No. 14-3274

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORFOLK SOUTHERN RAILWAY CO.,

Petitioner,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR,

Respondent.

On Petition for Review of the Final Decision
and Order of the United States Department of Labor's
Administrative Review Board

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal may be resolved based on the parties' briefs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases--continued:

Page

Cases--continued:

Page

Cases--continued:

Statutes:

Page

Statutes--continued:

Page

Statutes--continued:

Code of Federal Regulations:

Miscellaneous:

Page

Miscellaneous--continued:

STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(b), the Secretary of Labor ("Secretary") agrees in large part with Petitioner Norfolk Southern Railway Co.'s ("Norfolk Southern") statement of jurisdiction. In the interest of completeness, however, the Secretary states the following. This case arises under the employee protection provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109, and the regulations implementing FRSA, 29 C.F.R. Part 1982. The Secretary had subject matter jurisdiction over this case based on a complaint filed on January 18, 2011 with the Occupational Safety and Health Administration ("OSHA") by Marcus Kruse against Norfolk Southern pursuant to 49 U.S.C. 20109(d)(1). On January 28, 2014, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order affirming the Administrative Law Judge's ("ALJ") decisions that Norfolk Southern had violated FRSA's whistleblower protection provision and awarding attorney's fees to Kruse as the prevailing party.[1] *See* App. A61-67.

On March 28, 2014, Norfolk Southern filed a timely Petition for Review of the Board's decision with this Court. *See* App.

[1] The Secretary has delegated to the Board the authority to issue final agency decisions under the employee protection provisions of FRSA. *See* Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. 1982.110(a).

A67. As the alleged violation occurred in Michigan, this Court has jurisdiction to review the Secretary's final decision. *See* 49 U.S.C. 20109(d)(4) (review of final order of the Secretary may be obtained in the court of appeals for the circuit in which the violation occurred or in which the complainant resided on the date of the violation); *see also* 29 C.F.R. 1982.112(a).

STATEMENT OF THE ISSUE

Whether the Secretary properly held that 49 U.S.C. 20109(f), which states 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," does not preclude a railroad employee from pursuing a retaliation claim under FRSA even though the employee also has pursued arbitration to enforce a collective bargaining agreement.

STATEMENT OF THE CASE

A. Statutory Background

1. Grievances and Arbitration in the Railroad Industry

In 1926, Congress enacted the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.*, to establish a process for resolving labor disputes between railroad carriers and their employees without interrupting commerce or railroad operations. *See* 45 U.S.C. 151a. The RLA requires that railroad carriers and employees "make and maintain" collective bargaining agreements ("CBAs")

concerning rates of pay, rules, and working conditions. 45 U.S.C. 152 First; *see Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 310 (1989).

The RLA mandates that disputes requiring the application or interpretation of a CBA must first be handled according to the internal grievance procedures specified in the CBA. *See Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 72-73 (2009) (citing 45 U.S.C. 153 First (i)). For example, CBAs typically provide that when a railroad carrier suspects that an employee has violated an operating rule, the railroad conducts an investigation through a hearing in which a railroad official is the hearing officer (this is known as an "on-property hearing" or "on-property proceedings"). *See generally Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R.,* 522 F.3d 746, 748 (7th Cir.), *aff'd*, 558 U.S. 67 (2009). If the railroad's hearing officer concludes that the employee has violated the rule, the railroad imposes discipline at the conclusion of the hearing. The employee, usually through his union, can then appeal the discipline internally to a higher authority within the railroad (*i.e.*, file a grievance) asserting that the discipline violated the terms of the CBA. *See generally id.*

If the employee or the railroad seeks review of the railroad's decision on the employee's grievance, the RLA

requires that the appealing party do so through what is commonly referred to as "arbitration" before the National Railroad Adjustment Board or a Public Law Board established by the railroad and union (collectively the "Adjustment Board"). *See* 45 U.S.C. 153 First (i). This arbitration does not include fact-finding; rather, it is strictly an appeal of the railroad's decision on the employee's grievance, which, in turn, is based on the record from the on-property hearing. *See*, *e.g.*, NRAB Third Div. Award No. 26381 (June 25, 1987) (new evidence that was not handled on property is not properly before the Adjustment Board) (attached as Addendum A). The Adjustment Board's arbitration decision is final and binding on the parties. *See* 45 U.S.C. 153 First (m).

Thus, the RLA mandates that any dispute requiring the application or interpretation of a CBA be handled following the procedures set forth in the statute. *See Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 324 (1972) (because dispute required interpreting the CBA and the RLA provided the exclusive procedure for resolving the dispute, the RLA preempted state law wrongful discharge claim). By contrast, claims that are independent of a CBA and that do not require the interpretation or application of a CBA are not preempted by the RLA and may be brought in other forums. *See*, *e.g.*, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 257-59, 266 (1994) (claims under state law

did not require interpretation of the CBA, and therefore were not preempted by the RLA); *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 564-65 (1987) (claim under Federal Employers' Liability Act ("FELA") not preempted by the RLA because FELA provides substantive protections independent of a CBA and provides for remedies distinct from those available under the RLA).

2. FRSA and Background Regarding FRSA's Election of Remedies Provision

In 1970, Congress enacted FRSA to promote safety in railroad operations. *See* 49 U.S.C. 20101 *et seq.* After FRSA's passage, Congress noted that railroad employees "who complained about safety conditions often suffered harassment, retaliation, and even dismissal." *Consol. Rail Corp. v. United Transp. Union*, 947 F. Supp. 168, 171 (E.D. Pa. 1996) (citing Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811, *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832). To protect these employees, Congress amended FRSA in 1980 to add a section explicitly prohibiting railroads from retaliating and discriminating against employees who, among other things, provided information about violations of federal railroad safety laws or refused to work under hazardous conditions. *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811 (amended 2007). FRSA required that

retaliation complaints be resolved following the RLA's procedures for CBA-dispute resolution (*i.e.*, internal grievance followed by arbitration before an Adjustment Board). *See id.* § 10, sec. 212(c)(1), 94 Stat. 1815. The amendments also included an election of remedies provision, which stated:

> Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

Id. § 10, sec. 212(d), 94 Stat. 1815.[2]

In 2007, Congress again amended FRSA to bolster the protection of employees. First, the amendments expanded the protected acts of employees by, among other things, prohibiting retaliation for notifying the railroad or the Secretary of Transportation of a work-related injury or illness. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, sec. 20109(a)(4), 121 Stat. 266, 444, 445 (codified at 49 U.S.C. 20109(a)(4)). Second, Congress eliminated the requirement of subjecting FRSA complaints to the RLA's dispute-resolution procedures and instead transferred authority to investigate and adjudicate these complaints to the

[2] In 1994, FRSA's whistleblower provision was re-designated from 45 U.S.C. 411 to 49 U.S.C 20109, and the language in the election of remedies provision was modified to its current form, but this modification was not intended as a substantive change. *See* Pub. L. No. 103-272, 108 Stat. 745, 867 (1994).

