Why Participation in RLA Proceedings Does Not Constitute Election of Remedies

Metro North's Argument Ignores the Text of the FRSA

The Respondent Metro North Railroad argues that subsection (f) of the FRSA, 49 U.S.C. 20109(f), mandates the dismissal of any FRSA complaint brought by an employee who has participated in the Railway Labor Act, 45 U.S.C. 151 *et seq.*, (RLA) disciplinary process. In other words, the Railroad argues that an employee's involvement in the RLA disciplinary process automatically constitutes an "election of remedies" that bars any FRSA complaint. Such an argument, however, ignores the plain meaning of subsection (f) and fails to read subsection (f) in conjunction with subsections (g) and (h).

The Plain Meaning of the Text Controls

It is a fundamental rule of statutory construction that the plain meaning of the text controls, and any discerning of congressional intent must begin with an examination of the statute's text. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). But another basic principle of statutory construction also applies, namely that the statute is the text itself, not the title given to the section or to the subsections within the statute: "headings and titles are not meant to take the place of the detailed provisions of the text. . . . the title of a statute and the heading of a section cannot limit the plain meaning of the text. . . . they cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co*., 331 U.S. 519, 528-29 (1947); *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc*., __ U.S. __, __ 128 S.Ct. 2326, 2336 (2008).

In pressing its baseless interpretation of subsection (f), Metro North conveniently ignores these controlling principles of statutory interpretation.

FRSA subsection (f) may be entitled "Election Of Remedies." But that subsection does not actually use the term "remedy" in its text. Nor does the phrase "election of remedies" appear anywhere in the text of the FRSA. The actual text of subsection (f) reads in full:

> An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

That is, an employee may not seek protection under both the FRSA and another statute for the same unlawful act of the railroad. The key phrases here are "may not seek protection" and "for the same allegedly unlawful act." Let us examine the plain meaning of that statutory language viewed on its own and in the full context of the other FRSA subsections.

*"Unlawful Act"*

The only type of “unlawful act” that is addressed by the FRSA is spelled out in the text of the FRSA itself:

> A railroad . . . 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 . . . to notify, or attempt to notify, the railroad . . . of a work-related personal injury or work-related illness of an employee.

49 U.S.C. 20109(a)(4). Thus the FRSA declares it is an unlawful act for a railroad to discriminate against an employee *only if such discrimination is due, in whole or in part, to the employee's protected activity*.

For a railroad to file a disciplinary charge against an employee is not it itself an "unlawful act" (it is legal for a railroad to file disciplinary charges under its collective bargaining agreements, and it happens hundreds of times a day). Filing a disciplinary charge is only an "unlawful act" if it constitutes discrimination due in whole or in part to an employee's engaging in activities specifically protected by the FRSA. That is, the act of disciplining is "unlawful" only if it is found to be a form of discrimination due at least in part to an employee's protected activity. Absent such discrimination, there is no "unlawful act" for the FRSA to protect against. And as noted below, the RLA does not and cannot address whether any act by a railroad constitutes discrimination under the FRSA or any other law, nor does the RLA remedy any such discrimination.

*"To Seek Protection"*

FRSA subsection (f) only states that an employee may not seek "protection" under the FRSA and another provision of law "for the same unlawful act."

The RLA does not address whether any act of a railroad constitutes discrimination due in whole or in part to protected activity such as reporting an injury. And the RLA does not provide any "protection" from such discrimination. At no point in the entire RLA process will any agency, fact finder, arbitrator, or judge issue any findings declaring that such FRSA discrimination has occurred and ordering any remedies based on such discrimination.

FRSA subsection (f) does *not* say an employee may not seek *remedies* under both this section and another provision of law. Congress certainly could have stated that an employee cannot seek remedies under both the FRSA and another law, but chose not to do so. Instead Congress only referred to "protection" under the FRSA. The only unlawful act that the FRSA can or does protect against is discrimination for engaging in activity protected by the FRSA. To seek protection from such unlawful discrimination means to invoke the protection of a whistleblower statute. Because an employee can seek protection under only one whistleblower protection statute, the employee must elect which whistleblower retaliation protection statute he is invoking.

