

OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES DEPARTMENT OF LABOR

_____)
WANDA WILEY,)
)
Complainant,) Case No. 2013-FRS-00009
)
v.)
)
NORFOLK SOUTHERN RAILWAY)
COMPANY,)
)
Respondent.)
-----)

**BRIEF OF THE ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE***

This case involves complainant Wanda Wiley’s retaliation claim against Norfolk Southern Railway Company (“Norfolk” or “Respondent”), brought pursuant to the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20109(b)(1), (d). In response to Norfolk’s December 17, 2013 Motion for Summary Decision, the Assistant Secretary for Occupational Safety and Health (“Assistant Secretary”) respectfully submits this brief explaining his conclusion that the deferral doctrine does not support dismissal of this case.

I. BACKGROUND

A. Wiley’s Termination and Arbitration

On April 10, 2012, Wiley, a Norfolk employee, engaged in a verbal altercation with fellow employee Dustin Taylor. Norfolk conducted a formal investigation by holding a hearing on May 3, 2012. At the hearing, numerous Norfolk employees testified that Wiley directed profane language and threatening gestures toward Taylor on April 10. Wiley testified that she

was frustrated with Taylor because he refused to stop his frequent touching of her rear end while they were at work. On May 23, Norfolk’s hearing officer found Wiley guilty of conduct unbecoming of an employee based on the statements and gestures she made toward Taylor, and therefore terminated her employment. Wiley filed an internal appeal to K.K. Ashley, Norfolk’s Director of Labor Relations, arguing that her outburst was the result of “frustration and anger over years of sexual harassment and abuse.” Ashley affirmed the hearing officer’s decision, concluding that nothing, not even sexual harassment, justified Wiley’s behavior.

Wiley disputed Ashley’s conclusion, and the parties were unable to resolve their dispute. Therefore, pursuant to the governing collective-bargaining agreement (“CBA”) and section 3 of the Railway Labor Act, 45 U.S.C. § 153 (“RLA”), the parties submitted the matter to arbitration by the Public Law Board No. 6826 (“PLB”). For evidence, the parties relied on only the May 3 hearing transcript. On July 31, 2013, the PLB concluded that clear and convincing evidence showed Wiley “was properly found guilty of inappropriate behavior when she directed profane language and threatened her coworker.” The PLB described Wiley’s conduct as “inexcusable,” but ultimately awarded her reinstatement without backpay based on her past good behavior and service.

B. Wiley’s Retaliation Claim

On September 20, 2012, Wiley filed a complaint with the Occupational Safety and Health Administration (“OSHA”), asserting that Norfolk retaliated against her for reporting a workplace-safety hazard—namely, sexual harassment—in violation of FRSA. After OSHA prescreened the complaint and determined no reasonable cause supported Wiley’s claim, Wiley objected to OSHA’s findings and requested a hearing before an Administrative Law Judge (“ALJ”).

II. ARGUMENT

Norfolk argues that the ALJ should grant summary decision on Wiley's retaliation claim based on the deferral doctrine. Specifically, Norfolk argues that the ALJ should defer to the conclusions of the PLB's 2013 arbitration decision and dismiss this case, as the arbitration involved the same factual issues as Wiley's retaliation claim. While OSHA found no reasonable cause to believe there was retaliation in this case, the Assistant Secretary respectfully disagrees that deferral to the PLB is appropriate. Rather, Wiley is entitled to have a hearing before the Department of Labor ("Department") in which the ALJ is to consider, *de novo*, whether retaliation in violation of FRSA occurred.¹

The Department's longstanding policy under the whistleblower statutes is that deferral to an arbitrator's decision interpreting a CBA is discretionary and "is appropriate only in narrow circumstances." *CalMat Co. v. Dep't of Labor (CalMat I)*, 364 F.3d 1117, 1126 (9th Cir. 2004).² While "due deference should be paid to the jurisdiction of other forums established to resolve

¹ Based on the complaint, Respondent's position statement, and the arbitration transcript, OSHA found that no reasonable cause existed to believe retaliation occurred; that "Complainant cannot establish a protected activity," as nothing suggests "Respondent had any knowledge of any inappropriate behavior directed towards Complainant"; and that "[t]he termination was a result of Complainant's aggressive and hostile behavior." See OSHA findings, Exhibit C to Norfolk's Memorandum in Support of Summary Decision. In making this determination, OSHA properly used the arbitration transcript as evidence on the factual issues in the case, but did not defer to the arbitration. See *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181-82 (noting under the Surface Transportation Assistance Act (STAA) that the Secretary must consider the arbitration proceeding even where he does not defer, but that the Secretary may decide how much weight to give the arbitration decision). Under FRSA, Wiley is now entitled to *de novo* review of her FRSA whistleblower claim. 49 U.S.C. § 20109(d)(2)(A), incorporating the rules and procedures in 49 U.S.C. § 42121(b)(2).

