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Issue Date: 09 August 2011

Case No.: **2011-FRS-00015**

In the Matter of:

BRANDY THOMPSON,
Complainant

v.

NORFOLK SOUTHERN RAILWAY CORP.,
Respondent

ORDER DENYING RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND DENYING RESPONDENT'S MOTION TO PRECLUDE COMPLAINANT FROM SEEKING PUNITIVE DAMAGES AND GRANTING RESPONDENT'S REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53. The complaint alleged that the Complainant[1] was suspended in retaliation for reporting an injury occurring on the job. The Occupational Safety and Health Administration (OSHA), as the agent of the Secretary of Labor, investigated the complaint and reported its findings on April 4, 2011. Those findings were that "Complainant's filing of an injury report on March 13, 2008, was a contributing factor in his suspension without pay. Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated the FRSA."

Respondent appealed the OSHA determination to the Office of Administrative Law Judges (OALJ), stating that it objected to "both the Secretary's Findings and her Preliminary Order." On June 11, 2011 the Respondent moved to dismiss the complaint on the basis of 49 U.S.C. § 20109(f), the election of remedies provision of the FRSA. Respondent also requested that if the complaint was not dismissed, the decision be certified for interlocutory appeal and that the Complainant be precluded from seeking punitive damages. On July 26, 2011, the Complainant responded to Respondent's motion, arguing dismissal was not warranted, the issue

[1] Norfolk Southern Railway employee Jeff Thompson initiated the complaint. When he died in August 2010, his wife, Brandy Thompson, continued the complaint on behalf of her husband's estate as personal representative of the estate.

should not be certified for interlocutory appeal, and punitive damages should not be disallowed. On August 2, 2011, Respondent replied to Complainant's response.

Railway employee, Jeff Thompson alleged in his complaint that he reported an injury to Norfolk Southern that occurred on the job in March 2008 as a result of his exposure to a chemical that had leaked from a car in Respondent's yard. He further alleged that as a result of reporting the injury he was charged with making false and/or conflicting statements. After an investigative hearing, Thompson was found guilty on May 1, 2008 of providing false and conflicting statements regarding the incident and was assessed time out of service without pay between March 14 and May 1, 2008. Thompson exercised his appeal rights under the collective bargaining agreement between Respondent and his union, the Brotherhood of Locomotive Engineers and Trainmen, and the Railway Labor Act (RLA). According to the Secretary's Findings, Respondent denied his appeal on May 27, 2008 and again on June 16, 2008. On June 13, 2008, he filed a complaint under FRSA. He then filed for an arbitration hearing under his collective bargaining agreement and on December 18, 2009 received a favorable decision and was awarded his lost wages at the conclusion of that arbitration. On April 4, 2011, the Secretary of Labor issued findings in the FRSA complaint and ordered Respondent to expunge adverse references from Complainant's personnel records relating to the charge, pay Complainant's estate $14,400 in attorney's fees and $15,000 in compensatory damages, and post a notice to employees and provide all employees with information regarding the FRSA and reporting work-related injuries/illnesses.

Respondent's Motion and Complainant's Response

Respondent argues that Complainant is barred from seeing relief under the FRSA by the election remedies provision of the FRSA because he pursued Railway Labor Act remedies by exercising his appeal rights under his collective bargaining agreement. The FRSA election of remedies provision, 49 U.S.C. § 20109(f), states the following:

> Election of remedies—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.

Respondent argues that in the RLA process Complainant did "'seek protection' (back pay) under 'another provision of law' (RLA § 3) 'for the same allegedly unlawful act of the railroad carrier' (his suspension from employment without pay)." Resp. Motion to Dismiss, June 11, 2011 at 9.

Complainant argues that the election of remedies provision does not bar Complainant's claim under the FRSA considering subsections (g) and (h) of 49 U.S.C. § 20109, which were added in 2007. Those subsections provide the following:

> (g) 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.

