

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

GEORGE RATLEDGE,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY CO.,
BULL MOOSE TUBE CO.,

Defendants.

Civil Case No. 1:12-cv-402

Hon. Curtis L. Collier

**BRIEF OF THE ACTING SECRETARY OF LABOR
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF
IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN GUENTHER
Counsel for Whistleblower Programs

RACHEL GOLDBERG
Senior Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

TABLE OF CONTENTS

	Page
STATEMENT OF IDENTITY AND INTEREST	1
BACKGROUND	1
I. History and Procedural Posture of this Case.....	1
II. Grievances and Arbitration in the Railroad Industry	3
III. FRSA and the Procedural Background Regarding FRSA’s Election of Remedies Provision	5
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. FRSA’S ELECTION OF REMEDIES PROVISION DOES NOT APPLY TO A GRIEVANCE/ARBITRATION TO ENFORCE A CBA.....	10
A. “Another Provision of Law” Does Not Include a Grievance/Arbitration to Enforce a CBA	10
B. The “Same Allegedly Unlawful Act” Under FRSA Does Not Include a Violation of the Applicable CBA.....	17
II. IF THIS COURT CONCLUDES THAT FRSA’S ELECTION OF REMEDIES PROVISION IS AMBIGUOUS, IT SHOULD GRANT <i>CHEVRON</i> DEFERENCE TO THE ARB’S INTERPRETATION IN <i>MERCIER/KOGER</i>	21
CONCLUSION.....	25
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974)..... 12, 13

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995)..... 16

Anderson v. U.S. Dep't of Labor,
422 F.3d 1155 (10th Cir. 2005) 22

Andrews v. Louisville & Nashville R.R. Co.,
406 U.S. 320 (1972)..... 5

Araujo v. New Jersey Transit,
--- F.3d ---, 2013 WL 600208 (3d Cir. Feb. 19, 2013) 17

Atchison, Topeka & Santa Fe Ry. Co. v. Buell,
480 U.S. 557 (1987)..... 5

Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.,
522 F.3d 746 (7th Cir.), *aff'd*, 558 U.S. 67 (2009)..... 4

Bolton v. Merit Sys. Prot. Bd.,
154 F.3d 1313 (Fed. Cir. 1998)..... 24

BP W. Coast Prods., LLC v. Fed. Energy Regulatory Comm'n.,
374 F.3d 1263 (D.C. Cir. 2004)..... 22

Chevron U.S.A., Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984)..... 10, 21, 23

City of Arlington v. FCC,
668 F.3d 229 (5th Cir. 2012) 24

City of Arlington v. FCC,
133 S. Ct. 524 (Oct. 5, 2012) 24

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986)..... 24

Consol. Rail Corp. v. Ry. Labor Executives' Ass'n,
491 U.S. 299 (1989)..... 3, 12

Cases - continued

<i>Consol. Rail Corp. v. United Transp. Union</i> , 947 F. Supp. 168 (E.D. Pa. 1996)	5
<i>Demski v. U.S. Dep't of Labor</i> , 419 F.3d 488 (6th Cir. 2005)	22
<i>Gonero v. Union Pac. R.R. Co.</i> , No. Civ. 2:09-2009, 2009 WL 3378987 (E.D. Cal. Oct. 19, 2009)	13
<i>Graf v. Elgin, Joliet, & E. Ry. Co.</i> , 697 F.2d 771 (7th Cir. 1983)	11
<i>Hawaiian Airlines, Inc. v. Norris</i> , 512 U.S. 246 (1994)	5, 18
<i>Hydro Res., Inc. v. EPA</i> , 608 F.3d 1131 (10th Cir. 2010)	24
<i>Kasten v. Saint-Gobain Performance Plastics Corp.</i> , 131 S. Ct. 1325 (2011)	21, 22
<i>Koger v. Norfolk S. Ry. Co.</i> , ARB Case Nos. 09-101, 2011 WL 4889278 (Admin. Review Bd. Sept. 29, 2011)	1, 8, 11, 13
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958)	8
<i>Mercier v. Union Pacific R.R. Co.</i> , ARB Case Nos. 09-121, 2011 WL 4889278 (Admin. Review Bd. Sept. 29, 2011)	1, 8, 11, 13
<i>Milton v. Norfolk S. Ry. Corp.</i> , ALJ No. 2011-FRS-00004 (ALJ July 8, 2011)	13
<i>Mississippi Power & Light Co. v. Mississippi</i> , 487 U.S. 354 (1981)	23, 24
<i>NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984)	24
<i>Norfolk S. Ry. Co. v. Solis</i> ,	

-- F. Supp. 2d --, 2013 WL 39226 (D.D.C. Jan. 3, 2013).....	<i>Passim</i>
Cases - continued	
<i>Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n</i> , 499 U.S. 117 (1991).....	14, 15
<i>Norman v. Mo. Pac. R.R.</i> , 414 F.2d 73 (8th Cir. 1969)	12, 18
<i>Northern Ill. Steel Supply Co. v. Sec'y of Labor</i> , 294 F.3d 844 (7th Cir. 2002)	24
<i>P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.</i> , 856 F.2d 546 (3d Cir. 1988).....	24
<i>Powers v. Union P. R.R.</i> , No. 2010-FRS-00030 (ALJ May 17, 2011).....	18
<i>Pruidze v. Hodler</i> , 632 F.3d 234 (6th Cir. 2011)	24
<i>Ramirez-Canales v. Mukasey</i> , 517 F.3d 904 (6th Cir. 2008)	22
<i>Ratledge v. Norfolk S. Ry. Co.</i> , ALJ No. 2012-FRS-00064 (ALJ Dec. 10, 2012).....	3
<i>Rayner v. Smirl</i> , 873 F.2d 60 (4th Cir. 1989)	10
<i>Samantar v. Yousuf</i> , 130 S. Ct. 2278 (2010).....	12
<i>Sereda v. Burlington N. Santa Fe R.R. Co.</i> , No. 4:03-cv-10431, 2005 WL 5892133 (S.D. Iowa Mar. 17, 2005)	18
<i>Snell Island SNF LLC v. NLRB</i> , 568 F.3d 410 (2d Cir. 2009).....	24
<i>Stephens v. Erickson</i> , 569 F.3d 779 (7th Cir. 2009)	20
<i>Terminal R.R. Ass'n v. Bhd. of R.R. Trainmen</i> , 318 U.S. 1 (1943).....	11
<i>Thompson v. Norfolk S. Ry. Corp.</i> ,	

