THE CASE

Summary of Facts:

Petitioner was a locomotive engineer for Respondent from 1995 until his termination from the railroad in 2012 for excessive absences. (A 20, 24).¹ In 2006, Petitioner began seeing Dr. John Bernick for non-work related depression and anxiety. (Id. at 23). As part of his treatment plan, Dr. Bernick prescribed Xanax for Petitioner to take as a “stop gap” measure when Petitioner felt he needed to take the medication for his anxiety and depression. (Id. at 35). In addition, Dr. Bernick advised Petitioner that in addition to taking Xanax, Petitioner should not work as a locomotive engineer during an anxiety episode if he did not feel safe. (Id. at 212, 237, 239, 244, 254-255, 312-313). Dr. Bernick has testified that allowing Petitioner to work while experiencing an anxiety and depression episode would be “a formula for disaster” and Dr. Bernick would have been a “fool” to allow Petitioner to operate freight trains in his impaired state. (Id. at 313). Dr. Bernick provided Respondent with documents and medical recommendations, including prescription medication, for treatment of these medical conditions. (Id. at 212-213, 320). Dr. Bernick additionally prescribed, ordered and regularly signed paperwork for Petitioner as needed to obtain leave from work for these conditions pursuant to the Family Medical Leave Act. (“FMLA”) (Id. at 218, 423-426). Respondent does not dispute that Petitioner is not permitted to work as

¹ Petitioner’s citation to the record below references the Appendix filed by the Grand Trunk Western Railroad as Petitioner in the Sixth Circuit Court of Appeals.

a locomotive engineer while under the influence of prescription drugs such as Xanax. (Id. at 70).

In December of 2011, Petitioner missed eight days of work because of his anxiety and depression. (Id. at 90, 115). Respondent deemed six of these missed days to be “unexcused absences” over a seventeen day period. On December 28, 2011, Petitioner received from Respondent a “notice of investigation”, for Petitioner’s alleged “failure to work on a regular basis between the period of November 28, 2011 through December 29, 2011.” (Id. at 92, 390). After the hearing, in a letter dated January 24, 2012, Respondent terminated Petitioner from work for excessive absenteeism.

On March 1, 2012 Petitioner filed a complaint with the Occupational Safety and Health Administration (OSHA) for wrongful retaliation and termination pursuant to the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20109. On February 6, 2013 OSHA dismissed the complaint on the basis that Petitioner’s absence for a “non-work related illness: did not constitute qualifying “protected activity.” Petitioner appealed OSHA’s dismissal to an Administrative Law Judge (“ALJ”) on February 25, 2013. Petitioner was eventually reinstated on a leniency basis by Respondent in August of 2012. (Id. at 99). Petitioner missed approximately seven months of work. (Id. at 94).

PROCEEDINGS BELOW

A. Proceedings Before The Administrative Law Judge

The ALJ held an evidentiary hearing at which Petitioner and Respondent submitted witness testimony, including from Petitioner, his doctor, and the Respondent's manager who fired Petitioner, as well as documentary evidence. The ALJ concluded, in an August 11, 2014 opinion that Respondent had violated the FRSA. (App. 36-115). The ALJ held that Petitioner had engaged in protected activity because he was following the treatment plan of his physician and the protected activity was a factor in Respondent's decision to terminate Petitioner's employment. (*Id.*). Thus, the ALJ awarded damages to Petitioner. The ALJ explained that under the Administrative Review Board's decision in Bala v. Port Authority Trans-Hudson Corp., No. 12-048, 2013 WL 5872050 ("Bala") (Admin. Rev. Bd. Sept. 27, 2013), which provided the Secretary of Labor's interpretation of the FRSA provision at issue, 49 U.S.C. § 20109(c)(2), an employee's absence based on a physician's orders or treatment plan is a protected activity under FRSA regulations regardless of whether it results from an on duty or off duty condition. (*Id.*).

B. Proceedings Before the Administrative Review Board

Respondent appealed the ALJ's decision to the Administrative Review Board ("Board") on August 21, 2014.

The Board affirmed the ALJ's decision in Williams v. Grand Trunk W. R.R. Co., No. 14-092, 2016 WL

7742872 (Admin. Rev. Bd. Dec. 5, 2016) (App. 24-35). 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. Dept of Labor, (“PATH”), 776 F.3d 157 (3d Cir. 2015), had 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. (Id.). But the Board disagreed with and therefore declined to follow PATH. (Id.).² Relying on its discussion of the issue in Bala, the Board instead reiterated its position that a plain reading of the relevant statutory text set forth in 49 U.S.C. § 20109(c)(2), as well as considerations of the legislative history and congressional intent behind the FRSA, leads to the conclusion that absences from work pursuant to a doctor’s instructions are a protected activity under the FRSA for both on and off duty medical conditions. (Id.).

