

# International Brotherhood of Electrical Workers



DALE E. DOYLE  
General Chairman

RICHARD J. HEYLAND  
Vice General Chairman

999 Westview Drive, Suite 5  
Hastings, MN 55033  
651-438-2927 • Fax 651-480-1731  
usibsystem16@earthlink.net  
S<sup>®</sup>

MARK S. KLECKA  
Asst. General Chairman

JEFF BURK  
Asst. General Chairman

DARRELL PATTERSON  
Asst. General Chairman

May 9, 2014

## FIRST QUARTER REPORT, 2014 SYSTEM COUNCIL NO 16 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Brothers and Sisters:

Finally, spring has arrived. This winter was brutal and our members have reported excessive overtime hours as a result of the winter conditions.

We have completed arrangements for the 2015 System Council Convention to be held in Bloomington, Minnesota the week of July 5, 2014 at the Radisson Blue Hotel at the Mall of America.

System Council Secretary Darlene Wood announced her retirement effective May 15, 2014. Darlene has been with the Council since 1993 and devoted to the operation of the Council. We wish her the best for a long, happy and healthy retirement in Florida.

There was recently a senseless act of workplace violence on the BNSF property at Klamath Falls, Oregon. The victim was previously an Electrician at Alliance, Nebraska prior to promotion to an exempt and a member of this organization. Our thoughts and prayers are with the family.

As you will find in this report, Railroad business appears to be gaining momentum as some Carriers are increasing personnel according to the information we are receiving.

The first quarter the council staff has conducted business or obtained information relative to the following Carriers under the jurisdiction of this office:

*Our Business – Representation & Service*

# *International Brotherhood of Electrical Workers*

First Quarter Report  
May 9, 2014  
Page Two

## **Belt Railway Company of Chicago:**

One (1) discipline issue was reported which was handled by the assigned Local.

## **CN/CCP/DMIR/DWP/EIE/IC and WC:**

We received approval for adoption of the revised Section A (Mechanical/Engineering Department) Agreement. The Agreement has been signed and is being distributed to the membership by the Carrier.

We understand there have been a number of new members hired on the property. We are scheduled to meet with representatives of the Carrier in May to discuss manpower issues.

## **CP/Soo:**

We have completed the codification and received approval for the updating of the Communication Department Agreement. The Codified Agreement has been signed and distributed to local officers. We continue to work to codify/update the Mechanical/Engineering Department Labor Agreement.

There have been a couple of issues with the Carrier and our members which are currently being investigated. A Board discussion has been rendered on a discipline case. The member and Local have been notified of the decision.

A few employees have been hired this past quarter.

## **Gary Railroad Company:**

No news to report.

# *International Brotherhood of Electrical Workers*

First Quarter Report  
May 9, 2014  
Page Three

## **Lake Superior and Ishpeming Company:**

We received a Notice to Contract on the property, resulting from the winter weather conditions. A building was lost as well as some track equipment due to a fire.

## **NICTD:**

Preliminary Section Six discussions have been conducted with the membership, as well as other Organizations (BofRC and BMWED) in preparation for this upcoming round of bargaining. I wish to personally thank Local Representative James William for offering to assist Assistant General Chairman Klecka.

We continue to work on the codification and upgrading of the Labor Agreement on the property.

## **Paducah and Louisville Railway Company:**

We met with the Carrier in March concerning our outstanding Section Six notices. We were advised that one (1) other Organization on the property reached a tentative accord which was placed before the membership for ratification.

## **Montana Rail Link:**

There has been an inquiry at this office that indicates the Carrier is looking for Mechanical Department Electricians.

## **BNSF Railway Company:**

We continue to receive reports of increasing business with more freight to be hauled and trains waiting for power to pull the freight.

# *International Brotherhood of Electrical Workers*

First Quarter Report  
May 9, 2014  
Page Four

We have seen a number of new members on the New Hire/Termination reports, Apprentice Time Credit Applications coming through the office, as well as requests for upgrades of Apprentices. There are locomotives also being contracted for repairs due to the need for power.

We continue to work toward the execution of the Level Agreement as well as answers to the questions our members have submitted.

There have been a number of contracting notices received by this office, which have been forwarded to the Locals involved.

We also continue to see a number of discipline investigations which I cannot over emphasize the importance of our members complying with company rules.

We have also seen a number of managerial changes in all departments, and a report of additional Responders being added and considered for additional locations.

Attached to this report is the first quarter travel and financial reports. Articles of interest are posted regularly on the Council website at [ibewsc16.org](http://ibewsc16.org).

Respectfully and fraternally submitted,

Dale E. Doyle  
General Chairman/Secretary-Treasurer

DED/aj

Attachments

# *International Brotherhood of Electrical Workers*

## **Dale Doyle's Travel First Quarter 2014:**

February 11, 2014 – St. Paul, Minnesota – Local 886 meeting

February 12, 2014 – Minneapolis, Minnesota – Meeting with Phil Qually – UTU

February 18 through 21<sup>st</sup>, 2014 – Barstow, California – Local 1023 meeting – Investigations

February 27, 2014 – Duluth, Minnesota – Local 366 meeting – Visit Allouez Taconite Facility

March 6<sup>th</sup> and 7<sup>th</sup>, 2014 – Paducah, Kentucky – P&L Section Six meeting

March 14, 2014 - Minneapolis, Minnesota – CP/Soo claims conference

March 19, 2014 – Fort Worth, Texas – Level Agreement meeting

March 25<sup>th</sup> through 27<sup>th</sup>, 2014 – Kansas City, Missouri – Local 866 visit – BNSF General Chairmen's Association meeting

## **Rick Heyland's Travel First Quarter 2014:**

None

## **Mark Klecka's Travel First Quarter 2014:**

February 6<sup>th</sup> and 7<sup>th</sup>, 2014 – Michigan City, Indiana – Labor Agreement update – NICTD

February 10<sup>th</sup> and 11<sup>th</sup>, 2014 – Kansas City, Kansas – Telecom South Foreman meeting

February 24<sup>th</sup> through 26<sup>th</sup>, 2014 – Michigan City, Indiana – Labor Agreement update – NICTD – Local 2355 meeting

March 18<sup>th</sup> through 20<sup>th</sup>, 2014 – Lincoln, Nebraska – Havelock Labor/ Management meeting

March 24, 2014 – Spokane, Washington – Local 1155 meeting

March 25<sup>th</sup> through 27<sup>th</sup>, 2014 – Missoula, Montana – Investigation – Montana Rail Link site visit

# *International Brotherhood of Electrical Workers*

## **Jeff Burk's Travel First Quarter 2014:**

January 28<sup>th</sup> and 29<sup>th</sup>, 2014 – Fort Worth, Texas – BNSF SACP meeting

February 10<sup>th</sup> and 11<sup>th</sup>, 2014 – Kansas City, Missouri – BNSF Telcom Central Foreman's meeting

March 19, 2014 – Fort Worth, Texas – BNSF Level Agreement

March 26, 2014 – Kansas City, Missouri – BNSF GCA meeting

## **Darrell Patterson's Travel First Quarter 2014**

January 9, 2014 – Kansas City, Kansas – Local 886 meeting

January 15, 2014 – Topeka, Kansas – Local 959 meeting

March 10<sup>th</sup> through 13<sup>th</sup>, 2014 – Overland Park, Kansas – BNSF Level Agreement

March 13, 2014 – Kansas City, Kansas – Local 866 meeting

March 19<sup>th</sup> and 20<sup>th</sup>, 2014 – Fort Worth, Texas – Level Agreement

March 25, 2014 – Kansas City, Kansas – Argentine Shop Extension

March 26, 2014 – North Kansas City, Missouri – BNSF General Chairmen's Association meeting

# International Brotherhood of Electrical Workers



DALE E. DOYLE  
General Chairman

RICHARD J. HEYLAND  
Vice General Chairman

999 Westview Drive, Suite 5  
Hastings, MN 55033  
651-438-2927 • Fax 651-480-1731  
usibsystem16@earthlink.net  


MARK S. KLECKA  
Asst. General Chairman

JEFF BURK  
Asst. General Chairman

DARRELL PATTERSON  
Asst. General Chairman

August 14, 2014

## **SECOND QUARTER REPORT, 2014 SYSTEM COUNCIL NO 16 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**

Brothers and Sisters:

Most Locals have conducted elections this past quarter and attached to this report is a form used by the International for reporting officers for the IBEW Directory. It would be a great help if all locals would complete this form and return it to this office to update our files. Also, if you desire, please provide a legible e-mail address. If there are new officers in the Local, the Local or direct Carrier reporting officers should also be advised of the Local's designated representatives.

The Railroad Department conference is scheduled for October 15 and 16, 2014 at the Pointe Hilton Squaw Peak Resort in Phoenix, Arizona. All railroad locals were advised by a letter dated June 11, 2014 from President Hill.