Secretary of Labor. *See id.* § 1521, sec. 20109(c)(1), 121 Stat. 446 (codified at 49 U.S.C. 20109(d)(1)). Third, Congress retained the election of remedies provision without modification, but added two new provisions that specified that nothing in section 20109 of FRSA preempted or diminished other rights of employees and that the rights provided by FRSA could not be waived. *See id.* § 1521, sec. 20109(e), (f), (g), 121 Stat. 447 (codified at 49 U.S.C. 20109(f), (g), (h)). Thus, in its current form, FRSA states:

> (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.
>
> (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. 20109(f), (g), (h). The 2007 amendments were an attempt to "enhance[] administrative and civil remedies for employees" and "to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Conf. Rep. No. 110-259, at

348 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 180-81, 2007 WL 2162339.

Pursuant to the 2007 amendments, an employee who believes that he or she has been retaliated against for reporting a workplace injury or engaging in other conduct protected by FRSA may file a complaint with OSHA. *See* 49 U.S.C. 20109(d); 29 C.F.R. 1982.103. After an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. Either the complainant or the respondent may then file objections to OSHA's determination and request a hearing *de novo* before an ALJ. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106. The ALJ's decision is subject to discretionary review by the ARB, which issues the final order of the Secretary. *See* 29 C.F.R. 1982.110.

FRSA proceedings are governed by the rules and procedures, as well as the burdens of proof, set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121(b). *See* 49 U.S.C. 20109(d)(2). An employee must show by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he

suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See Consol. Rail Corp. v. U.S. Dep't of Labor*, No. 13–3740, 2014 WL 2198410, at *2 (6th Cir. May 28, 2014) (citing 29 C.F.R. 1982.109(a)); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). A "contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Araujo*, 708 F.3d at 158 (internal quotation marks omitted). Once the employee makes this showing, to prevail the employer must demonstrate "'by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected behavior.'" *Consol. Rail Corp.*, 2014 WL 2198410, at *2 (quoting 29 C.F.R. 1982.109(b)); *Araujo*, 708 F.3d at 157.

B. Statement of Facts

Marcus Kruse works as a freight train conductor for Norfolk Southern. *See* App. A62. On March 31, 2010 he reported that he had suffered a work-related injury. *See id.* He was out of work as a result of the injury until August 11, 2010. *See id.* After returning to work, Kruse was subject to increased scrutiny on the job and his supervisor told him that injuries were "not tolerated" and that he could "ill afford to have another [injury]." *Id.* at A45, A62.

In September 2010, Kruse worked on the L61 train with Jack Lawson, an engineer who controlled the train's engine. During a review of locomotive reports, Norfolk Southern managers noticed that this train had been speeding on several occasions. *See id.* at A62. Norfolk Southern charged Kruse and Lawson with a single excessive speeding incident (operating the train at 21 mph, 6 mph over the posted speed limit of 15 mph, for 6 seconds) that occurred on September 7. *See id.* at A46, A62. As the conductor on the train on September 7, Kruse did not have access to the same instruments as Lawson, the engineer, for monitoring the train's speed. *See id.* According to the foreman who initiated the speeding charge, he chose to charge for the September 7 incident because it was the only instance where he could not only charge the engineer but also "nail" Kruse. *See id.* On the other instances when it was documented that the train had been speeding, only Lawson could have been charged because it was not certain that Kruse had been riding in the engine with Lawson on those occasions. *See id.*

Norfolk Southern held an on-property hearing on October 1, 2010. *See* App. A20. Kruse was suspended without pay for 30 days for the speeding incident. *See id.* at A62. In response, Kruse's union initiated a CBA grievance on Kruse's behalf. *See id.* Kruse appealed that decision through arbitration to an Adjustment Board, which, on August 23, 2011, upheld the finding

of excessive speed, but reduced the discipline to a 30-day deferred suspension with pay for all lost time. *See id.* at A1-3, A62.

Kruse filed a whistleblower complaint under FRSA with OSHA on January 18, 2011. *See* App. A62. Following OSHA's dismissal of his complaint, Kruse requested a hearing before an ALJ on June 29, 2011. *See id.* at A18-19.

C. The ALJ's Recommended Decision and Order

Norfolk Southern moved for a summary decision by the ALJ, arguing, among other things, that Kruse's arbitration of his CBA dispute was an election of remedies under FRSA, and therefore his FRSA complaint was barred. *See* App. A62. The ALJ denied the motion on November 4, 2011, citing binding ARB precedent in the consolidated cases of *Mercier v. Union Pacific R.R.* and *Koger v. Norfolk Southern Ry.*, ARB Case Nos. 09-121, 09-101, 2011 WL 4889278 (Admin. Review Bd. Sept. 29, 2011) ("*Mercier*"), in which the ARB concluded that FRSA's election of remedies provision does not bar an employee from pursuing a retaliation claim under FRSA if the employee has also pursued arbitration to enforce the terms of the employee's CBA. *See* App. A8-17, A62.

The ALJ conducted a hearing on December 1, 2011. *See* App. A19. After hearing the testimony of five witnesses and considering the parties' briefs, joint stipulations, and numerous exhibits, the ALJ issued a decision and order on June

22, 2012, concluding that Norfolk Southern had retaliated against Kruse for reporting a work-related injury. The ALJ found that, taken together, the temporal proximity between Kruse' return to work and Norfolk Southern's decision to bring disciplinary charges against him, the increased scrutiny of Kruse's work, the foreman's expressed desire to "nail" Kruse, and Norfolk Southern's inconsistent explanations for the discipline imposed on Kruse were persuasive evidence that Kruse's injury report contributed to Norfolk Southern's decision to suspend him. *See id.* at A44-47. The ALJ further determined that Norfolk Southern had failed to satisfy its burden of proving by clear and convincing evidence that it would have taken the same action absent the protected activity. *See id.* at A48. In particular, the ALJ found "no credible evidence" supporting Norfolk Southern's contention that its "ordinary practice is to hold conductors equally responsible for an engineer's speeding, where the conductor does not have a speedometer." *See id.* Thus, the ALJ ordered Norfolk Southern to expunge Kruse's disciplinary record, pay him $4,000 in compensatory damages for emotional distress, and pay reasonable attorney fees and costs. *See id.* at A50.

D. The ARB's Final Decision and Order

Norfolk Southern petitioned the ARB for review of the ALJ's decision on the grounds that the ALJ should have dismissed

Kruse's whistleblower complaint under FRSA's election of remedies provision. *See* App. A55. Norfolk Southern did not challenge the ALJ's factual findings or legal conclusions that it had retaliated against Kruse.