C. Proceedings in The Sixth Circuit Court of Appeals

The Respondent then sought review of the Board’s decision in a Petition For Review before the United States Court of Appeals for the Sixth Circuit. The current Petitioner, Webster Williams, Jr., participated in the Appeal before the Sixth Circuit as an Intervenor. On November 20, 2017, the Sixth Circuit issued its decision overturning the Board’s decision. (App. 1-23). The Sixth Circuit rejected the analysis of the Board

² As the Board noted, it was not bound by the decision of one Circuit Court in litigation arising in another jurisdiction. (citing, inter alia, Brizendine v. Cotter and Co. 4F.3d 457, 462 n.4 (7th Cir. 1993), vacated on other grounds, 511 U.S. 1103 (1994).

and held that the retaliation provisions of 49 U.S.C. § 20109(c)(2), did not entitle an employee to relief from his termination due to absences that resulted from his non-work related anxiety. The Sixth Circuit rejected the Board's determination that the plain language of 49 U.S.C. § 20109(c)(2) does not limit protected activity to absences resulting from on duty injuries, and that the safety purposes of the FRSA 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, are protected from discipline. (Id.). The Sixth Circuit specifically held that the Board's reliance on Russello v. United States, 464 U.S. 16 (1983) was misplaced. In Russello, this Court explained that "where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Id. at 23. Instead, the Sixth Circuit held that 49 U.S.C. § 20109(c)(2) must be read in connection with 49 U.S.C. § 20109(c)(1) and ruled that the "course of employment" limitation with respect to providing medical treatment to injured employees also applied to 49 U.S.C. § 20109(c)(2) and the retaliatory protection provided to employees who are absent from work pursuant to a treatment plan enacted by a treating physician. (App. 1-23).

REASONS FOR GRANTING THE WRIT

The FRSA clearly states that the purpose of the statute is to promote safety in every area of railroad operations and reduce railroad related accidents. The opinion below is inconsistent with the stated purpose of the FRSA and inconsistent with the plain language of the involved provision. The Court below's narrow interpretation of 49 U.S.C. § 20109(c)(2); and the decision that railroad employees are only protected from retaliation when following the treatment plan of a treating doctor for work related conditions, places public safety at risk. A railroad employee who has a medical conditions that makes him/her unsafe in the work place creates every bit as much a risk to his/her co-workers and the public as an employee working with a medical impairment that is due to an on duty injury.

Review is particularly important to rail workers who are now forced to choose between reporting to work to operate a freight train, while impaired, and under the advice of a physician not to work, and marking off legitimately sick, and in so doing subjecting himself/herself to discipline which could lead to his/her termination as an employee. Review is also important to the public at large, who face the risk of trains being operated by employees whose treating doctors have directed them not to work because of a medical condition. The opinion below significantly reduces the safety impact of the FRSA. This unjust result below should be reviewed and reversed.

I. Contrary To Well Established Supreme Court Precedent, The Court Below Erroneously Ignored The Plain Language Of 49 U.S.C. § 20109(c)(2) And Improperly Rewrote The Statute By Inventing Language Limiting The Scope Of 49 U.S.C. § 20109(c)(2) To Only Those Conditions Which Originate With An On Duty Injury

The court below judicially amended 49 U.S.C. § 20109(c)(2) to narrow its retaliation protection only to those employees for following orders or a treatment plan of a treating physician for on the job injuries.³ Section (c) of 49 U.S.C. § 20109 contains two distinct subsections under the label “Prompt medical attention.” Sub section (c)(1), subtitled “Prohibition,” prohibits railroad carriers from denying, delaying, or interfering with medical treatment of an employee “who is injured during the course of employment.” This sub-section also requires railroad carriers to “promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.” 49 U.S.C. § 20109(c)(2), subtitled “Discipline” states, inter alia, that railroad carriers may not discipline or threaten to discipline an employee for “requesting medical or first aid treatment, or following orders or a treatment plan of a treating physician...” without any reference to the origin of the medical condition or required treatment.

³ In so ruling the Court below specifically adopted the flawed reasoning of the Third Circuit in Port Authority Trans-Hudson Corp. v. Sec’y, U.S. Dept of Labor, 776 F.3d 157, 161-162 (3d Cir. 2015).

The court below in its erroneous decision in effect added the “injured during the course of employment” language to 49 U.S.C. § 20109(c)(2), thus limiting the safety related protection from unlawful “discipline”, even though those terms are not set forth or mentioned in that section. Congress did not insert that limitation into the statute and it must be assumed that it did so intentionally. Nevertheless, the court below choose to ignore the plain language of the statute and add language which Congress never included.

