ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of: MICHAEL MERCIER, Complainant, v. UNION PACIFIC RAILROAD, Respondent, and LARRY L. KROGER Complainant, v. NORFOLK SOUTHERN RAILWAY CO. Respondent.	ARB Case Nos. 09-121 and 09-101

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

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASES 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Grievances and Arbitration in the Railroad Industry 7

II. "Another provision of law" 10

III. "Unlawful act" 21

CONCLUSION 26

CERTIFICATE OF SERVICE 27-28

TABLE OF AUTHORITIES

Page

Cases:

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 19-20

Andrews v. Louisville & Nashville R.R. Co.,
406 U.S. 320 (1972) 9

Atchison, Topeka & Santa Fe Ry. Co. v. Buell,
480 U.S. 557 (1987) 9

Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.,
522 F.3d 746 (7th Cir.), *aff'd*
130 S. Ct. 584 (2009) 8

Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.,
394 U.S. 369 (1969) 15

Consol. Rail Corp. v. Ry. Labor Executives' Ass'n,
491 U.S. 299 (1989) 7, 15

Graf v. Elgin, Joliet & E. Ry. Co.,
697 F.2d 771 (7th Cir. 1983) 12-13

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 9-10, 14, 23

Int'l Ass'n of Machinists v. Central Airlines, Inc.,
372 U.S. 682 (1963) 16, 18-19

Int'l Bhd. of Elec. Workers v. Foust,
442 U.S. 42 (1979) 14

Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union,
457 U.S. 15 (1982) 13

Koger v. Norfolk S. Ry Co.,
ALJ No. 2008-FRS-00003 (May 29, 2009) 2-3

Mercier v. Union Pac. R.R.,
ALJ No. 2008-FRS-00004 (June 3, 2009) 3-5

Cases -- continued

Page

Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n,
499 U.S. 117 (1991) 16-18

Norman v. Mo. Pac. R.R.,
414 F.2d 73 (8th Cir. 1969) 23

Ry. Employees' Dep't v. Hanson,
351 U.S. 225 (1956) 16

Rayner v. Smirl,
873 F.2d 60 (4th Cir. 1989) 10

Sereda v. Burlington N. Santa Fe R.R. Co.,
2005 WL 5892133 (S.D. Iowa 2005) 25

Terminal R.R. Ass'n v. Bhd. of R.R. Trainmen,
318 U.S. 1 (1943) 11, 15

Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen,
130 S. Ct. 584 (2009) 7

Virginia Ry. Co. v. Sys. Fed'n No. 40,
300 U.S. 515 (1937) 16

Statutes:

Airline Deregulation Act,

49 U.S.C. 1305(a)(1) 19

Federal Railroad Safety Act,
45 U.S.C. 411(d), *amended by* 49 U.S.C. 20109(d) (1994) 5

49 U.S.C. 20109 1
49 U.S.C. 20109(a) 22
49 U.S.C. 20109(b) 22
49 U.S.C. 20109(c)(2) 22
49 U.S.C. 20109(f) 2, 5
49 U.S.C. 20109(g) 21
49 U.S.C. 20109(h) 21

Statutes -- continued

Page

Federal Railroad Safety Administration, Pub. L. No. 110-432, 122 Stat. 4848 (2008) 5

Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815 (1980) 5

Implementing Recommendations of the 9/11 Commission Act of 2007,Pub. L. No. 110-53, 121 Stat. 266 (2007) 5

Interstate Commerce Act, 49 U.S.C. 11341(a), (*repealed* 1995) 17

49 U.S.C. 11344 (*repealed* 1995) 18
49 U.S.C. 11347 (*repealed* 1995) 18

Occupational Safety & Health Act,

29 U.S.C. 660(c) 25

Railway Labor Act, 45 U.S.C. 151 *et seq.* 2

45 U.S.C. 151a 14
45 U.S.C. 152 First - Eleventh 14-15
45 U.S.C. 153 First 7, 15
45 U.S.C. 153 First (i) 7-8, 10
45 U.S.C. 153 First (m) 9
45 U.S.C. 154 15
45 U.S.C. 155 ..... 7, 15
45 U.S.C. 156 ..... 7, 15
45 U.S.C. 184 19

