Santiago, dated November 9, 2009 ("Summary Judgment Order"). In brief, this Court held that changing the classification of an injury occurring at the workplace to a non-occupational injury may rise to the level of "interference with medical treatment," but found that there were genuine issues of material fact in dispute as to whether (1) Metro-North's reclassification would deter a similarly situated employee from reporting a safety concern or a work-related injury and (2) the decision to change the classification was motivated or contributed to by the Complainant's protected activity. See Summary Judgment Order at 4-6. A hearing was held from November 17, 2009 to November 19, 2009 to resolve those disputed facts.

II. SUMMARY OF THE ARGUMENT

This case arises under the 2007 amendments to the employee protections of the Federal Railroad Safety Act, 49 U.S.C. § 20109 ("the FRSA" or "FRSA"). In this action we advance an interpretation of 49 U.S.C. § 20109(a)(4) that is intended to carry out the will of Congress, namely the improvement of rail safety through the full and accurate collection of data about rail accidents, injuries, and illnesses. To effectuate this Congressional goal, we read 49 U.S.C. § 20109(a)(4) liberally to give broad meaning to the words "in any other way discriminate" contained in section (a)(4); consistent with the Congressional purpose of 49 U.S.C. § 20109(a)(4), these words should be construed to encompass behavior, like Metro-North's conduct here—reclassifying Mr. Santiago's occupational injury as non-occupational—which deters employees from reporting work-related personal injuries and manipulates safety statistics.

Metro-North's actions go precisely where Congress prohibited the railroads from going: between the employee injured at work and his or her treating doctor. The reclassification by the railroad of occupational injuries as non-occupational, without medical basis, and in

contravention of an employee's treating physician, is a form of intimidation and harassment recognized by Congress.

Under this reading of the statute, not only do Metro-North's actions constitute a violation of the whistleblower protection under FRSA; the severity of those actions makes punitive damages appropriate. The overwhelming evidence at trial shows that Metro-North's medical department did more than substitute the judgment of its doctor over that of Mr. Santiago's treating physician; worse still, Metro-North consistently imposed the willfully uninformed decisions of an unsupervised physician assistant over the medically sound treatment of a licensed chiropractor. It did so knowing full well that (1) Mr. Santiago remained injured and in need of further treatment and (2) that its decision to reclassify would immediately end its financial obligation to cover any continued treatment *but without* knowledge of whether any other source would continue to support his treatment.

III. ARGUMENT

A. THE FRSA DIVESTS RAIL CARRIERS OF THE AUTHORITY TO RECLASSIFY AN OCCUPATIONAL INJURY AS NON-OCCUPATIONAL IN CONTRAVENTION OF THE TREATING PHYSICIAN'S CONCLUSION TO THE CONTRARY.

The 2007 and 2008 amendments to the FRSA should be read as a unified remedial scheme addressing the chronic underreporting of workplace accidents occurring on the railroad. The text and legislative history, liberally construed, see generally Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), evince a broad prohibition of railroad policies and procedures that subtly and overtly interfere with rail employees' right to report work-related personal injuries and illnesses.[3]

[3] In relevant part, the 2007 amendments to section (a) of the FRSA also (1) expanded FRSA liability to contractors, subcontractors and officers and employees of the rail carrier; and (2) expanded the general employee protections to include, inter alia: "provid[ing] information . . . or otherwise assist[ing] in any investigation [of certain conduct]" by government regulatory or law enforcement agencies, a Member of Congress or a person with supervisory authority; "refus[ing] to violate . . . a federal law, rule, or regulation relating to railroad safety or security;" "cooperat[ing] with

Critically, our interpretation of section (a)(4) is informed by the language and legislative history of 49 U.S.C. § 20109(c). In section (a)(4) Congress framed the contours of a new employee protection—the right to report an injury—in general terms. And through section (c) Congress gave that protection further meaning by prohibiting specific railroad conduct legislatively found[4] to discourage the exercise of that right. Section (c)(1) illuminates what Congress meant by the words "in any other way discriminate" included in section (a)(4). This interpretation of 49 U.S.C. § 20109(a)(4) fully effectuates the Congressional purpose of the amended legislation, and is entitled to appropriate deference in accordance with Skidmore v. Swift & Co., 323 U.S. 134 (1944).

1. In order to give full force and effect to the purpose of the FRSA, the right to report an injury provided in 49 U.S.C. § 20109(a)(4) must be read to protect the full and accurate reporting of a work-related personal injury or illness including the number of lost work days.

Title 49 U.S.C. § 20109(a)(4) provides that (emphasis added):

> [a] railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, 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. . . . to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee[.]

On its face, 49 U.S.C. § 20109(a)(4) evinces a very specific purpose: to ensure the accurate reporting of workplace accident and illness statistics—the incidence of those injuries and the

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a safety or security investigation by" or "furnishing [certain] information" to the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; and "to accurately report hours on duty . . . ."

