

U.S. Department of Labor

Administrative Review Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



In the Matter of:

MICHAEL L. MERCIER,  
COMPLAINANT,

ARB CASE NO. 09-121  
ALJ CASE NO. 2008-FRS-004

v.

UNION PACIFIC RAILROAD CO.,  
RESPONDENT,

and

LARRY L. KOGER,  
COMPLAINANT,

ARB CASE NO. 09-101  
ALJ CASE NO. 2008-FRS-001

v.

NORFOLK SOUTHERN RAILWAY CO.,  
RESPONDENT.

DATE:

SEP 29 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant Michael L. Mercier:*

Paul W. Iversen, Esq., *Williams & Iversen, P.A.*, St. Paul, Minnesota

*For the Respondent Union Pacific Railroad:*

Michael A. Cox, Esq.; Steven J. Pearlman, Esq.; and Joshua N. Dalley, Esq.,  
*Seyfarth Shaw LLP*, Chicago, Illinois

Rami S. Hanash, Esq., *Union Pacific Railroad Company*, Omaha, Nebraska

*For the Complainant Larry L. Koger:*

James L. Farina, Esq., *Hoey & Farina, P.C.*, Chicago, Illinois

*For the Respondent Norfolk Southern Railway Company:*

Jeffrey S. Berlin, Esq., and Mark E. Martin, Esq., *Sidley Austin LLP*,  
Washington, District of Columbia

Mark D. Perreault, Esq., *Norfolk Southern Corporation*, Norfolk, Virginia

*For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae:*

Rachel Goldberg, Esq.; William C. Lesser, Esq.; and M. Patricia Smith,  
Esq.; *United States Department of Labor*, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado,  
*Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

## FINAL DECISION AND ORDER ON INTERLOCUTORY REVIEW

The Complainants, Michael L. Mercier and Larry L. Koger, each filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). In the complaints, Mercier and Koger each alleged that his respective employer terminated his employment in violation of the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson/Reuters 2011), 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. In each case, a Labor Department Administrative Law Judge (ALJ) issued a pre-hearing ruling. The ALJ in *Mercier* (ALJ No. 2008-FRS-004) ruled that Mercier's complaint is not barred under the FRSA's election of remedies provision at 49 U.S.C.A. § 20109(f) and thus denied Union Pacific Railroad's motion for summary decision. Conversely, the ALJ in *Koger* (ALJ No. 2008-FRS-003) ruled that Koger's complaint is so barred and thus granted Norfolk Southern Railroad's motion to dismiss the complaint.

Before the Administrative Review Board (ARB or Board), the parties in *Mercier* sought interlocutory review of the ALJ's ruling. Koger filed an appeal with the ARB. The ARB granted interlocutory review of the ALJ's ruling in *Mercier* and consolidated Mercier's appeal (ARB No. 09-121) for purposes of decision with Koger's then-pending appeal (ARB No. 09-101). ARB's Order Granting Interlocutory Review and of Consolidation for Purposes of Decision dated Sept. 16, 2009.

## BACKGROUND

The ARB set forth the background facts of this case in its September 16, 2009, order in which it granted interlocutory review and consolidated the above-captioned cases. We summarize briefly.

### *1. Facts and proceedings in Mercier v. Union Pacific*

Union Pacific terminated Mercier's employment in November 2007. On Mercier's behalf, his union, the Brotherhood of Locomotive Engineers and Trainmen, filed a grievance and later pursued arbitration under the Railway Labor Act (RLA), 45 U.S.C.A. § 151 *et seq.* (Thompson/Reuters 2011), alleging that the termination violated the collective bargaining agreement between the union and Union Pacific Railroad.

Mercier filed his FRSA whistleblower complaint with the Labor Department on March 27, 2008. The case was referred to an ALJ for hearing. Union Pacific moved for summary judgment, arguing that Mercier's complaint is barred under the FRSA's election of remedies provision, 49 U.S.C.A. § 20109(f), which states that an employee cannot "seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." Relying on subsection (f), Union Pacific contended that Mercier's decision to pursue his union grievance and arbitration under the RLA constituted seeking protection under "another provision of law." Union Pacific contended that Mercier's FRSA (whistleblower) complaint is thus barred by the election of remedies provision.

