U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 08 July 2011

Case No.: 2011-FRS-00004

In the Matter of:

LATONYA MILTON,
Complainant

v.

NORFOLK SOUTHERN RAILWAY CORP.,
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION FOR LACK OF JURISDICTION

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 was disciplined and later discharged 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 October 5, 2010. Those findings were that there was "no reasonable cause to believe that Respondent violated the Complainant's rights under FRSA." The Complainant appealed the OSHA determination to the Office of Administrative Law Judges (OALJ). On May 9, 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. On June 7, 2011, the Complainant responded to that motion.

Complainant alleges in her complaint that she was injured at work in a coupling incident on March 19, 2010. She reported the incident that day but did not report that she was injured until March 24, 2010. She was subsequently terminated for failure to report an on-duty injury and for making false and conflicting statements regarding an on-duty injury. The parties agree that Complainant appealed that termination through her union, based on the contractual provisions set forth in the collective bargaining agreement of the National Conference of Firemen and Oilers (NCFO) and the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* An arbitration hearing is pending before the Special Board of Adjustment No. 1106.

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 she instead elected to pursue her Railway

Labor Act remedies by exercising her appeal rights under her 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 pursuit of an appeal under a collective bargaining agreement challenging a discharge as a violation of the rights provided by that agreement is seeking protection under "another provision of the law." Respondent also contends that Complainant is challenging her discharge in both the RLA process and this DOL proceeding, thus she is seeking protection in both cases for "the same allegedly unlawful act," regardless of what legal theory she is using to challenge it. Therefore, Respondent concludes that the election of remedies provision bars Complainant from seeking relief under the FRSA.

Complainant argues that the election of remedies provision does not bar Complainant's claim under the FRSA. Complainant argues that seeking protection under a collective bargaining agreement is not seeking protection under "another provision of law" because a collective bargaining agreement is a contractual agreement and that the fact that it is enforceable through provisions of a federal law does not transform it into a provision of law. Complainant also notes that the FRSA protects against unlawful acts, which are defined as discrimination against an employee due to the employee's protected activity. In contrast, the RLA does not provide for protection from such discrimination as it is not a whistleblower protection statute.

Complainant further argues that Respondent does not correctly consider 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.

Complainant argues those subsections limit the scope of subsection (f) so as to allow the protections under the FRSA to operate in addition to the safeguards of the RLA, not in place of them. Respondent contends that subsections (g) and (h) should instead be interpreted as to make the FRSA preclusive of itself in favor of other avenues of relief, not visa versa. Essentially, Respondent argues that if an employee first files a complaint under FRSA § 20109, then subsections (g) and (h) preserve the employee's right to later elect relief under an alternative law such as the RLA. The reverse, however, is not true.

Discussion

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 multiple recent cases and several administrative law judges have ruled differently. The Administrative Review Board has not yet ruled on the issue on appeal. Cited by the Respondent is *Koger v. Norfolk Southern Railway Company*, 2008 FRS-00003 (May 29, 2009), in which the administrative law judge 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. However, the ALJ in that case did not discuss the impact of subsections (g) and (h). The two 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. *Mercier v. Union Pacific Railroad*, 2008-FRS-00004 (June 3, 2009); *Newman v. Union Railroad*, 2010-FRS-00001 (April 26, 2010).[1] Also, in examining whether seeking redress under collective bargaining constitutes protection under "another provision of law," the ALJ in *Mercier* held that it does not, but rather relates to contractual protection.

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 protections 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."

Respondent concedes that subsections (g) and (h) must have some meaning. However, Respondent's argument that subsections (g) and (h) prohibit only FRSA claims brought after an exercise of collective bargaining rights, but would allow an FRSA claim if brought before, is an illogical distinction. Congress' intent was to enhance the civil and administrative remedies available to aggrieved employees. There is no sensible rationale that would justify allowing or

---

[1] 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 did also hold that the election of remedies provision does not apply to claims that provide lesser remedies than the FLSA.

not allowing a complainant to pursue both collective bargaining and FRSA remedies based solely on the order in which the complainant chose to pursue each course. If the concern in allowing both avenues of redress is duplicity of awards and conflicting decisions, the order in which the avenues are pursued would have no effect in alleviating those concerns.

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 filed a grievance pursuant to a collective bargaining agreement from pursuing a complaint under the FRSA.

With regards to whether Complainant's pursuit of her appeal under her collective bargaining agreement is seeking protection under "another provision of law," I find that it is not. Subsection (f) states only that "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" (emphasis added). The protections Complainant seeks to exercise are provided by the collective bargaining agreement itself, not the RLA. The RLA simply mandates that railroad carriers and employees make reasonable efforts to implement collective bargaining agreements and regulates how disputes are to be resolved. In pursuing an appeal under a collective bargaining agreement, the Complainant is arguing that the railroad violated the terms of the collective bargaining agreement, a contractual protection, not that the RLA was violated.

Further, I note that the goal of protecting railroad employees against discrimination based on whistleblower activities would not be promoted by limiting their avenues of redress only to proceedings under a collective bargaining agreement. Claims under the FRSA are specifically targeted at whether a complainant 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.

For the foregoing reasons, I find Complainant is not precluded from appealing her termination pursuant to her collective bargaining agreement while simultaneously litigating this claim under the FRSA through the Department of Labor.