On January 28, 2014, the ARB affirmed the ALJ's decision. As an initial matter, the ARB noted that the record supported the ALJ's findings and conclusions. *See* App. A64. The ARB then rejected Norfolk Southern's arguments that *Mercier,* in which the ARB held that FRSA's election of remedies provision does not preclude an employee who has sought to enforce his CBA through arbitration from also pursuing a retaliation claim under FRSA, was wrongly decided. *See id.* at A64-65. Noting that numerous courts have agreed with its conclusion in *Mercier*, the ARB reaffirmed its view that an employee who files a FRSA whistleblower complaint and pursues arbitration to enforce a CBA does not "seek protection under this provision and another provision of law" within the meaning 49 U.S.C. 20109(f). *See id.* A65 & n.12 (citing *Reed v. Norfolk S. Ry.,* 740 F.3d 420 (7th Cir. 2014); *Ray v. Union Pac. R.R.*, 971 F. Supp. 2d 869 (S.D. Iowa 2013); *Ratledge v. Norfolk S. Ry.*, No. 1:12-cv-402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013); *Battenfield v. BNSF Ry.*, No. 12-cv-213, 2013 WL 1309439 (N.D. Okla. Mar. 26, 2013)).

SUMMARY OF ARGUMENT

An employee's pursuit of arbitration to enforce a CBA does not constitute an election of remedies under the plain language in FRSA's election of remedies provision. The other "provision of law" under which an employee "seek[s] protection" refers to statutes that are similar in kind to FRSA in providing substantive rights to employees. When a railroad employee pursues arbitration of a CBA dispute, he is seeking protection under his CBA, which is governed by non-statutory common law; he is not seeking protection under a provision of law that provides substantive rights to employees. While the RLA mandates that CBA disputes be resolved through arbitration, it does not confer any substantive contractual rights or dictate the terms of the CBA or how the CBA should be interpreted or applied. As such, an employee is not seeking protection under the RLA when he claims in arbitration that the railroad violated the terms of his CBA when it disciplined or discharged him.

Additionally, the "allegedly unlawful act" for which an employee seeks protection through an arbitration is not the same "allegedly unlawful act" for which the employee seeks protection under FRSA. In a CBA arbitration, the "allegedly unlawful act" is the violation of the terms of the CBA. In a FRSA claim, the "allegedly unlawful act" is the retaliation for engaging in whistleblowing activities.

Lastly, if this Court concludes that FRSA's election of remedies provision is ambiguous, it should grant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the ARB's reasonable interpretation of this statutory provision in this case, and by extension, in *Mercier*.

It bears noting that since the 2007 amendments to FRSA, two courts of appeals and several district courts have directly confronted this issue and all have reached the same conclusion: an employee's pursuit of arbitration to enforce his CBA rights is not an election of remedies under FRSA. *See Grimes v. BNSF Ry.,* 746 F.3d 184 (5th Cir. 2014) (per curiam); *Reed v. Norfolk S. Ry.,* 740 F.3d 420 (7th Cir. 2014); *Koger v. Norfolk S. Ry.,* No. 1:13-12030, 2014 WL 2778793 (S.D.W. Va. June 19, 2014); *Pfeifer v. Union Pac. R.R.,* No. 12-cv-2485, 2014 WL 2573326 (D. Kan. June 9, 2014); *Ray v. Union Pac. R.R.*, 971 F. Supp. 2d 869 (S.D. Iowa 2013); *Ratledge v. Norfolk S. Ry.*, No. 1:12-cv-402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013); *cf. Battenfield v. BNSF Ry.*, No. 12-cv-213, 2013 WL 1309439 (N.D. Okla. Mar. 26, 2013) (examining section 20109(f) and permitting plaintiff to add FRSA retaliation claim despite having challenged his termination under his CBA); *Norfolk S. Ry. v. Solis*, 915 F. Supp. 2d 32, 43-45 (D.D.C. 2013) (concluding that court did not have jurisdiction to review ARB's *Mercier* decision because the

ARB's statutory interpretation was, at a minimum, a colorable interpretation of FRSA's election of remedies provision).

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of the ARB's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 49 U.S.C. 20109(d)(4); *Consol. Rail Corp. v. Dep't of Labor*, No. 13-3740, 2014 WL 2198410, at *2 (6th Cir. May 28, 2014) (citing *Belt v. U.S. Dep't of Labor*, 163 Fed. Appx. 382, 386 (6th Cir. 2006) (per curiam)). Under the APA, this Court reviews the ARB's conclusions of law *de novo*, granting deference under *Chevron*, to the agency's interpretations of ambiguous provisions in the statute that it is charged with administering. *See Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 491 (6th Cir. 2005) (granting *Chevron* deference to ARB's interpretation of the term "employee" under analogous whistleblower protection provisions of the Energy Reorganization Act ("ERA")); *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor,* 134 F.3d 1292, 1294 (6th Cir. 1998)(noting that the Court grants *Chevron* deference to the ARB's interpretations of the ERA); *see also McNeill v. U.S. Dep't of Labor*, 243 Fed. Appx. 93, 97 (6th Cir. 2007) (per curiam) (same); *Belt*, 163 Fed. Appx. at 386 (same). Thus, when "Congress has not directly addressed the precise question at issue," this Court upholds the ARB's statutory interpretation so

long as it "is based on a permissible construction of the statute." *McNeill*, 243 Fed. Appx. at 97 (*quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

II. THE ARB PROPERLY HELD THAT 49 U.S.C. 20109(f) DID NOT PRECLUDE KRUSE FROM SEEKING PROTECTION UNDER FRSA.

Under the plain terms of 49 U.S.C. 20109(f), Kruse did not "seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier" when he sought to arbitrate his claim that Norfolk Southern's decision to suspend him violated the CBA and when he later challenged the suspension decision as retaliatory under FRSA. When Kruse pursued arbitration of his CBA dispute, he neither sought protection under "another provision of law" nor did he challenge "the same allegedly unlawful act of the railroad carrier." This conclusion not only flows from the text of 49 U.S.C. 20109(f), but also is fully supported by the remaining text of FRSA's employee protection provision, the legislative history and context of FRSA, and the role that the RLA and the CBA grievance and arbitration process play in resolving rail labor disputes.

A. An Employee Does Not "Seek Protection Under . . . Another Provision of Law" When He Pursues an Arbitration to Enforce a CBA.

1. FRSA's reference to "seek[ing] protection" makes clear that the other "provision of law" must provide substantive protections comparable to those in FRSA.

