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**Issue Date: 03 June 2009**

CASE NO. : 2008-FRS-4

In the Matter of

MICHAEL L. MERCIER
Complainant

v.

UNION PACIFIC RAILROAD
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises from a complaint filed by Michael L. Mercier (complainant) under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U. S. C. § 20109. On March 26, 2009, as supplemented on May 4, 2009, Respondent filed a Motion for Summary Disposition. Complainant's Memorandum in Opposition to Respondent's Motion was filed on April 27, 2009.

Complainant is a member of the Brotherhood of Locomotive Engineers and Trainmen (BLET). Respondent's Motion at 2. On November 19, 2007, BLET initiated a labor grievance on Complainant's behalf under the Railway Labor Act (RLA) alleging that Complainant's termination (actually a thirty day suspension without pay) was in violation of the collective bargaining agreement (CBA) between Respondent and BLET. Id. at 2, 4. A conference was held which did not change Complainant's status and BLET sought arbitration. Pursuant to a Waiver signed by Complainant and Respondent on July 27, 2007, Complainant: (1) admitted to misconduct (in violation of EEO policies); (2) waived his right to an investigation; (3) agreed to apologize to an affected co-worker; (4) agreed to attend EEO training; (5) agreed to a thirty day suspension without pay; (6) agreed to an eighteen month period of probation; (7) agreed to refrain from engaging in retaliatory conduct; and (8) agreed that the Waiver Agreement "may" result in dismissal without a hearing. Respondent's Motion, Exhibit A. Complainant was subsequently terminated on or about November 5, 2007, and Complainant filed a complaint with the Department of Labor on March 27, 2008.

I.

Respondent's first argument is that Mercier's complaint is barred by the election of remedies provision at 49 U. S. C. § 20109(f). Section (f) provides, "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 contends that Complainant has elected to pursue his complaint under the RLA and is, therefore, precluded from seeking relief under the FRSA pursuant to the instant complaint.

Respondent's argument is without merit. Respondent completely ignores the amendments to the FRSA passed by Congress on August 3, 2007, which include §§ (g) and (h). These provisions state:

> (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.

These two provisions clearly indicate that Congress intended to eliminate the preemption of discrimination claims arising under federal or state law. Furthermore, 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 §§ (g) and (h) must be read in conjunction with the provision at § (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 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 the law. See *Graf v. Elgin, Joliet and Eastern Railway Co.*, 697 F. 2d 771, 776 (7th Cir. 1983) ("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.")

The Supreme Court has held that prior arbitration of contractual claims does not bar subsequent judicial resolution of statutory claims. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the plaintiff filed a grievance under the CBA after he was discharged. Prior to the arbitration hearing, the plaintiff filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission (EEOC). The arbitrator determined that the plaintiff was terminated for just cause and the EEOC failed to find a violation of Title VII of the Civil Rights Act of 1964. Plaintiff

then filed suit in the U. S. District Court for the District of Colorado, which dismissed the claim on employer's motion for summary judgment holding that the plaintiff was bound by the arbitrator's decision and was, therefore, precluded from suing under Title VII. The Court of Appeals for the Tenth Circuit affirmed. The Supreme Court held that the lower courts erred in relying, *inter alia*, on the doctrine of election of remedies to dismiss the claim. The Court stated,

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual rights under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence...no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

415 U. S. at 49-50. The Court concluded that "... the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration of a collecting-bargaining agreement and his cause of action under Title VII." Id. at 59-60. Thus, the Supreme Court in *Alexander* recognized the difference between a complainant's contractual remedy and his statutory right, finding that a complainant has the ability to enforce both, regardless of whether they arise from the same factual occurrence.

Cases cited by the Respondent in its Motion do not support its position regarding the application of the election of remedies provision. *Sereda v. Burlington Northern Santa Fe Rail-Road Co.*, 2005 WL 5892133 (S. D. Iowa Mar. 17, 2005) is inapplicable to this case, as it predates the subsequent amendments to the FRSA regarding the election of remedies. Furthermore, *Sereda* deals with the prohibition of a state wrongful discharge claim and a claim under the FRSA rather than with a complainant seeking redress under a CBA while pursuing a complaint under the FRSA. In *Department of Environmental Management v. State of Rhode Island Labor Relations Board*, 799 A. 2d 274 (June 14, 2002), there was no statutory right that the union was seeking to enforce through the judicial process. Rather, the union was attempting to re-litigate the same issue that had already been decided through arbitration. This case is clearly distinguishable from the present case. Finally, Respondent's reliance on *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210 (W. D. Wash. 2003), cited in its supplement to its Motion, is misplaced. In *Fadaie*, a case decided under the Airline Deregulation Act, complainant could either file in a court of law or file a complaint with OSHA. A complainant under the FRSA does not have this option; he must pursue the claim through administrative channels. The court ruled that, since complainant filed a discrimination complaint with OSHA, he was compelled to follow through with the administrative process and could not "collaterally attack an adverse ruling from the Secretary by filing a new civil action in district court."

