

No. 13-2307

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUSTIN D. REED,

Plaintiff-Appellee,

v.

NORFOLK SOUTHERN RAILWAY CO.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLEE

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Pursuant to Federal Rule of Appellate Procedure 29(a), and in response to this Court's June 13, 2013 invitation to the Department of Labor ("Department") to file a brief as *amicus-curiae*, the Secretary of Labor ("Secretary") submits this brief in support of Plaintiff-Appellee. For the reasons set forth below, the district court correctly concluded that Plaintiff's arbitration of his collective bargaining agreement dispute was not an election of remedies under the Federal Railroad Safety Act's election of remedies provision.

STATEMENT OF IDENTITY, INTEREST,
AND SOURCE OF AUTHORITY TO FILE

The 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). Pursuant to his authority to adjudicate FRSA complaints administratively, the Secretary, through the Department’s Administrative Review Board (“ARB”), determined that FRSA’s election of remedies provision does not require a railroad worker to forgo enforcement of his collective bargaining agreement (“CBA”) rights in order to pursue a whistleblower complaint under FRSA. *See Mercier v. Union Pac. R.R.*, and *Koger v. Norfolk S. Ry.*, ARB Case Nos. 09-121, 09-101, 2011 WL 4889278 (ARB Sept. 29, 2011) (“*Mercier/Koger*”). Thus, the Secretary has rejected the argument Norfolk Southern Railway Co. (“Norfolk Southern”) makes in this case. The Secretary has a strong interest in ensuring railroad workers’ full access to FRSA’s whistleblower protections and in ensuring that FRSA’s whistleblower protections are interpreted consistently with the Secretary’s interpretation of the statute in *Mercier/Koger*.

STATEMENT OF THE ISSUE

The whistleblower protection provision in FRSA contains an election of remedies provision at 49 U.S.C. 20109(f) that states: “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.” The issue presented is whether pursuit of arbitration to enforce a CBA constitutes an election of remedies under 49 U.S.C. 20109(f) such that it bars the employee from subsequently filing a FRSA whistleblower complaint.

STATEMENT OF THE CASE

A. 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” 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 grievance procedures specified in the CBA (grievances are usually decided by a railroad manager). *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)). 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). The Adjustment Board’s decision is final and binding on the parties. *See* 45 U.S.C. 153 First (m).

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.*, 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. 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).

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

Since 1980, FRSA has included a whistleblower protection provision. *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815 (amended 2007). Before 2007, FRSA required that whistleblower 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). It also included an election of remedies provision, which is substantially the same as FRSA's current election of remedies provision. *Id.* § 10, sec. 212(d).¹

In 2007, Congress 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, 121 Stat. 266, 444, sec. 20109(a)(4) (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.* § 1521, sec. 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.* § 1521, sec. 20109(e), (f), (g) (codified at 49 U.S.C. 20109(f), (g), (h)). Thus, in its current form, FRSA states:

¹ In 1994, FRSA's whistleblower provision was re-designated from 45 U.S.C. 441 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. 745, 867 (1994).

(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.

The Secretary’s adjudication of FRSA complaints is a multi-stage process, culminating in a decision by the ARB, to whom the Secretary has delegated authority to act on his behalf in adjudicating FRSA complaints. *See* 49 U.S.C. 20109(d)(2); 29 C.F.R. 1982.104–.106, 1982.110; Secretary of Labor’s Order No. 2-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012). 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). Final orders of the Secretary are subject to judicial review 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).²

² In addition, 49 U.S.C. 20109(d)(3), which provided the district court’s jurisdiction for Reed’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.”