When Congress enacted the totally revised FRSA in 2007, it was well aware that railroads such as Metro North are covered by more than one whistleblower protection statute. As explained in the Complainants' Reply Memo In Support of the Motion To Compel (at pages 4-5) and in the Department of Labor's Response Memo regarding punitive damages (at pages 5-6), the whistleblower protections of the National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142, also are available to Metro North employees. And as confirmed by the Federal Railroad Administration, railroad employees also can invoke the whistleblower protections of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c):

> The statutory "election of remedies" provision is intended to protect an employer from having to pay the same types of damages to an employee multiple times just because there are multiple statutory provisions upon which an employee could file a complaint or a suit. The election of remedies provision is intended to prevent, for example, an employee from getting double the back pay, compensatory damages, and punitive damages the employee is entitled to by seeking protection under both the

> Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c), and Section 20109 [of the current FRSA].

73 Federal Register 8442, 8455 (Wednesday, February 13, 2008).

Thus, Metro North employees have at least three whistleblower protection statutes from which to choose: the FRSA, the NTSSA, and OSHA Section 660(c). A Metro North employee cannot proceed under more than one of those statutes, but must elect to invoke the protection of one of the available whistleblower protections statutes that apply to him. As seen below, in no way is the RLA a whistleblower protection statute that addresses any discrimination for engaging in protected whistleblower activity.

The Railway Labor Act Is Not a Whistleblower Protection Statute

The Railway Labor Act has no whistleblower protection provisions and is not a whistleblower protection statute. 45 USC 151 *et seq*. The purpose of a Railway Labor Act disciplinary proceeding is to interpret and apply the collective bargaining agreement, not to protect whistleblowers. It cannot and does not address whether the railroad acted unlawfully by retaliating for whistleblower activity protected by the FRSA.

It is important to understand the extremely limited scope of the railroad disciplinary proceeding process. It is the railroad that elects to bring a disciplinary charge against an employee for the alleged violation of one of the railroad's rules. It is the railroad that conducts the disciplinary hearing to establish whether the rule was violated. The trial hearing officer is a railroad manager who simultaneously acts as judge, prosecutor, and jury. Any evidence regarding any discriminatory basis of the

disciplinary charge is strictly excluded from the transcribed record by the hearing officer. Any subsequent arbitration brought under the RLA is not a de novo hearing, but rather is strictly limited to the record of the disciplinary hearing developed by the railroad. A RLA arbitrator cannot address whether the disciplinary charge was brought in whole or in part due to discrimination for any protected whistleblower activity by the employee. That is because the arbitrator has no evidence in the record before her on which to base any such finding, and because any attempt to go beyond the boundaries of the trial record would violate the scope of her jurisdiction as a RLA arbitrator.

As noted by one district court, Congress clearly did not intend for the RLA to displace or preempt the new FRSA anti-retaliation provisions:

> Before 2007, Section 20109(c) of FRSA mandated that a "dispute, grievance or claim [for whistleblower retaliation] is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. § 153)." Effective August 3, 2007, however, prior subsection (c) was removed and a new subsection (f) was added. Section 20109(f) [now (g)] now provides as follows: "No preemption.--Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law." 49 U.S.C. § 20109(f). [(g)]

*Abbot v. BNSF Railway Co.,* 2008 U.S. Dist. LEXIS 70707 *4-5 (D.KS Sept. 16, 2008). This reading is consistent with the Federal Rail Administration's interpretation stated in a 2008 Final Rule: "Another substantial change to Section 20109 is that the statute no longer states that disputes and grievances are to be handled under the Railway Labor Act (''RLA''), but instead permits relief under this section to be initiated by an employee

filing a complaint with the Secretary of Labor." 73 Federal Register 8442, 8453 (Wednesday, February 13, 2008).

Subsection (f) Must Be Harmonized With Subsections (g) and (h)

The United States Supreme Court has stressed time and again that "Statutory construction is a 'holistic endeavor.'" *Koons Buick Pontiac GMC, Inc. v., Nigh*, 543 U.S. 50, 60 (2004), *quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365, 371 (1988), *Graham County Soil & Water Conservation Dist. v. United States*, 545 U.S. 409 (2005). Courts "must not be guided by a single sentence or member of a sentence, but look to the provision of the whole law, and to its object and policy" and "at a minimum" must examine "a statute's full text, language as well as punctuation, structure, and subject matter." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc*., 508 U.S. 439, 455 (1993). Thus the language of a statute only has meaning within the context of the broader statute, and a statute's text must be examined in the context of the plain meaning of its related statutory provisions.