[4] We assert that section (c) provides guidance in the interpretation of section (a)(4). Our construction of section (a)(4), which we are charged with enforcing, is permissibly enhanced by the statutory provision in section (c). For example, both courts and federal regulatory agencies have interpreted enforcement provisions as providing an insight into the legislative intent. See, e.g., Whirlpool, 445 U.S. 1; 29 U.S.C.654 (a)(1).

severity thereof—to government regulators. More broadly speaking, the premise of section (a)(4) is to promote safety on the railroad. All of the rights guaranteed in sub-section (a) share this goal. To accomplish this goal, the legislation's remedial orientation is prophylactic in nature. Each sub-section in 49 U.S.C. § 20109(a) aims to keep the railway safe by protecting a specific communication between employees and investigative agencies/individuals in the hope that these protections will foster the collection and categorization of safety data in order to (1) understand how and why accidents occur and thus, (2) to identify and reduce risks before accidents happen. Like many other remedial safety statutes, the FRSA recognizes the importance of employee cooperation in the achievement of the government's safety agenda. In the same way that protecting workers' right to cooperate in a safety investigation helps the government monitor the railroad's compliance with federal safety laws, protecting rail workers' right to report a work-related injury helps the government enforce a railroad's FRA (Federal Railroad Administration) reporting obligations.

Significantly, the reporting obligations 49 U.S.C. § 20109(a)(4) reinforces require not only that the railroad report to the FRA the occurrence of an accident, but also the severity of each injury resulting there from (i.e. number of lost work days).[5] The text of 49 U.S.C. § 20109(a)(4) mirrors the scope of a railroad's reporting obligations; 49 U.S.C. § 20109(a)(4) is written in terms of "personal injur[ies]" and "illness[es]." In part, Congress was interested in

[5] By federal law, railroads are required to file a monthly report with the Secretary of Transportation, under oath, listing "all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier's operations during the month." See Written Statement of Joseph H. Boardman before the Committee on Transportation and Infrastructure, U.S. House of Representatives (Oct. 25, 2007) at 4 (citing 49 U.S.C. 20901(a)). The carrier is required to describe the nature, cause, and circumstances of each accident or incident included in the report. Id. Likewise, the FRA's accident reporting regulations require that each railroad submit monthly reports to the FRA summarizing collisions, derailments, and certain other accidents and incidents involving damages above a periodically revised dollar threshold, certain injuries to passengers and other persons, as well as certain occupational injuries to and illnesses of railroad employees. Id. (citing 49 C.F.R. Part 225). The FRA reporting requirements concerning an employee injury are triggered, generally, when an event involving the operation of the railroad results in an employee dying, requiring medical treatment (beyond first aid), missing at least one day of work, being placed on restricted work activity or receiving a job transfer, or losing consciousness due to the injury. Id.

accident statistics. But this language reveals a concern that goes beyond the mere occurrence of a rail accident. This language emphasizes, and the right to report must include, the *results* of the accident. That this is what 49 U.S.C. § 20109(a)(4) means is underscored in the text of 49 U.S.C. § 20109(c): "prompt medical attention." Through 49 U.S.C. § 20109(c), Congress enumerated specific prohibitions of railroad conduct that discouraged rail employees from *reporting* injuries and in turn compromised safety.

2. Title 49 U.S.C. § 20109(c) effectuates 49 U.S.C. § 20109(a)(4) by precluding the railroad from overriding the reasonable medical decisions of the employee's treating physician.

In section 49 U.S.C. § 20109(c), Congress identified —and strictly prohibited—railroad conduct that undermines the full protection given to rail employees in 49 U.S.C. 20109(a)(4).

Specifically, under section 20109(c)(1) (emphasis added):

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

Likewise, section 20109(c)(2) provides that (emphasis added):

> [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 treatment plan of a treating physician**, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Rail Administration medical standards for fitness of duty or, if there are no pertinent Federal Rail Administration standards, a carrier's medical standards for fitness of duty. . . .

Reading these two provisions together, this Court concluded, that section (c) was more than just a first aid provision; as a whole, section (c) "protect[s] employees from interference with medical

care or the treatment plan of the treating physician during the course of treatment and recovery from a work injury." Summary Judgment Order at 5.

The statute precludes the railroad from directing where or when an injured worker will get medical care in the aftermath of a work-related injury. The statute is entitled "*prompt* medical attention" and expressly precludes any "delay, denial or interference" in medical or first aid treatment. And while the statute imposes on the railroad an affirmative duty to transport injured workers—if the injured employee so chooses—to get medical care, it leaves no discretion to the railroad as to whether the transportation would be to a doctor or to the emergency room or whether the transportation would be to one hospital as opposed to another. The statute mandates the *nearest* hospital where the employee can receive safe and appropriate medical care.

