U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 26 April 2010

CASE NO. 2010-FRS-1

In the Matter of:

CHARLES P. NEWMAN, JR.,
Complainant

v.

UNION RAILROAD,
Respondent

ORDER DENYING RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Background

Procedural and Factual Background

A hearing, involving the above-named parties, will be conducted pursuant to the employee protection provisions of the Federal Rail Safety Act [hereinafter "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 (Aug. 3, 2007), beginning on May 10, 2010 in Pittsburgh, Pennsylvania.

This matter arises out of a workplace injury suffered by the Complainant on October 6, 2008. The Complainant, an electrical repairman for the Respondent, fell into a stairwell and injured his right wrist. The Respondent summoned Complainant to a formal investigation hearing in accordance with the terms of the collective bargaining agreement [hereinafter "CBA"] on October 8, 2008. The Complainant accepted responsibility for violating cited rules and served a five day suspension. After the suspension the Complainant returned to work, but on restricted duties due to his injury. He was removed from service on December 5, 2008. After a formal investigation hearing on January 23, 2009, he was dismissed from service on February 24, 2009 for providing false statements concerning his physical condition and ability to perform work. The Complainant appealed this dismissal using grievance/arbitration procedures, pursuant to the collective bargaining agreement. His appeal was denied on May 13, 2009, and again on November 24, 2009. The Complainant, through his union, filed a notice of appeal to arbitration as permitted under the CBA. On February 23, 2010, an Agreement for the establishment of a special board of adjustment signed by the union was sent to the National Mediation Board.

The Complainant also filed a whistleblower complaint with OSHA, under the FRSA, on December 12, 2008. The Complainant alleged that Respondent retaliated against him for reporting his injury. The Complainant was terminated "for cause" on February 24, 2009. In March 2009, he amended his complaint to included allegations that his February 24, 2009 termination was in retaliation for reporting the injury and for filing his FRSA whistleblower complaint. On September 2, 2009, OSHA issued its findings. It found that there was reasonable cause to believe that Respondent violated FRSA regarding the five day suspension. It found that there was no reasonable cause to believe that Respondent violated FRSA when removing the Complainant from service on December 5, 2008 and terminating his employment on February 24, 2009. Both parties objected to OSHA's findings and requested a hearing before an administrative law judge.

Respondent's Motion to Dismiss

On March 29, 2010, the Respondent filed a Motion to Dismiss for Lack of Jurisdiction. The Respondent argues that FRSA's Election of Remedies provision precludes the Complainant from seeking protection under the FRSA because he already sought protection under another provision of law. The 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's motion contends that the Complainant's decision to pursue his claim under the grievance/arbitration framework was an "election" of a remedy under a provision of law separate from the FRSA, specifically the Railway Labor Act [hereinafter "RLA"], 45 U.S.C. § 151 *et seq.*

In support of this argument, Respondent discusses the legislative history of the FRSA. Respondent notes that the FRSA was amended in 1980 to allow rail employees who had been retaliated against for engaging in protective activities to challenge their discipline in arbitration under Section 3 of the RLA. Congress also adopted an Election of Remedies provision at that time. The FRSA was amended three times after 1980, but the Election of Remedies provision stayed substantively the same. The Respondent argues that pursuing remedies through the grievance/arbitration procedures constitutes "seeking protection" because of Congress' recognition in 1980 that rail employees could seek redress through RLA arbitration. The Respondent further argues that pursuing remedies through the grievance/arbitration procedures is seeking protection "under another provision of law" because the RLA sets forth many requirements that govern the grievance/arbitration process. Thus, the Respondent argues, the Complainant's appeal on March 16, 2009 was a statutory act under the RLA. Therefore the Complainant "elected" to pursue his grievance under the RLA and his complaint in this matter is barred by FRSA Section 20109 (f).

Complainant's Response

The Complainant responded to Respondent's motion on April 17, 2010. Complainant points to the 2007 amendments made to the FRSA as reason to deny Respondent's motion. In 2007, two subsections were added to 49 U.S.C. § 20109. These 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.

Complainant states that before the 2007 amendments the FRSA was a preemptive statute. Sections (g) and (h), however, change that. Complainant argues that the Respondent's motion ignores the text of Sections (g) and (h). Statutory sections must be construed together. Complainant argues that Respondent's reading of the FRSA makes Sections (g) and (h) superfluous. Section (h) in particular, the Complainant argues, would be meaningless if Section (f) required that an employee choose only one remedy between a FRSA whistleblower claim and grievance/arbitration proceedings under a collective bargaining agreement.

