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Issue Date: 17 May 2011

CASE NO.: 2010-FRS-00030

In the Matter of:

ROBERT POWERS,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances: Patrick Cowan, Esq.
Law Office of H. Chris Christy
for Complainant

Tim D. Wackerbarth, Esq.
Joseph P. Corr, Esq.
Lane Powell, PC
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

ORDER DENYING SUMMARY DECISION

This is an action under the whistleblower provision of the Federal Rail Safety Act.[1] Complainant challenges Union Pacific's termination of his employment, alleging that it was in retaliation for his reporting a workplace injury.

Union Pacific moves for summary decision. It argues that, under the Federal Rail Safety Act's election of remedies provision, 49 U.S.C. § 20109(f), Complainant abandoned his whistleblower claim when he grieved the termination under a collective bargaining agreement. It also argues that Complainant relies on statutory obligations that did not exist at the time of the termination and cannot be applied retroactively.

Complainant opposes the motion.[2] He does not that dispute that his union pursued a grievance to arbitration, which resulted in an award in his favor. Rather, he argues that this did not trigger the

[1] *See* 49 U.S.C. § 20109.

Act's election of remedies provision because that happens only when a complainant seeks a remedy elsewhere for the same alleged unlawful conduct, and that here the grievance was based on a contract (the collective bargaining agreement), not on alleged unlawful conduct. Complainant also argues that his claim rests on a provision of the Act that pre-existed the termination.

I find that Union Pacific construes the election of remedies provision too broadly. Complainant is correct that his union's pursuit of a remedy under the collective bargaining agreement did not trigger the Act's election of remedies provision. He also is correct that the statutory obligations on which he relies pre-date the termination and do not require retroactive application. The motion thus lacks merit.

Undisputed Facts[3]

Complainant began to work for Union Pacific in 1996. R.Ex. A at 13. Some eleven years later, in May 2007, he reported that he'd injured a hand at work. *Id.* at 56. He saw a doctor, who restricted him from lifting more than five pounds with the affected upper extremity. R.Ex. B at 13-14. On September 20, 2007, Complainant's physician somewhat relaxed the restriction: Complainant could not pull, push or lift more than ten to fifteen pounds; he also had to be allowed to wear a splint or brace while working. R.Ex. 24-25.

When Complainant was reassigned to a different job in October 2007 on account of seniority considerations, he could not perform the new assignment within his medical restrictions and went on a medical leave. R.Ex. A at 131-32, 203. His doctors relaxed the restrictions further over time, but as late as mid-2008, he was not permitted to engage in repetitive motion of the upper extremity or lift over 50 pounds. R.Ex. C at 32-33.

While Complainant was on leave, Union Pacific engaged an investigator, who took *sub rosa* videos. Union Pacific concluded from the videos that Complainant's actual activities exceeded his purported medical limitations. R. Mot. Sum. Dec. at 4-5. After a formal investigation, Union Pacific terminated Complainant's employment on September 3, 2008 for dishonesty and failure to stay within medical restrictions. *Id.*; R.Ex. D-E.

Complainant's union, the Brotherhood of Maintenance of Way Employees, grieved the dismissal under the collective bargaining agreement. The union pursued the grievance through arbitration before a Public Law Board. The grievance procedure under the collective bargaining agreement is regulated by the Railway Labor Act. *See* 45 U.S.C. §§ 152, 157-59 (2006).

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[2] Claimant sought leave to file a late opposition, citing his attorney's pressing calendar. A party should seek additional time before a deadline runs, not after. Nonetheless, in the interest of justice, I allow the late filing. I also granted Union Pacific's request for leave to file a reply, which it in fact filed.

[3] Union Pacific offers eight exhibits with its motion. Without objection, I admit them into evidence. I refer to the exhibits as, "R.Ex." Complainant offered no evidence in opposition and did not dispute the facts as Union Pacific asserts them.

The record shows that it was the union's chair, not Complainant, who signed the complaint in arbitration. R.Ex. F at 4. The Public Law Board captioned the case with the union as a party, not Complainant. R.Ex. G at 634. Reviewing the parties' contentions, the Board refers to them as the contentions of the "Organization" or the "Carrier," not the contentions of the "Claimant" (as the Board refers to Complainant). *See id.* at 637.