> (h) Rights retained by employee— 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. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

The Complainant states:

> At the commencement of the FRSA case, an aggrieved party completes the election of remedies form and chooses the whistleblower statute under which she intends to travel and is thus prevented from pursuing duplicative whistleblower complaints. Then, subsections (g) and (h) provide the clearest expression possible about the implications that result from making a FRSA election. By electing to pursue an FRSA claim, the complainant does not diminish or forego any of her other rights, including the right to pursue a claim under the collective bargaining agreement.
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> Comp. Response Brief, July 26, 2011 at 6.

Respondent argues that Congress left the election of remedies provision unchanged in the 2007 amendment of the FRSA and did not intend a substantive change in the law. Respondent agrees that the added subsections (g) and (h) do preserve the right of an employee to pursue claims under a collective bargaining agreement. However, Respondent explains that the election of remedies provision then applies as to the consequences that follow if the employee elects to exercise that right, namely that the employee cannot then pursue a FRSA complaint. If a railroad employee is allowed to challenge a suspension both under the RLA process and though a FRSA complaint, inconsistent results could be reached, Respondent argues.

Discussion

Election of Remedies

The FRSA was amended in 1980 to allow railroad employees who felt they had been retaliated against for engaging in protected conduct to challenge that retaliation pursuant to the RLA arbitration procedures. Included in the act was an election of remedies provision. In 2007, the 9/11 Commission Act made numerous changes to the FRSA. The amendments left the election of remedies provision, now § 20109(f), substantively intact while adding subsections (g) and (h). Congress' intent in making the amendments was to both to broaden what is considered protected conduct and to enhance the civil and administrative remedies available to aggrieved employees. H.R. No. 110-259 (July 25, 2007), 2007 USCCAN 119.

The issue of how the election of remedies provision should be applied has been raised in a handful of recent cases. The Administrative Review Board (ARB) has not yet ruled on the

issue on appeal.[2] Cited by the Respondent is *Koger v. Norfolk Southern Railway Company*, 2008-FRS-00003 (May 29, 2009), in which the administrative law judge (ALJ) interpreted the election of remedies provision to bar a complainant from proceeding under the FRSA when he had previously elected to pursue redress under RLA arbitration procedures. Notably, the ALJ in that case did not discuss the impact of subsections (g) and (h). The three ALJs who have considered the subsections in conjunction with the election of remedies provision have concluded that FRSA permits a complainant to pursue both a collective bargaining appeal and a whistleblower complaint under the FRSA. *Mercier v. Union Pacific Railroad*, 2008-FRS-00004 (June 3, 2009); *Newman v. Union Railroad*, 2010-FRS-00001 (April 26, 2010); *Milton v. Norfolk Southern Railway Corp.*, 2011-FRS-00004 (June 24, 2011; July 11, 2011).[3]

Respondent correctly asserts that Congress left the election of remedies provision, subsection (f), intact in 2007. However, in addition to that choice, Congress chose to add subsections (g) and (h). The Respondent and Complainant disagree over whether that addition modified the scope of the election of remedies provision. All of the sections must be read in conjunction with each other. Respondent reconciles them by stating that (g) and (h) preserve an employee's rights under a collective bargaining agreement but (f) bars the employee from pursuing a FRSA complaint with the Department of Labor if he does exercise his rights under a collective bargaining agreement. Complainant argues that the election of remedies provision requires an employee to choose a whistleblower statute under which to pursue a whistleblower complaint. Subsections (g) and (h) then guarantee that regardless, the employee may still appeal discipline pursuant to a collective bargaining agreement.

I agree with the Complainant and find that reading subsections (g) and (h) in conjunction with subsection (f) shows an intent to prevent complainants from pursuing duplicative whistleblower complaints. Subsection (f) addresses the concern that complainants could fall under other employee protection statutes in addition to the FRSA. Subsections (g) and (h) recognize that an employee may seek redress using other channels that will not risk duplicative results. Specifically, subsection (h) states that "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."