In analyzing the statutory construction of a statute, it should be presumed that “Congress says what it means and means what it says.” Conn. Nat’l Bank v. Germain, 503 U.S. 249, 254 (1992). Therefore, a statute must be applied as it is written giving its terms the ordinary meaning that carried when the statute was enacted. Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014). It is also well established that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Russello v. United States, 464 U.S. 16, 23 (1983). See also, Sebelius v. Cloer, 133 S. Ct. 1886 (2013) and Allison Engine Co. Inc. v. United States ex rel. Sanders, 533 U.S. 662 (2008).

Accordingly, under well established law, it is presumed that Congress acted intentionally in its silence regarding whether an employee must be injured on the job in order to obtain the protection of 49 U.S.C. § 20109(c)(2), while making such a requirement explicit in 20109(c)(1). The two provisions, when read together, indicate a clear intent on the part of Congress to

protect both the immediate needs of employees who are injured at work, while also promoting railway safety in protecting employees who need treatment for injuries or illness obtained both at and outside the work place. The court below's ruling where it added the "injured during the course of employment" restriction to 49 U.S.C. § 20109(c)(2) is contrary to the clear intent of Congress. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 842, 843 (1984) ([i]f the intent of Congress is clear, that is the end of the matter.... for the court).

The relevant provision is not ambiguous or contradictory. This is not a case involving the plain or obvious meaning of a phrase or word. This is an instance of a judicial rewriting of a statute that adds words and changes statutory protections. Those are legislative functions and not the province of the judiciary. Further, the decision of the court below is contrary to this Court's decision in Burlington Northern v. White, 548 U.S. 53 (2006) where the issue was whether the anti-retaliation section of Title VII was limited in scope to only protect those expressly covered by adjoining but different substantive provisions. This Court held since the anti-retaliation provision expressly did not possess the "limiting words" present in the substantive provision, its scope of protection was not restricted by the accompanying substantive section. Id. at 62-63. This Court stated:

"No such limiting words appear in the antiretaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read in *pari materia* to mean the same thing. See, e.g.

Pasquantino v. United States, 544 U.S. 349, 355, n. 2, 125 S. Ct. 17, 161 L.Ed.2d 619 (2005); McFarland v. Scott, 512 U.S. 849, 858, 114 S. Ct. 2568, 129 L.Ed.2d 666 (1994); Sullivan v. Everhart, 494 U.S. 83, 92, 110 S. Ct. 960, 108 L.Ed.2d 72 (1990). Rather, the question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, “Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983).

There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-801, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to

prevent harm to individuals based on what they do, *i.e.*, their conduct.

White, 548 U.S. 53, 62-63 (2006).

In this case, just like in White, the words “injured during the course of employment” simply do not exist in the anti-retaliation sub-section at (c)(2). This anti-retaliation provision is not in any way subservient to the status protections found at sub-section (c)(1). The court below got this wrong. As applied to this case, the substantive protections found at (c)(1) convey “status” on a railroad employee that is injured or falls ill at work and mandates that the railroad employer get the employee medical care absent interference. By contrast, the anti-retaliation provision found at (c)(2) protects employees not based on their employment or “during the course of employment” status but instead on their affirmative “conduct” - acting to follow the treatment plan or order of their physician not to work regardless of the origination of their illness or injury.

Here, the language also differs because the provisions address distinct rail safety issues. Sub-section (c)(1) sought to ensure injured employees receive appropriate medical care without delay. In contrast, (c)(2) is anti-retaliatory in the context that it prohibits discipline when employees follow the treatment plan or order of their doctors. Clearly, (c)(2) is not furthering the purpose of (c)(1) since an employee could hardly be disciplined for the conduct of his/her employer in not transporting the employee to a medical facility without delay. Instead, (c)(2) furthers the “primary objective” of section 20109 as a whole - to promote rail safety to every area of rail operations.

In limiting the scope of (c)(2) to on the job injuries, the court below erroneously ignored the plain language of (c)(2) and improperly rewrote the statute by inventing language not in the statute. This is contrary to the decisions of this Court dealing with statutory interpretation. The decision of the court below should be reversed.

II. The Court Below's Narrow Interpretation of 49 U.S.C. § 20109(c)(2) Frustrates Congressional Intent And Places Public Safety At Risk

There is a real and present danger to railroad workers and to the public at large in allowing impaired employees to work. The FRSA was designed to enhance railroad safety, not make the impaired employee choose between working sick and keeping his/her job. The decision of the court below promotes that exact impossible unsafe choice. Since 2007, the following tragic and horrific railroad disasters have occurred which were caused, at least in part, due to human error on the part of a railroad crew member:

- **September 29, 2016** - A New Jersey Transit commuter train derailed in Hoboken, New Jersey killing 1 and injuring 114 due to a medical impairment of the locomotive engineer.