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 to enforce an employee's CBA. *See id.* at *8.³ The ARB concluded that the plain meaning of "another provision of law" in FRSA's election of remedies provision does not encompass arbitration to enforce a CBA. *See id.* at *5.⁴

C. History and Procedural Posture of This Case

In February of 2010, Norfolk Southern charged Reed with a rule violation connected to his reporting of an on-duty injury. App. 2.⁵ Norfolk Southern held an investigation and determined that Reed had made false and inconsistent statements in reporting an on-duty injury and terminated his employment. *Id.* Reed filed a grievance, which was heard by a Norfolk Southern officer who denied the grievance. *Id.* Reed appealed by arbitrating the matter before an Adjustment Board. *Id.* The Adjustment Board reinstated Reed, but without back pay. *Id.*

While Reed's arbitration was pending before the Adjustment Board, Reed filed a FRSA whistleblower retaliation complaint with the Department in October 2010 alleging that his termination was in retaliation for reporting his on-duty injury. App. 2-3.⁶ On February 7, 2012, Reed exercised his right to file a de novo action in district court pursuant to 49 U.S.C.

20109(d)(3) by filing his complaint in this action.

³ The ARB remanded each of these cases to their respective Administrative Law Judges ("ALJ"). *See Mercier/Koger*, 2011 WL 4889278, 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.

⁴ The ARB used the terms grievance and arbitration interchangeably.

⁵ "App." refers to the Required Short Appendix attached to Norfolk Southern's Brief.

⁶ Reporting a work-related injury or illness is a protected activity under FRSA. *See* 49 U.S.C. 20109(a)(4).

D. The District Court's Decision

On April 26, 2013, the district court denied Norfolk Southern's motion for summary judgment on the election of remedies issue. App. 1-9. The court concluded that Reed's arbitration was not an election of remedies under section 20109(f) because a grievance and arbitration filed pursuant to a CBA "are not encompassed by the phrase 'another provision of law'" in FRSA's election of remedies provision. *Id.* at 7. The court also concluded that FRSA's election of remedies provision is ambiguous and therefore the Secretary's reasonable interpretation of this provision in *Mercier/Koger* deserved deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). App. 8.

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" referred to in section 20109(f) must be similar in kind to FRSA in providing substantive rights to employees. Moreover, "another provision of law" refers to statutes, not the common law of contracts. The substantive rights a railroad employee is seeking to protect when he pursues arbitration are provided by the CBA, not the RLA, and the action is therefore governed by contract law. 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* to the ARB’s reasonable interpretation of this statutory provision in *Mercier/Koger*.

It bears noting that since the 2007 amendments to FRSA, five district courts, including the district court in this case, 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 Ray v. Union Pac. R.R.*, No. 4:11-cv-334, 2013 WL 5297172 (S.D. Iowa Sept. 13, 2013); *Ratledge v. Norfolk S. Ry.*, No. 1:12-cv-402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013); *Reed v. Norfolk S. Ry.*, No. 12-cv-873, 2013 WL 1791694 (N.D. Ill. Apr. 26, 2013) (App. 1-9); *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/Koger* decision because the ARB’s statutory interpretation was, at a minimum, a colorable interpretation of FRSA’s election of remedies provision).

ARGUMENT

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

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

1. Section 20109(f) of FRSA provides that “[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the

railroad carrier.” Pursuing an arbitration under a CBA, even if that CBA is created pursuant to the RLA and the RLA dictates that arbitration is the means of resolving a CBA dispute, is not seeking protection under “another provision of law” within the plain meaning of FRSA’s election of remedies provision. The statutory analysis begins with the language of the statute itself. The term “provision of law” cannot be read in isolation. Rather, its meaning is derived from the other terms in section 20109(f) and the overall statutory scheme.

Specifically, it is defined by the term “this section,” which precedes it, and the adjective “another,” which modifies it. Taken together, this language suggests that the “provision of law,” while different from “this section,” is similar to “this section.” *See Ratledge*, 2013 WL 3872793, at *12 (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*, 2013 WL 5297172, at *8 (finding *Ratledge*’s statutory analysis compelling). Because “this section” refers to section 20109’s substantive protections for employees who engage in whistleblowing activities, “another provision of law” refers to a statutory provision like section 20109 that contains substantive protections for employees. This language does not encompass the RLA because the RLA provides no substantive protections for employees.

2. The RLA prescribes the procedures through which an employee enforces his CBA rights, but it is not the source of his substantive rights and protections; the CBA is and the interpretation of the provisions in the CBA is a matter of non-statutory common law.⁷ The language in paragraph (h) of section 20109 underscores this distinction. Paragraph (h) states that nothing in section 20109 diminishes an employee’s rights “under any Federal or State law *or*

⁷ “[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). Norfolk Southern does not dispute this basic point.