ALJ No. 2011-FRS-00015 (ALJ Aug. 9, 2011).....	13
Cases - continued	
<i>Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen</i> , 558 U.S. 67, 130 S. Ct. 584 (2009).....	4
<i>United States v. Mead Corp.</i> , 533 U.S. 218 (2001).....	22, 23
<i>Welch v. Chao</i> , 536 F.3d 269 (4th Cir. 2008)	22
<i>Wiest v. Lynch</i> , ---F.3d ---, 2013 WL 1111784 (3d Cir. Mar. 19, 2013).....	22
Statutes:	
28 U.S.C. 1332.....	14
42 U.S.C. 1983.....	14
Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i>	8
Civil Rights Act of 1964, 42 U.S.C. 2000e <i>et seq.</i> (Title VII)	
42 U.S.C. 2000e-2(a)(1).....	19
42 U.S.C. 2000e-3(a)	19
Energy Reorganization Act of 1974, 42 U.S.C. 5851	22
Federal Employers' Liability Act, 45 U.S.C.A. 51 <i>et seq.</i>	5
Federal Railroad Safety Act, 49 U.S.C. 20101 <i>et seq.</i>	5
49 U.S.C. 20109.....	1, 6
49 U.S.C. 20109(a)	17
49 U.S.C. 20109(a)(4).....	6
49 U.S.C. 20109(b).....	17
49 U.S.C. 20109(d).....	1, 23
49 U.S.C. 20109(d)(1)	6

49 U.S.C. 20109(d)(2)	8
Statutes -- continued	
49 U.S.C. 20109(d)(2)(A).....	7
49 U.S.C. 20109(d)(3)	3, 8
49 U.S.C. 20109(d)(4)	8
49 U.S.C. 20109(f).....	<i>Passim</i>
49 U.S.C. 20109(g).....	6, 7, 12, 13, 16
49 U.S.C. 20109(h).....	6, 7, 12, 13, 16
Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, <i>reprinted in</i> 1980 U.S.C.C.A.N. 3830, 3832	5
Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, sec. 10, §§ 212(c)(1) and (d), 94 Stat. 1811 (amended 2007)	5, 6
Immigration and Nationality Act of 1990, 8 U.S.C. 1101 <i>et seq.</i>	22
Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1521, § 20109(a)(4), (c)(1), (e), (f), and (g), 121 Stat. 266	6
Interstate Commerce Act, 49 U.S.C. 501 <i>et seq.</i>	15
Occupational Health and Safety Act of 1970, 29 U.S.C. 651 <i>et seq.</i>	
29 U.S.C. 660(c)	20
Railway Labor Act, 45 U.S.C. 151 <i>et seq.</i>	3
45 U.S.C. 151a.....	3
45 U.S.C. 152 First	3
45 U.S.C. 153 First (i).....	4
45 U.S.C. 153 First (m).....	4
Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A	22
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 <i>et seq.</i>	
49 U.S.C. 42121(b)(2)(A).....	7
49 U.S.C. 42121(b)(2)(B)(i)	7

49 U.S.C. 42121(b)(3)	8
-----------------------------	---

Code of Federal Regulations:

29 C.F.R. Part 1982,

29 C.F.R. 1982.104	7
29 C.F.R. 1982.104(e)(1)	7
29 C.F.R. 1982.105	7
29 C.F.R. 1982.106(a)	7
29 C.F.R. 1982.110(a)	7
29 C.F.R. 1982.112(a)	8
29 C.F.R. 1982.112(b)	8

Congressional Record:

126 Cong. Rec. 26532 (1980)	20
-----------------------------------	----

Federal Reports:

H.R. Rep. No. 110-259 (2007) (Conf. Rep.), <i>reprinted in 2007 U.S.C.C.A.N. 119, 180-81</i>	7, 16, 21
H.R. Rep. No. 96-1025 (1980), <i>reprinted in 1980 U.S.C.C.A.N. 3830, 3832, 1980 WL 13014</i>	16

Miscellaneous:

Black's Legal Dictionary (9th ed. 2009)	19
Department of Labor's Office of Administrative Law Judges at http://www.oalj.dol.gov/	13
National Mediation Board at http://www.nmb.gov/arbitration/amenu.html	4
National Railroad Adjustment Board Third Div. Award No. 24348 (April 27, 1983)	18
National Railroad Adjustment Board Third Div. Award No. 26381 (June 25, 1987)	4
Pub. L. No. 103-272, 108 Stat. 867 (1994)	6
Secretary's Order No. 1-2010, 75 Fed. Reg. 3924-01 (Jan. 15, 2010)	7
Secretary's Order 01-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012)	7