² Although *CalMat I* involved STAA and not FRSA, such cases are applicable in the FRSA context. Both statutes protect against retaliation for reporting safety violations, CBA arbitrations in both contexts analyze compliance with the applicable CBA's terms only, and the statutes' retaliation provisions require identical analyses, compare *Wignall v. Union Pac. R.R. Co.*, ARB Case No. 10-103, 2012 WL 682855, at *3 (Feb. 22, 2012), with *Lachica v. Trans-Bridge Lines*, ARB Case No. 10-088, 2012 WL 759334, at *2 (Feb. 1, 2012).

disputes which may also be related to complaints under the OSHA whistleblower statutes,” deferral is not appropriate in every case that involves both an arbitration of a dispute under the applicable CBA and a whistleblower complaint. OSHA Whistleblower Investigations Manual, Directive No. CPL 02-03-003, at 4-4 to 4-5 (Sept. 20, 2011). Deferral is appropriate only where the agency can be sure that deferral will not undermine rights under the whistleblower statutes. *See, e.g., CalMat I*, 364 F.3d at 1117 (upholding Secretary’s refusal to defer to CBA arbitration that did not address the employee protections provided by STAA); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 182 (11th Cir. 1987) (finding CBA arbitration was not due deference because it did not give full consideration to STAA whistleblower rights). Indeed, as Norfolk concedes, the Department will not defer to the outcome of an arbitration that addressed solely contract-based issues and in which the whistleblower claim was not implicated. *See Norfolk’s Memorandum in Support of Summary Decision* at 22 n.6; *cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 (2009) (summarizing Supreme Court precedent that where employees “had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions” (citations omitted)). Deferral to an arbitration proceeding is appropriate only if (1) the arbitration proceeding adequately addressed “all relevant issues”; (2) it was “fair, regular, and free of procedural infirmities”; and (3) its outcome “was not repugnant to the purpose and policy of the relevant OSHA whistleblower statute.” OSHA Whistleblower Investigations Manual, Directive No. CPL 02-03-003, at 4-4 to 4-5 (Sept. 20, 2011); *see also* 29 C.F.R. § 1977.18(c) (same three-pronged analysis reflected in regulations implementing Occupational Safety and Health Act retaliation protections).³ Under these standards, deferral to an arbitrator’s

³ While the regulations under section 11(c) specifically provide for deferral, the absence of a

decision under section 3 of the RLA will rarely be appropriate in a FRSA whistleblower case such as this one, because the arbitrator in an RLA proceeding will seldom have the authority to consider all the issues relevant to a FRSA whistleblower claim. *See* DWPP Field Alert No. 2013-6, *OSHA Investigators Should Exercise Caution in Determining Whether to Defer to CBA Arbitration Decisions in Federal Railroad Safety Act Cases* (Sept. 9, 2013) (Attached as Exhibit A); *CalMat I*, 364 F.3d at 1127 (noting that deferral was not appropriate in part because the arbitrator lacked the power to determine the issue of discrimination and was limited to the “four corners of the labor agreement”); *cf. Consol. Rail Corp. v. Ry. Labor Execs.’ Ass’n*, 491 U.S. 299, 307 (1989) (under the RLA, the issue in arbitration is whether a party has a contractual right to take an action under the terms of a CBA); *Norman v. Mo. Pac. R.R.*, 414 F.2d 73, 82–83 (8th Cir. 1969) (distinguishing the RLA, which establishes a “detailed and elaborate procedure” for the resolution of disputes related to a CBA, from Title VII, which “prohibits racial and other discrimination in employment”).⁴

specific regulatory provision for deferral under FRSA does not, in and of itself, mean that the concept of deferral cannot apply to FRSA whistleblower cases. As OSHA explained when it eliminated a specific reference to deferral in the Department’s STAA regulations, deferral and postponement principles apply in accordance with case law. *See Procedures for the Handling of Retaliation Complaints under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982 (STAA), as Amended, Final Rule*, 77 Fed. Reg. 44121, 44133 (July 27, 2012).