Revision of Title 49, Pub. L. No. 103-272, 108 Stat. 867 (1994) 5

Urban Mass Transportation Act of 1964, 78 Stat. 307 (1964), *amended by* Pub. L. No. 89-562, 80 Stat. 716 (1966) (current version at 49 U.S.C. 5301 *et seq.*) 13

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121
49 U.S.C. 42121 25

Miscellanous:

Page

126 Cong. Rec. 26532 (1980) 24

H.R. Rep. No. 96-1025 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 1980 WL 13014 20

H.R. Rep. No. 110-259 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119 25-26

NRAB Third Div. Award No. 24348 (April 27, 1983) 23

NRAB Third Div. Award No. 26381 (June 25, 1987) 8

NRAB First Div. Award No. 24913 (June 15, 1998) 23

NRAB Third Div. Award No. 34228 (August 23 2000) 8

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

The Assistant Secretary for Occupational Safety and Health submits this brief as amicus curiae in this consolidated matter under the whistleblower protection provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109. Both of the cases in this consolidated review require the Administrative

Review Board ("ARB" or "Board") to interpret the election of remedies provision in FRSA, 49 U.S.C. 20109(f). For the reasons discussed below, the election of remedies provision does not preclude a FRSA complaint where an employee has pursued a grievance and/or arbitration pursuant to the employee's collective bargaining agreement ("CBA") under the Railway Labor Act ("RLA"), *see* 45 U.S.C. 151 *et seq.*

STATEMENT OF THE ISSUE

Whether a railroad employee's grievance and/or arbitration constitutes an election of remedies under FRSA's election of remedies provision, thereby precluding a FRSA complaint.

STATEMENT OF THE CASES

I. *Larry L. Koger v. Norfolk Southern Railway Company*

Larry L. Koger is an employee of Norfolk Southern Railway Company ("Norfolk Southern"). (*Koger v. Norfolk S. Ry. Co.*, ALJ No. 2008-FRS-00003 (May 29, 2009) ("Koger ALJ Order"), slip op. at 1.) In July 2007, a train on which he was working derailed. (*Id.*) Koger reported an injury arising out of the derailment. (*Id.*) After an investigative hearing concerning the derailment, Norfolk Southern discharged Koger on August 21, 2007, for violating an operating rule. (*Id.* at 2.) Koger, through his union, the United Transportation Union, appealed his discharge through a grievance and arbitration process as provided for in the union's CBA. In January 2008, the arbitration adjustment

board issued an interim award returning Koger to service. (*Id.*) In July 2008, the arbitration adjustment board issued a final award, concluding that discipline was appropriate, but reduced the discipline from discharge to an unpaid suspension. (*Id.*)

In February 2008, after the arbitration adjustment board issued its interim award but before it issued its final award, Koger filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that he was discharged in violation of the whistleblower protection provisions of FRSA for reporting a work-related injury. (Koger ALJ Order at 1.) OSHA dismissed the complaint without addressing the election of remedies issue. (*Id.*) Koger appealed the decision to an Administrative Law Judge ("ALJ"). On May 29, 2009, the ALJ granted Norfolk Southern's motion to dismiss the complaint on the ground that Koger's complaint was barred by FRSA's election of remedies provision because Koger had pursued arbitration. (*Id.* at 6.) Koger has appealed that decision to the Board.

II. *Michael L. Mercier v. Union Pacific Railroad*

Michael L. Mercier is an employee of Union Pacific Railroad Company ("Union Pacific"). (*Mercier v. Union P. R.R.*, ALJ No. 2008-FRS-00004 (June 3, 2009) ("Mercier ALJ Order"), slip op. at 1.) In November 2007, Union Pacific discharged Mercier. (Union

Pacific's Br. at 11-12.)[1] Soon thereafter, Mercier, through his union, the Brotherhood of Locomotive Engineers and Trainmen, initiated a grievance to appeal his discharge, as provided for in the union's CBA. (Mercier ALJ Order at 1.) In January 2008, his grievance was denied. He then initiated arbitration to appeal that decision.[2] On December 17, 2009, the arbitration adjustment board issued an interim award reinstating Mercier. (Union Pacific's Reply Br. at 9.)