STATEMENT OF IDENTITY AND INTEREST

The Acting Secretary of Labor (“Secretary”) has a strong interest in the interpretation of the whistleblower provision of the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. 20109, because he administers and enforces the statute, and adjudicates FRSA whistleblower complaints brought by employees of railroad carriers. *See* 49 U.S.C. 20109(d). The Secretary has a particularly strong interest here because the reading of FRSA’s election of remedies provision, 49 U.S.C. 20109(f), that Norfolk Southern advances would constitute a threshold defense in many FRSA whistleblower cases. Therefore, the proper interpretation of FRSA’s election of remedies provision is of critical importance to protecting railroad workers’ whistleblower rights under FRSA. In addition, the Secretary, through his adjudicatory authority, decided in the consolidated cases *Mercier v. Union Pacific R.R. Co.* and *Koger v. Norfolk Southern Ry. Co.*, ARB Case Nos. 09-121, 09-101, 2011 WL 4889278 (Admin. Review Bd. Sept. 29, 2011) (“*Mercier/Koger*”), that FRSA’s election of remedies provision does not require a railroad worker to choose between pursuing a whistleblower complaint under FRSA and a grievance under a collective bargaining agreement (“CBA”). The Secretary has a strong interest in ensuring railroad workers’ access to FRSA’s whistleblower protections consistent with the Secretary’s interpretation of FRSA in *Mercier/Koger* and in ensuring that FRSA’s whistleblower protections are interpreted consistently nationwide.

BACKGROUND

I. History and Procedural Posture of this Case

Unless otherwise noted, the following facts are alleged by Plaintiff George Ratledge in his Complaint. Ratledge began working for Norfolk Southern in 1971. Compl. ¶ 7. He was working as a Carman on January 7, 2010 when he hit his head on a metal support upon entering a

building. *Id.* ¶¶ 12-16. He reported the injury to his supervisors the next day, Friday, and again the following Monday, and requested to complete the injury report forms, but was told by one of his supervisors that he (the supervisor) would be fired if Ratledge filed the forms. *Id.* ¶¶ 18-20. His supervisor instructed him to wait to see if he improved before filing any forms, and also told him that, if he did file injury forms, he should say that the injury had just occurred rather than reporting the real date of the injury. *Id.* ¶¶ 19-21. Finally, several days after Ratledge first reported the injury, he told his supervisor that he needed medical treatment because his arm was numb and tingling, and he completed the injury form using the correct injury date. *Id.* ¶ 23. Norfolk Southern's doctor treated Ratledge, including prescribing medication and ordering a CT scan, and released him to return to work with restrictions. *Id.* ¶¶ 24-25. After Ratledge returned from the doctor, several managers interrogated him for approximately 45 minutes about the injury, which included making Ratledge wear his hard hat and other protective gear and measuring his height. *Id.* ¶¶ 26-27. The managers later conducted an investigation at the location of the injury and concluded that Ratledge could not have injured himself as he had reported. *Id.* ¶¶ 29-31. Ratledge was charged with falsifying an injury and failing to timely report his injury, but the late reporting charged was later dropped. *Id.* ¶ 32. Ratledge was placed out of service pending a formal disciplinary investigation. *Id.* ¶ 31.

Norfolk Southern held a formal investigative hearing, at the conclusion of which Norfolk Southern found Ratledge guilty of falsifying the injury. *Id.* ¶¶ 35-38. Norfolk Southern terminated Ratledge's employment on October 8, 2010. *Id.* ¶ 38. Pursuant to the applicable CBA, Ratledge, through his union representative, filed a grievance of Ratledge's termination. Norfolk Southern's Director of Labor Relations denied Ratledge's grievance. *Id.* ¶¶ 40-41. Ratledge appealed (or "arbitrated" in the language of the Railway Labor Act, as discussed

below) the grievance to the Public Law Board, which concurred with the guilty decision, but reduced the termination to a suspension without pay and ordered Ratledge reinstated. *Id.* ¶ 42. However, Ratledge remains physically unable to perform his Carman job. *Id.*

While the formal investigative hearing was pending, Ratledge filed a FRSA complaint with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) on March 17, 2010, and an amended complaint on October 13, 2010. *Id.* ¶ 44. On July 18, 2012, OSHA issued findings against Norfolk Southern finding reasonable cause to believe that Norfolk Southern terminated Ratledge in retaliation for reporting a workplace injury in violation of FRSA. *Ratledge v. Norfolk S. Ry. Co.*, ALJ No. 2012-FRS-00064 (ALJ Dec. 10, 2012). Norfolk Southern objected to OSHA’s findings and requested a hearing before an ALJ, as permitted under FRSA regulations. *Id.* While the matter was pending before the ALJ, Ratledge exercised his right under FRSA, 49 U.S.C. 20109(d)(3), to seek de novo review before this Court because the Secretary had not issued a final decision within 210 days. Norfolk Southern now moves to dismiss Ratledge’s FRSA complaint arguing that FRSA’s election of remedies provision bars Ratledge from pursuing a FRSA whistleblower complaint because he previously grieved and arbitrated his termination.

II. 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 the formation of CBAs concerning rates of pay, rules, and working conditions. *See* 45 U.S.C. 152 First; *Consol. Rail Corp. v. Ry. Labor Executives’ 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 grievance procedures specified in the CBA. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 130 S. Ct. 584, 591 (2009) (citing 45 U.S.C. 153 First (i)). Typically, CBAs provide that when a railroad carrier suspects that an employee has violated an operating rule, for example, the railroad conducts an investigation through a hearing (known as an “on-property hearing” or “on-property investigation”). *See generally Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 522 F.3d 746, 748 (7th Cir.), *aff'd*, 558 U.S. 67 (2009). If the railroad 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.*

At the conclusion of the grievance process, 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 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, 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).¹ The Adjustment Board’s decision is final and binding on the parties. *See* 45 U.S.C. 153 First (m).

¹ This and the other decisions of the National Railroad Adjustment Board cited in this brief can be found on the website of the National Mediation Board at <http://www.nmb.gov/arbitration/amenu.html>, follow “Arbitration Awards” tab, and search by decision number.