Complainant further argues that Section (f), even if read in the manner that Respondent's motion suggests, does not support the Respondent's position. The Complainant argues that pursuing an appeal of the disciplinary action taken by Respondent is not seeking protection "under another provision of law" because the appeal process is governed by the collective bargaining agreement. The procedures are governed by the RLA, but the rights sought to be vindicated are contractual. Further, Complainant argues, the disciplinary proceedings are instituted by the employer against the employee. Therefore, following the CBA/RLA procedures is not an "election" by the employee.

Discussion

As the parties discuss in their briefs, 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. When it amended the FRSA in 1980, Congress also included an Election of Remedies provision that is substantively identical to the current Election of Remedies provision at 49 U.S.C. § 20109 (f). Complainants pursing a claim under the FRSA could not bring claims under any of the other statutes covering their conduct. The 9/11 Act, however, made numerous changes to the FRSA in 2007. The Conference Report for the 9/11 Act states that it was Congress' intent to both to broaden what is considered protected conduct and to enhance the civil and administrative remedies available to aggrieved employees.[1] The 2007 Amendments left the Election of Remedies Provision, Section

[1] H.R. No. 110-259 (July 25, 2007), 2007 USCCAN 119.

(f), substantively intact while adding Sections (g) and (h). Thus the decision on Respondent's Motion to Dismiss revolves around how Sections (f), (g), and (h) relate to one another.

Two decisions by Administrative Law Judges attempted to answer the question of how Sections (f), (g), and (h) fit together. The first, cited by the Respondent, is *Koger v. Norfolk Southern Railway Company*, 2008 FRS-00003 (May 29, 2009). In *Koger*, the complainant believed he had been retaliated against for reporting a workplace injury. The complainant appealed his dismissal in accordance with the RLA and was reinstated by a Public Law Board. The complainant also filed a complaint against his employer with OSHA, and appealed OSHA's findings to the Office of Administrative Law Judges. The employer moved to dismiss based on the Election of Remedies provision, arguing that the complainant's decision to appeal under the RLA precluded his Department of Labor complaint. The ALJ noted that Congress made sweeping changes to the FRSA with the passage of the 9/11 Act in 2007, but left the Election of Remedies provision substantively unchanged. The ALJ noted that several other federal statutes contain express election of remedies provisions and that they have been interpreted to mean that a potential plaintiff's options are limited at the very outset of litigation.[2] The ALJ interpreted Section (f) similarly, holding that the complainant had elected to pursue redress under the RLA arbitration procedures and was thus the Department of Labor lacked jurisdiction over his FRSA claim.

The second ALJ decision addressing this issue was decided shortly after *Koger*. In *Mercier v. Union Pacific Railroad*, 2008-FRS-00004 (June 3, 2009), the complainant's union initiated a grievance on his behalf under the RLA procedures, alleging that his termination was in violation of the collective bargaining agreement. The complainant additionally filed a complaint with the Department of Labor. The employer moved to dismiss based on the Election of Remedies provision, arguing that the complainant had elected to pursue his claim under the RLA. The ALJ disagreed and found otherwise, denying the employer's motion. The ALJ cited Sections (g) and (h) and read them as showing Congress' intent to eliminate the preemption of discrimination claims arising under federal/state law or collective bargaining agreements. The ALJ found that the employer's reading of Section (f) could not be reconciled with the text of Sections (g) and (h). The ALJ further found that a collective bargaining agreement does not qualify as "another provision of law" under Section (f).[3] Citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the ALJ discussed the importance of recognizing the difference between a complainant's contractual and statutory rights to redress against his employer. Thus, the ALJ denied the respondent's motion.[4]

The Respondent is correct to point out the significance of Congress leaving the Election of Remedies provision substantively unchanged each time it amended the FRSA. Congress had numerous opportunities to change or remove the provision altogether and declined to do so.

---

[2] Those other statutes (the Federal Labor –Management Relations Act, 5 U.S.C. § 7121 (d); the Federal Telecommunications Act of 1996, 47 U.S.C. § 207) did not contain language similar to Sections (g) and (h) of the FRSA, 49 U.S.C. § 20109. The ALJ did not discuss those sections.

[3] The ALJ cited *Graf v. Elgin, Joliet and Eastern Railway Co.*, 697 F.2d 771, 776 (7th Cir. 1983) (stating that "nor does the fact that an activity is regulated by a federal statute, as collective bargaining in the railroad industry is regulated by the Railway Labor Act, mean that disputes between private parties engaged in that activity arise under the statute").

[4] Both *Koger* and *Mercier* are currently before the Administrative Review Board on appeal.