⁴ RLA arbitrations may also lack sufficient procedural safeguards to meet the Department’s deferral standards. The Fifth Circuit recently held that RLA arbitrations cannot have collateral estoppel effect in FRSA whistleblower proceedings because they lack a neutral adjudicator at the hearing stage of the process. *Grimes v. BNSF Ry. Co.*, ___ F.3d ___, No. 13-60382, 2014 WL 593600, at *6 (5th Cir. Feb. 17, 2014). Without a neutral hearing officer, the RLA arbitration procedures do not “afford[] basic elements of adjudicatory procedure” sufficient for collateral estoppel to apply. *Id.*

A. *Deferral Is Inappropriate Because the Arbitration Did Not Address All the Relevant Issues of Wiley's Retaliation Claim.*

To show a prima facie case of FRSA retaliation, a complainant must demonstrate that (1) she engaged in protected activity under FRSA, (2) she suffered an adverse employment action, and (3) the protected activity was a contributing factor to the adverse action. *Wignall v. Union Pac. R.R. Co.*, ARB Case No. 10-103, 2012 WL 682855, at *3 (Feb. 22, 2012). Once shown, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of any protected activity. *Id.*

Generally, the Administrative Review Board (ARB) will affirm deferral in a retaliation case only when the prior decision squarely addressed the retaliation claim's merits. *Cf., e.g., Germann v. CalMat Co. (CalMat II)*, ARB Case No. 04-008, 2005 WL 1359125, at *4 (May 31, 2005) (in STAA retaliation case, ARB affirmed deferral to state-court decision when state court had ruled on parallel state-law retaliation claim). Where it does not, the agency will not defer. For example, in *Lachica v. Trans-Bridge Lines*, ARB Case No. 10-088, 2012 WL 759334 (Feb. 1, 2012), complainant filed a STAA retaliation claim with OSHA against his former employer, Trans-Bridge Lines (TBL). The ALJ deferred to a prior arbitration, in which an arbitrator analyzed the governing CBA and determined TBL had just cause to terminate complainant. *Id.* at *1. On appeal, the ARB reversed, reasoning that the arbitrator's just-cause determination did not address whether complainant engaged in STAA-protected activity by complaining about non-working cameras on his bus, whether protected activity contributed to complainant's termination, or whether TBL "would have fired [complainant] regardless of whether he engaged in" protected activity. *Id.* at *2; *see also CalMat I*, 364 F.3d at 1125–27 (explaining why deferral to CBA just-cause arbitration decision was inappropriate in case involving STAA retaliation claim). The Assistant Secretary could find only one case, *Porter v. Greyhound Bus*

Lines, in which the ARB found deferral to the results of a CBA arbitration appropriate. ARB Case No. 98-116, 1998 WL 319468, at *1 (Jun. 12, 1998). That case involved the unique factual circumstance where the arbitrator had specifically evaluated and rejected the complainant's retaliation claim under STAA. *Id.*

In Wiley's case, the PLB arbitration determined only that Wiley violated Norfolk's rules of conduct and that such violations were inexcusable—a determination akin to whether Norfolk had just cause for terminating her. This limited the PLB's responsibilities to answering only the following questions: (1) What did Wiley do on April 10?; (2) Did Taylor's sexual harassment mitigate her April 10 conduct?; and (3) Did Wiley's conduct merit dismissal? None of these questions address the pertinent issues in Wiley's retaliation claim, namely whether Wiley's complaints about Taylor's conduct constituted protected activity under FRSA,⁵ whether those complaints contributed to Norfolk's May 23 termination decision, and whether Norfolk would have terminated Wiley in the absence of her sexual-harassment complaints.

Although the PLB described Wiley's April 10 conduct as "inexcusable," it did not consider comparator evidence; instead, it focused on Wiley's conduct alone. Thus it did not address the critical question of whether Norfolk terminated other employees for committing comparable conduct. Presuming that Wiley engaged in FRSA-protected activity by "reporting, in good faith, a hazardous safety or security condition," Wiley deserves an opportunity to show that Norfolk treated her differently than similarly situated coworkers, which would allow a factfinder to conclude that her complaints contributed to Norfolk's decision and that Norfolk would not have terminated her if she had not complained of sexual harassment. *See, e.g., Araujo v. N.J. Transit Auth.*, 708 F.3d 152, 163 (3d Cir. 2013) (reversing district court's grant of

⁵If Norfolk did not learn about Wiley's complaints on April 10, it learned about them at the latest when she testified on May 3, twenty days prior to her termination.

summary judgment because “[w]hile the facts in the record may show that Araujo was technically in violation of written rules, they do not shed any light on whether [defendant’s] decision to file disciplinary charges was retaliatory”).