Thus, disputes requiring the application or interpretation of a CBA must be handled following the procedures set forth in the RLA. *See Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324-25 (1972) (state law wrongful discharge claim was preempted by RLA because it required interpreting the CBA). 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. Co. v. Buell*, 480 U.S. 557, 564-65 (1987) (a Federal Employers' Liability Act ("FELA") claim was 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).

III. FRSA and the Procedural 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, *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, sec. 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.* at sec. 10, § 212(c)(1). 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. at sec. 10, § 212(d).²

In 2007, Congress again amended FRSA to bolster the protections 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, sec. 1521, § 20109(a)(4), 121 Stat. 266 (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 Secretary of Labor. *See id.* at sec. 1521, § 20109(c)(1) (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.* at sec. 1521, § 20109(e), (f), (g) (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.

² In 1994, FRSA 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 slightly (to its current form), but this modification was not intended as a substantive change. *See* Pub. L. No. 103-272, 108 Stat. 867 (1994).

(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. Rep. No. 110-259, at 348 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 180-81.

The Secretary has delegated responsibility for handling FRSA complaints to the Assistant Secretary of Labor for Occupational Safety and Health (“Assistant Secretary”). *See* 29 C.F.R. 1982.104; Secretary’s Order No. 01-2012, 77 Fed. Reg. 3912, (Jan. 25, 2012)). FRSA requires that the Assistant Secretary either dismiss a complaint if it does not contain a prima facie showing of retaliation or conduct an investigation and issue findings and determinations. *See* 49 U.S.C. 20109(d)(2)(A), *incorporating the procedures in* 49 U.S.C. 42121(b)(2)(A) and (B)(i); 29 C.F.R. 1982.104(e)(1) and 1982.105. Either the employee or the railroad may file objections to the findings and determinations and seek a hearing before a Department of Labor Administrative Law Judge (“ALJ”). *See* 49 U.S.C. 20109(d)(2)(A), *incorporating the procedures in* 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106(a). Either party may seek review of an ALJ decision by the Department of Labor’s Administrative Review Board (“ARB”), to whom the Secretary has delegated authority to act on his behalf under FRSA in reviewing ALJ decisions and issuing final orders. *See* 29 C.F.R. 1982.110(a); Secretary’s Order No. 1-2010, 75 Fed. Reg. 3924-01 (Jan. 15, 2010). Thus, the ARB carries out FRSA’s directive that the Secretary issue final orders on

FRSA complaints. *See* 49 U.S.C. 20109(d)(2), *incorporating the procedures in* 49 U.S.C. 42121(b)(3). Final orders of the Secretary are subject to judicial review only in the U.S. courts of appeals under the standards set forth in the Administrative Procedure Act. *See* 49 U.S.C. 20109(d)(4); 29 C.F.R. 1982.112(a), (b).³

Pursuant to the procedures outlined above, the ARB issued a decision in September 2011 interpreting FRSA’s election of remedies provision in two consolidated cases. *See Mercier/Koger*, 2011 WL 4889278. The ARB concluded that FRSA’s election of remedies provision does not apply to an arbitration pursued under an employee’s CBA. *See id.* at *8.⁴ The ARB concluded that the plain meaning of “another provision of law” in FRSA’s election of remedies provision did not encompass grievances/arbitrations filed pursuant to a CBA. *See id.* at *5. The fact that a CBA is established pursuant to the RLA, the ARB explained, “is not the same as a right created under a provision of law.” *Id.* The ARB remanded each of these cases to their respective ALJs. *See id.* at *8. As a result, the ARB’s decision was not a final order appealable to the court of appeals following the procedures set out in FRSA.

Despite there being no appealable final order, Norfolk Southern, the respondent in the *Koger* case, filed suit in the District Court for the District of Columbia challenging the ARB’s *Mercier/Koger* decision, arguing that the district court had jurisdiction to review the decision under the doctrine articulated in *Leedom v. Kyne*, 358 U.S. 184 (1958), which permits district court jurisdiction even where there is no final agency order in very limited circumstances. *See*

³ In addition, 49 U.S.C. 20109(d)(3), which provides this Court’s jurisdiction for Ratledge’s FRSA claim, allows an employee to bring his FRSA whistleblower complaint in U.S. district court “if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee.”

⁴ In the *Mercier/Koger* decision, the ARB used the terms “grievance” and “arbitration” interchangeably. For consistency, this brief uses the term “grievance/arbitration” throughout.

Norfolk S. Ry. Co. v. Solis, -- F. Supp. 2d --, 2013 WL39226 (D.D.C. Jan. 3, 2013). The district court dismissed Norfolk Southern's case. *See id.* at *8. The court noted that *Leedom* jurisdiction is not warranted if the agency's statutory interpretation is at least a colorable reading of the statute, and concluded that FRSA's election of remedies provision was not unambiguous and that the ARB's interpretation was, at a minimum, a colorable interpretation of FRSA's election of remedies provision. *See id.* at *9-10. Essentially agreeing with the ARB's conclusion that "another provision of law" does not include grievances/arbitrations under a CBA, the court concluded that the RLA's provisions for mandatory arbitration concerning a CBA are procedural, while the substantive provisions at issue come from the CBA itself. *See id.* at *9. The court also reasoned that the "unlawful act" is not the dismissal itself. *See id.* at *9-10. The court distinguished a retaliatory dismissal under FRSA from a dismissal in violation of the terms of the CBA. *See id.*

SUMMARY OF ARGUMENT

Ratlidge's pursuit of a grievance/arbitration does not constitute an election of remedies under FRSA's election of remedies provision because the substantive rights an employee such as Ratlidge is seeking to protect when he pursues a grievance/arbitration are provided by the CBA, not the RLA, and the action is therefore governed by contract law, which is not "another provision of law." While the RLA, which is "another provision of law," requires that railroad carriers and employees exert every reasonable effort to make and maintain CBAs and mandates how CBA disputes are to be resolved, 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 a grievance/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 such as Ratledge seeks protection through a grievance/arbitration is not the same “allegedly unlawful act” for which the employee seeks protection under FRSA. In a FRSA claim, the “allegedly unlawful act” is the retaliation for engaging in whistleblowing activities. In a grievance/arbitration, the “allegedly unlawful act” is the violation of the terms of the CBA.