That ALJ rejected Union Pacific's argument. The ALJ observed that 49 U.S.C.A. § 20109(g) states that nothing in the section "preempts" or "diminishes any other safeguards against discrimination," and that under 49 U.S.C.A. § 20109(h), employees retained rights and remedies "under any Federal or State law or under any collective bargaining agreement" and that these rights and remedies "may not be waived." The ALJ noted that Union Pacific had made no attempt to reconcile subsections (g) and (h) with subsection (f), and concluded that subsections (g) and (h) do not prevent an individual who has filed a grievance pursuant to a collective bargaining agreement from pursuing an FRSA complaint. The ALJ noted that subsection (f) prohibits an employee from seeking protection under "both this section and another provision of law" and concluded that the contractual agreement or collective bargaining agreement under which Mercier had proceeded in his grievance/arbitration action is not a provision of law in itself although it is enforceable through provisions of law such as the RLA. The ALJ denied Union Pacific's motion for summary disposition. The ARB granted interlocutory review.

### *2. Facts and proceedings in Koger v. Norfolk Southern*

Norfolk Southern terminated Koger's employment in August 2007. Koger's union, United Transportation Union, filed a grievance and pursued arbitration under the RLA on his behalf as provided for in the collective bargaining agreement it had with Koger's employer. Koger also filed a FRSA whistleblower complaint. Koger alleged in

his complaint that Norfolk Southern discharged him for reporting an injury, activity protected by the FRSA's employee protection provisions.

Prior to a hearing, the ALJ granted Norfolk Southern's motion to dismiss the complaint. The ALJ determined that the FRSA's election of remedies provision, 42 U.S.C.A. § 20109(f), barred Koger's FRSA whistleblower complaint because Koger had pursued a grievance and arbitration under the RLA, which constituted "another provision of law." The ALJ also found that the actions of which Koger complained in both the arbitration and the FRSA complaint involved "the same allegedly unlawful act of the railroad carrier," namely Koger's discharge. Koger appealed.

### JURISDICTION AND STANDARD OF REVIEW

The ARB has the authority to hear interlocutory appeals of administrative law judge orders under the FRSA in exceptional circumstances. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, 3925 para. 5 (c) (48) (Jan. 15, 2010).

The issue before us in *Mercier* is whether the ALJ properly ruled that the FRSA's election of remedies provision does not bar *Mercier's* complaint where he previously pursued a grievance and arbitration provided for in his union's collective bargaining agreement and enforceable under the RLA. The ALJ's ruling in *Mercier* stands in opposition to the ALJ's ruling in *Koger*. We consolidated *Koger* with *Mercier* for purposes of decision; thus our decision in *Mercier* determines the outcome in *Koger*.

### DISCUSSION

#### *A. Statutory Scheme*

In 1980, Congress amended the FRSA to allow rail employees who alleged retaliation to challenge their discipline only through the procedures afforded under the RLA. Congress added an election of remedies provision, Pub. L. No. 96-423 § 10(d) (1980), that remains the same in substance. The current election of remedies provision reads as follows:

**(f) 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.

49 U.S.C.A. § 20109(f).

The legislative history of Section 20109(f) reveals Congress's concerns that some rail workers potentially qualified for protection from discrimination under two statutes,

the FRSA and a Labor Department regulation, 29 C.F.R. § 1977.12 (2010), promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 660(c)(1) (Thomson/Reuters 2011). The OSHA regulation granted covered workers the right to be “protected against subsequent discrimination” for refusing to work under hazardous conditions. 29 C.F.R. § 1977.12(b)(2). Congress intended to bar rail employees from seeking a remedy under both acts. *See* 126 Cong. Rec. 26532 (1980) (statement of Rep. Florio describing the provision as “clarifying the relationship between the remedy provided [under the FRSA] and a possible separate remedy under [the Occupational Safety and Health Act]. It is our intention that pursuit of one remedy should bar the other, so as to avoid resort to two separate remedies, which would only result in unneeded litigation and inconsistent results.”). Congress apparently intended the original election of remedies provision to bar resort to both FRSA and Occupational Safety and Health Act remedies.

Congress enacted numerous amendments to the FRSA on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act), but did not alter the substance of Section 20109(f). The 2007 Amendments transferred authority for rail employees’ whistleblower claims from the National Railroad Adjustment Board to the Labor Department’s Occupational Safety and Health Administration and created new rights, remedies, and procedures. Under the Railway Labor Act, the National Railroad Adjustment Board has jurisdiction to issue a final decision in “disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements.” 45 U.S.C.A. § 153(h)(1). The 2007 Amendments stripped the National Railroad Adjustment Board of authority to resolve whistleblower complaints under 49 U.S.C.A. § 20109 and transferred that authority to the Labor Department.