Here, there are three FRSA subsections that must be read together and harmonized: subsection (f) entitled Election of Remedies, subsection (g) entitled No Preemption, and subsection (h) entitled Rights Retained by Employee.

Metro North argues that the FRSA preempts the RLA because an employee must either elect to proceed under the RLA or the FRSA: if an employee elects to proceed under the FRSA, then he is barred from proceeding under the RLA, and vice versa. However, the text of FRSA subsection (f) must be read in conjunction with (g). Subsection (g) states that "Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law." The phrase "nothing in this section" means the entire FRSA

section and all its subsections. "Nothing in this section" means nothing in subsection (f) can be used to preempt or diminish an employee's safeguards under the Railway Labor Act.

Subsections (f) and (g) must be harmonized so as to avoid a fatal conflict that cancels out one or both subsections. Read together, those two subsections lead to the unavoidable conclusion that the FRSA operates in addition to the RLA, not in place of it. The protections of the FRSA are in addition to the safeguards of the RLA. The two federal statutes are like two locomotives running on parallel tracks, co-existing rather than competing to occupy the same single track.

This interpretation is reinforced by the language of FRSA subsection (h): "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement." Again, the phrase "nothing is this section" is all-inclusive and unlimited in scope. Its plain meaning must be applied to every subsection within the FRSA, including subsection (f). And subsection (h) plainly states that nothing in the FRSA shall be deemed to diminish the remedies of any employee under the Railway Labor Act or any collective bargaining agreement. This is in fact the only place where the word "remedies" appears in the actual text of the FRSA. And it is used in the context of a sweeping declaration that nothing in the FRSA shall be interpreted to diminish the remedies of any employee under the Railway Labor Act.

The language of subsection (f) must be read in light of the transcendent "nothing in this section" language of subsections (g) and (h). Congress carefully included those two clauses in order to limit the scope of subsection (f). And the meaning of (g) and (h)

is plain: subsection (f) cannot be interpreted to diminish any employee's rights and *remedies* under the Railway Labor Act. The FRSA's protection against whistleblower discrimination exists *in addition to* the collective bargaining remedies available to an employee under the RLA. That interpretation harmonizes the plain meaning of all three subsections. Metro North's willful misinterpretation of subsection (f) improperly ignores the effect of subsections (g) and (h), and relegates them to dead letters.

Metro North's misreading of subsection (f) is soundly rejected by ALJ Leland in *Matter of Mercier v. Union Pacific Railroad* (2008-FRS-4) (June 3, 2009):

> Congress made it clear that nothing in the statute, including the election of remedies provision, is to be read as limiting an employee's rights under a collective bargaining agreement. The amended provisions at sections (g) and (h) must be read in conjunction with the provision at section (f). Despite the obvious impact of these provisions, Respondent has not made any attempt to reconcile them with its interpretation of the election of remedies provision. Sections (g) and (h) do not prevent an individual who has filed a grievance pursuant to a CBA from pursuing a complaint under the FRSA. The plain language of the statute also invalidates the employer's argument under the election of remedies provision. Section (f) prohibits an employee from seeking protection under "both this section and another provision of law." Complainant, however, is not seeking protection under "another provision of law," but under a contractual agreement. The fact that a collective bargaining agreement is enforceable through provisions of a federal law does not transform it into a provision of law.

*Mercier, supra*, at 2. The court in *Mercier* correctly viewed subsection (f) in conjunction with the plain meaning of subsections (g) and (h), and arrives at the inescapable

conclusion that an employee's participation in RLA proceedings does not constitute an election of remedies under the FRSA.