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*, 467 U.S. 837 (1984), to the ARB’s reasonable interpretation of this statutory provision in *Mercier/Koger*.

ARGUMENT

I. FRSA’S ELECTION OF REMEDIES PROVISION DOES NOT APPLY TO A GRIEVANCE/ARBITRATION TO ENFORCE A CBA

A. “Another Provision of Law” Does Not Include a Grievance/Arbitration to Enforce a CBA

“[A]nother 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 Rayner v. Smirl*, 873 F.2d 60, 66 n.1 (4th Cir. 1989).⁵ An employee such as Ratledge does not seek protection under “another provision of law,” the RLA, when challenging an adverse employment action in a grievance/arbitration. Instead, the employee seeks protection under a contract, the CBA, because it is the CBA, not the RLA, which provides the employee the substantive right he can seek to vindicate in a grievance/arbitration. Indeed, the Supreme Court has explained that while the RLA establishes a process to form CBAs and to resolve disputes regarding the terms in a CBA, the statute does not provide specific substantive rights to employees:

⁵ The court in *Rayner* analyzed FRSA prior to the 2007 amendments.

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). The RLA does not dictate the terms that must be included in the CBA or how the CBA should be interpreted.

For example, a provision in a CBA requiring just cause in order to discipline or discharge an employee is not a provision that is 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 not a claim to enforce a provision of the RLA. While 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.⁶ “[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.”

Graf v. Elgin, Joliet, & E. Ry. Co., 697 F.2d 771, 776 (7th Cir. 1983). In considering this exact issue in *Mercier/Koger*, the ARB 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.” 2011 WL 4889278, at *5.

Moreover, 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

⁶ By contrast, an employee might possibly be considered to seek protection under the RLA if, for example, a railroad refused to subject to arbitration and the employee sought to compel arbitration on the basis that the RLA requires arbitration.

whether retaliation in violation of FRSA occurred. *See Consol. Rail Corp.*, 491 U.S. at 307 (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, 49-50 (1974) (“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.”).⁷ Thus, when an employee pursues a grievance/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 a grievance/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.

Other provisions in FRSA support this conclusion. Paragraphs (g) and (h) of section 20109 provide that nothing in section 20109 preempts or diminishes other rights or remedies under federal or state laws or a CBA. A basic rule of statutory construction is that statutory language must be read in context of the statute as a whole. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). Paragraphs (g) and (h) reflect that Congress “anticipate[d] and permit[ted] a

⁷ Norfolk Southern unsuccessfully attempts to distinguish *Alexander* on the basis that the case dealt with “judge-made election of remedies (and waiver) rules,” not a statutory election of remedies provision. Def’s Br. in Supp. of Mot. to Dismiss (“Def’s Br.”) at 16. This distinction does not alter the conclusions of the Supreme Court in *Alexander* that an employee who pursues arbitration only “seeks to vindicate his contractual rights under a collective-bargaining agreement,” 415 U.S. at 49, and that arbitrators have “authority to resolve only questions of contractual rights,” *id.* at 53-54.

concurrent whistleblower complaint *and* arbitration provided for in a collective bargaining agreement and enforceable under the RLA.” *Mercier/Koger*, 2011 WL 4889278, at *6 (emphasis in original) (citing *Gonero v. Union Pac. R.R. Co.*, No. Civ. 2:09-2009, 2009 WL 3378987, at *2-6 (E.D. Cal. Oct. 19, 2009) (section 20109(f) does not preclude an employee from pursuing multiple claims, including claims under state law, because to interpret section 20109(f) otherwise would “diminish the rights of railroad workers”); *Alexander*, 415 U.S. at 52 (“[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination.”)); see *Thompson v. Norfolk S. Ry. Corp.*, ALJ No. 2011-FRS-00015, slip op. at 4-5 (ALJ Aug. 9, 2011) (reading paragraph (f), (g) and (h) of FRSA together “shows an intent to prevent complainants from pursuing duplicative whistleblower complaints[,]” not an intent to bar employees from pursuing grievances under a CBA); *Milton v. Norfolk S. Ry. Corp.*, ALJ No. 2011-FRS-00004, slip op. at 3-4 (ALJ July 8, 2011) (same)).⁸ As the District of Columbia District Court correctly explained:

Congress’ provisions under . . . 20109(g) and (h) limited preemption of other rights of action by an employee and reinforced employee rights. 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.

Norfolk S. Ry., 2013 WL 39226, at *10

Norfolk Southern attempts to argue against this logic by asserting that “another provision of law” under which an employee seeks protection need not be the source of the substantive right the employee seeks to enforce. Def’s Br. at 12. Norfolk Southern’s argument relies on a strained and unsupported reading of the statute. The fact that the RLA mandates arbitration to

⁸ This and other decisions of the Department of Labor’s ALJs cited in this brief can be found on the website of the Department of Labor’s Office of Administrative Law Judges at <http://www.oalj.dol.gov/>.

resolve CBA disputes – a fact that the Secretary does not dispute – does not mean that this statutorily-required arbitration is the statute under which the employee seeks protection. The RLA arbitration requirement is purely procedural. Norfolk Southern’s argument is akin to arguing that a plaintiff alleging a violation of state tort law in federal court under diversity jurisdiction is seeking protection under the statute providing for diversity jurisdiction, 28 U.S.C. 1332, rather than under state tort law. The fact that the RLA mandates arbitration as the procedure to resolve CBA disputes does not convert the RLA into a statute providing substantive rights to employees as to how a CBA is to be interpreted or applied.