Under the plain language of FRSA, to "seek protection under both this section and another provision of law" means that the other "provision of law" under which an employee "seek[s] protection" must be similar in kind to "this section."[3] Seeking protection under "this section" (*i.e.*, 49 U.S.C. 20109) means bringing a claim based on FRSA's substantive whistleblower protections. *See Reed v. Norfolk S. Ry.*, 740 F.3d 420, 424-25 (7th Cir. 2014). Therefore, "[t]o seek protection under another provision of law must mean something similar: to bring a claim founded on a comparable substantive protection[,]" such as, for example, a claim of retaliation for reporting safety concerns or workplace injuries under the Occupational Safety and Health Act ("OSH Act"). *Id.* at 425. As the Seventh Circuit explained in *Reed*, and as other courts have agreed, a contrary interpretation shears the words in the election of remedies provision from their context. *Id*. at 424-25; s*ee Ratledge v. Norfolk S. Ry.*,

[3] As an initial matter, "another provision of law," as used in FRSA's election of remedies provision, refers to statutes; it does not include non-statutory common law, such as contract law. *See Reed*, 740 F.3d at 423 n.1; *Rayner v. Smirl*, 873 F.2d 60, 66 n.1 (4th Cir. 1989). Norfolk Southern does not dispute this basic point.

No. 1:12-cv-402, 2013 WL 3872793, at *12 (E.D. Tenn. July 25, 2013) (the language "another provision of law" in FRSA's election of remedies provision indicates that the other provision of law "should be similar in kind to § 20109"); *see also Ray v. Union Pac. R.R.*, 971 F. Supp. 2d 869, 880-81 (S.D. Iowa 2013) (finding *Ratledge*'s statutory analysis compelling). Thus, to preclude a FRSA whistleblower action under the election of remedies provision, the other provision of law under which an employee seeks protection must provide protection for whistleblowing activity similar to that covered by FRSA. *See Reed*, 740 F.2d at 426 ("The election-of-remedies provision only bars railroad employees from seeking duplicative relief under overlapping antiretaliation or whistleblower statutes[.]").[4]

2. The RLA provides no substantive protections; thus an employee pursing RLA arbitration seeks protection under the terms of his CBA, not the RLA.

While the RLA is a federal statute and therefore is a provision of law as a general matter, the RLA does not provide substantive protections to employees for whistleblowing. When an employee pursues arbitration of a CBA dispute, which the RLA mandates as the method of resolving CBA disputes, the employee

[4] The election of remedies provision is not rendered null by this interpretation; it applies to other whistleblower protection statutes, such as the OSH Act, the National Transit Systems Security Act, 6 U.S.C. 1142, and state statutory whistleblower protection statutes.

is not "seek[ing] protection under . . . another provision of law" within FRSA's meaning. Rather, when an employee pursues arbitration of a CBA dispute, the employee is seeking protection under the CBA itself and the interpretation of the provisions in a CBA is a matter of non-statutory common law.

The Supreme Court has explained that while the RLA establishes a process to "make and maintain" CBAs and to resolve disputes regarding the interpretation of a CBA, the statute does not provide specific substantive rights to employees:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce.

Terminal R.R. Ass'n v. Bhd. of R.R. Trainmen, 318 U.S. 1, 6 (1943). In other words, the RLA "is entirely agnostic as to the content of any [CBA]." *Reed*, 740 F.3d at 423 (citing *Terminal R.R. Ass'n*, 318 U.S. at 6).

Rather than providing substantive protection to an employee, the RLA prescribes the procedures through which an employee enforces his CBA rights. The RLA provides, indeed

mandates, that CBA disputes be resolved through arbitration; it does not dictate the terms that must be included in the CBA or how the CBA should be interpreted. The Seventh Circuit in *Reed* recognized the limited nature of the RLA: "[T]he [RLA] offers [an employee] no protection at all; it merely instructs him to bring any grievances that cannot be resolved on-property to a specific forum." 740 F.3d at 424.

While the RLA dictates that an employee pursuing a CBA dispute must do so in a particular forum (*i.e.*, arbitration before an Adjustment Board), that requirement does not mean that the employee is seeking protection under the RLA when he arbitrates his CBA dispute. As the Seventh Circuit explained, "[w]e doubt that a person who arbitrates a grievance based on a private contractual agreement necessarily does so 'under' federal law merely because a federal statute requires that the claim be brought before an [A]djustment [B]oard." *Reed,* 740 F.3d at 424; *see id.* (*quoting Graf v. Elgin, Joliet & E. Ry.,* 697 F.2d 771, 776 (7th Cir. 1983) ("[T]he fact that an activity is regulated by a federal statute, as collective bargaining in the railroad industry is regulated by the Railway Labor Act," does not mean "that disputes between private parties engaged in that activity arise under the statute")). The ARB similarly reasoned that "[t]he fact that a party relies on the [RLA] to enforce a right in a collective bargaining agreement is not the

same as a right created under a provision of law." *Mercier v. Union Pac. R.R. and Koger v. Norfolk S. Ry., ARB Case Nos. 09-121, 09-101*, 2011 WL 4889278, at *5 (Admin. Review Bd. Sept. 29, 2011).

Norfolk Southern attempts to counter this conclusion by pointing to the history of the RLA. *See* Norfolk Southern's Br. at 11-14. As originally enacted, the RLA did not mandate arbitration of CBA disputes. *See Union Pac. R.R. v. Price*, 360 U.S. 601, 610 (1959). As a result, railroads frequently refused to participate in such arbitrations. *See id.* In response to complaints by labor organizations, Congress amended the RLA to require that railroads participate in arbitrations before Adjustment Boards. *See id.* at 611-12. Based on this history, Norfolk Southern argues that the RLA provides employees substantive protections by providing a guaranteed arbitration process that railroads cannot refuse to participate in and are bound by. *See* Norfolk Southern's Br. at 13. Norfolk Southern's argument, however, only underscores the procedural nature of an employee's "right" to arbitration under the RLA as the means of resolving CBA disputes. As this Court recognized in *McCall v. Chesapeake & Ohio Railway,* 844 F.2d 294, 301 (6th Cir. 1988), the RLA "contains few substantive provisions . . . . Instead, the [RLA] leaves the establishment of most substantive rights to the collective bargaining process and merely provides mechanisms

for enforcing those rights." Thus, the RLA's requirement that the parties engage in arbitration to resolve CBA disputes that cannot be resolved on-property reflects that the RLA provides a procedural guarantee, not a substantive right.

The lack of any substantive protection for whistleblowing in the RLA is highlighted by the fact that arbitrators (*i.e.*, Adjustment Boards) are limited to deciding whether an adverse employment action is justified under a CBA, not whether statutes are violated, such as whether retaliation in violation of FRSA occurred. *See 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"); *cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52-53 (1974) ("[T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement . . . . The arbitrator, however, has no general authority to invoke public laws."). Thus, when an employee pursues arbitration, the employee can seek enforcement only of his contractual rights in that process, not any separate

statutory rights. This limit on the Adjustment Board's authority further shows that an arbitration is an action under contract law to enforce the terms of the CBA, and not an action seeking protection under another provision of law.