Therefore, because the PLB’s decision did not adequately address all of the relevant facts of Wiley’s FRSA retaliation claim, the deferral doctrine does not support dismissal of this case.

B. National Labor Relations Board Cases Interpreting the Deferral Doctrine Do Not Control the Department’s Decision to Defer in FRSA Retaliation Cases.

In support of its motion, respondents cite to a number of National Labor Relations Board (NLRB) cases discussing the deferral doctrine, arguing that NLRB cases should inform the doctrine’s application in cases before the ARB. The NLRB defers to an arbitration proceeding when it appears to have been fair and regular, all parties had agreed to its binding nature, the arbitrator adequately considered the unfair labor practice (“ULP”) at issue, and the arbitrator’s decision is not clearly repugnant to the purposes of the statute. *Shands Jacksonville Med. Ctr.*, 359 N.L.R.B. No. 104, 2013 WL 1793943, at *1 (Apr. 26, 2013) (citing *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955)). The NLRB regards an arbitrator as having adequately considered the ULP at issue if: “(1) the contractual issue is factually parallel to the [ULP] issue; and (2) the arbitrator was presented generally with the facts relevant to resolving the [ULP].” *Id.* (citing *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984)). Additionally, in determining whether deferral is appropriate, the NLRB also considers additional factors, including whether the arbitration clause in the applicable CBA clearly encompasses the dispute at issue, and whether there is a claim of employer animosity to the employee’s exercise of protected rights. *See San Juan Bautista, Inc.*, 356 N.L.R.B. No. 102, 2011 WL 702297, at *2 (Feb. 28, 2011).

First, NLRB deferral precedent is inapplicable to cases involving Department-administered whistleblower statutes. In *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195

(2d Cir. 1993), a case involving a STAA retaliation claim, the Second Circuit held that reliance on the NLRB's deferral standards "is misplaced" in the whistleblower context. *Id.* at 1200. The court distinguished the Department's whistleblower proceedings from those of the NLRB, explaining that (1) unlike the Department, the NLRB had "a decades-old policy of deferral to arbitration awards," which it must follow until it adopts a new policy through formal rulemaking or adjudicative procedures; and (2) unlike STAA (or FRSA, for that matter), NLRB complainants lack an individual right to prosecute cases after the NLRB determines no reasonable cause exists. *Id.* Furthermore, the court noted that in *Martin*, as here, the arbitration did not consider all relevant issues. *Id.* In accordance with *Martin*, therefore, the NLRB cases cited by respondent are irrelevant to whether an ALJ should defer to an RLA-arbitration decision in a FRSA whistleblower case.

Second, even if NLRB deferral cases applied in the FRSA context, deferral would still be inappropriate. As explained above, the PLB arbitration did not address all the relevant issues of Wiley's FRSA retaliation claim, including the commanding factual question of whether her sexual-harassment complaints (presuming the complaints constituted FRSA-protected whistleblowing) contributed to her termination; therefore, under NLRB precedent, the PLB arbitration and Wiley's FRSA claim are not factually parallel. *See Advance Transp. Co.*, 310 N.L.R.B. 920, 920 (1993) (just-cause arbitration was not entitled to deferral in ULP proceeding; proceedings were not factually parallel because arbitration focused only on whether employer had just cause under CBA to terminate employee, and did not consider evidence of protected activity, respondent's antiunion animus, or pretext); *P.C. Sacchi, Inc.*, Case No. 20-CA-29595 (NLRB Mar. 12, 2001) (ALJ) (arbitration was not entitled to deference in ULP action when it held only that employer had contractual right to terminate employee, as arbitrators did not

address whether employer terminated employee in part for engaging in protected activity); *cf. IAP World Servs., Inc.*, 358 N.L.R.B. No. 10, at *2 (Feb. 24, 2012) (affirming ALJ’s decision deferring to arbitration, as arbitrator specifically analyzed complainant’s ULP claim and resolved it). In addition, Norfolk points to no evidence suggesting that Wiley’s FRSA whistleblower complaint could have been subject to arbitration under the CBA; and Wiley appears to assert that Norfolk had animosity toward her alleged FRSA-protected activity.