Recently, the Director of the Railroad Department, Bill Bohne, issued an email to all locals with members who are employees on rail carriers who participate in national handling. The letter requested ideas and suggestions for inclusion in our Section 6 notices. Those ideas and suggestions are to be submitted to this office.

This office is planning for the council convention next summer, and at this time we are looking at a presentation for DOL reporting requirements and also railroad retirement tax requirements. If anyone else has any other suggestions for specific training, please submit to this office for consideration.

This past quarter the council staff has conducted business or obtained information relative to the following carrier's under the jurisdiction of this office:

*Our Business – Representation & Service*

# *International Brotherhood of Electrical Workers*

Second Quarter Report  
August 14, 2014  
Page Two

## **Belt Railway Company of Chicago:**

No news to report.

## **CN/CCP/DMIR/DWP/EIE/IC and WC:**

We are in the initial stages of handling three claims on the property for rules violations.

The Carrier has also served a number of contracting notices. Local representatives have been contacted concerning the notices.

We have also recently been advised that an important arbitration hearing is scheduled for late October concerning PTC work involving the CN/IC, & the B of RS and this office.

I would also like to note that Local 881 Chairman, Charles Cox, was highlighted in the CN Employee Magazine "CN People" for his efforts to help steer inner-city boys aged six and up away from street life and towards something positive. I wish to also acknowledge Brother Cox's efforts and thank him for his service to not only the youth programs in Memphis, but to the Carrier and this Organization. A copy of the article is attached.

## **CP/Soo:**

The St. Paul Yard was affected by the recent flooding of the Mississippi river, however due to precautions, there were no emergency force reductions.

There have been several employees hired and positions that need to be filed. This office met with Carrier Labor Relations in April for two days to discuss the updating and amending of the Mechanical Department Agreement.



# *International Brotherhood of Electrical Workers*

Second Quarter Report  
August 14, 2014  
Page Three

## **Gary Railroad Company:**

No news to report.

## **Lake Superior and Ishpeming Company:**

No news to report.

## **NICTD:**

Section Six notices have been served on the Carrier. The work on the updating and codification of the Labor Agreement on the property has been completed and the final draft is being reviewed for accuracy. Once completed, we will seek necessary approvals.

## **Paducah and Louisville Railway Company:**

As of this writing, there has been no significant movement in the Section Six notices.

## **Montana Rail Link:**

No news to report.

## **BNSF Railway Company:**

The parties involved in the Level Agreement continue to work towards execution in September.

# *International Brotherhood of Electrical Workers*

Second Quarter Report  
August 14, 2014  
Page Four

We continue to receive investigation notices and although this may be redundant, I cannot over emphasize the importance of rules compliance by our members.

Recently, there have been members charged for rules violations as a result of the drive cams installed in company vehicles. These charges have resulted in the dismissal of one of our members.

We recently executed an agreement for the establishment of seniority for employees hired on the same date which is applicable to all agreements on the property. The locals have been provided a copy for their information and files.

We continue to receive contracting notices in all departments which are distributed to the locals involved as soon as possible.

The Carrier recently bulletined several Responder positions at several new locations and as of this writing, we have not been notified of who has been awarded the positions.

There are a number of issues the Council staff are working on at this time including two letters of understanding and resolution of several claims.

Attached to this report is the second quarter travel and financial reports. Articles of interest are posted regularly on the Council website at [ibewsc16.org](http://ibewsc16.org).

Respectfully and fraternally submitted,

Dale E. Doyle  
General Chairman/Secretary-Treasurer

DED/aj

Attachments

# *International Brotherhood of Electrical Workers*

## **Dale Doyle's Travel Second Quarter 2014:**

April 3, 2014 - St. Paul, Minnesota - Soo Line General Chairmen's Meeting

April 16-17, 2014 - Minneapolis, Minnesota - Soo Line Labor Relations

April 29-30 - Memphis, Tennessee - Local 778/881

May 1, 2014 - Memphis, Tennessee - Local 778/881

May 6, 2014 - Minneapolis, Minnesota - Meeting with BNSF GCA President Bruce Glover

May 21-22, 2014 - Chicago, Illinois - Local 757/CN Meeting/Local 533 Shop Visit

May 26-30, 2014 - Red Lodge, Montana - 8<sup>th</sup> District Progress Meeting

June 3, 2014 - St. Paul, Minnesota - Local 886 Meeting

June 5, 2014 - Minneapolis, Minnesota - Local 506 Meeting

June 9-10, 2014 - Kansas City, Missouri - BNSF Technical Training Center

June 18, 2014 - Superior, Wisconsin - Local 1559 Investigation

June 19, 2014 - Brainerd, Minnesota - Local 783 Meeting

## **Rick Heyland's Travel Second Quarter 2014:**

April 23-25, 2014 - Lincoln, Nebraska - Investigation

May 12-14, 2014 - Hastings, Minnesota - Office Staff Meeting

## **Mark Klecka's Travel Second Quarter 2014:**

April 9-11, 2014 - Hastings, Minnesota - Office Duties

May 12-14, 2014 - Hastings, Minnesota - Office Staff Meeting

# *International Brotherhood of Electrical Workers*

May 21-22, 2014 - Chicago, Illinois - CN LR and 14<sup>th</sup> Suburban Services

June 17-18, 2014 - Lincoln/Havelock, Nebraska - Officer Meeting - State Inspector Meeting

June 24-26, 2014 - Branson, Missouri - 11<sup>th</sup> District Progress Meeting

## **Jeff Burk's Travel Second Quarter 2014:**

April 8, 2014 - Temple, Texas - Local 418 Meeting

April 9, 2014 - Galveston, Texas - BNSF Mechanical Investigation

April 30, 2014 - May 1, 2014 - Fort Worth, Texas - BNSF SACP Meetings

May 12-16, 2014 - Hastings, Minnesota - Office Staff Meeting

June 24-26, 2014 - Branson, Missouri - 11<sup>th</sup> District Progress Meeting

## **Darrell Patterson's Travel Second Quarter 2014**

April 17, 2014 - Topeka, Kansas - Investigation

April 22-24, 2014 - Overland Park, Kansas - TTC Level Agreement Testing

May 8, 2014 - Kansas City - Kansas - Local 866 Meeting

May 9, 2014 - Kansas City - Missouri - Railroad Retirement Conference

May 12-15, 2014 - Hastings, Minnesota - Office Staff Meeting

May 21, 2014 - Topeka, Kansas - Local 959 Meeting

June 10, 2014 - Overland Park, Kansas - TTC Level Agreement Testing

June 12, 2014 - Kansas City, Kansas - Local 866 Meeting

June 17-21, 2014 - Albuquerque, New Mexico - 7<sup>th</sup> District Progress Meeting

# International Brotherhood of Electrical Workers



DALE E. DOYLE  
General Chairman

RICHARD J. HEYLAND  
Vice General Chairman

999 Westview Drive, Suite 5  
Hastings, MN 55033  
651-438-2927 • Fax 651-480-1731  
usibsystem16@earthlink.net

MARK S. KLECKA  
Asst. General Chairman

JEFF BURK  
Asst. General Chairman

DARRELL PATTERSON  
Asst. General Chairman

November 4, 2014

## THIRD QUARTER REPORT, 2014 SYSTEM COUNCIL NO 16 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Brothers and Sisters:

Vice Chairman Richard Heyland recently underwent surgery and is recovering successfully at home. Cards may be sent to:

3030 – 140<sup>th</sup> Street  
Wever, IA 52658

Section Six Notices are being prepared soon for serving sometime after November 1, 2014. I wish to sincerely thank those Locals that submitted suggestions. These suggestions will be considered when formulating the Notices.

To date we have heard that some Carrier's (one confirmed) plan to leave National handling and at least one has confirmed return to National handling.

This past summer, most Locals in the Council have went through the Local election cycle. If you have not yet notified this office of changes in the local officers, please do, so we can contact the necessary officers.

Also, the Carriers are required to provide this office with a report of new hires, terminations etc. and upon receipt we forward to the Locals for handling via U.S. mail. We have started e-mailing this report to certain Locals and would like to create a distribution list for separate Carriers. I would like to request that you forward the e-mails of each Local President and

*Our Business – Representation & Service*

# *International Brotherhood of Electrical Workers*

Third Quarter Report  
November 4, 2014  
Page Two

Financial Secretary for this purpose. Your cooperation in this matter would be sincerely appreciated.

This past quarter the council staff has conducted business or obtained information relative to the following carrier's under the jurisdiction of this office:

## **Belt Railway Company of Chicago:**

No news to report.

## **CN/CCP/DMIR/DWP/EJE and WC:**

There continues to be a number of contracting notices served for improvements to Carrier property in the Chicago area.

Two claims have been handled and submitted for arbitration. One continues being handled on the property.

We have received notice of the Carrier's intent to hire Mechanical Department Electricians at various locations.

## **CP/Soo:**

There continues to be issues with discipline on the property, currently three issues being progressed out of the St. Paul Facility.