<https://www.nts.gov/investigations/Pages/2016-hoboken-nj.aspx>

- **May 12, 2015** - Amtrak derailment in Philadelphia, Pennsylvania which killed eight (8) people. NTSB officials blamed human error of the engineer for the crash who had no memory of the event but

recalled a “dream-like” memory of hitting the brakes as the train was going to tip-over.

<https://www.nts.gov/investigations/AccidentReports/Pages/RAR1602.aspx>

- **December 1, 2013** - Metro-North derailment in the Bronx, New York killing 4 people and injuring 61 others. The derailment was blamed on the locomotive engineer who came out of a “daze” too late to slow down.

<https://www.nts.gov/investigations/AccidentReports/Pages/RAB1412.aspx>

- **January 6, 2012** - CSX Transportation, Inc. derailment in Westville, Indiana resulting over \$5,000,000.00 in damage caused by 2 crew members missing several slow and stop signals.

<https://www.nts.gov/investigations/AccidentReports/Pages/RAB1303.aspx>

- **September 12, 2008** - A Metrolink train carrying 225 persons collided with a Union Pacific freight train killing 25 people and injuring more than 135 caused the Metrolink engineer missing a stop signal due to distraction.

<https://www.nts.gov/investigations/AccidentReports/Pages/RAR1001.aspx>

These examples are just a few of the tragic incidents impacting both railroad employees and the public related to human factors. In the instant case, Dr. John Bernick testified in straight forward terms that requiring the Petitioner to work while impaired was a “formula for disaster” and as a medical professional he

would be a “fool” to allow Petitioner to operate freight trains in such an impaired state. Dr. Bernick’s opinion related directly to the railroad workplace, not some unrelated off-duty scenario like obtaining medical care from an off-duty car accident.

This case presents the precise type of concern Congress envisioned when drafting 20109(c)(2) and the Board correctly understood and implemented the regulation as it was written. Unfortunately, the court below rejected the sound and logical approach to applicability of 20109(c)(2) as correctly articulated by the Board in this case.

The Board determined that Respondent violated the FRSA when it disciplined Petitioner for following the advice of his treating physician and refraining from work as a locomotive engineer due to medical impairment. The Board properly recognized that sub-section 20109(c)(2)’s protections are triggered not by a factual inquiry as to where the injury or illness originated but instead the crucial factual issue is whether the safety issue caused by the medical impairment occurs at work or impacts the ability to work.

For example, if a medically impaired rail employee derailed a train carrying dangerous chemicals does it really matter if the employee’s illness arose from an “on-duty” or “off-duty” injury or illness? No, it should not. The point of the FRSA and specifically sub-section 20109(c)(2) was to allow medically impaired employees to mark off work without fear of discipline and not subject themselves, their co-workers, and the public to hazard regardless of the origination of that illness - at work or somewhere else. While a medical impairment

may originate from an off duty cause, in no way does that eliminate the on duty hazards posed by forcing medically impaired employees to work in the railroad industry.

The FRSA was created to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. In creating the legislation, Congress repeatedly stated that Federal Railroad administration’s duty should put “safety as the highest priority” at our nation’s railroads. Pub. L. 110-432, 122 Stat. 4848, Title I, Section 101. Interpretation of the involved regulation should further this remedial purpose.

Regrettably, the court below’s misinterpretation of this issue advocates for the opposite position. As this case illustrates, Respondent threatens and assesses discipline to put legitimately impaired employees in the impossible position to either come to work and run trains or face, as was the case here, dismissal.

The impact on public safety of the decision by the court below is profound. Subjecting employees to discipline when they are absent from work as a result of the treatment plan formulated by a doctor is in the words of Dr. Bernick a “formula for disaster” with respect to public safety. The court below’s narrow interpretation of 20109(c)(2) flies in the face of all common sense and runs counter to the very purpose of the FRSA. This case provides this Court with the opportunity to rectify the court below’s narrow reading of 20109(c)(2) and provide the public and railroad workers with the protection required to allow medically impaired railroad workers to mark off without fear of discipline.

CONCLUSION

For all reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit and, ultimately, to vacate and reverse the order below.

Respectfully submitted,

Robert B. Thompson

Counsel of Record

Harrington, Thompson, Acker &
Harrington, Ltd.

One N. LaSalle Street, Suite 3150

Chicago, IL 60602

(312) 332-8811

htah@harringtonlaw.com

Counsel for Petitioner