Indeed, courts draw a clear distinction between contractual rights provided for in a CBA, which must be enforced via RLA arbitration, and statutory rights that may be pursued in other forums. *See*, *e.g.*, *Atchison, Topeka & Santa Re Ry. v. Buell,* 480 U.S. 557, 562-65 (1987) (distinguishing between rights under a CBA established pursuant to the RLA and statutory rights under FELA); *Norman*, 414 F.2d at 81-83 (distinguishing between contractual rights under a CBA established pursuant to the RLA and statutory rights under Title VII); *cf. Alexander*, 415 U.S. at 49-50 ("In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress.").

In sum, it is the CBA, not the RLA, that an employee seeks protection under when he challenges an adverse employment action in an arbitration to enforce the CBA. For example, a CBA may contain a provision requiring just cause in order to discipline or discharge an employee. This provision is not required by the RLA; it is a provision which the parties negotiated to include

in the CBA. Therefore an action to enforce that right is an action to enforce a contract – the CBA; it is not a claim to enforce a provision of the RLA.[5] Although the RLA dictates how an employee can enforce that right, the right itself is independent of the RLA, and the RLA does not guide the interpretation of whether that right has been violated. Therefore, as the Seventh Circuit concluded, when a railroad employee's claim "is based only on rights set forth in his [CBA], . . . he is seeking protection under that agreement and not under the [RLA]." *Reed*, 740 F.3d at 424. As such, an employee does not "seek protection under . . . another provision of law" within the meaning of section 20109(f) when he pursues arbitration of a CBA dispute.

3. The plain language of 49 U.S.C. 20109(h) confirms that Congress did not intend for employees to have to choose between pursuing arbitration to enforce a CBA and a FRSA retaliation claim.

The language in paragraph (h) of section 20109 confirms that Congress did not regard arbitration to enforce a CBA as "seeking protection under . . . another provision of law" that would preclude an employee from challenging retaliation under FRSA. Paragraph (h) states that nothing in section 20109 diminishes an employee's rights "under any Federal or State law

[5] By contrast, an employee might possibly be considered to seek protection under the RLA if, for example, a railroad refused to participate in arbitration and the employee sought to compel arbitration on the basis that the RLA requires arbitration.

or under any collective bargaining agreement." 49 U.S.C. 20109(h) (emphasis added). By listing CBAs separately from federal law in paragraph (h), Congress indicated that it viewed railroad CBAs and federal law as distinct and did not view the protections provided in a railroad CBA as protections under federal law such as the RLA. If it had, there would have been little need to specifically list CBAs in paragraph (h) because the reference to federal law (*e.g.*, the RLA) would have already encompassed the enforcement of a CBA. A basic rule of statutory construction is that statutory language must be read in the context of the statute as a whole. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010). Thus, 49 U.S.C. 20109(h)'s reference to rights under a collective bargaining agreement buttresses the conclusion that an employee enforcing a CBA through arbitration is seeking protection under the CBA, not under the RLA, and therefore is not "seek[ing] protection under . . . another provision of law."

Moreover, as the Seventh Circuit noted in *Reed*, Congress added paragraph (h) to FRSA's whistleblower protections to "affirmatively disclaim[] any intention to diminish railway employees' rights." 740 F.3d at 425-26. Norfolk Southern argues that its interpretation of the election of remedies provision is consistent with paragraph (h) because it does not diminish an employee's rights or remedies – the employee is free

to bring a FRSA claim or a CBA grievance and arbitration, just not both. *See* Norfolk Southern's Br. at 22-24. In rejecting this same argument, the Seventh Circuit reasoned that Norfolk Southern's interpretation of paragraph (h) "sits uneasily with the saving clause's broad language. By contrast, § 20109(h) fits snugly with our reading of § 20109(f)." *Reed*, 740 F.3d at 426. The D.C. district court likewise noted that based on Congress' provisions limiting the preemption of other rights in 49 U.S.C. 20109(g) and (h), "[i]t would be highly inconsistent with the 2007 amendments for Congress, by transferring retaliation claims to the Secretary, to limit the ability to engage in RLA arbitration and pursue a separate retaliation claim under FRSA without further clarification." *Norfolk S. Ry. v. Solis*, 915 F. Supp. 2d 32, 44 (D.D.C. 2013).

4. FRSA's legislative history further buttresses the conclusion that arbitration to enforce a CBA does not fall within FRSA's election of remedies provision.

The history of FRSA's election of remedies provision further supports the conclusion that Congress did not intend employees to have to choose between pursing arbitration to enforce a CBA and bringing a FRSA retaliation complaint. The original provision stated:

> Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks

> protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, sec. 212(d), 94 Stat. 1811 (amended 2007). Analyzing this language and the fact that no substantive changes were intended when the language was modified to its current form in 1994, the Seventh Circuit in *Reed* noted that "the original phrasing emphasizes that one can only seek protection under a provision of law that itself affords protection for retaliatory acts[,]" and the RLA affords employees no substantive protections. 740 F.3d at 425 (emphasis in original).

The legislative history also shows that the election of remedies provision was aimed at preventing employees from seeking protection under other statutes that provided similar substantive protections as FRSA's whistleblower provision. The House Representative who managed the 1980 bill, which included the election of remedies provision, stated:

> We also agreed to a provision clarifying the relationship between the remedy provided here and a possible separate remedy under [the Occupational Safety and Health Act ("OSH Act")]. Certain railroad employees, such as employees working in shops, could qualify for both the new remedy provided in this legislation, or an existing remedy under [the OSH 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.

126 Cong. Rec. 26,532 (1980) (statement of Rep. James Florio). Section 11(c) of the OSH Act protects employees against retaliation for filing a complaint, instituting a proceeding, testifying, or exercising rights provided by the statute. *See* 29 U.S.C. 660(c). Thus, the election of remedies provision was originally conceived as preventing pursuit of remedies under other whistleblower protection statutes that provided protections similar to the protections in FRSA.

5. Norfolk Southern relies on inapt analogies to contend that the RLA need not provide substantive protections akin to those in FRSA to fall within FRSA's election of remedies provision.