We previously reported of meeting with the Carrier to update the Mechanical Department Agreement, however due to changes in the Minneapolis headquarters in the Labor Relations office, no further discussions have been conducted.

# *International Brotherhood of Electrical Workers*

Third Quarter Report  
November 4, 2014  
Page Three

We were recently advised of the Carrier's intent to sell the D and H property. A copy of the news release is attached.

We have been advised of some issues with PTC installations and have requested a meeting with Carrier representatives to discuss, however the Carrier officer previously in charge of the project has been moved to another assignment.

## **Gary Railroad Company:**

We have been informally advised of the Carrier's intent to not enter into National handling, however as of this writing, no official notification.

## **Lake Superior and Ishpeming Company:**

We continue to see contracting notices which result from the major fire last winter and the subsequent issues with the electrical system found on the property.

Section 6 Notices will be served on the property and we have had some preliminary discussions with other Organization representatives about forming a bargaining collation.

## **NICTD:**

As reported in the second quarter, Section 6 Notices were served on the property. An agreement was reached with representatives of the Carrier, submitted to the membership and approved. The agreement has been signed and the calculations of what is due the membership is being completed. My sincere appreciation is extended to Assistant General Chairman Mark Klecka, Executive Board member Jimmy Williams and the Local for all assistance rendered in this matter.

We will work to incorporate all changes resulting from this agreement into the updated Labor Agreement we are currently working on and hopefully will have the agreement completed in a few months.

# *International Brotherhood of Electrical Workers*

Third Quarter Report  
November 4, 2014  
Page Four

## **Paducah and Louisville Railway Company:**

In discussion with Carrier representatives, we were advised that one of the other organizations on the property had reached a tentative agreement and that agreement was being prepared to be submitted to the membership for ratification. It is my hope that we start to see movement to resolve our outstanding notice.

## **Evansville and Western Railroad:**

No news to report.

## **Montana Rail Link:**

There has been one discipline case handled on the property. That case has been listed to a public law board for adjudication, however, no date has been assigned due to government funding issues.

Our committeeman on the property for many years, Steve Howes, retired at the end of October. On behalf of the Council, we wish him the best for a long, happy and healthy retirement. Steve had many years of service, both the former BN and MRL.

## **BNSF Railway Company:**

We are moving toward execution of the Level Agreement and the Apprentice Coordinator positions are being bid in the shops. Upon awarding of the Trainer Coordinator positions, a joint meeting is going to be held in Kansas City to discuss plans to move forward. This discussion will include topics such as application and awarding of time credits, rotation of apprentices for on-the-job training etc. If you have any ideas or suggestions, please forward to this office or the Training Coordinator.



# *International Brotherhood of Electrical Workers*

Third Quarter Report  
November 4, 2014  
Page Five

There have been a number of new electricians added in recent months and over the next few months there are going to be electricians assigned at Lafayette, LA, Oklahoma City, OK, Grand Forks, ND and Dilworth, MN, locations where we have not had electricians previously or for a considerable period of time.

We have seen funding authorized for several outstanding discipline cases. A second division hearing was conducted in Chicago in September with approximately 12 cases and 4 or 5 expedited cases have been funded. As soon as the awards are received, the claimants and the Locals will be notified of the results.

There are a number of issues the Council staff is working on at this time with various departments.

Attached to this report are the third quarter financial reports. Articles of interest are posted regularly on the Council website at [ibewsc16.org](http://ibewsc16.org).

Respectfully and fraternally submitted,

Dale E. Doyle  
General Chairman/Secretary-Treasurer

DED/aj

Attachments

# *International Brotherhood of Electrical Workers*

## **Dale Doyle's Travel Third Quarter 2014:**

July 8, 2014 – St. Paul, MN – Local 886 Meeting

July 14 through 18<sup>th</sup>, 2014 – Tampa, FL – System Council 7

July 29, 2014 – St. Paul, MN – Local 886 Investigation

August 3 through 9<sup>th</sup>, 2014 – Livingston, MT – Local 152 Investigation

August 20, 2014 – Minneapolis, MN – CP/SOO – Labor Relations Meeting

August 21, 2014 – Superior, WI – Local 1559 – Meeting

August 28 through 29<sup>th</sup>, 2014 – Fort Worth, TX – BNSF Labor Relations

September 10, 2014 – St. Paul, MN – Local 886 – Investigation

September 17 through 19<sup>th</sup>, 2014 – Chicago, IL – Arbitration Hearings – Local 533 Visit, 14<sup>th</sup> Street

September 23 through 24<sup>th</sup>, 2014 – Fort Worth, TX – BNSF General Chairmen's Association

## **Rick Heyland's Travel Third Quarter 2014:**

### **Mark Klecka's Travel Third Quarter 2014:**

July 9 through 10<sup>th</sup>, 2014 – Michigan City, IN – Labor Relations Meetings

July 21 through 22<sup>nd</sup>, 2014 – Fond Dulac – Escanaba Local Union 757 Meetings

July 23 through 24<sup>th</sup>, 2014 – Hastings, MN Office

August 18 through 21<sup>st</sup>, 2014 – Chesterton, IN – NICTD Negotiations

August 26, 2014 – Chesterton/Michigan City, IN – NICTD Negotiations 2355 Meeting

August 27, 2014 – Chicago, IL 14<sup>th</sup>. Street Labor/Management Meeting – Bids and Overtime Handling

September 15 through 19<sup>th</sup>, 2014 – Portland, OR / Vancouver, WA 1782 Training/Meetings

September 23 through 25<sup>th</sup>, 2014 – Chicago, IL – 6<sup>th</sup> District Progress Meeting

# *International Brotherhood of Electrical Workers*

September 30, 2014 – Michigan City, IN – Ratification Vote Meeting – Local Union 2355  
NICTD

## **Jeff Burk's Travel Third Quarter 2014:**

July 15 through 17<sup>th</sup>, 2014 – St. Peter Beach, FL - System Council 7, IBEW

July 28 through 29<sup>th</sup>, 2014 – Fort Worth, TX – BNSF SACP Meeting

August 5, 2014 – Belen, NM – IBEW Local 1199 Meeting

August 6 through 7<sup>th</sup>, 2014 – Amarillo, TX – IBEW Local 1146 Meeting

August 12, 2014 – Temple, TX – BNSF Mechanical Department Investigation

August 20, 2014 – Gallup, NM – BNSF Telecom Investigations (2) and Winslow, AZ - Meet  
Local 1199 Member

August 28, 2014 – Fort Worth, TX – BNSF Labor Relations Meeting

August 29, 2014 – Fort Worth, TX – BNSF Mechanical Level Agreement Meeting

September 24, 2014 – Fort Worth, TX – BNSF General Chairmen's Association Meeting

## **Darrell Patterson's Travel Third Quarter 2014**

July 10, 2014 – Kansas City, KS – Local 866 Meeting

July 14 through 18<sup>th</sup>, 2014 – Hastings, MN – System Council 16 Office Work

July 28 through 31<sup>st</sup>, 2014 – Fort Worth, TX – BNSF SACP Meetings

August 12, 2014 – Overland Park, KS – BNSF TTC Time Credits with Bob Bowling

August 14, 2014 – Kansas City, KS – Local 866 Meeting

August 15, 2014 - Overland Park, KS – BNSF TTC Time Credits with Bob Bowling

August 18, 2014 - Overland Park, KS – BNSF TTC Time Credits with Bob Bowling

August 22, 2014 - Overland Park, KS – BNSF TTC Time Credits with Bob Bowling

August 27 through 30<sup>th</sup>, 2014 – Fort Worth, TX – BNSF Labor Relations and BNSF Level  
Agreement Meeting

September 9, 2014 - Overland Park, KS – BNSF TTC Time Credits with Bob Bowling

## *International Brotherhood of Electrical Workers*

September 10, 2014 – Argentine, KS – BNSF Shop Extension Meeting

September 11, 2014 – Kansas City, KS – Local 866 Meeting

September 16, 2014 - Overland Park, KS – BNSF TTC Time Credits with Bob Bowling

September 23 through 25<sup>th</sup>, 2014 – Fort Worth, TX – BNSF General Chairmen's Association Meeting

# International Brotherhood of Electrical Workers



DALE E. DOYLE  
General Chairman

RICHARD J. HEYLAND  
Vice General Chairman

999 Westview Drive, Suite 5  
Hastings, MN 55033  
651-438-2927 • Fax 651-480-1731  
usibsystem16@earthlink.net  


MARK S. KLECKA  
Asst. General Chairman

JEFF BURK  
Asst. General Chairman

DARRELL PATTERSON  
Asst. General Chairman

January 28, 2015

## FOURTH QUARTER REPORT, 2014 SYSTEM COUNCIL NO 16 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Brothers and Sisters:

Best wishes for the New Year.

National negotiations have started and the Locals have been advised of the status by Director Bohne.