The House Conference Committee report characterizes the 2007 Amendments as “enhanc[ing] administrative and civil remedies for employees.” H.R. Rep. No. 110-259, at 31 (2007). Those purposes were also served by two provisions Congress added to Section 20109 as part of the 2007 Amendments: 49 U.S.C.A. § 20109(g) and (h). These sections provide:

**(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.

49 U.S.C.A. § 20109(g), (h).

***B. Section 20109 permits a whistleblower claim to run concurrently with a collective bargaining grievance***

Union Pacific contends that Mercier's pursuit of a grievance under his collective bargaining agreement constitutes an election of remedies that, under 42 U.S.C.A. § 20109(f), precludes his whistleblower claim. We disagree.

It is fundamental that statutory construction begins with the statute itself. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011). *See* SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION, § 46:1 (7th Ed.). “If the statute’s meaning is plain and unambiguous, there is no need for further inquiry and the plain language of the statute will control its interpretation.” *Luckie v. United Parcel*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039 (ARB June 29, 2007) (citing *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002)).<sup>1</sup> Section 20109(f) expressly states that an “employee may not seek protection under both this section and *another provision of law* for the same allegedly unlawful act . . . .” 29 U.S.C.A. § 20109(f) (emphasis added). Under these terms, the plain language of Section 20109(f) limits its application to protection sought under “another provision of law.”

In our view, the plain meaning of “another provision of law” does not encompass grievances filed pursuant to a “collective bargaining agreement,” which is not “another provision of law” but is instead a contractual agreement. This understanding is illuminated by language used in Section 20109(h), which expressly references “a collective bargaining agreement” in describing the application of subsection (h). The fact that a party relies on the law to enforce a right in a collective bargaining agreement is not the same as a right created under a provision of law. *See, e.g., 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.”). Consequently, if the parties’ election of remedies defense rests on rights created by a collective bargaining, we do not need to

<sup>1</sup> *See also, e.g.,* 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46:4 (N. Singer, 6th ed. 2000) (“A party who asks the court to ignore the plain language of a statute must show that it is manifest that the legislature could not possibly have meant what it said in that language, or the natural reading of the statute would lead to an absurd result.”).

interpret the remainder of the Election of Remedies provision. Nonetheless, further reasoning supports this interpretation of the statute.

First, the amendment to Section 20109, which added subsections (g) and (h) does not change the interpretation of subsection (f) in this case. A grievance and arbitration action provided for in a collective bargaining agreement and enforceable under the RLA does not work to waive the rights and remedies the FRSA affords here. By their terms, sections (g) and (h) anticipate and permit a concurrent whistleblower complaint *and* arbitration provided for in a collective bargaining agreement and enforceable under the RLA. The language of subsection (g) states that nothing in the Act “preempts or diminishes any other safeguards” against a variety of discrimination and/or retaliation employment-related actions, and subsection (h) ensures that workers retain certain rights to use grievance procedures for such actions. At a minimum, the addition of subsections (g) and (h) to Section 20109 reflect Congress’s apparent intent to eliminate any preemption or bar of retaliation claims when there is a concurrent grievance procedure pending under a collective bargaining agreement emanating from the same “unlawful act.” 29 U.S.C.A. § 20109(f). See, e.g., *Gonero v. Union Pacific Railroad Co.*, No. Civ. 2:09-2009, 2009 WL 3378987, \*2-\*6 (E.D. Cal. Oct. 19, 2009) (district court determined that the FRSA’s election of remedies provision allowed railroad employee to pursue multiple claims related to railroad safety or whistleblower retaliation, *including* under state law). Thus, Mercier’s collective bargaining grievance does not preclude his whistleblower complaint under the plain meaning of Section 20109(f).

Next, interpreting Section 20109(f)’s reference to “another provision of law” to *not* encompass grievance procedures under a collective bargaining agreement is underscored in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which the Supreme Court addressed the relationship between a grievance process for collective bargaining agreements and the enforcement of an individual’s right to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, et seq. (Thompson/Reuters 2010). The Court determined that contractual rights are distinct from federal statutory rights, and held that a “contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination.” *Id.* at 52. The Court held further that

[b]oth rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. . . . [T]he arbitrator’s task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the “industrial common law of the shop” and the various needs and desires of the parties. The arbitrator, however, has *no general authority to invoke public laws* . . . .