Further, the statute precludes the railroad from dictating the nature or extent of an injured employee's medical treatment. Generally, the railroad is strictly prohibited from "interfer[ing]" with an employee's medical treatment without regard for the cause or motive of the railroad's actions. More specifically, the orders and/or treatment plan of an employee's treating physician are not subject to question vis-à-vis disciplinary action or discharge. In other words, the statute presumes that the treating physician's orders and/or treatment plan are correct and conclusive. Under this statute, then, it is no defense that the treating physician was wrong in the eyes of the railroad's medical staff.[6]

B. THE LEGISLATIVE HISTORY OF THE FRSA SUPPORTS THIS CONSTRUCTION OF THE STATUTE.

A close examination of the legislative history surrounding the enactment of the recent FRSA amendments demonstrates that Congress intended this legislation to isolate important

[6] Significantly, the statute contemplates one potential area of disagreement between the railroad and the employee's treating physician. In relevant part, section (c)(2) provides that a railroad would not be held to violate the statute for refusing to return an employee to work, despite the opinion of the treating physician that the employee was ready for work.

decisions about injured employees' medical care in the hands of independent medical professionals or conversely, to remove any power of the railroad to use employees' medical care as an opportunity to skew safety statistics. The recent amendments to the FRSA reflect Congressional findings of widespread harassment and intimidation of injured rail workers throughout the rail industry. For at least five years before the 2007 amendments to the FRSA, both the House and the Senate examined the inadequacy of existing whistleblower protections in the FRSA and the punitive atmosphere surrounding medical care and injuries in the railroad.[7] The most recent hearings on the subject grew out of an in-depth review of railroad employee injury reporting practices undertaken by the House Committee on Transportation and Infrastructure's Oversight and Investigations staff. Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the Committee on Transportation and Infrastructure, 110th Congr. (2007) ("Impact Hearing"); see also Summary of the Subject Matter, Oversight and Investigations Majority Staff of the House Committee on Transportation and Infrastructure, 110th Congr. (Oct. 22, 2007) ("House Report"). In these hearings, Congress examined rail worker allegations that railroad safety management programs deterred workers from reporting injuries and created barriers to these workers' medical care.

Overall, the legislative record is replete with examples of abusive practices including: (1) counseling employees not to file injury reports in the first place; (2) finding employees exclusively at fault for their injuries and administering discipline; and (3) subjecting employees who have reported injury accidents to increased performance monitoring, performance testing,

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[7] Railroad Safety: Hearing Before the Sub-Committee on Surface Transportation and Merchant Marine of the Committee on Commerce, Science, and Transportation, 107th Congr. 61 (2002) (S. Hrg. 107-1108); Domestic Passenger and Freight Rail Security: Hearing Before the Committee on Commerce, Science and Transportation, 109th Congress, 2005 (S. Hrg. 109-462); and Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the Committee on Transportation and Infrastructure, 110th Congr. (2007) (H. Hrg. 110-84).

and often followed by subsequent disciplinary action, including termination. House Report at 3. Congress was likewise aware of concerns expressed by the Administrator of the Federal Railroad Administration, namely that: "[h]arassment and intimidation calculated to avoid reporting of employee on-duty injuries create barriers to proper medical care. . . ." See Impact Hearing (written statement of Joseph H. Boardman, Administrator, Federal Railroad Administration) at 139-159. Congress shared Administrator Boardman's concerns: "It is not right for people on the job to be told[,] you shouldn't report this injury; maybe you can just sit here in the health room, maybe you just need an aspirin or maybe you just need a little time, and don't put this on the report because then it becomes an accident, and that looks bad for the railroad." See Impact Hearing (testimony of Hon. James Oberstar, Chairman, House Committee on Transportation and Infrastructure) at 1-2.

Congress had before it myriad reports of harassment that created barriers to medical treatment. The legislative record contains examples of supervisors (1) accompanying injured employees on their medical appointments to try to influence the type of treatment injured employees received, often having private conversations with treating doctors; (2) attempting to send employees to company physicians instead of allowing a choice of their own treatment providers; (3) prohibiting an injured employee from going to the hospital; and (4) generally putting up barriers to impede prompt and appropriate medical treatment. House Report at 5. Notably, Congress also had before it several government reports as well as the legislative history of statutes passed by the states of Minnesota and Illinois, two states whose "concern[for] the large number of reports of rail carriers denying medical treatment or interfering with medical

treatment of injured employees" led them to pass statutes outlawing the delay, denial or interference with medical treatment.[8] House Report at 9.