We are now in the first month of the new year and seniority rosters will be posted for 2015. I ask that all Local Officers check the rosters against the Local's journal sheets to be certain all employees who should be members are and that all exempt employees submitting per capita are properly documented. If there are issues that need to be further investigated, please do not hesitate to contact this office.

In my third quarter report, I requested e-mails for all Local Presidents and Financial Secretaries to submit the New Hire/Termination Reports. My appreciation is extended to the Locals that responded, however until all have reported, we will continue to submit the reports via U.S. mail.

Recently, the Court of Appeals for the Third Circuit issued a decision in Path –v- Secretary of Labor (the Bala case). The court held that the Federal Railroad Safety Act (FRSA) does **not** protect employees who follow the orders of a treating physician if the injury being treated occurred **off** duty. A copy of the report provided by our firm is attached for your review.

*Our Business – Representation & Service*

# *International Brotherhood of Electrical Workers*

Fourth Quarter Report  
January 28, 2015  
Page Two

There is one issue that I find necessary to discuss with this report. We have seen a number of investigation notices recently concerning our members being charged with a violation of the Carrier's drug and alcohol policies, and most specifically marijuana. Please be upfront and honest with our members, even though a number of states have legalized medical or recreational marijuana, the rules in the industry have **not** changed. It is not permissible to have marijuana, alcohol and drugs, which include certain prescribed and quantity of prescribed drugs in your system. Even "over the counter" (OTC) medications which affect your ability to safely perform your duties may fall under your Carrier's drug and alcohol policy. Many OTC products contain enough alcohol to trigger a violation. This is a very serious issue that must be conveyed to our members.

This past quarter the council staff has conducted business or obtained information relative to the following carrier's under the jurisdiction of this office:

## **Belt Railway Company of Chicago:**

No news to report.

## **CN/CCP/DMIR/DWP/EJE and WC:**

In early December, arbitration was held in San Francisco, CA. The case concerned a claim initiated by the B of RS claiming PTC work. We were a third party to this dispute to protect the interests of our members and this Organization. As of this writing, no decision has been rendered. My sincere appreciation is extended to Assistant Chairmen Klecka and Burk and Local 757 Chairman Jim Wriston for the countless hours expended on this project.

Local 757 Committeeman Mike Kelly, Waterloo, Iowa retired in December after many years of railroad service. We wish him the very best for a long, happy and healthy retirement.

The CN opened a training facility in Homewood in October which I understand will benefit our members on the property as programs are developed.

# *International Brotherhood of Electrical Workers*

Fourth Quarter Report  
January 28, 2015  
Page Three

We attempted to reach an agreement for our members who are Bridge Technicians to perform work on the GTW property rather than contractors, however we were unsuccessful in this attempt.

## **CP/Soo:**

We continue to see a number of issues with discipline on this property. We currently have four (4) discipline issues in various stages of handling, and recently had two (2) decisions rendered.

We have met with Carrier Labor Relations to discuss monthly rates for the B & B Electricians and a PTC agreement collectively with the B of RS.

In November, the Carrier served notice of its intent to abolish positions at the Communication Control Center in Minneapolis, MN and transfer the work to Canada. Following numerous hours of investigation and negotiation, an implementing agreement was reached, approved and executed. I would like to thank Local Chairman Jim Hall for all assistance rendered in this transaction.

The Carrier previously advised of its intent to not join the NCCC in National Negotiations and will stand alone. A Section 6 Notice was served on the Carrier in a letter dated December 17, 2014. The initial session was conducted on January 21, 2015. There was some discussion, however the consensus is the National Health and Welfare Plan is a tied to Agreement and that issue must be investigated.

We also executed a Letter of Understanding for our member at the Milwaukee Work Equipment Shop to work on a 4-10 schedule for the next several months.

# *International Brotherhood of Electrical Workers*

Fourth Quarter Report  
January 28, 2015  
Page Four

## **Gary Railroad Company:**

The Company advised that it was their intent to not join the NCCC in national handling and to stand alone. The Carrier has served their notice on this office and we have served our notice on the Carrier, however no date of the initial conference has been scheduled.

## **Lake Superior and Ishpeming Company:**

We had our first Section 6 session with company representatives on January 22, 2015. We have formed a coalition with the I A of M and NCF & O on this property at this time.

## **NICTD:**

Michael Noland has replaced Gerald Hanas as the Carrier's General Manager.

## **Paducah and Louisville Railway Company:**

We met with representatives of the Carrier, the B of RC, I A of M and this office on January 22, 2015 to discuss the Health Care Plan on the property which seems to be a major hurdle with the parties in reaching a resolution to our Section 6 Notices.

## **Evansville and Western Railroad:**

No news to report.

## **Montana Rail Link:**

No news to report.



# *International Brotherhood of Electrical Workers*

Fourth Quarter Report  
January 28, 2015  
Page Five

## **BNSF Railway Company:**

A number of awards have been rendered in outstanding discipline cases and all members and their Locals have been provided copies of the awards.

We met with representatives of the Carrier's Telecom Department in November to discuss issues and the plans for 2015.

There have been serious issues at the Allouez Taconite Facility and in October we met with representatives of the TCU, Management and Labor Relations to discuss the issues. A follow-up meeting is scheduled in February.

This office, collectively with the I A of M and NCF & O worked with our members to change the shift starting times at the Denver Mechanical Facility to avoid traffic congestion at shift change.

As we continue to move forward in the implementation of the "Level Agreement" all Training Coordinators are now in place and the Level 1 testing is about to start, time credit is being reviewed on new employees and terms of the July 31, 2014 are being worked through. Our members at the Roadway Equipment Shop in Brainerd have expressed an interest in applying the Level Agreement. We have discussed this request with the shop manager and have agreed to discuss further this quarter.

Respectfully and fraternally submitted,

Dale E. Doyle  
General Chairman/Secretary-Treasurer

DED/aj

Attachments

# *International Brotherhood of Electrical Workers*

## **Dale Doyle's Travel Fourth Quarter 2014:**

October 1, 2014 – St. Paul, MN – CP Soo Investigation – Local 886

October 13-17, 2014 – Phoenix, AZ – Rail Department Meetings

October 24, 2014 – Minneapolis, MN – Meeting with Local 1559, TCU and BNSF Representatives to discuss issues at Allouez

November 4, 2014 – St. Paul, MN - Local 886 Meeting

November 5-6, 2014 – Waterloo, IA – Local 757 Meeting

November 17-18, 2014 – Denver, CO – BNSF Telecom Meeting

November 20-21, 2014 – Minneapolis, MN – CP Soo - Abolishment of Control Center Positions

December 3-5, 2014 – San Francisco, CA – CN/BRS/IBEW Arbitration

December 8, 2014 – Minneapolis, MN – B & B Electrician Agreement

## **Rick Heyland's Travel Fourth Quarter 2014:**

No Travel.

## **Mark Klecka's Travel Fourth Quarter 2014:**

October 13-17, 2014 – Phoenix, AZ – Rail Progress Meeting and General Chairman Meeting

November 17-18, 2014 – Denver, CO – Annual Telecom Meeting – BNSF

November 19-21, 2014 – Chicago, Homewood, IL – Investigations

## **Jeff Burk's Travel Fourth Quarter 2014:**

October 7, 2014 - Commerce, CA – Local 946 Meeting

October 8, 2014 – Commerce, CA – BNSF Mechanical Department Investigation

October 14-16, 2014 – Phoenix, AZ – IBEW Railroad Department Conference

## *International Brotherhood of Electrical Workers*

October 27-29, 2014 – Fort Worth, TX – BNSF SACP Meetings

November 17-18, 2014 – Denver, CO – BNSF Annual Telecom Meeting

November 21, 2014 – Tulsa, OK – Attend Retirement Lunch for BNSF Telecom Employees

November 24-25, 2014 – Springfield, MO – Local 778 Meeting and Investigation

December 4, 2014 – San Francisco, CA – CN/IC PTC Arbitration with BRS

### **Darrell Patterson's Travel Fourth Quarter 2014:**

October 13-17, 2014 – Phoenix, AZ – IBEW Railroad Conference

October 22, 2014 – Overland Park, KS – TTC Time Credits

October 27-30, 2014 – Fort Worth, TX – BNSF SACP Meetings

November 13, 2014 – Kansas City, KS - Local 866 Meeting

November 17-18, 2014 – Denver, CO – BNSF Telecom Meetings

November 19-21, 2014 – Overland Park, KS – BNS Trainer Coordinator Meetings

December 11, 2014 – Kansas City, KS – Local 866 Meeting

# ZWERDLING, PAUL, KAHN & WOLLY, P.C.

## MEMORANDUM

January 16, 2015

TO: Dale Doyle, Chairman, IBEW Railroad Coordinating Council

FROM: Michael S. Wolly, Margo Pave

RE: *PATH v. Secretary of Labor* (U.S. Court of Appeals for the Third Circuit)

As you know from Mike's email yesterday, the Court of Appeals for the Third Circuit has issued its decision in *PATH v. Secretary of Labor* (the "Bala" case). (Another copy of the decision is attached hereto for ease of reference.) Unfortunately the Court reversed the Department of Labor's Administrative Review Board ("ARB"). The Court held that the Federal Railroad Safety Act (FRSA) does not protect employees who follow the orders of a treating physician if the injury being treated occurred off-duty.