*Id.* at 52-53 (emphasis added). See also *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 288-289 (1984) (arbitration did not foreclose separate complaint brought under 42 U.S.C.A. § 1983); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737-738 (1981) (arbitration award did not preclude a subsequent suit based on the same underlying facts alleging a violation of the minimum wage provision of the Fair Labor Standards Act).

This interpretation of 49 U.S.C.A. § 20109(f) to permit whistleblower claims to proceed concurrent with collective bargaining grievance procedures, in light of subsections (g) and (h), is consistent with the Act's plain meaning and comports with the Supreme Court's tenet that "a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26, 36 (1998); *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.5 (1998) ("We agree that context counts and stress in this regard what the Court has said '[o]ver and over: In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (internal quotations and citations omitted). Like Title VII in *Alexander*, 415 U.S. 36, the 2007 Amendments to the FRSA incorporating Section 20109(g) and (h), reflect Congress's intent that railroad employees not be limited in pursuing their rights under the whistleblower statute despite also enforcing their contractual rights in arbitration. See *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, -015, -106; ALJ Nos. 2009-AIR-015, -016, -017 (ARB Sept. 16, 2011).

While subsection (f) cannot be read to bar concurrent whistleblower and collective bargaining claims, we *do* understand the necessity for barring duplicative *recovery* under those claims. The FRSA provides that an employee prevailing in a whistleblower complaint "shall be entitled to all relief necessary to make the employee whole." 49 U.S.C.A. § 20109(e)(1). Damages may include reinstatement, backpay, compensatory damages, and punitive damages not to exceed \$250,000. 49 U.S.C.A. § 20109(e)(2), (3). In this case, Mercier appears to pursue compensatory damages for pain and suffering stemming from mental hardship, stress, and treatment for depression. See Mercier Complaint at 9. These are damages distinct to his complaint under 49 U.S.C.A. § 20109 that may not be available to him under the collective bargaining agreement. In any event, it is well-established that any relief to which Mercier is entitled would be that which would make him "whole" and would not include double recovery. See generally *Sears Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956) ("a plaintiff may pursue an action against an identical defendant in several courts at the same time, even though inconsistent remedies are sought. But . . . there can be only one recovery."); *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1317 (9th Cir. 1986) (same).



The Federal Railroad Administration<sup>2</sup> in 2008 expressed this bar to duplicative recovery as follows:

The statutory “election of remedies” provision is intended to protect an employer from having to pay the same types of damages to an employee multiple times just because there are multiple statutory provisions upon which an employee could file a complaint or a suit. The election of remedies provision is intended to prevent, for example, an employee from getting double the backpay, compensatory damages, and punitive damages the employee is entitled to by seeking protection under both the Occupational Safety and Health Act of 1970, 29 U.S.C. [§] 660(c), and Section 20109.

73 Fed. Reg. 8455 (2008).

Based on the foregoing interpretation of the FRSA’s mandate, (1) we deem nothing in these whistleblower protection provisions as diminishing Mercier’s right to pursue arbitration under the collective bargaining agreement between his union and his employer, and (2) we hold that by pursuing arbitration Mercier did not waive any rights or remedies that the FRSA affords him, including the right to pursue a whistleblower complaint under its provisions.


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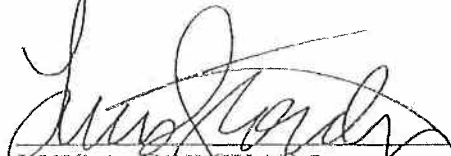
<sup>2</sup> The Federal Railroad Administration, part of the United States Department of Transportation, imposes railroad regulations, conducts inspections, and promotes safety and efficiency of the nation’s railroads. *See* 49 U.S.C.A. § 103.

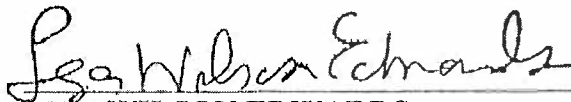
CONCLUSION

Accordingly, we **AFFIRM** the ALJ's order in *Mercier* allowing the complaint to proceed and **DENY** Union Pacific's request that we dismiss it. In light of our ruling in *Mercier*, we **REVERSE** the dismissal of Koger's complaint. We **REMAND** to the Office of Administrative Law Judges the *Mercier* and *Koger* cases for further proceedings consistent with this opinion.

SO ORDERED.

  
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PAUL M. IGASAKI,  
Chief Administrative Appeals Judge

  
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LUIS A. CORCHADO  
Administrative Appeals Judge

  
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LISA WILSON EDWARDS  
Administrative Appeals Judge