ORDER

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

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/amc
Newport News, Virginia

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 11 July 2011

Case No.: **2011-FRS-00004**

In the Matter of:

LATONYA MILTON,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY CORP.,
Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION FOR LACK OF JURISDICTION UPON RECONSIDERATION

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 was disciplined and later discharged 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 October 5, 2010. Those findings were that there was "no reasonable cause to believe that Respondent violated the Complainant's rights under FRSA." The Complainant appealed the OSHA determination to the Office of Administrative Law Judges (OALJ). On May 9, 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. On June 7, 2011, the Complainant responded to that motion. The undersigned issued an order denying Respondent's motion for summary disposition for lack of jurisdiction on June 24, 2011, the same day the Respondent replied to the Complainant's response.[1]

Respondent filed a motion for reconsideration on June 27, 2011, requesting that the undersigned reconsider after reading Respondent's June 24, 2011 reply to Complainant's response to Respondent's motion for summary decision. Respondent also requested the undersigned clarify two sections of the order, one regarding the reason Complainant was fired and one mischaracterizing an argument Respondent made.

Discussion

The first page of the June 24, 2011 order stated that the Complainant was "terminated for failure to report an on-duty injury and for making false and conflicting statements regarding an on-duty injury." Respondent noted that its position is that Complainant was terminated for violation of General Conduct Rule N, which requires timely reporting of injuries, and for making false and conflicting statements

[1] The Respondent had submitted a letter on June 7, 2011 requesting until June 17 to file a reply brief and then on June 9, 2011 submitted a second letter requesting until June 24 to file its reply. The second request was overlooked by this office and the Respondent's brief arrived after the undersigned ruled on the motion.

concerning her report of an on-duty injury. Complainant, of course, contends she was fired for reporting an on-duty injury, which is the protected activity upon which her claim is based, as stated in the second sentence of the June 24, 2011 order.

Respondent also states that the undersigned misconstrued its argument regarding how subsections (f), (g), and (h) should be harmonized. Regarding the effect of subsections (f), (g), and (h), the Respondent stated the following in its motion for summary disposition for lack of jurisdiction:

> To reconcile subsections (f), (g), and (h), as *Newman* attempted to do, the more logical conclusion is to find that these sections make §20109 preclusive of *itself* in favor of other preferred avenues of relief, such as the RLA. Indeed, if an employee seeking relief under §20109 "may not seek protection under both [§20109] and another provision of law for the same allegedly unlawful act," and "nothing in [§20109] preempts or diminishes any *other* safeguards" (emphasis added) or "diminish[es] the rights, privileges, or remedies of any employee under and Federal or State law or under any collective bargaining agreement," then it must be true that §20109 makes other remedies preclusive of §20109 itself, not the vice versa reasoning in *Newman*.
>
> Pursuant to this rationale, an employee who wishes to file a complaint under §20109 for a disputed discharge may do so. Once the employee has so filed, subsections 20109(g) and (h) preserve that employee's later right to elect relief under an alternative law, such as the RLA. When, as in Ms. Milton's case, that employee then elects to seek relief for that same disputed discharge under any law other than §20109, the Election of Remedies provision, § 20109(f), takes effect, and the employee's §20109 claim must be dismissed. Any other conclusion completely deprives §20109(f) of the plain meaning of its language, effectively eviscerating Congress' express intent.

After reviewing Respondent's motion and additional discussion in Respondent's reply brief, the undersigned strikes from the June 24, 2011 order the misunderstanding of Respondent's argument. The following sections include that misinterpretation and the undersigned does not consider that misinterpretation in this decision on reconsideration.

> Essentially, Respondent argues that if an employee first files a complaint under FRSA § 20109, then subsections (g) and (h) preserve the employee's right to later elect relief under an alternative law such as the RLA. The reverse, however, is not true.[2]
>
> However, Respondent's argument that subsections (g) and (h) prohibit only FRSA claims brought after an exercise of collective bargaining rights, but would allow an FRSA claim if brought before, is an illogical distinction... There is no sensible rationale that would justify allowing or not allowing a complainant to pursue both collective bargaining and FRSA remedies based solely on the order in which the complainant chose to pursue each course. If the concern in allowing both avenues of redress is duplicity of awards and conflicting decisions, the order in which the avenues are pursued would have no effect in alleviating those concerns.[3]

However, neither the clarification of the Employer's argument nor a reading of the Employer's reply brief changes the remainder of my reasoning or holding in the July 24, 2011 Order. Specifically, upon reconsideration I continue to make the following findings:

---

[2] July 24, 2011 Decision and Order, page 2

[3] July 24, 2011 Decision and Order, page 3-4

In pursuing an appeal under a collective bargaining agreement, the Complainant is arguing that the railroad violated the terms of the collective bargaining agreement, a contractual protection, not that the RLA itself was violated. The fact that the collective bargaining agreement is enforceable though the RLA does not make the rights granted under the collective bargaining agreement into provisions of the RLA. *See, Graf v. Elgin, Joliet and Eastern Railway Co.*, 697 F. 2d 771, 776 (7th Cir. 1983). Thus, the election of remedies provision does not apply in this case because Complainant did not seek protection under "another provision of law" when she appealed her termination through the grievance procedure in her collective bargaining agreement.

When Congress amended § 20109 it enhanced the civil and administrative remedies available to railroad employees. Added subsections (g) and (h) must be read in conjunction with already existing subsection (f). Subsection (f) remained to address the concern that complainants could fall under other employee protections statutes in addition to the FRSA. Subsection (h) specifically 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." Thus, subsection (h) recognizes an employee's continuing right to pursue redress under a collective bargaining agreement and § 20109 notwithstanding subsection (f).

I find that the FRSA as currently written does not prevent an individual who has filed a grievance pursuant to a collective bargaining agreement from pursuing a complaint under the FRSA. The Complainant's claim is not barred.

ORDER

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

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/amc
Newport News, Virginia