The case involved a signal repairman (Bala) employed by PATH. Bala had previously received warnings from PATH that his high level of absenteeism might result in discipline if it continued.<sup>1</sup> Subsequent to these warnings, Bala hurt his back while moving boxes at home. His doctor ordered him to stay off work and he did. PATH suspended him for up to six days without pay for violating the Carrier's attendance policy, based on the combination of his previous absences and those related to his back injury. Bala filed a complaint with the Department of Labor, challenging the suspension as illegal retaliation under the FRSA, which provides that a Carrier "may not discipline . . . an employee for following orders or a treatment plan of a treating physician." Both an Administrative Law Judge and the ARB agreed with Bala, expressly rejecting PATH's argument that the FRSA's anti-retaliation provision applies only to on-duty injuries.

The Court of Appeals, however, agreed with PATH. It held that "Congress intended the entirety of subsection 20109(c) [of the FRSA] to apply only when an employee sustains an injury during the course of employment." The Court noted that the first subsection of § 20109(c) states that a Carrier may not "deny, delay or interfere with the medical or first aid treatment of an employee *who is injured during the course of employment.*" Based on that, the Court concluded that the reference to "following orders or a treatment plan of a treating physician" in the second

---

<sup>1</sup> This case may be a good illustration of the adage that "bad facts make bad law." The Court starts its opinion by noting that Bala had taken 82 sick days in 2007, as compared with the average 17 sick days per year taken by other unionized signalmen at PATH. Thus, it seems that the Court considered Bala to be a "problem" employee, which may have colored the Court's view of his case.

subsection of § 20109(c) also must be limited to injuries that occur “during the course of employment” – that is, that the second subsection “refers back” to the content of the first subsection. In so concluding, the Court rejected the DOL’s argument that the absence of specific language limiting the anti-retaliation provision to on-duty injuries “reflects a deliberate choice by Congress to extend protections even to workers who sustain injuries off-duty.”

The Court’s decision was based not only on the language of the statute but also on its view that interpreting the provision as the DOL does would allow railroad employees “unlimited sick leave.” The Court expressly noted that, under the Department’s approach, a doctor could order an employee not to work and there would be no limit to the amount of time that the Carrier would have to allow the employee to be absent. According to the Court, that is not what Congress intended.

The Third Circuit is the first Court of Appeals to address this question. The chances are good, therefore, that any future Court that reviews an ARB decision under § 20109(c) will look to this decision for guidance.

As always, let us know if you have any questions about the decision.

Cc: Bill Bohne

**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

No. 13-4547

---

PORT AUTHORITY TRANS-HUDSON CORP.,  
Petitioner

v.

SECRETARY, UNITED STATES DEPARTMENT  
OF LABOR, AS DELEGATED TO THE  
ADMINISTRATIVE REVIEW BOARD,  
Respondent

\*Christopher Bala,  
Intervenor

\*(Pursuant to the Clerk's Order dated 2/6/14)

On Petition for Review from the Administrative Review  
Board of the United States Department of Labor  
ARB Case No. 12-048

Argued November 19, 2014

Before: SMITH, HARDIMAN, and BARRY, *Circuit Judges*

(Filed: January 15, 2015)

Megan Lee, Esq. (**ARGUED**)  
Port Authority of New York & New Jersey  
Litigation and Corporate Security  
225 Park Avenue South  
13th Floor  
New York, NY 10003  
*Counsel for Petitioner*

Steven W. Gardiner, Esq. (**ARGUED**)  
United States Department of Labor  
Office of the Solicitor  
Suite N-2716  
200 Constitution Avenue, N.W.  
Washington, DC 20210  
*Counsel for Respondent*

Lawrence M. Mann, Esq.  
Alper & Mann  
9205 Redwood Avenue  
Bethesda, MD 20817  
*Counsel for Amicus-respondent*

Ronald M. Johnson, Esq. (**ARGUED**)  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
*Counsel for Amicus-petitioner*

Charles C. Goetsch, Esq. (**ARGUED**)  
Cahill, Goetsch & Perry  
43 Trumbull Street  
New Haven, CT 06510  
*Counsel for Intervenor respondent*

Harry W. Zanville, Esq.  
Suite 1201  
500 West Harbor Drive  
San Diego, CA 92101  
*Counsel for Amicus-respondent*

---

OPINION

---

SMITH, *Circuit Judge*.

Petitioner railroad Port Authority Trans-Hudson Corporation (“PATH”) challenges a decision and order of the Administrative Review Board of the United States Department of Labor, which held that PATH violated the Federal Railroad Safety Act when it suspended one of its employees for excessive absenteeism. Specifically, PATH was held to have violated an anti-retaliation provision, 49 U.S.C. § 20109(c)(2), which prohibits railroads from disciplining employees “for following orders or a treatment plan of a treating physician.” The physician’s order which the employee was following related to treatment for an *off-duty* injury. Reading



subsection (c)(2) in context, we agree with PATH that only physicians' orders which stem from *on-duty* injuries are covered.

Accordingly, we will grant the petition.

### I.

Intervenor Christopher Bala is a unionized signal repairman who has worked for PATH since 1990. Per PATH's agreement with Bala's union, signal repairmen of Bala's seniority are entitled to 12.5 paid holidays and 23 paid vacation days per year. Separate from this allotment of paid holidays and vacations, Bala took in excess of 600 sick and personal days through 2008.<sup>1</sup> In 2007 alone, Bala took 82 sick days, compared to the 17 days of sick leave per year taken by unionized signalmen at PATH, on average, between 2002 and 2008. As a result of these absences, PATH issued numerous warnings to Bala over the years that if his attendance did not improve formal disciplinary action might be taken.

On June 22, 2008, Bala experienced back pain while moving boxes at his home. The next day, Bala's

---

<sup>1</sup> Under the union agreement, if Bala is "prevented from performing [his] duties by reason of sickness," he is to be paid in full for up to 65 days of sick leave annually, and to receive half-pay for an *additional* 195 days annually. Bala did not bring a claim pursuant to that agreement.

physician ordered him off work through July 2008. On July 14, 2008, PATH followed through on its prior warnings, and notified Bala that an internal hearing would be held regarding his absenteeism. As a result of that hearing, PATH suspended Bala for up to six days (partially contingent on improved attendance), without pay, for violating PATH's attendance policy. The suspension was based on the sum total of Bala's absences, including but not limited to those following his June 22, 2008 back injury.

Bala filed a complaint with the Respondent in this case, the United States Secretary of Labor, alleging that the suspension was retaliation for taking statutorily protected sick leave. The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.*, provides that "[a] railroad carrier . . . may not discipline . . . an employee . . . for following orders or a treatment plan of a treating physician." 49 U.S.C. § 20109(c)(2).<sup>2</sup> Although subsection (c)(2) immediately follows a provision prohibiting railroads from "deny[ing], delay[ing], or

---

<sup>2</sup> Claimants alleging retaliation for taking statutorily protected sick leave often rely on the Family and Medical Leave Act ("FMLA"), which provides workers protected sick leave and is accompanied by an anti-retaliation provision. But at oral argument, Bala's counsel expressed some skepticism that Bala would have qualified under the FMLA due to his prior absences.

interfer[ing] with the medical or first aid treatment *of an employee who is injured during the course of employment*,” 49 U.S.C. § 20109(c)(1) (emphasis added), Bala argued that subsection (c)(2) applies regardless of where an employee is injured. An Administrative Law Judge (“ALJ”) agreed and held that PATH violated the FRSA by disciplining Bala for following his physician’s orders not to work after his off-duty injury,<sup>3</sup> and awarded Bala just over \$1,000 in back pay for the days he was suspended. The Administrative Review Board (“ARB”) of the United States Department of Labor (“DOL”) upheld the ALJ’s award in *Bala v. Port Authority Trans-Hudson Corp.*, ARB Case No. 12-048, 2013 WL 5773495 (Sept. 27, 2013).

In upholding the award, the ARB rejected PATH’s argument that subsection (c)(2) is limited to physicians’ orders stemming from *on-duty* injuries. However, a mere 14 months earlier, in *Santiago v. Metro-North Commuter Railroad Corp.*, ARB Case No. 10-147, 2012 WL 3164360 (July 25, 2012), a different ARB panel (albeit

---

<sup>3</sup> The ALJ heard arguments that because Bala had previously injured his back at work, his subsequent back injury at his home constituted an aggravation of an on-duty injury, and accordingly would still be covered even if subsection (c)(2) only applied to on-duty injuries. As this issue was not raised below or to this Court, it is waived.

comprised of two of the same three members) stated just the opposite, that subsection (c)(2) “identifies protected activity as . . . complying with treatment plans for *work* injuries.” *Id.* at \*5 (emphasis added). The *Bala* panel, while citing *Santiago* seven times, failed to address this clear contradiction.