The union requested that Complainant be reinstated with full seniority and lost wages and with his personnel file expunged. R.Ex. F at 4. On May 1, 2009, the Board held a hearing pursuant to the Railway Labor Act. R.Ex. G at 634. On July 8, 2009, it found for the union and ordered Union Pacific to provide all of the relief that the union had requested. *Id.* at 639; *see also* R.Ex. A at 180-82. Union Pacific apparently complied.[4]

Meanwhile, when the grievance was still pending, Complainant filed the present Federal Rail Safety Act complaint in November 2008. R.Ex. H.

Discussion

On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

I. The Union's Pursuit of a Grievance Did Not Constitute Complainant's Election of a Remedy.

The Federal Rail Safety Act requires what it terms an "election of remedies" as follows: "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." 49 U.S.C. § 20109(f). The ultimate question presented here is whether the union's pursuit of a grievance, asserting on Complainant's behalf rights under a collective bargaining agreement, constitutes an election of remedies under the Federal Rail Safety Act and forecloses the present action.

The parties point to no applicable controlling case law. Nor do they identify analogous statutes in which precedential decisions interpret the same or very similar language.

[4] Union Pacific asserts that it reinstated Complainant with full backpay. *See* Resp. Mot. Sum. Dec. at 11. It offered no evidence of this, but Complainant did not dispute it.

The relevant statutory provisions raise three issues. First, the statute refers to the person seeking protection under another provision of law as "an employee"; it is silent about cases in which the party seeking an alternate remedy is a union. If a union pursues a grievance on behalf of the employee, does that constitute the employee's election for purposes of the Act's elections of remedies provision? Second, the statute refers to the pursuit of another remedy for the same "unlawful act." Is an alleged breach of a collective bargaining agreement an "unlawful act," or is it a simple breach of contract? Third, the Act provides that employees' rights to remedies under the whistleblower provisions cannot be waived by "agreement" or as a "condition of employment." 29 U.S.C. §20109(h). Can the election of remedies provision apply consistent with that requirement if the collective bargaining agreement offers fewer remedies than the Act? I address these issues in turn.

A. The Union's Pursuit of a Grievance Was Not Complainant's Election under the Act.

When a union pursues a grievance, its decision to do so is an act of the union, not of the employee. The union's action is based on the collective bargaining agreement and its overall majoritarian interests. As the Supreme Court has long acknowledged, a "union's exclusive control over the manner and extent to which an individual grievance is presented" raises concerns about its enforcement of federal statutory rights on behalf of individual members. *See, e.g., Alexander v. Gardner-Denver*, 415 U.S. 36, 58 n.19 (1974). This is because the union may subordinate the interests of an individual employee to those of its collective membership. *Id.* "The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." *McDonald v. West Branch*, 466 U.S. 284, 291 (1984).[5]

Congress recently amended the Federal Rail Safety Act consistent with a recognition of a real distinction between unions and their individual members. In 2007, it added a subsection entitled, "Rights retained by employee." 29 U.S.C. §20109(h) (re-designated from subsection (g) in 2008). The provision includes the following: "The rights and remedies in this section [*i.e.*, the whistleblower provisions] may not be waived by any agreement, policy, form, or condition of employment." *Id.* The thrust is that a union's agreement with an employer to waive some of the individual whistleblower protections in the statute is unenforceable; the statute created rights retained in the individual worker irrespective of any collective bargaining agreement.[6]

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[5] *Gardner-Denver* and *McDonald* concern the enforceability of mandatory arbitration provisions in collective bargaining agreements when applied to individual workers' Title VII claims. These cases' ambit – and perhaps their continued viability – was greatly diminished in *14 Penn Plaza LLC v. Pyett*, ___ U.S. ___, 129 S.Ct. 1456, 1464, 1472 (2009). As Justice Thomas explained, writing for a 5-4 majority in that case, the Court has long acknowledged a judicial policy concern about a union's interests differing from those of its individual members. *Id.* at 1464. But, absent direction from Congress in a particular statute, this judicial policy generally cannot overcome the strong policy favoring arbitration in both the Federal Arbitration Act and the federal labor laws. *Id.* Nothing about *Pyett*, however, negates the recognition that the interests of a union do not always coincide with – and sometimes are inconsistent with – its individual members' pursuit of federal statutory rights.