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*, 130 S. Ct. 2278, 2289 (2010). Thus, an employee enforcing a CBA through arbitration is seeking protection under the CBA, not under the RLA, and therefore is not seeking protection under “another provision of law.”

When challenging an adverse employment action in an arbitration to enforce a CBA, an employee seeks protection under a contract, the CBA, because it is the CBA, not the RLA, which provides the employee the substantive right he seeks to vindicate in an arbitration.⁸ The Supreme Court has explained that while the RLA establishes a process to “make and maintain” CBAs and to resolve disputes regarding the terms in 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.

⁸ 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.

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; it only provides, indeed mandates, that CBA disputes be resolved through arbitration.

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.

This Court recognized this distinction in *Graf v. Elgin, Joliet & Eastern Railway Co.*: “[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.” 697 F.2d 771, 776 (7th Cir. 1983). In considering this 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. The district court in *Ratledge* also recognized this distinction:

The *entire* [RLA] framework is statutory. But the rights [an employee] seeks to enforce are not. Throughout the entire process, the substantive provisions at issue – the provisions that create rights and pursuant to which [the employee] in this case sought relief – are not provisions of *law*. They are . . . contractual rights governed by the framework of the RLA, as opposed to contract law. And it is those rights, not the RLA, under which [the employee] sought protection.

2013 WL 3872793, at *14 (emphases in original).

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 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, 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 an arbitration, the employee can seek enforcement only of his contractual rights in that process, not any separate statutory rights.⁹ 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.

3. Norfolk Southern argues 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, and that the RLA is analogous to 42 U.S.C. 1983, which provides the remedy, but not the substantive right, that a plaintiff seeks to vindicate in a section 1983 claim. (Norfolk Southern’s

⁹ Indeed, there is a clear distinction between contractual rights provided for in a CBA and statutory rights. *See, e.g., Atchison*, 480 U.S. at 562-65 (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.”).

Br. at 23-25.) The district court in *Ratledge* properly rejected this argument, as it “ignores the equivalence” that section 20109(f)’s reference to “another provision of law” requires. *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).

The RLA and section 1983 are not analogous. Section 1983 explicitly sets out 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). 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.

Norfolk Southern also argues that permitting an employee to pursue an arbitration and a FRSA claim is contrary to the Supreme Court’s decision in *Norfolk & Western Railway Co. v. American Train Dispatchers Ass’n*, 499 U.S. 117 (1991) (“*Dispatchers*”). Norfolk Southern’s Br. at 25-28. But that case and this one do not address the same statutory language and differ in context. 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). Thus, *Dispatchers* 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 ICC has determined that the consolidation is in the public interest. *Id.* at 133.

Indeed, in *American Airlines, Inc. v. Wolens*, the Supreme Court made clear 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. *Id.*; *see 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”); *Norfolk S. Ry.*, 915 F. Supp. 2d at 44 (rejecting Norfolk Southern’s *Dispatchers* 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”).

4. 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. 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.

Congress’s 2007 amendments to FRSA, adding paragraphs (g) and (h), further illustrate Congress’s intent with respect to section 20109(f). FRSA now provides that “[n]othing 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,” and specifies that an employee’s protections under FRSA “may not be waived by any agreement.” 49 U.S.C. 20109(h). Section 20109(g) provides that “[n]othing in this section preempts or diminishes any other safeguards against discrimination . . . provided by Federal or State law.” 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.”). The District Court for the District of Columbia reached a similar conclusion in reference to paragraphs (g) and (h) of FRSA: “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.*, 915 F. Supp. 2d at 44.

Thus, paragraphs (g) and (h) reflect that Congress “anticipate[d] and permit[ted] a 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.*, 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”)). 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).