PATH petitioned this Court to set aside the ARB’s decision and order, and presented two questions: (1) whether subsection (c)(2) applies to orders of treating physicians that stem from *off-duty* injuries; and (2) assuming the statute’s application to off-duty injuries, whether there was sufficient evidence to find that PATH disciplined Bala because of such protected absences. We conclude that Congress intended the entirety of subsection 20109(c) to apply only when an employee sustains an injury during the course of employment. It is, therefore, unnecessary for us to reach the second question of the sufficiency of the evidence. We will grant PATH’s petition.

## II.

The ARB had jurisdiction, as delegated to it by the Secretary of Labor, pursuant to 49 U.S.C. § 20109(d)(1). We have jurisdiction over this appeal pursuant to 49 U.S.C. § 20109(d)(4).

We review the ARB’s decision to determine if it was, *inter alia*, “arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.” *See* 5 U.S.C. § 706(2)(A); *Doyle v. U.S. Sec’y of Labor*, 285 F.3d 243, 248-49 (3d Cir. 2002). While “we exercise plenary review in deciding questions of law,” *id.* at 249, our review is potentially subject to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, “when we are called upon to resolve pure questions of law by statutory interpretation, we decide the issue *de novo* without deferring to an administrative agency that may be involved.” *Patel v. Ashcroft*, 294 F.3d 465, 467 (3d Cir. 2002) (superseded by statute on other grounds).

### III.

Before the FRSA was amended by the Rail Safety Improvement Act of 2008 (“RSIA”),<sup>4</sup> 49 U.S.C. § 20109

---

<sup>4</sup> Pub. L. No. 110–432, 122 Stat. 4848 (October 16, 2008). As the RSIA was passed four months *after* Bala’s injury, the ARB briefly addressed retroactivity concerns and held that because Bala’s suspension was not handed down until after the statute was passed, there was no retroactivity problem. Since this issue was not raised on appeal, it is waived. *Gonzalez v. AMR*, 549 F.3d 219, 225 (3d Cir. 2008); *Ordway v. United States*, 908 F.2d 890, 896 (11th Cir. 1990) (non-retroactivity is an affirmative defense which a court need not always resolve *sua sponte*).

was exclusively an anti-retaliation provision. Subsections (a) and (b) of § 20109 provided (and still provide) protections to employees who assist in investigations into railroad safety, refuse to violate laws pertaining to railroad safety, notify a railroad or the Secretary of Transportation about “work-related” injuries or illnesses, and report and/or refuse to work in hazardous conditions. The RSIA inserted a new subsection (c), containing both an anti-retaliation provision, subsection (c)(2), and a more direct worker safety provision, subsection (c)(1):

**(c) Prompt medical attention.—**

**(1) Prohibition.--**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.

**(2) Discipline.**--A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or *for following orders or a treatment plan of a treating physician*, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For 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.

49 U.S.C. § 20109(c) (emphasis added). We are the first federal appeals court to consider a case involving this subsection.<sup>5</sup>

We are confronted here with a statute that specifically references at subsection (c)(1) “injur[ies] during the course of employment,” while subsection (c)(2) does not. PATH argues that the “treatment” in subsection (c)(2) “refers back” to the “treatment” in subsection (c)(1) and thereby incorporates the “during the course of employment” limitation into subsection (c)(2).<sup>6</sup>

---

<sup>5</sup> We have previously encountered § 20109 in *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013). There we held that there was enough evidence supporting the plaintiff’s retaliation claim for reporting a work-related injury under subsection (a)—a provision not directly implicated in this case—such that summary judgment should not have been granted in favor of the defendant railroad.

<sup>6</sup> This is, at the very least, a permissible theory of statutory construction. *See, e.g., United States v. Navajo Nation*, 556 U.S. 287, 299 (2009) (“The ‘program’ twice mentioned in § 638 refers back to the Act’s opening provision . . . § 631.”); *Melkonyan v. Sullivan*, 501 U.S. 89, 94 (1991) (“The requirement [in (d)(1)(B)] that the fee application be filed within 30 days of ‘final judgment *in the action*’ plainly refers back to the ‘civil action . . . in any court’ in (d)(1)(A).”).



The DOL, contending that the two paragraphs are “distinct” provisions, argues that the absence of the “during the course of employment” limitation in subsection (c)(2) reflects a deliberate choice by Congress to extend protections even to workers who sustain injuries off-duty. Since, under subsection (c)(2), a physician’s order could include a direction that an employee not work (as the physician’s order did in this case), and because there is no temporal limitation in the statute, the DOL’s interpretation would functionally confer indefinite sick leave on all railroad employees who can obtain a physician’s note.<sup>7</sup>

We agree with PATH that the “during the course of employment” limitation applies to subsection (c)(2). As we explain below, because subsection (c)(2) is an anti-retaliation provision obviously related to subsection

---

<sup>7</sup> The fact that railroads may still be able to discipline employees who take sick leave in bad faith as well as those who take excessive *unprotected* absences, does not negate the existence of indefinite sick leave for potentially appreciable numbers of railroad employees. Nor does the safe-harbor provision in subsection (c)(2), which allows an employer to refuse to permit an employee to return to work if s/he does not meet applicable medical standards. That refusal is permissible only until the employee meets those standards, at which point s/he is entitled to return to work.

(c)(1), it should *presumptively* be interpreted only to further the objectives of subsection (c)(1). The DOL’s broad interpretation of subsection (c)(2) would not further the objectives of subsection (c)(1), and the DOL is unable to rebut the aforementioned presumption. The ARB, relying on *Russello v. United States*, 464 U.S. 16, 23 (1983), concluded that the absence of any express on-duty limitation in subsection (c)(2), in contrast to the presence of such a limitation in subsection (c)(1), means that Congress did not intend for that limitation to apply to subsection (c)(2). But, for reasons we explain below, *Russello* is unhelpful here.

Moreover, further examination of the statutory text affirmatively supports the conclusion that subsection (c)(2) is limited to addressing on-duty injuries. We do recognize that the DOL advances a logical policy argument in support of its position: that railroad safety could be threatened if injured workers are pressured to return to work by the absence of indefinite sick leave. But there is no evidence Congress ever considered that reason, and simultaneously-enacted provisions suggest that Congress would have written subsection (c)(2) differently if that were its intent.

#### A.

Subsection (c)(1), entitled “Prohibition,” is a “substantive provision;” while subsection (c)(2), entitled “Discipline,” is an “antiretaliation provision.”

*See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61-62 (2006) (analyzing the relationship between §§ 703 and 704 of Title VII). Generally, an “antiretaliation provision seeks to secure [the] primary objective” advanced by the substantive provision. *Id.* at 63. *Cf. Dellinger v. Sci. Applications Int’l Corp.*, 649 F.3d 226, 230 (4th Cir. 2011) (“The anti-retaliation provision is included [in the Fair Labor Standards Act], not as a free-standing protection . . . but rather as an effort ‘to foster a climate in which compliance with the substantive provisions of the [Act] would be enhanced.’”) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960)).

The plain text of subsection (c)(1), which covers an “employee who is injured during the course of employment,” makes clear that its primary objective is to ensure that railroad employees are able to obtain medical attention for injuries sustained on-duty. Subsection (c)(2) furthers that objective by encouraging employees to take advantage of the medical attention protected by subsection (c)(1), without facing reprisal. Interpreting subsection (c)(2) to also cover off-duty injuries would not further the purposes of subsection (c)(1), which is explicitly limited to on-duty injuries.