Conversely, the opinion in *Koger v. Norfolk Southern Railway Co*., 2008-FRS-00003 (May 29, 2009), illustrates the errors that can result when a court fails to read a statute's subsection in conjunction with the plain meaning of its related provisions. *Koger* simply ignores the existence of subsections (g) and (h), both of which categorically state in sweeping language that "*Nothing in this section* preempts or diminishes . . ." and "*Nothing in this section* shall be deemed to diminish the rights, privileges, or remedies . . ." Thus the plain language of the FRSA requires that subsection (f) must be read in light of the transcendent all-encompassing mandates of subsections (g) and (h). Put another way, subsection (f) is subservient to the mandates of subsections (g) and (h). The FRSA categorically and without limitation states that subsection (f) does not preempt or diminish any other employee safeguards provided by Federal law and does not "diminish the rights, privileges, or remedies of any employee under any Federal or State law or collective bargaining agreement." Thus the FRSA states in sweeping language without exception that nothing in it, including subsection (f), "shall be deemed to diminish the . . . remedies of any employee under any . . . Federal law . . . or any collective bargaining agreement." The Railway Labor Act is such a federal law, and proceedings under the RLA are strictly limited to interpreting the terms of an employee's collective bargaining agreement.

By ignoring the operative effect of subsection (g) and (h), the *Koger* court was led into a baseless interpretation of subsection (f). The result in *Koger* depended entirely on the court's assumption that Congress did not "make any substantive change in the

election of remedies provision." *Koger, supra*, 2-3. But that is not the case. First, in 2007 Congress changed the remedies available under the FRSA and removed the enforcement of those FRSA remedies out from the RLA and into the hands of OSHA's Whistleblower's Office. Second, and more important, in 2007 Congress added the new subsections (g) and (h) with transcendent language that qualifies the scope and narrows the effect of subsection (f). Subsection (f) can only be read in light of subsections (g) and (h), and cannot violate the sweeping prescriptions set forth in those subsections that govern the entire text of section 20109.

Because the result in *Koger* was only reached by reading subsection (f) in isolation while ignoring the effect of subsections (g) and (h), the opinion is not persuasive and is of no precedential value. To perpetuate such a reading would violate basic principles of statutory interpretation and render subsections (g) and (h) dead letters.

No Double Recovery Of Remedies

The interpretation of the FRSA's election of remedies subsection set forth above follows the plain meaning of the text while harmonizing subsection (f) with subsections (g) and (h). It also does not lead to any double recoveries. That is because the remedies listed by the FRSA are tailored to the practical reality of an employee's situation. The FRSA generally states that a prevailing employee "shall be entitled to all relief necessary to make the employee whole." 49 U.S.C. 20109(e)(1). If reinstatement is not needed or already has been accomplished, then it is not required under the FRSA. And if an employee already has been made whole for his lost wages, then there is no double recovery for that remedy. The Railway Labor Act does not provide any

remedy for compensatory damages, attorneys fees, or punitive damages, so no double recovery is even possible there. Because the FRSA exists in addition to--instead of in place of--the RLA, and because the flexible relief under the FRSA is tailored to each employee's individual situation, double recovery is easily avoided.

A Railroad's Unilateral Filing of Disciplinary Charges Is Not an Election of Remedies By an Employee

It is the railroad who makes a unilateral decision to file disciplinary charges against an employee. Once the employee is charged, he has no choice but to defend himself against the charges as best he can under the provisions of the collective bargaining agreement. But no employee elects to be disciplined, and in no way can a railroad's unilateral filing of such charges be deemed to be an election of remedies by the employee. It is the railroad who dictates the entry of the employee into the entire RLA disciplinary process, not the employee. If not for the railroad's unilateral election to file charges, the employee would not be thrown into the RLA process, which ranges all the way from being charged, to a waiver, to a disciplinary trial, to an internal appeal on the property, to reference to a non-de novo arbitration board strictly limited to the record developed by the railroad.

Yet, Metro North argues that when a railroad files a disciplinary charge against an employee, that action automatically constitutes an election of remedies *by the employee* barring any FRSA complaint. If that were the law, then all railroads would be insulated from FRSA liability by the mere act of filing disciplinary charges motivated in whole or in part by the employee's protected activity, the very conduct the FRSA is designed to prohibit.

This same principle--namely that an employee's participation in RLA disciplinary proceedings is involuntary and in no way any election made by him--holds true regardless of how far into the extended RLA process the employee is forced to proceed. If reinstatement or back wages happen to occur during the RLA process, the FRSA easily tailors its remedies so as to avoid any double recovery, but in no way can it be said that an employee's unelected participation in the RLA disciplinary process somehow bars him from the entire spectrum of whistleblower protection remedies afforded by the FRSA.