[6] Subsection (h) does not necessary preclude an application of *Pyett* to Federal Rail Safety Act cases. Under *Pyett*, the selection of an arbitral forum, as opposed to a courtroom, is not a waiver of substantive rights. *See Pyett*, 129

I conclude that, when a union chooses to pursue a grievance on behalf of an employee, it is acting as a union, and that this is distinct from an election of the individual employee to seek a remedy other than under the Federal Rail Safety Act. As the union, not Complainant, pursued the grievance, Complainant did not trigger the election of remedies provision in the Act.[7]

B. The Grievance Was Not Pursued for "Unlawful Conduct."

The union's contention – and the basis for the award – in the labor arbitration was not that Union Pacific engaged in conduct was unlawful; rather, it was that Union Pacific breached its contractual obligations under the collective bargaining agreement. As the union's complaint alleges: "It is [the union's] contention that the Carrier violated the terms and provisions of the current Collective Bargaining Agreement . . . ." R.Ex. G at 634; R.Ex. F at 3.[8]

But, "To breach a contract is not unlawful; the breach only begets a remedy in law or in equity." *Benderson Dev. Co. v. U.S. Postal Service*, 998 F. 2d 959, 962 (Fed. Cir. 1993) (interpreting a statutory provision requiring that the Postal Service only acquire property in a "lawful" manner).[9] As the election of remedies provision is limited to allegations elsewhere of the same "unlawful act," the provision does not apply to contract claims such as the one pursued here. *See Mercier v. Union Pacific*, 2008-FRS-00004, (ALJ June 3, 2009) at 2 (under the Federal Rail

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S.Ct. at 1469-70. If subsection (h) limits only a waiver of substantive rights, privileges, and remedies, then the selection of an arbitral forum – as opposed to the administrative forum that the Act sets up – might not run afoul of subsection (h). I need not and do not reach this question.

As a general matter of federal labor law, unions have a duty of fair representation to their members. *Marquez v. Screen Actors*, 525 U.S. 33, 44 (1998). A union would be liable, for example, if it decided not to pursue a grievance for reasons such as unlawful discrimination. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Unions are subject to the requirements of Title VII and the Age Discrimination in Employment Act. *See* 42 U.S.C. §2000e-2(c); 29 U.S.C. §623(d). These factors should diminish the conflict of interest between unions and individual members, *see Pyett*, 129 S.Ct. at 1473, but they will not eliminate them in all individual cases.

[7] Union Pacific, which must establish as undisputed the facts on which it relies for this motion, did not place the collective bargaining agreement on the record. Absent evidence to the contrary, I must assume that, under the collective bargaining agreement, it is the union's exclusive choice whether to pursue a grievance (subject to the union's duty of fair representation – *see* fn. 6, *supra*).

[8] The union did not contend, and the arbitrator did not decide, whether Union Pacific engaged in unlawful conduct by terminating Complainant in retaliation for Claimant's reporting a workplace injury. The focus of the arbitration was not on Union Pacific's motivation, but rather on whether it had good cause for the termination under the collective bargaining agreement's termination provision. The arbitrator concluded only that Union Pacific "failed to prove by substantial evidence that Claimant [*i.e.*, Complainant] was in violation of GCOR Rule 1.6, Part 4 – dishonest, by working outside his then current medical restrictions." R.Ex. G at 5.

[9] *See also Shoryer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1043-44 (9th Cir. 2010) (alleged breach of contract insufficient to show "unlawful" conduct for purposes of the California unfair competition statute, Cal. Civ. Code §17200); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1253-54 (10th Cir. 1988) ("Under the RLA, while the courts have no jurisdiction to hear airline employee claims based solely upon the contract, the courts do have jurisdiction over claims based upon federal statutes. . . . Certainly no inconsistency results from permitting both contractual rights and statutory rights to be enforced in their respectively appropriate forums."); *Mosqueda v. Burlington Northern & Santa Fe Ry.*, 981 F. Supp. 1403 (D. Kan. 1997) ("Plaintiff's claim of racial discrimination was brought under the statutory authority of Title VII, not the provisions of the Collective Bargaining Agreement.").

Safety Act, disputes under a collective bargaining agreement are contractual and not based on another provision of law).[10]

C. The Election of Remedies Provision Does Not Apply to Claims That Provide Lesser Remedies Than Does the Federal Rail Safety Act.

The amendment codified in subsection (h) precludes application of the election of remedies provision when the alternate recourse was to arbitration under a collective bargaining agreement with lesser remedies than those afforded under the Act.[11] At the arbitration, the union was limited to the remedies that the collective bargaining agreement allowed. Those remedies apparently did not include emotional distress or punitive damages. (At least nothing on the record suggests that they did, and the union did not seek such damages.)[12] In contrast, the Federal Rail Safety Act allows these remedies. *See* 29 U.S.C. §20109(e)(2)(C), (e)(3) (providing compensatory damages plus possible punitive damages not to exceed $250,000).