Norfolk Southern also erroneously argues that the RLA is analogous to section 1983, 42 U.S.C. 1983. According to Norfolk Southern, section 1983 and the RLA are analogous in that section 1983 provides the remedy, but not the substantive right, that a plaintiff seeks to vindicate in a section 1983 claim. In the same way, Norfolk Southern contends, the RLA provides the remedy the employee seeks in a CBA dispute without providing the substantive rights at issue.. Def’s Br. at 13-14. These statutes are not analogous. Section 1983 sets out, in explicit language, the remedies available to a person whose constitutional or federal statutory rights have been violated. *See* 42 U.S.C. 1983 (a person who deprives another person of the rights, privileges, or immunities provided by the Constitution and laws shall be liable in an action at law or equity). Unlike the explicit language in section 1983, nothing in the RLA sets out the remedies available to an employee to whom a CBA has not been properly applied. The RLA provides merely for the forum (*i.e.*, arbitration by the Adjustment Board); it does not prescribe or dictate the remedies available as section 1983 does.

Lastly, Norfolk Southern erroneously alleges that permitting an employee to pursue a grievance/arbitration and a FRSA claim is contrary to *Norfolk & Western Railway Co. v.*

American Train Dispatchers Ass'n, 499 U.S. 117 (1991), which it contends stands for the proposition that a railroad employee who seeks relief under the terms of a CBA is seeking protection under the RLA. Def's Br. at 14-15. In *Norfolk & Western*, the Court held that the Interstate Commerce Act's ("ICA") provision exempting railroads 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 a contract" such as the RLA, and thus relieved railroads of their obligations under CBAs. 499 U.S. at 129 (emphasis added). This conclusion is necessarily unique to the statutory exemption in the ICA, which the Court interpreted in light of the national policy promoting railroad consolidation following World War I. *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 [ICA], 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 and citation omitted). Thus, *Norfolk & Western* is necessarily limited to a statutory scheme that promotes the consolidation of railroad carriers and, to carry out that goal, requires that "any obstacle imposed by law" give way when the Commission has determined that the consolidation is in the public interest. *See id.* at 133. *Norfolk & Western* does not stand for the proposition that the RLA provides employees the substantive rights that employees seek to protect through a grievance/arbitration. *See Norfolk S. Ry.*, 2013 WL 39226, at *9 (rejecting Norfolk Southern's *Norfolk & Western* argument because "the RLA provisions for mandatory arbitration of disputes concerning the CBA are procedural, while the substantive

provisions at issue come from the CBA itself”). Indeed, the Supreme Court subsequently recognized in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), that the interpretation of “all other law” in *Norfolk & Western* was limited to the context of the specific national policy promoting railroad consolidation, *see id.* at 229 n.6, and that it did not apply to the interpretation of similar terms in an action to enforce a contract because a contract contains no “state-imposed obligations” but rather “self-imposed undertakings,” *id.* at 228-29.

In this case, unlike in *Norfolk & Western*, there is no statutory policy promoting railroad consolidation that can inform the interpretation of section 20109(f). Instead, the national policy that informs the interpretation 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] ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers[,]” H.R. Rep. No. 110-259, at 348 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 180-81. 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. With the 2007 amendment to FRSA, Congress expanded the activities that are protected, provided greater remedies, and established a new forum to adjudicate an employee’s whistleblower retaliation claim. Nothing in FRSA indicates that Congress intended to foreclose the alternative remedies already available to employees.⁹

⁹ To the contrary, Congress explicitly preserved those remedies by including the new provisions in FRSA’s paragraphs (g) and (h), which establish that nothing in section 20109 preempts or diminishes other rights and remedies under federal and state laws or a CBA.

B. The “Same Allegedly Unlawful Act” Under FRSA Does Not Include a Violation of the Applicable 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[.]” 29 U.S.C. 20109(f). The “allegedly unlawful act” for which Ratledge seeks protection under FRSA is retaliatory termination. FRSA makes it unlawful to “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” for reporting a workplace injury or engaging in other activities protected by the Act. 49 U.S.C. 20109(a), (b). An adverse action such as a discharge or discipline is not in and of itself unlawful. The adverse action is unlawful under FRSA only if it is, at least in part, in retaliation for the employee having engaged in some protected activity.

In contrast to his FRSA claim, Ratledge sought protection through the grievance/arbitration process for a termination allegedly in violation of the CBA. Retaliatory termination and termination in violation of the CBA are not the same unlawful acts. As a commonsense principle, a termination may be unlawful under FRSA but not violate the CBA. For instance, the employee may have violated a seldom-enforced railroad rule, so that termination is proper under the CBA, but the railroad cited the rule as a pretext to terminate the employee in retaliation for protected activity, which would violate FRSA. *See Araujo v. New Jersey Transit*, -- F.3d --, 2013 WL 600208, at *10 (3d Cir. Feb. 19, 2013) (concluding that, 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 for the first time was retaliatory under FRSA). Conversely, a termination may violate the CBA without running afoul of FRSA’s whistleblower protections. “[B]y characterizing the ‘act’ as the

dismissal,” Norfolk Southern “paints the ‘act’ with a broad enough brush to include two very different factual scenarios.” *Norfolk S. Ry.*, 2013 WL 39226, at *9.¹⁰