The remedies available under an employee's collective bargaining agreement vary from agreement to agreement and are unknown in this case, other than that they included an award of lost wages. In contrast, remedies under the FRSA include reinstatement, back pay with interest, compensatory damages (including litigation costs, expert witness fees, and attorney fees), and punitive damages up to $250,000. 49 U.S.C. §20109(e), 29 U.S.C. §1982.109(d)(1). Thus, the

[2] The Administrative Review Board granted interlocutory review of the summary disposition decisions in *Koger v. Norfolk Southern Ry.*, 2008-FRS-00003, ARB Case No. 09-101 and *Mercier v. Union Pacific R.R.*, 2008-FRS-00004, ARB Case No. 09-121 and consolidated the cases on September 16, 2009 but has not yet issued a decision.

[3] The ALJ in *Powers v. Union Pacific Railroad*, 2010-FRS-00030 (May 17, 2011) found similarly but the reasoning is partially based on different circumstances from those in this case, namely that the union, not the complainant, pursued the grievance under the collective bargaining agreement. Thus, the ALJ held that the election to pursue redress under the collective bargaining agreement was not the complainant's election under the FRSA. In addition, the ALJ held that the election of remedies provision does not apply where the remedies provided under a collective bargaining agreement are less than those available under FRSA.

Complainant may well have remedies available through a FRSA whistleblower complaint that were not available in arbitration under the Brotherhood of Locomotive Engineers and Trainmen collective bargaining agreement. An employee would not be entitled to double recovery as the FRSA grants a successful Complainant "all relief necessary to make the employee whole." 49 U.S.C. §20109(e)(1).

Claims under the FRSA are specifically targeted at whether an Employer acted in retaliation for an employee's whistleblower activity. A collective bargaining agreement proceeding could involve any violation of a railroad's rules. Such a proceeding may not involve any allegation of whistleblower activity and is not designed to address whether an employee was retaliated against for such activity. Further, an FRSA violation may occur if a railroad carrier discharges, demotes, suspends, reprimands, or in any other way discriminates against an employee if such discrimination is due "in whole or in part" to an employee's protected action, including notifying the carrier of a work-related injury or illness. Thus, an FRSA violation may exist where a violation of a collective bargaining agreement does not.

In this case, Complainant was charged with and found guilty of giving false and/or conflicting statements concerning a personal injury and falsification of an injury and penalized by time without pay. He appealed that discipline and won at arbitration. In his FRSA complaint, he contends that he was disciplined because he reported an injury. To read the statute to reduce the remedies available to an employee alleging retaliation for a protected activity I believe would go contrary to Congressional intent.

I find that considering the addition of subsections (g) and (h) in 2007, the FRSA as currently written does not prevent an individual who has appealed discipline pursuant to a collective bargaining agreement from pursuing a complaint under the FRSA. The election of remedies provision is not meaningless, however, and would preclude the Complainant from pursuing a claim under certain other overlapping laws, for example the National Transit Systems Security Act. Based on the foregoing, I find Complainant is not precluded from litigating this claim under the FRSA through the Department of Labor due to the fact that the employee earlier exercised his right to arbitration under his collective bargaining agreement.

Interlocutory Appeal

The ARB has held that an ALJ has the authority to certify questions of law for appeal. A party seeking review of an interlocutory order is to request certification by the ALJ for review of the order. *See, Puckett v. Tennessee Valley Authority*, 2002-ETA-15 (ARB Sept. 26, 2002). The ARB has stated that review of interlocutory orders should proceed in accordance with 28 U.S.C. §1292(b), which governs certification of interlocutory appeals by federal district courts. *Id. See also, Hasan v. J.A. Jones Mgmt. Serv.*, 2002-ERA-18 (ARB July 16, 2002). Section 1292(b) allows that a judge may certify a question of law for appeal where the judge believes "there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The question of whether pursuit of collective bargaining agreement and Railway Labor Act remedies triggers an application of FRSA's election of remedies provision is currently on

appeal to the ARB in the consolidated cases of *Koger v. Norfolk Southern Ry.*, 2008-FRS-00003, ARB Case No. 09-101 and *Mercier v. Union Pacific R.R.*, 2008-FRS-00004, ARB Case No. 09-121. In its grant of interlocutory review in *Mercier*, the ARB stated:

> The Board agrees with the ALJ that the election of remedies issue presented here is appropriate for interlocutory review under 28 U.S.C.A. § 1292(b). The issue presents a controlling legal question, which will terminate the litigation if the ALJ's decision is reversed. Furthermore, the fact that an ALJ has recently issued a decision in *Koger* that stands in opposition to the ALJ's decision in this case demonstrates that there is substantial ground for difference of opinion on this issue.