In March 2008, after his grievance was denied but before the arbitration adjustment board issued its interim award, Mercier filed a complaint with OSHA alleging that he was discharged in violation of the whistleblower protection provision of FRSA for reporting safety concerns. OSHA dismissed the complaint without addressing the election of remedies issue. Mercier appealed the decision to an ALJ. On June 3, 2009, the ALJ denied Union Pacific's motion for summary disposition, concluding that Mercier's complaint was not barred by FRSA's election of remedies provision because Mercier's grievance did not constitute an election of remedy under this provision.

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[1] Mercier was discharged for violating a leniency agreement that Mercier had entered with Union Pacific arising out of charges against Mercier for violation of Union Pacific's equal employment opportunity policy and directives. (Union Pacific Br. at 11-12.)

[2] It is unclear from the record when Mercier initiated the arbitration.

(Mercier ALJ Order at 3.) Union Pacific filed an interlocutory appeal of that decision to the Board. On September 16, 2009, the Board granted the request for interlocutory review and consolidated the case with Koger's appeal. (ARB Nos. 09-121 and 09-101 (Sept. 16, 2009).)

SUMMARY OF ARGUMENT

FRSA's whistleblower protection provision contains the following "[e]lection of remedies" provision:

> An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

49 U.S.C. 20109(f). Thus, an employee may not file a FRSA complaint and seek protection under "another provision of law" for the same "allegedly unlawful act."[3]

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[3] The whistleblower protection provision in FRSA, including an election of remedies provision, was first enacted in 1980. *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815 (1980). The election of remedies provision required an employee to choose protection under "this section" or under "any other provision of law" in connection with the same allegedly unlawful act of an employer. 45 U.S.C. 411(d) (1980), *amended by* 49 U.S.C. 20109(d) (1994). In 1994, the whistleblower protection provision in FRSA was redesignated from 45 U.S.C. 411 to 49 U.S.C. 20109, and the language in the election of remedies provision was modified slightly, but this modification was not intended as a substantive change. *See* Pub. L. No. 103-272, 108 Stat. 867 (1994). In 2007, FRSA was amended as part of the Implementing Recommendations of the 9/11 Commission Act of 2007; the amendment added protected activities and remedies, and granted the Secretary of Labor authority to implement the whistleblower protection provision. *See* Pub. L. No. 110-53, 121 Stat. 266 (2007). FRSA was further amended in October 2008 to include additional protected activities. *See* Pub. L. No. 110-432, 122

Neither an employee's grievance nor an employee's initiation of arbitration constitutes an election of remedies under this provision because the substantive rights an employee is seeking to protect when he pursues a grievance and/or 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 that the railroad carrier violated the terms of his CBA when it disciplined or discharged him. Additionally, the "allegedly unlawful act" for which the employee seeks protection through a grievance and/or arbitration is not the same "allegedly unlawful act" for which the employee seeks protection under FRSA. Therefore, FRSA's election of remedies provision does not preclude a

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Stat. 4848 (2008). The 2007 and 2008 amendments carried over the election of remedies provision, with the same language, from the 1994 version of the statute.

FRSA claim when an employee has pursued a grievance and/or arbitration.

ARGUMENT

I. Grievances and Arbitration in the Railroad Industry

The RLA mandates that disputes requiring the application or interpretation of an existing CBA (known as "minor" disputes) be "handled in the usual manner," followed, if either party seeks it, by arbitration. 45 U.S.C. 153 First (i); *see Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 130 S. Ct. 584, 591 (2009); *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-03 (1989).[4] The "usual manner" of handling such disputes is the grievance process and is set out in the applicable CBA. The RLA establishes the procedures for the arbitration. *See* 45 U.S.C. 153 First. Thus, "the RLA requires employees and carriers, before resorting to arbitration, to exhaust the grievance procedures specified in the collective-bargaining agreement." *Union Pac. R.R. Co.*, 130 S. Ct. at 591.

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[4] By contrast, "major" disputes are those that concern the existence, formation, or changes to the terms of a contract. *See Consol. Rail Corp.*, 491 U.S. at 302-03. For major disputes, "the RLA requires the parties to undergo a lengthy process of bargaining and mediation[,]" with assistance from the National Mediation Board if either party requests it. *Id.* at 302; *see* 45 U.S.C. 155 and 156.

