



## Train Law Blog

Posted at 8:15 PM on September 30, 2013 by Charlie Goetsch

### **ALERT: FRSA Trumps Railroad Attendance Policy Discipline!**

It's official: railroad employees who follow their treating doctor's orders not to work cannot be disciplined for those absences, even if the absence is due to an off-duty medical condition. Why? Because *Bala v. PATH* now is the law of the land, having just been affirmed in full by the highest appeals tribunal in the U.S. Department of Labor, the Administrative Review Board. The ARB's ruling applies to railroads nationwide, and every OSHA Whistleblower office in the country now is required to enforce it.

A year and a half ago, Judge Timlin stunned the railroad industry when she ruled in [Bala v. PATH](#):

the purpose of the FRSA is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents. . . . in enacting the FRSA, Congress stated that 'employees should not be forced to choose between their lives and their livelihoods.' . . . After reviewing the FRSA's text and purpose, I find it clear that Section 20109(c)(2) exists not only to encourage employees suffering on-the-job injuries to report unsafe conditions to their superiors without fear of reprisal, but also to discourage sick or injured workers from returning to duty while their impairment poses a threat to the safety of railroad passengers and fellow employees. I thus find that Section 20109(c)(2) applies equally to treatment plans arising out of on-duty and off-duty injuries.

In other words, safety trumps discipline. PATH and the American Association of Railroads disagreed, and filed an appeal arguing that discipline trumps safety. [I filed a brief endorsing Judge Timlin's interpretation](#) of FRSA Subsection (c)(2), and the United States Solicitor of Labor weighed in with an [amicus brief](#) confirming that FRSA Section (c)(2) protects ALL medically impaired railroad employees who follow their doctor's orders not to work, even workers who are injured off the job or have a non-work related medical condition.

In response, [the ARB's Decision](#) fully endorses Judge Timlin's interpretation, holding: "Subsection (c)(2) of 49 U.S.C. 20109 affords railroad employees protection from discipline when following treating physicians' orders that stem from off-duty injuries." The ARB stressed that both the plain language of Subsection (c)(2) and the FRSA's legislative history mandates that conclusion. And the ARB emphatically rejected the AAR's argument that such an application of (c)(2) will interfere with the ability of railroads to discipline employees:

nothing in Section 20109 precludes an employer from disciplining an employee for excessive absences. The only limitation set out in (c)(2) is that an employee cannot be disciplined because he/she is complying with the orders of treatment plan of a treating physician. . . . The express statutory language set out in Sections (c)(1) and (2), as well as the legislative history reflecting Congress's broad concern over safety in the railroad industry and protection of injured railroad workers, makes clear that Congress did not intend to foreclose from protection railroad workers who "follow orders or a treatment plan of a treating physician" even when the injury they are being treated for occurred off-duty.

The bottom line is, if an employee notifies a railroad his treating doctor has ordered him not to work, the railroad cannot use that absence for disciplinary purposes. And it doesn't matter if the absence is due to sickness, an off-duty injury, or an on-duty injury. From now on, any railroad that disciplines employees for such absences will pay a steep price in FRSA damages and attorney fees. For all the briefs and decisions regarding Subsection (c), [click here](#). For more information on all the elements of the Federal Rail Safety Act, go to [Rail Whistleblowers Library](#).

**Comments (0)** Read through and enter the discussion with the form at the end  
Charles Goetsch Law Offices LLC  
405 Orange St.  
New Haven, CT, 06511  
Phone:  
203-672-1370