Norfolk Southern argues that "another provision of law" under which an employee "seek[s] protection" need not be the source of the substantive right the employee seeks to enforce, and that the RLA is analogous to 42 U.S.C. 1983, which does not provide substantive rights, but provides the mechanism for vindicating federal rights provided for elsewhere. *See* Norfolk Southern's Br. at 15-17. The Seventh Circuit properly rejected this analogy as "inapt." *Reed*, 740 F.3d at 424. While section 1983 provides a cause of action for the deprivation of constitutional or federal statutory rights, the RLA does not similarly provide a cause of action for the breach of a CBA; rather, the RLA simply directs that a claim regarding an interpretation of a contract be resolved in a particular

arbitral forum. *See id*. "Even if we were to say, colloquially, that plaintiffs 'seek protection' under § 1983 (and not the applicable substantive federal right they aim to vindicate), we do not see how the same is true of the [RLA]." *Id.*; *see Ratledge*, 2013 WL 3872793, at *13 ("The word 'another' implies the second provision of law should be similar in kind to § 20109. Unlike § 1983, § 20109 *does* create a substantive right.") (emphasis in original).

Norfolk Southern also argues that permitting an employee to pursue both an arbitration and a FRSA claim is contrary to the Supreme Court's decision in *Norfolk & Western Railway v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) ("*Dispatchers*"). *See* Norfolk Southern's Br. at 25-28. Every court that has considered this argument has rejected it. *See Reed*, 740 F.3d at 422-23; *Ratledge*, 2013 WL 3872793, at *17; *Norfolk S. Ry.*, 915 F. Supp. 2d at 44.

Dispatchers addressed different statutory language and differs in context from the statutory language and context in this case. In *Dispatchers*, the Court held that a statute exempting railroad carriers from "the antitrust laws and from *all other law*" when the Interstate Commerce Commission ("ICC") approved a railroad consolidation was "broad enough to include laws that govern the obligations imposed by contract," such as the RLA, and thus relieved railroads of their obligations under

CBAs. 499 U.S. at 120, 129 (emphasis added). The Supreme Court's conclusion in *Dispatchers* was necessarily unique to the statutory exemption at issue there, which the Court interpreted in light of the national policy promoting railroad consolidation following World War I. *See id.* at 119. The Court stated that its interpretation was necessary given the statutory scheme requiring that "any obstacle imposed by law" give way to a railroad consolidation when the ICC determined that it was in the public interest. *Id.* at 133. Interpreting "all other law" to relieve railroads of their CBA obligations via the RLA "makes sense of the consolidation provisions of the [statute at issue], which were designed to promote economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Id.* at 132 (internal quotation marks omitted).

The Supreme Court subsequently made clear in *American Airlines, Inc. v. Wolens* that the interpretation of "all other law" in *Dispatchers* was limited to the context of the specific national policy promoting railroad consolidation. *See* 513 U.S. 219, 229 n.6 (1995). The Court held in *Wolens* that a provision of the Airline Deregulation Act that exempted airlines from complying with "any [state] law . . . relating to rates, routes, or services" of airlines did not exempt airlines from complying with their contractual obligations because airlines' contractual

obligations were not imposed by state law, but were self-imposed. *Id.* at 222-23, 228-29. The Court distinguished *Dispatchers'* seemingly conflicting interpretation of the similar phrase "all other law" by explaining that the different outcomes depended on the different statutory schemes. *See id.* at 229 n.6.

In each case, the Court determined whether "any law" or "all other law" included contractual obligations by determining which interpretation "ma[de] sense of" the relevant statutory provisions and which interpretation was in line with the interpretation put forth by the agency charged with enforcing the relevant statute. *Wolens*, 513 U.S. at 229 n.6; *see, e.g.*, *Ratledge*, 2013 WL 3872793, at *17 (concluding that, in light of *Wolens*, the Supreme Court "cabined *Dispatchers* to the statutory context and the intent of the statute at issue"). The District of Columbia Circuit's decision in *Mahoney v. RFE/RL, Inc.,* on which Norfolk Southern relies, *see* Norfolk Southern's Br. at 27, is consistent with this directive to interpret the statutory provision in light of the statutory scheme at issue. *See* 47 F.3d 447, 450 (D.C. Cir. 1995) (concluding that *Dispatcher*'s interpretation of "law" applied to the phrase "foreign laws" in the Age Discrimination in Employment Act ("ADEA") because such interpretation "would not render the [ADEA] senseless"; rather it furthers the statutory provision's purpose). Thus, as the

Seventh Circuit concluded, "*Dispatchers* does not lay down a mandatory rule about the scope of the term 'law' in federal statutes." *Reed*, 740 F.3d at 423. "FRSA . . . must be read on its own terms." *Id.*

The election of remedies provision must be read in light of Congress's intent. The national policy that informs the meaning of section 20109(f) is that articulated by Congress in enacting FRSA and amending it in 2007: to provide "essential protection for the rights of railroad employees," H.R. Rep. No. 96-1025 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832, 1980 WL 13014, at *8, and to "enhance[] administrative and civil remedies for employees . . . [and] to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers," H.R. Conf. Rep. No. 110-259, at 348 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 180-81, 2007 WL 2162339. That policy would be undermined if an employee had to forego rights guaranteed to him under FRSA to pursue remedies under his CBA or vice versa. Before the 2007 amendments, employees could pursue both a CBA right and a FRSA whistleblower complaint simultaneously because both were subject to the RLA's framework. If Congress intended to change this well-established practice of permitting an employee to pursue both claims at the same time, it would have made such a fundamental change clear. *See Ratledge*, 2013 WL 3872793, at *14 ("The Court would expect

such a change in the regulatory structure to be more clearly stated, and not left hiding behind decades-old statutory language."); *Norfolk S. Ry.*, 915 F. Supp. 2d at 44 ("It would be highly inconsistent with the 2007 amendments for Congress, by transferring retaliation claims to the Secretary, to limit the ability to engage in RLA arbitration and pursue a separate retaliation claim under FRSA without further clarification.") As the district court in *Ratledge* aptly noted:

> The 2007 amendments . . . were intended to provide *more* protection to employees . . . . Forcing an employee into such a choice will result in fewer § 20109 actions, and potentially insulate rail carriers from administrative or judicial review of retaliatory conduct. In this context, it is clear the RLA-arbitration procedure is not itself a "provision of law" as that phrase is used in the FRSA.

2013 WL 3872793, at *15 (emphasis in original). Thus, this Court should hold, as the Secretary, two other courts of appeals, and numerous district courts have held, that an employee, such as Kruse, does not "seek protection under . . . another provision of law" when he pursues arbitration to enforce a CBA, and therefore FRSA's election of remedies provision does not bar such an employee from subsequently pursuing a FRSA whistleblower claim.