Thus, I conclude that Mercier's complaint under the FRSA is not precluded by the election of remedies provision because of the use of the grievance procedure under the CBA.

II.

Respondent next argues that the Department of Labor lacks subject matter jurisdiction to hear the complaint. It points out that the first termination/suspension occurred on or about July 9, 2007, almost a month before the DOL was authorized by Congress to investigate complaints under the FRSA. Since the DOL lacks subject matter jurisdiction to hear Complainant's allegations of discrimination in connection with the first termination, Respondent contends that all allegations connected with the first termination cannot be considered, such that the second termination "stands alone." Respondent further argues that since Complainant makes no discernible allegation of FRSA violations in connection with the second termination, the instant case should be dismissed for lack of subject matter jurisdiction.

In cases arising under the FRSA, administrative law judges and the courts have uniformly found that there is no jurisdiction over a complaint filed under the amended FRSA where the alleged protected activity and adverse employment action occurred prior to the August 3, 2007 effective date of the amendments. See *Hamilton v. CSX Transportation*, 2008-FRS-00001 (ALJ February 26, 2008); *Bee v. BNSF Railway Co.*, 2008 WL 4527827 (D. Minn. 2008). These cases have relied on *Landgraf v. USA Film Prods.*, 511 U. S. 244 (1994). In *Landgraf*, the Court reasoned that there is a strong presumption against retroactive application of laws unless it is determined that Congress intended that the law be retroactively applied. If the statute contains no explicit or implicit intent for retroactive application, the Court must determine whether applying the statute retroactively would impose new legal duties on past conduct. In the present case, there is no express statement by Congress that the amended FRSA be applied retroactively. The FRSA amendments have, however, resulted in significant substantive changes, including the expansion of protected acts by employees, the enhancement of administrative and civil remedies for employees, the provision of de novo review in Federal District Court if the DOL does not timely resolve the complaint, and an increase in the cap on punitive damages. Since the amendments resulted in substantive changes, *Landgraf* prohibits the retroactive application of the amendments to FRSA.

As the Complainant's first termination/suspension occurred prior to the amendments to the Act, it falls outside the reach of the statute and is not actionable. However, the Complainant's second termination occurred after DOL had jurisdiction to adjudicate FRSA complaints, and, as a result, the court has jurisdiction. Even though only the second termination is actionable, the protected activity leading up to the first termination/suspension, and the termination/suspension itself, is relevant and therefore, admissible because it provides a complete picture of the relationship between Complainant and Respondent and whether Complainant was discriminated against because of his protected activity. Regardless of whether evidence pertaining to these events is admitted, Respondent's contention that there is no subject matter jurisdiction over the second termination is wholly without merit as the complaint falls squarely within the court's jurisdiction.

III.

Respondent's final argument is that if Complainant's action is not dismissed, further proceedings should be deferred or stayed pending the outcome of binding arbitration initiated

under the authority of the RLA. Respondent states that the issues in this matter and the remedy sought by Complainant are more appropriately addressed and awarded by the National Railroad Adjustment Board (NRAB). It maintains that this request is consistent with established judicial rulings that pertain to the conduct of parallel proceedings and the "deferral to arbitration" policies of the National Labor Relations Board (NLRB). Respondent argues that failure to follow the deferral to arbitration policies of the NLRB will force it to litigate the same matter in two different forums, leading to the potential for conflicting opinions and the squandering of adjudicatory resources.

Under the previous version of the FRSA arbitration was mandated by Congress. See *Consolidated Rail Corp. v. United Transportation Union et al*, 947 F. Supp. 168, 174 (1996). However, the recent amendments to the statute have placed adjudicatory power with the DOL. I can find no grounds to stay the current proceeding. The labor grievance in this case concerns whether Complainant was terminated without the benefit of a disciplinary hearing in violation of the CBA. See Respondent's Motion at 2. Since the FRSA whistleblower complaint is apparently not being arbitrated, there is no reason to stay the current proceeding.

Moreover, Respondent's analogy to the deferral policies of the NLRB is unpersuasive. In prosecuting charges under the NLRB, the General Counsel is generally responsible for investigating and prosecuting unfair labor practice charges. The NLRB regional counsel investigates the charges and if there is a violation, the case will be referred to an administrative law judge. Under the FRSA, the complainant files the complaint and he is responsible for pursuing the claim. The NLRB and the FRSA have different adjudicatory mechanisms, and, as such, the NLRB's policy of deferring to arbitration has no application to the FRSA.

For good cause shown,

IT IS ORDERED THAT Respondent's Motion for Summary Disposition is DENIED.

Daniel L. Leland

DANIEL L. LELAND
Administrative Law Judge

## SERVICE SHEET

Case Name: **MERCIER_MICHAEL_L_v_UNION_PACIFIC_RAILRO_**

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Document Title: **ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION**

I hereby certify that a copy of the above-referenced document was sent to the following this 3rd day of June, 2009:

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