As an amendment to the statute, subsection (h) must be seen as modifying and clarifying the Act's election of remedies provision (which pre-dated the amendment); the election of remedies provision must be construed consistent with subsection (h).[13] That means that no election of remedies can be required if it is based on an agreement between a union and an employer that would diminish the remedies to which the employee might be entitled under the Act. Any other rule would fail to give effect to subsection (h)'s mandate that no agreement can waive the employee's right to the remedies that the Act provides.

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[10] Union Pacific misplaces its reliance on an interpretation of legislative history in *Raynor v. Smirl*, 873 F.2d 60 (4th Cir. 1989). In 2007, Congress legislatively overruled the *Raynor* Court's holding that the Federal Rail Safety Act preempts state law claims and provides the exclusive remedy for railway whistleblowers. *See* 49 U.S.C. §20109(h). The statute now expressly provides that it does not preempt "any other safeguards against discrimination . . . provided by Federal or State law." *Id.* To the extent that *Raynor* correctly interpreted the pre-amendment legislative history as supporting its conclusion, that history was overruled with the amendment. Union Pacific's reliance on a district court's pre-amendment, unpublished decision that follows *Raynor* is similarly misplaced. *See Sereda v. Burlington Northern Santa Fe R. Co.*, 2005 WL 5892133 (S.D. Iowa 2005).

I respectfully disagree with Judge Krantz' decision in *Koger v. Norfolk Southern Ry. Co.*, Case No. 2008-FRS-00003 (May 29, 2009). As Judge Krantz observed, when Congress wants to require an employee to elect between a negotiated grievance procedure and a statutory claim, it has stated as much explicitly, as it did in the Federal Labor-Management Relations Act, 5 U.S.C. §7121(d). Congress imposed no such explicit election in the Federal Rail Safety Act.

[11] This is correct to the extent that it is the union that is empowered to pursue the grievance, not the employee. *See* discussion above.

[12] Again, as moving party, Union Pacific did not place the collective bargaining agreement on the record. I must decide the motion in the light most favorable to the non-moving party. I assume that the collective bargaining agreement does not provide for compensatory or punitive damages.

[13] Even were subsection (h) not added as an amendment, the election of remedies provision generally would have to be construed in the context of the entire statute. *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (construing language in the Bankruptcy Act). As the Supreme Court held in that case: "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear . . . ." *Id.*

In the present case, the Act's election of remedies provision could apply only if the remedies available under collective bargaining agreement are no less than those under the Act; they must include compensatory damages and permissible punitive damages of at least $250,000. Nothing on the record suggests that the collective bargaining agreement allowed for such remedies, and therefore Union Pacific has failed to present an adequate record for summary decision.[14]

II. Complainant's Claim Relates to Pre-Amendment Rights and Is Not a Retroactive Application of Later-Enacted Amendments to the Federal Rail Safety Act.

Union Pacific's argument about retroactivity lacks foundation. Complainant's claim alleges retaliation for his reporting a work-related injury. *See* 49 U.S.C. §20109(a)(4).[15] Congress added that section in 2007, which was prior to the violation alleged here. Pub. L. No. 110-53, 121 Stat. 444 (2007). The claim is not, as Union Pacific argues, based on the later-enacted provision that a railroad 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." 49 U.S.C. §20109(c). Complainant's OSHA complaint nowhere mentions a delay in providing medical treatment, and it expressly cites to section 20109(a)(4). Compl. at 6. Union Pacific's second argument therefore fails.

Conclusion and Order

The union's pursuing a grievance did not trigger the election of remedies provision in the Federal Rail Safety Act. It was an act of the union, not of Complainant, and it did not allege an "unlawful act" but was limited to a claimed breach of contract. It was based on the union's choice to pursue an avenue with lesser remedies than those that the statute affords. Complainant is not asserting rights based on a statutory provision enacted after Union Pacific terminated the employment; he relies solely on a provision that pre-dates the termination. Accordingly,

Union Pacific's motion for summary decision is DENIED.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

[14] Were it not for these additional remedies, it might be that the present action would be pointless. To the extent that the arbitration resulted in Complainant's being made whole on lost wages, seniority, and his employment record, there might be nothing left that he could be awarded in this forum. Complainant's potential entitlement to a make-whole remedy in this forum does not entitled him to a double recovery.

[15] This subsection prohibits discrimination against an employee due, in whole or in part, to the employee's act done "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." *Id.*