Critically, on this record, Congress concluded that what motivated this culture of harassment and intimidation of employees is the practical significance reporting accidents and injuries carries in the rail industry. As the above testimony from Chairman Oberstar reveals, reporting triggers government scrutiny and regulation or generally "looks bad for the railroad." See Impact Hearing (testimony of Hon. James Oberstar, Chairman) at 2. Congress also recognized that supervisory compensation systems contributed to these abusive practices, noting that management compensation is often based upon performance bonuses, at least in part, based on reportable injury statistics. See House Report at 6. Likewise, reporting could trigger significant financial obligations due to another federal statute, the Federal Employers' Liability Act ("FELA"). See Impact Hearing (testimony of Hon. James Oberstar, Chairman) at 1; see also Impact Hearing (written statement of Joseph Boardman).

More importantly, Congress concluded that the net effect of these abusive practices and procedures was to deter employees' right to report a work-related personal injury. At the very least, these management programs had "unintended consequences," namely that employees "generally perceive intimidation to the extent that those who are injured in rail incidents are often afraid to report their injuries or seek medical attention for fear of being terminated or severely disciplined." House Report at 3 (emphasis given).

The 2007 and 2008 amendments are a legislative response to this abuse. See House Report at 9 ("[The two amendments] are intended to address the above problems."). Through the amendments, Congress intended to ensure appropriate medical treatment for injured employees

[8] See generally, Ill. Public Act 094-0318; Minn. Stat. § 609.849(a)(1); FRA Draft Report on CSX Transportation Harassment and Intimidation Investigation, p. 4, Oct. 17, 2007; "FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents," GAO/RCED-89-109 (Apr. 1989).

as a remedy for the underreporting of rail accidents, and the resulting injuries and illnesses. To *the government* the significance of reporting cannot be understated. According to Congressional and FRA reports leading to the amendment of 49 U.S.C. § 20109, the FRA uses its railroad safety databases as the basis for its regulatory safety planning and reporting. Because of the link between the FRA safety databases and the FRA's regulatory actions, Congress was concerned that underreporting of accidents and injuries could have significant safety repercussions. As the 2007 Congressional Report noted, "[t]he key to any safety and regulatory program is the ability to collect and categorize all incident and accident data so that safety problem areas are fully understood, identified, and addressed." House Report at 1. Underreporting "makes accident statistics look better than they really are, [and] it denies the public, it denies regulators, and it denies the Congress a full understanding of the nature and extent of safety problems in the rail industry . . . ." Impact Hearing (testimony of Hon. James Oberstar, Chairman) at 1.

Though passed roughly a year apart, this legislative history shows that the 2007 and 2008 amendments were designed as a single remedial scheme containing new rights and remedies. See House Report at 9 ("By enacting both of these provisions a uniform national standard will be created for the protection of injured workers and allow them access to immediate medical attention free from railroad interference."). Broadly speaking, the 2007 amendments to section (a)—particularly section (a)(4)—acknowledge and reinforce the connection between rail safety and the full and accurate reporting of employee injuries; the promulgation of section (c) a year later addresses prohibitions against specific railroad conduct recognized as a remaining obstacle to the protections granted in 2007. More specifically, section (c) is a legislative finding that a railroad's reversal of a physician's treatment plan effectively deprives the employee of the right

to report a work-related injury (most importantly the number of lost work days or the full scope of the injury) to the Secretary of Transportation.

Cumulatively the amendments were meant to convey a message to the railroads: stop discriminat[ing] against workers who report safety problems. The message was not whispered; it was spoken loudly and clearly: Congress underscored its intent to create a real deterrent and not just make violations a cost of doing business, by increasing the availability of punitive damages exponentially, raising the cap from $20,000 to $250,000. See 49 U.S.C. § 20109(c) (1994); 49 U.S.C. § 20109(d)(3) (2007).

C. METRO NORTH UNLAWFULLY DISCRIMINATED AGAINST MR. SANTIAGO IN VIOLATION OF THE FRSA WHEN IT CHANGED HIS INJURY CLASSIFICATION FROM OCCUPATIONAL TO NON-OCCUPATIONAL IN CONTRAVENTION OF MR. SANTIAGO'S TREATING PHYSICIAN.

As this Court noted in its Summary Judgment Order, "neither party disputes that Complainant engaged in protected activity under the FRSA when [Mr. Santiago] reported his work injury, or that Metro North was aware of the protected activity."[9] Summary Judgment Order at 3. The disputed issues for trial were "whether Metro North's action in changing the status of [Mr. Santiago's] injury from occupational to non-occupational is an unfavorable personnel action under the FRSA and whether the protected activity was a contributing factor in any such unfavorable personnel action." Id. On the facts presented at trial, there can be but one conclusion: the Court should answer both of these questions in the affirmative.

OHS is staffed primarily by two physician assistants who make important decisions about employees' medical care with little or no supervision from a licensed doctor and with little or no

[9] The whistleblower protection provision of the FRSA provides that actions under the statute are governed by the analytical framework and burdens of proof applied under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b).