Indeed, Norfolk Southern paints with too broad a brush. An employee cannot seek protection through the grievance/arbitration process for retaliation. The RLA establishes the Adjustment Board’s jurisdiction as limited to interpreting and applying CBAs, and a retaliation claim does not require the application or interpretation of a CBA. *See, e.g., Hawaiian Airlines*, 512 U.S. at 255, 257-59, 266 (concluding that the RLA’s dispute resolution procedures relate only to disputes involving the application or interpretation of a CBA).¹¹ Consequently, even where a dispute under the CBA and a FRSA claim might address the same facts, the Adjustment Board has no authority to address an employee’s claim of retaliation.¹² *See, e.g., 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”); NRAB Third Div. Award No. 24348 (April 27, 1983) (Adjustment Board has no jurisdiction to consider Title VII discrimination claim because

¹⁰ *See also Powers v. Union P. R.R.*, ALJ No. 2010-FRS-00030, slip op. at 5 (ALJ May 17, 2011) (concluding that a breach of contract is not the same as “unlawful” conduct, and therefore FRSA’s election of remedies provision does not apply to contract claims under a CBA). *But see Sereda v. Burlington N. Santa Fe R.R. Co.*, 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).

¹¹ The Supreme Court concluded in *Hawaiian Airlines* that the employee’s state law claims were independent of the CBA because these claims turned on purely factual questions of the employee’s conduct and the employer’s motive and did not require interpretation or application of any terms of a CBA. *See* 512 U.S. at 262-66.

¹² Furthermore, as noted earlier, the Adjustment Board reviews only the on-property hearing record in determining whether the railroad carrier violated the CBA when it disciplined the employee. Information regarding retaliation is not necessarily developed in the on-property hearing. In any event, the only question the RLA grievance/arbitration process addresses is whether the employee in fact broke an operating rule set out in the CBA.

it is not related to the interpretation or application of a CBA). Interpreting “unlawful act” as Norfolk Southern suggests would therefore significantly diminish whistleblowers’ access to FRSA’s protections and is neither mandated nor supported by the statute.

Norfolk Southern argues that the plain language of FRSA’s election of remedies provision refers only to the act (*e.g.*, the dismissal), not the legal claims arising out of that act. Thus, an employee challenging his termination in a grievance/arbitration and a FRSA complaint, in Norfolk Southern’s view, is seeking protection in both actions for the “same allegedly unlawful act.” Def’s Br. at 17-18. Norfolk Southern’s argument ignores a key word in the statute. FRSA’s election of remedies provision does not say the “same act”; it says the “same allegedly unlawful act.” 49 U.S.C. 20109(f). The inclusion of the word “unlawful” necessarily incorporates the reason that the act is unlawful (*i.e.*, the legal claim). *See Black’s Legal Dictionary* (9th ed. 2009) (“unlawful” means “[n]ot authorized by law; illegal” and “unlawful act” means “[c]onduct that is not authorized by law; a violation of a civil or criminal law”).

While no other employment statute uses the exact phrase “unlawful act,” Title VII uses a similar phrase, the use of which supports the conclusion that the “unlawful act” in FRSA’s election of remedies provision is the retaliation (*i.e.*, the reason a particular act is unlawful). Title VII makes it an “unlawful employment practice” to fail to hire, to discharge, or otherwise discriminate against any individual in the terms and conditions of employment because of the individual’s race, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1). Similarly, Title VII makes it an “unlawful employment practice” to discriminate against an employee because the employee opposed a practice made unlawful by Title VII, or assisted in a proceeding under Title VII. 42 U.S.C. 2000e-3(a). To prove an “unlawful employment practice” under the retaliation provisions of Title VII, an employee must show that: (1) the employee engaged in statutorily

protected activity; (2) that the employer took a materially adverse action against the employee; and (3) that the employer did so, at least in part, due the employee's protected activity. *See, e.g., Stephens v. Erickson*, 569 F.3d 779, 786 (7th Cir. 2009) (setting out elements for retaliation claims under Title VII). The adverse action is only one element of an "unlawful employment practice;" the "unlawful employment practice" also requires that the adverse action was done, in part, because of activities protected under Title VII. Applying the same reasoning to this framework, an "unlawful act" under FRSA's election of remedies provision is retaliation for engaging in whistleblower protected acts.

This conclusion is bolstered by FRSA's legislative history, which indicates that the election of remedies provision was designed to prevent pursuit of multiple claims arising out of the unlawful act of retaliation. 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]. 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 Occupational Safety and Health Act]. It is our intention that pursuit of one remedy should bar the other, so as to avoid resort to two separate remedies, which would only result in unneeded litigation and inconsistent results.

126 Cong. Rec. 26532 (1980). Section 11(c) of the Occupational Safety and Health 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 directed at preventing employees from filing whistleblower retaliation claims under a different statutory scheme covering the same protected activity.

To interpret the phrase "allegedly unlawful act" otherwise unduly restricts railroad employees' right to the range of legal protections available that Congress intended railroad

employees to have. Such an interpretation would be contrary to the intent of the 2007 amendment to FRSA, which was to protect railroad employees “when reporting a safety or security threat or refusing to work when confronted by a hazardous safety or security condition” and thereby “enhance the oversight measures that improve transparency and accountability of the railroad carriers.” H.R. Rep. No. 110-259, at 348 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 181.

II. 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/KOGER*

The ARB’s decision in *Mercier/Koger* was the result of the statutorily-prescribed administrative adjudication process. The ARB’s interpretation is reasonable. Therefore, if this Court concludes that FRSA’s election of remedies provision is ambiguous, the ARB’s interpretation of that provision in *Mercier/Koger* is entitled to deference under *Chevron*.