Mercier, ARB Case No. 09-121, slip op. at 4.

While I do not want to encourage any unnecessary delay in this case, I find certification of interlocutory appeal of this order denying summary disposition to be appropriate. The ARB's grant of interlocutory review in *Mercier* recognizes the existing difference of opinion regarding this issue.[4] As in *Mercier*, the decision in *Koger* directly conflicts with my denial of summary disposition in the instant case. The ARB's decision on this issue will be controlling and if the decision results in the reversal of my denial of summary disposition based on the election of remedies provision, then it would result in the ultimate termination of this litigation.

To not stay the proceedings and proceed to hearing given the pending ARB decision that could terminate the litigation, could result in a waste of resources on the part of the parties and this office. Resolution of the existing difference of opinion would be controlling in whether this case should proceed to hearing.

Therefore, in accordance with 28 U.S.C. § 1292(b), I find that the question of whether pursuit of collective bargaining agreement and RLA remedies triggers an application of FRSA's election of remedies provision involves a controlling question of law as to whether there is substantial ground for difference of opinion and that an immediate appeal of this question may materially advance the ultimate termination of this litigation.[5]

Punitive Damages

Respondent contends that claims for punitive damages under federal statutes have routinely and consistently been held not to survive a plaintiff's death. The employee in this case died on August 28, 2010 and his wife is now pursuing his complaint on behalf of his estate. Respondent requests that Complainant's claims for punitive damages be summarily dismissed

[4] This difference of opinion appears to exist at the OSHA Regional Administrator level as well. Respondent cited two decisions by OSHA Regional Administrators, *Burlington Northern Santa Fee R.R./Rodriguez*, No. 9-3290-09-020 and *CSX Transportation/Crook*, No. 4-3750-09-006, in which the complaints were dismissed, citing the election of remedies provision. In both instances, the employees had previously pursued arbitration through their unions.

[5] Pursuant to 28 U.S.C. § 1292(b), Respondent has ten days after the entry of this order to appeal to the ARB.

because they did not survive the employee's death under federal common law. Additionally, Respondent contends Complainant should have filed a timely objection to the Secretary's Findings as required by 29 C.F.R. § 1982.106(a) objecting to the lack of an award for punitive damages.

Complainant argues there is no controlling case law indicating that the estate of an employee cannot receive an award for punitive damages after the employee's death. Complainant notes that the purpose of punitive damages is to punish reprehensible conduct and deter its future occurrence, a goal that continues after the employee's death. Complainant further argues that Respondent's broad objection to the OSHA Regional Administrator's decision preserved all issues on appeal, including punitive damages.

The FRSA permits an award of punitive damages up to $250,000. 49 U.S.C. §20109(e)(3). The Complainant is correct that there is no binding precedent for precluding an award of punitive damages after the death of a complainant in an FRSA case. I defer a decision on whether punitive damages can and should be awarded to a final decision and order in this case. I note that the Complainant first must prevail on the merits of his case before a decision is required on the award of any damages, including punitive damages. The Respondent's request is premature and ruling on the issue prior to hearing this case is unnecessary.

ORDER

Respondent's Motion for Summary Disposition for Lack of Jurisdiction is DENIED.

Respondent's Motion for Certification for Interlocutory Appeal of the undersigned's denial of summary disposition for lack of jurisdiction is GRANTED. The matter is hereby certified to the Administrative Review Board to consider the interlocutory appeal.

Respondent's Motion for a Stay of Proceedings pending appeal is GRANTED. The proceedings at this level are hereby stayed pending the Administrative Review Board's ruling on the interlocutory appeal or the refusal to accept the appeal for consideration.

Respondent's Motion for Summary Dismissal of Claims for Punitive Damages is DENIED.

Daniel A. Sarno, Jr.
DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

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