We think this much is beyond reasonable debate. Although the DOL contends that the provisions are “distinct,” it does not contest the fact that subsection

(c)(2) effectuates the purposes of subsection (c)(1). Nor does the DOL contest the fact that its broad interpretation of subsection (c)(2) would not further the purposes of subsection (c)(1)—indeed the DOL emphasizes that subsection (c)(2)’s protection for following the “orders or a treatment plan of a treating physician” is “a *distinct protection* only appearing in subsection (c)(2).” Respondent’s Br. at 21 (emphasis added). So, the real issue becomes the extent to which—despite their obvious relationship—subsection (c)(2) is a multi-purpose provision intended by Congress to also advance an objective that is independent from those advanced in subsection (c)(1). Consistent with the construction of anti-retaliation provisions in general, and in particular anti-retaliation provisions immediately following a related substantive provision (as in *Burlington* and here), we presume that Congress did not intend subsection (c)(2) to be a vehicle for advancing an independent objective.<sup>8</sup>

---

<sup>8</sup> See *Dellinger*, 649 F.3d at 235 (King, J., dissenting) (characterizing the majority’s approach as a “presum[ption]”). Of course, we would not allow considerations of the purpose of an anti-retaliation provision to trump the statute’s text. For example, we recently rejected a rather plausible argument that a whistleblower provision would be undermined, in favor of “Congress’s intent [as] clearly reflected in the text and

## B.

As “[t]he best evidence of the purpose of a statute is the statutory text adopted by both Houses of Congress,” *Wyeth v. Levine*, 555 U.S. 555, 599 (2009) (Thomas, J., concurring in the judgment) (internal brackets omitted) (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991)), we begin our search for evidence that Congress actually intended subsection (c)(2) to advance an independent objective by examining the textual analysis in the ARB’s decision below. That analysis focused on an extension of the Supreme Court’s decision in *Russello*. “[*Russello*] set[s] out [a canon of interpretation] 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

---

structure of [the Act].” *Khazin v. TD Ameritrade Holding Corp.*, No. 14-1689, 2014 WL 6871393, at \*4 (3d Cir. Dec. 8, 2014); *see also Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-69 (3d Cir. 2002) (resolving a conflict between “the overall purpose of the anti-retaliation provisions” and their “plain text” in favor of the plain text); *but cf. Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) (“It follows that courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language.”).

inclusion or exclusion.”” *Kapral v. United States*, 166 F.3d 565, 578 (3d Cir. 1999) (Alito, J., concurring) (quoting *Russello*, 464 U.S. at 23) (internal brackets omitted). Because subsection (c)(1) is explicitly limited to “injur[ies] during the course of employment” and subsection (c)(2) is not, applying *Russello*, the ARB concluded that Congress clearly intended subsection (c)(2) to apply without such limitation.<sup>9</sup> We disagree.

At issue in *Russello* was a Racketeer Influenced and Corrupt Organizations (“RICO”) forfeiture provision, 18 U.S.C. § 1963(a)(1), which extended to “any interest [the person] has acquired or maintained in violation of [the RICO statute].” The petitioner argued that one can only have an “interest” in something, and that per the language of subsection (a)(1) that interest must be an interest in the enterprise itself (and not in money or profits derived therefrom). The Supreme Court

---

<sup>9</sup> The ARB’s insistence in this regard is puzzling. After all, not only did it reject the conclusion it now advances in *Santiago*, it also: (i) rejected an ALJ’s application of *Russello* to interpret the relationship between subsections (c)(1) and (c)(2); (ii) observed the “parallel structure” of subsections (a), (b) and (c); and (iii) discussed inferring statutory references from context—all methodological approaches it abandoned below in order to reach its contrary conclusion. *See Santiago*, 2012 WL 3164360, at \*5-7, 10.

rejected that analysis on its face, and then stated: “[w]e are fortified in this conclusion by our examination of the structure of the RICO statute.” 464 U.S. at 22. Unlike subsection (a)(1), subsection (a)(2) extended only to interests “in . . . any enterprise” which were connected to a person’s RICO violation. Thus, the Supreme Court concluded that if Congress wanted to restrict subsection (a)(1) to only interests in enterprises, it would have done so explicitly as it did in subsection (a)(2).

We acknowledge a similarity between this case and *Russello*—but that similarity is superficial. The *Russello* presumption only applies when two provisions are sufficiently distinct that they do not—either explicitly or implicitly—incorporate language from the other provision. See *Clay v. United States*, 537 U.S. 522, 530 (2003) (“in *Russello* . . . [t]he qualifying words ‘in . . . any enterprise’ narrowed § 1963(a)(2), *but in no way affected* § 1963(a)(1)” (emphasis added; second omission in original)). Since the critical question here is *whether* subsection (c)(1) operates to cabin the scope of subsection (c)(2), *Russello* can only be meaningfully invoked after we resolve that inquiry.<sup>10</sup> Consequently, it is of little help here.<sup>11</sup>

---

<sup>10</sup> Holding otherwise, as the ARB did, would seem to foreclose the possibility that a statute could reference another provision without expressly saying so. That, of

Moreover, the *Russello* presumption is based on “[s]tatutory context,” *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 728 (6th Cir. 2013), and “a hypothesis of careful draftsmanship.” *Kapral*, 166 F.3d at 579 (Alito, J., concurring). But that hypothesis is at least partially eroded by numerous examples of inexact drafting in § 20109. See *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) (not following the *Russello* presumption, in part because of perceived drafting inconsistencies). For example, faced with stronger arguments from the plain text of the statute than the DOL advances here, other federal courts have rejected railroads’ contentions that: (i) employees have no remedy if they fail to receive the

---

course, is contrary to Supreme Court precedent. See *supra* n.6.

<sup>11</sup> We do note that the Supreme Court invoked *Russello* in *Burlington*, while analyzing how an anti-retaliation provision interacted with its accompanying substantive provision. See 548 U.S. at 63. But the Court was not confronted with an argument (plausible or otherwise) that the two sections actually referred to each other, as we are here. Moreover, the Supreme Court invoked *Russello* to *support* its conclusion that the anti-retaliation provision was meant to further the objectives of the substantive provision. By contrast, here the DOL invokes *Russello* to drive a wedge between the two provisions.



medical treatment subsection (c)(1) entitles them to;<sup>12</sup> and (ii) railroads may bring disciplinary charges against employees who report accidents and safety violations.<sup>13</sup>

### C.

The basis for rejecting the DOL's interpretation is not merely a presumption against it and the unpersuasiveness of the DOL's textual arguments. Rather, a close examination of the statutory text affirmatively supports the conclusion that subsection (c)(2) is limited to addressing on-duty injuries. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131

---

<sup>12</sup> *Delgado v. Union Pac. R. Co.*, No. 12 C 2596, 2012 WL 4854588, at \*2-4 (N.D. Ill. Oct. 11, 2012) (rejecting the argument that there is no private right of action for a violation of subsection (c)(1)'s "deny, delay, or interfere" prohibition, because subsection (d)(1) creates only private rights of action for "discharge, discipline, or other discrimination").

<sup>13</sup> *Conrad v. CSX Transp., Inc.*, No. 13-3730, 2014 WL 5293704, at \*2-3 (D. Md. Oct. 14, 2014), (rejecting the argument that because bringing disciplinary charges was expressly defined as "discipline" for purposes of subsection (c), while not explicitly mentioned as a form of "discriminat[ion]" prohibited by subsections (a) and (b), that bringing such charges was not prohibited under subsections (a) and (b)), *vacated and issue rendered moot*, 2014 WL 7184747 (D. Md. Dec. 15, 2014).

S. Ct. 1325, 1330-31 (2011) (“interpretation of [a] phrase [in an anti-retaliation provision] ‘depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.’”) (quoting *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)). Subsection (c) has two different segments (subsections (c)(1) and (c)(2)) which each provide similar protections to employees. Moreover, one segment is expressly limited to matters work-related, while the other has no such explicit limitation. Strikingly, the same is also true of subsection (b), making for an illuminating comparison:

**(b) Hazardous safety or security conditions.—**

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, *a hazardous safety or security condition*;

(B) refusing to work when confronted by *a hazardous safety or security condition related to the performance of the employee’s duties . . .*

49 U.S.C. § 20109(b) (emphasis added).

The DOL contends, consistent with its approach to interpreting subsection (c)(2), that because there is no express qualification in subsection (b)(1)(A), an employee is protected for reporting *any* “hazardous safety or security condition.” At oral argument the DOL was presented with a *reductio ad absurdum*: a PATH employee, wearing a PATH sweatshirt, protests pollution at a power plant “entirely unrelated” to railroads, his conduct at that protest impugns PATH’s reputation (since he was wearing a PATH sweatshirt), and PATH disciplines him as a result. The DOL, remaining consistent, responded that such discipline would violate subsection (b)(1)(A). We cannot agree.

“[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish.” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454-55 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.)). The purpose of the entirety of the FRSA is as obvious as it is express: “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. Accordingly, we think that subsection (b)(1)(A) must be read as having at least some work-related limitation, even though no such limitation appears on the face of the

statute. And if a work-related limitation must be applied to subsection (b)(1)(A), it would be consistent to also apply a work-related limitation to subsection (c)(2).

Subsection (c)(2) itself also supports the conclusion that an on-duty limitation applies therein. Although not the portion directly at issue here, subsection (c)(2) protects employees who “*request[]* medical or first aid treatment.” (emphasis added). It seems unlikely that Congress was concerned about railroads disciplining employees for requesting medical treatment for off-duty injuries.<sup>14</sup> Indeed, at oral argument, the DOL conceded that such a scenario was “unlikely as a practical matter” and could not articulate even a hypothetical situation where an employee would be disciplined for requesting medical treatment for an off-duty injury.<sup>15</sup> If Congress

---

<sup>14</sup> Subsection (c)(2)’s title of “Prompt medical attention” also suggests an on-duty limitation, as it is difficult to imagine how railroads could be responsible for ensuring that employees who are injured off-duty receive prompt medical attention. *Cf. I.N.S. v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 189 (1991) (“The text’s generic reference to ‘employment’ should be read as a reference to the ‘*unauthorized* employment’ identified in the paragraph’s title.”).