In determining whether deference under *Chevron* is appropriate, the first step is to determine whether the statutory provision at issue is ambiguous or whether Congress has spoken as to the precise question at issue. *See Chevron*, 467 U.S. at 842-43. As explained above, the Secretary believes the statute is plain in allowing Ratledge to pursue both a grievance/arbitration and a FRSA complaint. However, to the extent the court believes that the statute is ambiguous, the ARB’s *Koger/Mercier* decision is due deference under the second step of the *Chevron* analysis as the Secretary’s reasonable construction of the statute. *See Chevron*, 467 U.S. at 843; *Norfolk S. Ry.*, 2013 WL39226, at *9 (finding 49 U.S.C. 20109(f) ambiguous).

The Supreme Court has repeatedly made clear that *Chevron* deference to an agency’s adjudicatory decision interpreting a statute is appropriate when the agency is tasked with enforcing and adjudicating that statute. *See, e.g., Kasten v. Saint-Gobain Performance Plastics*

Corp., 131 S. Ct. 1325, 1335 (2011) (deferring to the Department of Labor’s and the Equal Employment Opportunity Commission’s interpretation of a statute given “Congress’ delegation of enforcement powers to [these] federal agencies”); *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 908-10 (6th Cir. 2008) (granting *Chevron* deference to the Board of Immigration Appeals’ interpretation of the Immigration and Nationality Act because the statute was amenable to multiple interpretations, the Board had interpreted it in case-by-case adjudications, and its interpretation was reasonable); *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)).

Relevant here, the Sixth Circuit and other courts of appeals have given *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., 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 Energy Reorganization Act’s whistleblower provision); *see also Wiest v. Lynch*, -- F.3d --, 2013 WL 1111784, at *8 (3d Cir. Mar. 19, 2013) (deferring to ARB’s changed interpretation of protected activity under Sarbanes-Oxley Act’s whistleblower provision); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (granting *Chevron* deference to ARB’s interpretations of the Sarbanes-Oxley Act’s whistleblower provision); *Anderson v. U.S. Dept. of Labor*, 422 F.3d 1155, 1173, 1181 (10th Cir. 2005) (granting *Chevron* deference to ARB’s interpretations of the environmental whistleblower statutes). “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. 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 *Mercier/Koger* is the result of that formal administrative procedure, the ARB’s *Mercier/Koger* decision is properly subject to review under *Chevron*.

To be due 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. *See Chevron*, 467 U.S. at 843 n.11. For the reasons outlined above, the ARB’s interpretation in *Mercier/Koger* is the most reasonable construction of FRSA’s election of remedies provision. In *Norfolk S. Ry.*, the court essentially agreed with the ARB’s interpretation, concluding that it was, at a minimum, a colorable interpretation of the statute. *See id.* at *9-10. While the court considered the ARB’s decision in a different context, its analysis was detailed and well-reasoned and is worthy of this Court’s consideration. The ARB’s *Mercier/Koger* decision is therefore deserving of deference under *Chevron*.

Norfolk Southern contends that the ARB’s *Koger/Mercier* decision is due no deference as the agency’s interpretation of its own jurisdiction. Def’s Br. at 23. To the extent the ARB’s *Koger/Mercier* decision was an interpretation of the Secretary’s jurisdiction rather than simply an interpretation of statutory language regarding the scope of an affirmative defense available to railroad carriers over whom the Secretary clearly has jurisdiction in FRSA whistleblower cases, the ARB’s interpretation is still due deference. *Chevron* deference includes deference to an agency’s interpretation of the statute regarding the scope of its own authority. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1981) (Scalia, J. concurring) (“[I]t is settled law that the rule of deference applies even to an agency’s interpretation of its own

statutory authority or jurisdiction.”) (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844-45 (1986); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984)); *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012) (noting the uncertainty in the law, but concluding that deference to agency’s interpretation of its own jurisdiction is proper); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145–46 (10th Cir. 2010) (en banc) (“Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, . . . including statutory ambiguities affecting the agency’s jurisdiction” (internal citations omitted)); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 415-16 (2d Cir. 2009) (citing *Mississippi Power & Light* and Second Circuit cases); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) (*Chevron* deference “is fully applicable to an agency’s interpretation of its own jurisdiction”). *But see Pruidze v. Hodler*, 632 F.3d 234, 237 (6th Cir. 2011) (noting the uncertainty on this issue and declining to decide it); *Northern Ill. Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 847-48 (7th Cir. 2002) (noting the Seventh Circuit precedent that a court reviews an agency’s determination of its own jurisdiction de novo and that the Supreme Court has not definitively ruled on this issue, citing *Mississippi Power & Light*, and concluding that Seventh Circuit precedent controlled); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998) (affording no deference to agency conclusion regarding scope of its own jurisdiction).¹³ In any event, the ARB’s interpretation of the statute is correct for all the reasons stated herein. FRSA’s election of remedies provision does not bar Ratledge from pursuing a FRSA whistleblower complaint because he pursued a grievance/arbitration under an applicable CBA.

¹³ The Supreme Court has granted certiorari in *City of Arlington* to address this specific issue. *See* 133 S. Ct. 524 (Oct. 5, 2012). The Court heard oral argument on January 16, 2013.

CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that this Court interpret FRSA's election of remedies provision to permit Ratledge's FRSA claim and deny Norfolk Southern's motion to dismiss.

Respectfully Submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAMS C. LESSER
Deputy Associate Solicitor

MEGAN GUENTHER
Counsel for Whistleblower
Programs

/s Rachel Goldberg
RACHEL GOLDBERG
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF SERVICE

I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this __ day of April, 2013:

s/ Rachel Goldberg
Rachel Goldberg
Attorney
U.S. Department of Labor
Office of the Solicitor
Room N2716
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5555