B. The "Same Allegedly Unlawful Act" Does Not Include a Violation of a CBA.

FRSA's election of remedies provision applies only to actions in which an employee seeks protection under another

provision of law for the "same allegedly unlawful act." 49 U.S.C. 20109(f). When an employee pursues a FRSA retaliation claim, he is not seeking protection for the "same allegedly unlawful act" as that challenged under a CBA. An adverse action such as a discharge or discipline is not in and of itself unlawful under FRSA. Rather, FRSA makes it unlawful to "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" if such action is due, in whole or in part, to reporting a workplace injury or engaging in other activities protected by the Act. 49 U.S.C. 20109(a), (b). Thus, the adverse action is unlawful under FRSA only if it is, at least in part, in retaliation for the employee's having engaged in some protected activity. Even if an employee is challenging the same underlying act, *e.g.*, his dismissal, in both a FRSA action and a CBA arbitration, what makes the act "unlawful" under FRSA is the retaliatory aspect of the act.[6]

For example, an employee in a CBA proceeding may claim that the railroad violated the terms of the CBA in suspending him.

[6] *But see Lee v. Norfolk S. Ry.,* No. 1:13-cv-4-MR-DSC (W.D.N.C. May 20, 2014), *appeal docketed*, No. 14-1585 (4th Cir. June 16, 2014) (concluding that section 20109 and 42 U.S.C. 1981 provide remedies for the "same allegedly unlawful act," which was Norfolk Southern's six-month suspension of the employee) (attached as Addendum B); *Sereda v. Burlington N. Santa Fe R.R.*, No. 4:03-cv-10431, 2005 WL 5892133, at *4 (S.D. Iowa Mar. 17, 2005) (stating that FRSA's election of remedies provision (under the pre-2007 version of the statute) "is addressed not to the character or motivation of the employer's allegedly unlawful act, but to the act itself," such as a discharge).

In a FRSA proceeding, the employee may claim that the railroad violated FRSA by retaliating against him. Suspension in violation of the CBA and retaliatory suspension are not the same unlawful acts. A suspension may violate a CBA (*i.e.*, the suspension was not justified under the CBA) but not be unlawful retaliation under FRSA. Conversely, a suspension may be technically warranted under the CBA, but nonetheless be unlawful retaliation for engaging in protected whistleblowing activities. *See, e.g., Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013) (even if plaintiff technically violated the operating rule, the railroad had never enforced that rule against employees in plaintiff's job class and therefore whether plaintiff in fact violated the rule is a separate question from whether the railroad's decision to enforce the rule against plaintiff was retaliatory under FRSA).[7]

1. The statutory language makes clear that an employee does not seek protection for the "same allegedly unlawful act" in an arbitration to enforce a CBA and a FRSA whistleblower claim.

The statutory language in FRSA makes clear that there is a distinction between an adverse action and an "allegedly unlawful act" covered by section 20109(f). The terms that FRSA uses to

[7] Thus, it is entirely possible that, as occurred in this case, an Adjustment Board could conclude that discipline was warranted under the terms of the CBA, but the ARB could conclude that the discipline was retaliatory under FRSA.

refer to adverse actions are unmoored from any retaliatory motive. As previously noted, FRSA makes it unlawful to "discharge, demote, suspend, reprimand, or in any other way discriminate" against an employee but only if such actions are because of activities protected under FRSA. 49 U.S.C. 20109(a), (b). Thus, the adverse action – discharging, demoting, suspending, reprimanding, or in any other way discriminating – is not, on its own, unlawful.

In addition, FRSA uses the terms "unfavorable personnel action" and "violation" distinctly, not synonymously.[8] Under the burdens of proof applicable to retaliation claims under FRSA, "[t]he Secretary may determine that a violation . . . has occurred only if" the employee demonstrates that protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii) (emphases added). Furthermore, the Secretary may not order relief "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. 42121(b)(2)(B)(iv) (emphasis added). Thus, under FRSA, proof that an adverse action occurred is an independent element of a

[8] As noted above, FRSA incorporates the rules, procedures, and burdens of proof from AIR21, 49 U.S.C. 42121, a separate whistleblower protection statute covering aviation industry employees. *See* 49 U.S.C. 20109(d) (incorporating the rules, procedures and burdens of proof in 49 U.S.C. 42121(b)).

retaliation claim. To show a violation (*i.e.,* an unlawful act), the employee must also prove that the employee's protected activity was a contributing factor in the railroad's decision to take the unfavorable personnel action and the railroad may defeat a whistleblower claim if it can show that it would have taken the unfavorable personnel action absent the protected conduct. The statute distinguishes between an adverse action (*i.e.*, an "unfavorable personnel action") and the retaliatory nature of the action, which is what makes the action unlawful.

If Congress had meant the election of remedies provision to bar employees from challenging an adverse action based on different legal theories (as Kruse did when he challenged his suspension as violating the CBA and as retaliatory under FRSA), Congress would not have used the language "same allegedly unlawful act." Congress could have barred employees from seeking protection under FRSA and another provision of law for "the same act," the "the same unfavorable personnel action," or "discharge, demotion, suspension, reprimand, or any other discrimination." It did not. Congress chose to bar an employee from "seeking protection under this section and another provision of law for the same allegedly unlawful act. . . ." 49 U.S.C. 20109(f). Norfolk Southern reads the term "unlawful" out of the statute.

2. The context and legislative history of FRSA support the Secretary's reading of "allegedly unlawful act."

In the context of an arbitration to enforce a CBA and a FRSA action, the distinction between an "unlawful act" and an action that is simply an "unfavorable personnel action" is particularly important. The RLA establishes the Adjustment Board's jurisdiction as limited to interpreting and applying CBAs. *See Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 255, 257-59, 266 (1994). Consequently, even where a dispute under a CBA and a FRSA claim might address the same underlying facts and involve the same adverse action, the Adjustment Board has no authority to address an employee's claim of retaliation, *i.e.*, an employee cannot seek protection under the CBA for retaliation. *Cf. Norman*, 414 F.2d at 82 (the RLA is not set up to remedy racial discrimination in employment practices, and therefore a racial discrimination claim under Title VII is not preempted by the RLA; the RLA "is not basically a fair employment practice act").[9] Thus, reading "unlawful act" as Norfolk Southern suggests forces employees to choose at the outset between two very different claims.

[9] The only question the arbitration process addresses is whether the employee in fact broke an operating rule, thus giving the railroad just cause for the disciplinary action under the terms of the CBA.