<sup>15</sup> The DOL’s able counsel did suggest that an employee who is injured away from work, makes an appointment to consult with his physician about that injury but cannot

likely did not consider the application of the phrase “requesting medical or first aid treatment” in subsection (c)(2) to off-duty injuries, it is unlikely that Congress would have shifted course mid-sentence (without any textual indication) to have the phrase “orders or a treatment plan of a treating physician” apply to off-duty injuries.

#### D.

Although lacking in textual support, the DOL does provide a logical policy basis for how a broad interpretation of subsection (c)(2) would advance railroad safety. The DOL argues that if subsection (c)(2) does not cover off-work injuries, employees may be “forc[ed] . . . to choose between violating employer attendance policies and compromising railroad safety by working while injured.” Respondent’s Br. at 11. Indeed, certain railroad employees “are engaged in [such] safety-sensitive tasks,” that the Supreme Court has compared the safety implications of their performance to those “who have routine access to dangerous nuclear power facilities.” *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S.

---

work between the time the appointment is scheduled and the appointment itself, might be disciplined. However, the employee’s inability to work would not be *because* of the request for medical treatment but rather *in spite* of such request.

602, 628 (1989) (finding a compelling interest in subjecting such employees to suspicionless drug testing).

In passing the RSIA, Congress was clearly concerned about the safety implications of how employees perform their duties. *See, e.g.*, 49 U.S.C. § 20156 (requiring a “fatigue management plan” to be included as part of railroads’ risk reduction programs); 49 U.S.C. § 20162 (requiring the Secretary of Transportation to establish “minimum training standards”); RSIA § 405 (requiring the Secretary of Transportation to study the safety impact of the use of cell phones and other potentially distracting electronic devices). But all of these employee safety provisions are expressly limited to “safety-related railroad employees”—a term of art under the FRSA.<sup>16</sup> These

---

<sup>16</sup> 49 U.S.C. § 20102(4) provides: “safety-related railroad employee’ means--

(A) a railroad employee who is subject to [hours of service restrictions under] chapter 211; (B) another operating railroad employee who is not subject to chapter 211; (C) an employee who maintains the right of way of a railroad; (D) an employee of a railroad carrier who is a hazmat employee as defined in section 5102(3) of this title; (E) an employee who inspects, repairs, or maintains locomotives, passenger cars, or freight cars; and (F) any other employee of a railroad carrier who directly affects railroad safety, as determined by the Secretary.”

provisions build on the longstanding commonsense recognition that only certain categories of railroad employees pose unique dangers if they work while impaired.<sup>17</sup> Strikingly, subsection (c)(2) contains no such limitation, which means it may extend even to railroad accountants. Had Congress intended to provide sick leave to workers in safety-sensitive positions in order to combat potential impairment, it likely would have placed a limit in subsection (c)(2) to that effect as it has regularly done when concerned about impaired railroad employees.

---

<sup>17</sup> The Hours of Service Act of 1907, 34 Stat. 1415 (March 4, 1907), limited the number of hours railroad employees could work, *if* they were “actually engaged in or connected with the movement of any train” and/or were an “operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.” The modern codification, 49 U.S.C. §§ 21101 – 21109 (“chapter 211”), is expressly incorporated as a basis for determining who is a “safety-related employee,” under the FRSA. *See supra* n.16. The drug tests at issue in *Skinner* were also limited to these types of employees. *Skinner*, 489 U.S. at 608 (“[t]he final regulations apply to employees assigned to perform service subject to the Hours of Service Act, ch. 2939, 34 Stat. 1415, as amended . . .”).

The alternative is that Congress meant to provide sick leave to all railroad employees. Providing an entire industry’s workers a right to unlimited sick leave is a substantial policy undertaking, and we are unaware of any other federal laws conferring such a right on workers in any industry.<sup>18</sup> Rather, the default rule under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, is that workers (regardless of industry) are provided with up to 12 weeks of sick leave every 12 months. 29 U.S.C. § 2612(a)(1). “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). We are not prepared to assume that Congress decided to enact such a

---

<sup>18</sup> The DOL inaptly draws our attention to 49 U.S.C. § 31105(a)(1)(B)—an anti-retaliation provision in the Surface Transportation Assistance Act—which is actually similar to § 20109(a)(2). They each provide protections to transportation employees who refuse to violate safety-related laws or regulations. While Department of Transportation regulations prohibit commercial drivers from operating a vehicle while “so impaired, or so likely to become impaired . . . as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle,” 49 C.F.R. § 392.3, the DOL’s interpretation of § 20109(c)(2) would give workers leave *regardless* of whether safety is implicated.



significant change by inserting an eleven-word sentence fragment between much more limited protections, from which such a change could be *deduced*. “[I]t is highly unlikely that Congress . . . [made] a decision of such economic and political significance . . . in so cryptic a fashion.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (internal quotations and citations omitted).

### E.

The DOL further suggests that the RSIA’s legislative history supports its position. Although, in light of the foregoing analysis, “resort to the legislative history is . . . unnecessary to decide this case, our inquiry in that regard discloses no support for [the DOL]’s position.” *In re Pelkowski*, 990 F.2d 737, 742 (3d Cir. 1993). Subsection (c) was modeled on two similar state statutes which were held preempted by federal law in 2007.<sup>19</sup> Like subsection (c)(2), both statutes were broken

---

<sup>19</sup> See 610 Ill. Comp. Stat. 107/10, *held preempted in BNSF Ry. Co. v. Box*, 470 F. Supp. 2d 855 (C.D. Ill. 2007); Minn. Stat. § 609.849, *held partially preempted in BNSF Ry. Co. v. Swanson*, No. 06-1013, 2007 WL 1994042 (D. Minn. July 3, 2007) *rev’d and held fully preempted*, 533 F.3d 618 (8th Cir. 2008); *The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads: Hearings Before the H.*

into two paragraphs: a “deny, delay or interfere” paragraph, followed by a “discipline” paragraph. In both state statutes, both paragraphs contained an “injured during the course of employment” limitation. By contrast, in the federal version, only subsection (c)(1) has such a limitation. The DOL, echoing its earlier arguments, contends that this is evidence of a deliberate choice by Congress.<sup>20</sup>

However, the DOL concedes that both of the state statutes and the federal hearings before the adoption of subsection (c) were focused on work-related injuries, and it has been unable to point to any express evidence that the policy it now advances was ever considered by

---

*Comm. on Transportation and Infrastructure*, 110th Cong. (Oct. 25, 2007).

<sup>20</sup> The DOL also points out that the initial House and Senate versions of what became subsection (c) were structured differently. *Compare* H.R. 2095, 110th Cong. (Oct. 17, 2007) at 68-69 (§ 606) *with* S. 1889, 110th Cong. (Mar. 3, 2008) at 183 (§ 411). However, we do not find this difference illuminating, and are not prepared to alter our conclusion regarding the statute’s meaning after “consideration of the Government’s highly speculative suggestions as to the meaning of the legislative history.” *United States v. Zucca*, 351 U.S. 91, 94-95 (1956). *See also* *Martin v. Hadix*, 527 U.S. 343, 357 (1999).

anybody at any point in the legislative process. Rather, because of the “broader safety purposes behind the statute,” the DOL asks us simply to assume that Congress would have wanted this result. Aside from the separation of powers issues raised by that proposition, how do we know that Congress would not have been more concerned about potential safety issues *caused* by absenteeism, thus outweighing the potential benefits of the DOL’s stance? We don’t—which is one reason why this Court does not formulate public policy.

#### F.

The DOL argues that even if we do not agree that the statute necessarily extends to off-duty injuries, the ARB’s interpretation is entitled to *Chevron* deference. But whether two different statutory provisions have the same scope “is a pure question of statutory construction for the courts to decide,” which warrants “[e]mploying traditional tools of statutory construction.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467 U.S. at 843 n.9. Only “if . . . the court determines Congress has not directly addressed the precise question at issue,” does the question become “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

Employing traditional tools of statutory construction,<sup>21</sup> we have concluded that subsection (c)(2) applies only to on-duty injuries. Accordingly, the ARB is not entitled to *Chevron* deference.<sup>22</sup>

#### IV.

Having concluded that the Administrative Review Board misinterpreted the statute, we will grant the petition challenging the Board's September 27, 2013 order, and remand with instructions that the proceeding against Petitioner be dismissed.

---

<sup>21</sup> See *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring) (Such traditional tools include “the statute’s text, its context, the structure of the statutory scheme, and canons of textual construction[, which] are relevant in determining whether the statute is ambiguous . . .”).

<sup>22</sup> We need not consider the separate argument that the ARB is not entitled to *Chevron* deference because rulemaking authority for the statute at issue has been delegated to the Secretary of Transportation. See 49 U.S.C. § 20103(a). Nor need we consider the additional separate arguments that the unacknowledged inconsistencies between the decision below and *Santiago* undermine the ARB’s claim to *Chevron* deference and/or renders its decision arbitrary and capricious under the Administrative Procedure Act.