Third, the NLRB’s deferral doctrine is currently in a state of flux. On February 7, 2014, the NLRB invited parties to file briefs on the questions of whether it should “adhere to, modify, or abandon its existing standard for post-arbitral deferral”; and whether the Board should adopt a new standard advanced by the NLRB’s General Counsel, which places the burden on the party urging deferral to show “that (1) the [CBA] incorporates the statutory right, or the statutory issue was presented to the arbitrator, and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.”⁶ *Babcock & Wilcox Constr. Co.*, Case No. 28-CA-022625 (NLRB Feb. 7, 2014). If the NLRB follows General Counsel’s suggestion and adopts the recommended deferral standard, NLRB case law would be better reconciled with that of the ARB.

C. Congressional Intent Favors Not Deferring to RLA Arbitrations in FRSA Retaliation Cases.

Prior to 2007, FRSA retaliation claims were required to be resolved through the RLA arbitration procedures. *See* 49 U.S.C. § 20109(c) (2006). Congress amended FRSA in 2007 to expand protected activities, enhance administrative and civil remedies for employees, and transfer the responsibility to hear and resolve FRSA retaliation claims to the Department. *See*

⁶ If shown, the NLRB “would defer unless the award was clearly repugnant to the [National Labor Relations] Act.”

H.R. Rep. No. 110-259, 31 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 119. Congress also added two new subsections: 49 U.S.C. § 20109(g), which states, “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”; and 49 U.S.C. § 20109(h), which states, “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 [CBA]. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.”

These 2007 amendments reflect Congress’s commitment to ensuring that FRSA retaliation claims are treated outside and independently of the RLA arbitration context. Indeed, the ARB, numerous district courts, and two courts of appeals have held as much by finding that FRSA’s election-of-remedies provision, 49 U.S.C. 20109(f), which states that “[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier,” does not preclude a complainant from pursuing a FRSA retaliation claim in addition to pursuing an arbitration under the applicable CBA. *See, e.g., Grimes*, 2014 WL 593600, at *6; *Reed v. Norfolk Southern Ry. Co.*, 740 F.3d 420, 423 (7th Cir. 2014) (citing district court decisions); *Mercier v. Union Pac. R.R. Co.*, ARB Case No. 09-121, 2011 WL 4915758, at *7 (Sept. 29, 2011). As the ARB explained in *Mercier*, “the 2007 Amendments[,] . . . 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.” *Id.* at *6. Therefore, the reasoning in *Mercier*—and, indeed, the very amendments themselves, which “stripped” from RLA arbitrations the responsibility to resolve FRSA whistleblower claims and placed it with the

Department, *see id.* at *4—suggests that Congress foresaw and intended that complainants would bring parallel FRSA claims and RLA arbitrations. Under these circumstances, the Department should exercise utmost caution in deciding to defer to RLA arbitrations, as an agency policy of widespread deferral would subvert Congress’s expressed purpose in amending FRSA. *Cf. Reed*, 420 F.3d at 426 (noting that while requiring an employee to choose between RLA arbitration and a FRSA whistleblower claim “may not literally be a diminution of either remedy, . . . it is a fine distinction—one that sits uneasily with the saving clause’s [49 U.S.C. 20109(h)’s] broad language”).

III. CONCLUSION

For the foregoing reasons, the deferral doctrine does not support dismissal of Wiley’s FRSA retaliation claim, and respondent’s Motion for Summary Decision should be denied.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower
Programs

EIRIK J. CHEVERUD
Attorney
U.S. Department of Labor
200 Constitution Ave., NW, N-2700
Washington, D.C. 20210
202.693.5516 | cheverud.eirik.j@dol.gov

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae* was served on each of the following on this 17 day of March, 2014, via overnight delivery:

William C. Tucker, Jr.
Maples, Tucker & Jacobs, LLC
501 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203

Crawford S. McGivaren, Jr.
Cabaniss, Johnston, Gardner,
Dumas & O'Neal LLP
P.O. Box 830612
Birmingham, Alabama 35283-0612

Sydney F. Frazier, Jr.
Cabaniss, Johnston, Gardner,
Dumas & O'Neal LLP
P.O. Box 830612
Birmingham, Alabama 35283-0612

Eirik J. Cheverud
Attorney