Therefore it is necessary to conclude that Congress did not intend Section (f) to be a dead letter when it enacted the 2007 amendments to the FRSA. Complainant is correct, however, that by amending the FRSA and inserting Sections (g) and (h), Congress intended to change the effect of Section (f) from what it was before the enactment of the 9/11 Act. Between 1980 and the 2007 amendments, the FRSA was a preemptive statute that allowed rail employees to challenge alleged retaliatory behavior only through the procedures of the RLA.

The plain text and the legislative history of the 2007 amendments to the FRSA intended to change the limited nature of the FRSA employee protection provisions by enhancing the remedies available to potential plaintiffs. But because Sections (f), (g), and (h) all must have at least *some* effect, the question of how much Section (f) limits Sections (g) and (h) (and vice versa) remains. The Respondent argues that Sections (g) and (h) only expand "the universe" of potential statutes under which a potential complainant could bring a claim. Thus, a potential complainant still must choose one remedy at the outset of litigation and is thereafter precluded from pursuing any other remedy for the same alleged conduct of the employer. The Complainant argues, based on the text of Sections (g) and (h), that nothing in the FRSA shall be deemed to diminish an employee's rights under other laws or a collective bargaining agreement. As for Section (f), the Complainant argues that it now limits a complainant only from pursuing duplicative retaliation claims under other "whistleblower" statutes, not from pursuing contractual rights under a CBA.

While both arguments are appealing, I find the Complainant's reasoning to be more persuasive and more in line with the language and intent of the employee protection provisions of the FRSA. Congress amended § 20109 to enhance the civil and administrative remedies available to railroad employees. Section (f) remained intact as recognition that railroad employees could potentially fall under overlapping employee protection statutes in addition to the FRSA, such as the National Transit Systems Security Act (enacted in the same bill that amended the FRSA in 2007). Congress intended to expand the avenues for railroad employees to seek redress for wrongful acts of employers, but still wanted to prevent the complainant from bringing duplicative litigation that could result in inconsistent or double awards. Sections (g) and (h) recognize that an employee may seek redress or vindicate rights using various channels of litigation that will not risk duplicative results.

The text of Section (h), in particular, recognizes that an employee can vindicate rights under a collective bargaining agreement and also seek redress by bringing suit under the FRSA. Section (h) specifically states that an employee's rights to seek remedies provided by a collective bargaining agreement shall not be diminished by any other section of the FRSA. If Respondent's interpretation of Section (f) that choosing to appeal discipline pursuant to a collective bargaining agreement prevents an employee from also filing a complaint under the FRSA is correct, it would make Section (h) meaningless.

The Respondent argues that a collective bargaining agreement cannot be divorced from the law that gives it force, in this case the RLA. Thus, appealing discipline through the CBA is seeking protection under "another provision of law" under Section (f). The Complainant argues that seeking redress through the collective bargaining agreement is not seeking protection under another provision of law because the rights being asserted are contractual and are thus different

than those in the statutory scheme. No matter which interpretation is correct, the provisions of § 20109 clearly dictate that the Complainant would not be precluded from pursuing both his appeal to arbitration and his "whistleblower" complaint. If the Complainant is correct and the CBA is not "another provision of law," Section (h) plainly states that neither his contractual nor his legal claims against his employer are preempted by the FRSA. If the Respondent is correct and the CBA procedures qualify as "another provision of law," the RLA, the Complainant still prevails because, as discussed above, Sections (g) and (h) changed the FRSA to allow an employee to attempt to vindicate rights using multiple means. Prior to the 2007 amendments, the Respondent's argument would have been correct. At that time the FRSA required the potential complainant to pick one avenue for pursuing his claim at the outset of the litigation. The 2007 amendments, however, sought to expand the opportunities for railroad employees to seek protection and vindicate their rights.

The amendments made to the FRSA by the 9/11 Act were intended to widen the scope of the employee protection provisions and enhance the civil and administrative remedies available to railroad employees. Respondent's reading of Section (f) would undercut those goals by keeping the FRSA a preemptive statute. Respondent's interpretation of Section (f) would make Sections (g) and (h) virtually toothless. Though an employee's opportunities to bring actions or vindicate rights against his employer are not unlimited, Sections (g) and (h) clearly enhance the civil and administrative remedies available to potential complainants by making the employee protection provisions of the FRSA non-preemptive. Thus, the Complainant is not precluded from appealing his discipline pursuant to the collective bargaining agreement while simultaneously litigating this suit against the Respondent through the Department of Labor.

Order

The Respondent's Motion to Dismiss for Lack of Jurisdiction is DENIED.

Richard A. Morgan

RICHARD A. MORGAN
Administrative Law Judge