FRSA's legislative history makes clear that this result was not what Congress intended. Rather, Congress intended that the "unlawful act" in FRSA's election of remedies provision mean retaliation for engaging in whistleblower protected acts. In fact, the election of remedies provision was designed to prevent pursuit of multiple claims arising out of the unlawful act of retaliation for engaging in protected whistleblowing activities regarding health and safety. As noted above, *supra.* at 28-29, the House Representative who managed the 1980 bill, which included the election of remedies provision, stated that the provision clarifies the relationship between the remedy against retaliation in the OSH Act, 29 U.S.C. 660(c), and FRSA. That representative further explained that some employees could have a remedy under both section 11(c) of the OSH Act and FRSA, and that Congress intended "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." 126 Cong. Rec. 26,532 (1980) (statement of Rep. James Florio). As the Seventh Circuit noted, Congressman's Florio's statement was "firmly rooted to the 'existing remedy' under the [OSH] Act" and Norfolk Southern overreads the statement by suggesting it is aimed at preventing all possibility that FRSA claims could be brought concurrently with other employment claims. *Reed*, 740 F.3d at 425 n.4. The election of remedies

provision was directed at preventing employees from filing whistleblower retaliation claims under a different statutory scheme covering the same protected activity. An interpretation of the phrase "allegedly unlawful act" that would require an election in the type of situation now before this Court would unduly restrict railroad employees' rights to the range of legal protections Congress made available to them.

III. IF THIS COURT CONCLUDES THAT FRSA'S ELECTION OF REMEDIES PROVISION IS AMBIGUOUS, IT SHOULD GRANT *CHEVRON* DEFERENCE TO THE ARB'S INTERPRETATION IN *MERCIER* AND THIS CASE.

As explained above, the Secretary believes that the statute is plain in allowing an employee to pursue both an arbitration to enforce a CBA and a FRSA complaint. However, if the Court believes that the statute is ambiguous, the ARB's *Mercier* decision, as reaffirmed in this case, is due deference under *Chevron* as the Secretary's reasonable construction of the statute. *See Chevron*, 467 U.S. at 843; *see also Ray*, 971 F. Supp. 2d at 880-81 (finding section 20109(f) ambiguous and holding that the ARB's decision in *Mercier* was entitled to deference); *Battenfield*, 2013 WL 1309439, at *4 (same).

The Supreme Court has made clear that an agency's interpretation of an ambiguous statutory provision is entitled to *Chevron* deference when the agency is tasked with enforcing and adjudicating that statute. *See, e.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870 (2013) (*Chevron* deference extends to

the agency's determination of its own authority); *Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S. Ct. 1325, 1335 (2011) (deferring to Department's and the EEOC's interpretation of a statute given "Congress' delegation of enforcement powers to [these] federal administrative agencies"); *BP W. Coast Prods., LLC v. Fed. Energy Regulatory Comm'n*, 374 F.3d 1263, 1272 (D.C. Cir. 2004) ("When Congress authorizes an agency to adjudicate complaints arising under a statute, the agency's interpretations of that statute announced in the adjudications are generally entitled to *Chevron* deference.") (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster . . . fairness and deliberation." *Mead*, 533 U.S. at 230.

In 2007, Congress amended FRSA to, *inter alia,* transfer to the Secretary of Labor the authority to investigate and adjudicate retaliation complaints, and the Secretary delegated the relevant authority to the ARB. Because Congress provided for a formal administrative procedure under FRSA through administrative adjudications, *see* 49 U.S.C. 20109(d), and the ARB's decision in this case and in *Mercier* were the result of

that formal administrative procedure, the ARB's decision in this case and in *Mercier* are properly due deference under *Chevron*.[10]

[10] In addition to the decisions in this case and *Mercier*, the Secretary has consistently interpreted FRSA's election of remedies provision in appellate and district court cases. *See, e.g., Reed*, 740 F.3d at 424 n.3; Statement of Interest of the United States, *Ratledge*, *supra,* No. 1:12-cv-402 (E.D. Tenn. May 21, 2013), ECF No. 44; Pl's Reply Mem. in Supp. of her Mot. for a Prelim. Inj. at 7-11, *Solis v. Union Pac. R.R.*, No. 4:12-cv-00394 (D. Idaho Oct. 5, 2012), ECF No. 21.

Norfolk Southern asserts that the Department has not been consistent in its interpretation of FRSA's election of remedies provision because a lone ALJ in the *Koger* case reached the opposite conclusion. *See* Norfolk Southern's Br. at 30. The ALJ's decision in *Koger*, however, was not the Department's final decision in that case. In *Mercier*, the ARB rejected the *Koger* ALJ's interpretation. *See* 2011 WL 4889278, at *8. The ARB's decision, not the ALJ's, represents the Department's position on this issue.

Norfolk Southern also relies on an unsigned and undated draft internal memorandum in which Department officials had tentatively reached a different conclusion as to the meaning of FRSA's election of remedies provision. *See* Norfolk Southern's Br. at 15, 30 n.16. This internal memorandum, which is a privileged agency document, was inadvertently disclosed in response to a request under the Freedom of Information Act ("FOIA"). Norfolk Southern has no basis to rely on this document in litigation. With a large "DRAFT" watermark on every page, the memorandum clearly and unmistakably indicated that it was not a final memorandum. Moreover, after it was inadvertently disclosed, the Department notified the FOIA requester, Norfolk Southern's former counsel, that the draft memorandum should not have been disclosed and requested that the document be returned and that all copies that the requester may have made of it be destroyed. *See* October 3, 2011 letter to Mark E. Martin, Sidley Austin LLP (attached as Addendum C). In apparent disregard of the Department's request, the document appears to have been disseminated among various railroads and has been relied on in litigation in *Grimes v. BNSF Ry.,* 746 F.3d 184 (5th Cir. 2014), and this case. This Court should not condone such litigation tactics.

Numerous courts of appeal have accorded *Chevron* deference to the ARB's interpretations of statutes that the ARB is tasked, through delegation from the Secretary, with enforcing through administrative adjudications. *See, e.g.*, *Lockheed Martin Corp. v. ARB,* 717 F.3d 1121, 1131-32 (10th Cir. 2013) (deferring to ARB's changed interpretation of protected activity under Sarbanes-Oxley Act's whistleblower provision); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (same); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (granting *Chevron* deference to ARB's interpretation of the Sarbanes-Oxley Act's whistleblower provision); *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1173-74, 1181 (10th Cir. 2005) (granting *Chevron* deference to ARB's interpretation of the environmental whistleblower statutes); *Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 491 (6th Cir. 2005) (granting *Chevron* deference to ARB's interpretation of the ERA).

To be entitled to deference, the ARB's interpretation need not be the only permissible interpretation or even the interpretation this Court would have adopted if it considered the issue in the first instance; it need only be reasonable. *See Chevron,* 467 U.S. at 843 n.11. For the reasons outlined above, the ARB's interpretation in this case and in *Mercier* is, at a minimum, a reasonable construction of FRSA's election of remedies provision. Therefore, to the extent that the election

of remedies provision is ambiguous, the ARB's reasonable construction of the statute is entitled to *Chevron* deference.

CONCLUSION

For the foregoing reasons, the ARB's Final Decision and Order should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 10,384 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Courier New, in 12-point font in text and 12-point font in footnotes.

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CERTIFICATE OF SERVICE

I certify that the Response Brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this 11th day of August, 2014:

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