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

1. 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.¹⁰

In Reed’s CBA proceeding, Reed claimed that Norfolk Southern violated the terms of the CBA in terminating him. In this proceeding, Reed claims that Norfolk Southern violated FRSA by retaliating against him. Termination in violation of the CBA and retaliatory termination are not the same unlawful acts. A termination may be unlawful under FRSA but not violate the CBA. *See, e.g., Araujo v. New Jersey 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

¹⁰ *But see 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).

was retaliatory under FRSA). Conversely, a termination may violate the CBA without running afoul of FRSA's whistleblower protections.

Further, the RLA establishes the Adjustment Board's jurisdiction as limited to interpreting and applying CBAs. *See Hawaiian Airlines*, 512 U.S. at 255, 257-59, 266. Consequently, even where a dispute under a CBA and a FRSA claim might address the same underlying facts, 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. *See 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").¹¹

2. FRSA's legislative history also makes clear that the "unlawful act" in FRSA's election of remedies provision is 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. 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.

¹¹ 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.

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 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.

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*

As explained above, the Secretary believes 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/Koger* decision is due deference under *Chevron* as the Secretary’s reasonable construction of the statute. *See Chevron*, 467 U.S. at 843; *Reed* App. 8 (finding section 20109(f) ambiguous and holding that the ARB’s decision in *Mercier/Koger* was entitled to deference)); *see also Ray*, 2013 WL 5297172, at *8 (same); *Battenfield*, 2013 WL 1309439, at *4 (same); *Norfolk S. Ry.*, 915 F. Supp. 2d at 43 (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 *Mercier/Koger* is the result of that formal administrative procedure, the ARB’s *Mercier/Koger* decision is properly due deference under *Chevron*.¹² 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

¹² In addition to the *Mercier/Koger* decision, the Secretary has consistently interpreted the election of remedies provision in district court cases. *See, e.g., Norfolk S. Ry.*, 915 F. Supp. 2d at 44; Statement of Interest of the United States, *Ratledge*, *supra* (No. 1:12-cv-402); Pl’s Reply Mem. in Supp. of her Mot. for a Prelim. Inj. at 7-11, *Solis v. Union Pacific R.R.*, No. 4:12-cv-00394 (D. Idaho Oct. 5, 2012). 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. Norfolk Southern’s Br. at 35 n.21. The ALJ’s decision in *Koger*, however, was not the Department’s final decision in that case. In *Mercier/Koger*, 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.

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 Energy Reorganization Act's whistleblower provision).

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 *Mercier/Koger* is, at a minimum, a reasonable construction of FRSA's election of remedies provision. In *Norfolk Southern Railway*, the district court essentially agreed with the ARB's interpretation, concluding that it was, at a minimum, a colorable interpretation of the statute. *See* 915 F. Supp. 2d at 43-45. 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 district court in this case likewise correctly granted deference to the ARB's *Mercier/Koger* decision. App. 8; *see Ray*, 2013 WL 5297172, at *8.

Norfolk Southern argues that *Chevron* deference is not warranted because the interpretation of FRSA's election of remedies provision determines whether the district court has subject matter jurisdiction over Reed's case, and an agency has no expertise on the scope of a district court's subject matter jurisdiction. *Norfolk Southern's Br.* at 35-37. Norfolk Southern's argument is flawed. The election of remedies provision does not determine whether a district court (or the Department, in the first instance) has jurisdiction over an employee's FRSA whistleblower

complaint. *See Ratledge*, 2013 WL 3872793, at *5-7 (FRSA’s election of remedies provision “does not invoke jurisdictional language”). Rather, it is a statutory defense available to railroad carriers. Thus, the issue in this case is whether the statutory language of FRSA’s election of remedies provision provides a defense to Norfolk Southern against Reed’s FRSA whistleblower claim, not whether the election of remedies provision precludes the district court from having subject matter jurisdiction over Reed’s FRSA whistleblower claim. To the extent that the election of remedies provision is ambiguous, the ARB’s expertise in adjudicating FRSA whistleblower claims is relevant and the ARB’s reasonable construction of the statute is entitled to *Chevron* deference.

CONCLUSION

For the foregoing reasons, the district court’s decision should be affirmed.

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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 6,966 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 Circuit R. 32(b), 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 Times New Roman, in 12-point font in text and 12-point font in footnotes.

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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 13th day of November, 2013:

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