Typically, CBAs provide that, when a railroad carrier suspects that an employee has violated an operating rule, for example, it conducts an investigation through a hearing (known as an "on-property hearing" or "on-property investigation") to determine if the employee in fact violated the rule. *See generally Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 522 F.3d 746, 748 (7th Cir.), *aff'd*, 130 S. Ct. 584 (2009). If the railroad carrier concludes that the employee has violated the rule, the carrier imposes discipline at the conclusion of the hearing. The employee, usually through his union, can then appeal the discipline internally (*i.e.* file a grievance). *See generally id.*

At the conclusion of the grievance process, the employee or the railroad carrier can then pursue arbitration before the National Railroad Adjustment Board or a Public Law Board established by the railroad carrier 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 carrier's decision on the employee's grievance, based on the record from the on-property hearing. *See, e.g.*, NRAB Third Div. Award No. 34228 (Aug. 23, 2000) (the record closes when a party files a notice of intent to seek arbitration before the Adjustment Board); NRAB Third Div. Award No. 26381 (June 25, 1987) (new evidence that was not

handled on property is not properly before the Adjustment Board). The Adjustment Board's decision is final and binding on the parties. *See* 45 U.S.C. 153 First (m).

All disputes requiring the application or interpretation of a CBA must be handled following the procedures set forth in the RLA. Thus, a railroad employee may not bring a claim alleging breach of his CBA in state or federal court; the RLA's dispute resolution provision preempts the choice of forum by requiring a employee who alleges a breach of his CBA to utilize the forum and procedures set out in the RLA. *See, e.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972).

On the other hand, 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) (rights provided under a state statutory whistleblower retaliation law and state tort common law of wrongful discharge were independent of the CBA, and therefore they 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 a substantive protection to railroad employees that is independent of the CBA and provides for remedies distinct from those available under the RLA).

II. "Another provision of law"

"[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. The Fourth Circuit concluded that the election of remedies provision in FRSA "refers to federal statutes or regulations, not the common [non-statutory] law remedies of the fifty states". *Rayner v. Smirl*, 873 F.2d 60, 66 n.1 (4th Cir. 1989).[5] In sum, "another provision of law" refers to statutes, and therefore necessarily refers to the RLA.

It does not follow, however, that a railroad employee challenging his discipline on the basis that it is contrary to the terms of the CBA is seeking protection under a provision of the RLA. The RLA establishes the procedures for challenging a discharge or a disciplinary decision. *See* 45 U.S.C. 153 First (i) (disputes may be handled in the "usual manner" (*i.e.*, internal appeal process) and if not resolved, either party may seek arbitration (*i.e.*, appeal) before the Adjustment Board); *Hawaiian Airlines*, 512 U.S. at 252 ("the RLA establishes a mandatory arbitral mechanism" to handle disputes arising out of the application or interpretation of CBAs). In other words, the RLA provides the right to a process for resolving a CBA dispute.

[5] The court in *Rayner* analyzed FRSA prior to the 2007 amendment.

The process or mechanism for challenging a discharge or disciplinary decision is distinct from the substantive right provided for in the CBA that the employee is seeking to enforce or vindicate. The Supreme Court explained this principle in an early case interpreting the RLA:

> 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). 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.

The CBA, not the RLA, creates the right that the employee is seeking to enforce, namely that the discharge or discipline must adhere to the terms of the CBA. Consequently, an employee challenging a discharge or discipline is seeking substantive protection under contract law, not under the RLA. Because contract law is non-statutory common law, it is not a "provision of law" within the meaning of FRSA's election of remedies provision.

The Seventh Circuit reached a similar conclusion in *Graf v. Elgin, Joliet & E. Ry. Co.*, 697 F.2d 771 (7th Cir. 1983). There, a railroad employee alleged wrongful discharge, which the court interpreted as a claim that the railroad carrier violated the CBA. *See id.* at 774-75. The court concluded that this claim did not arise under the RLA (or any other federal statute), and therefore there was no federal question jurisdiction for such a claim. *See id.* at 775-76. The court noted that, while a claim alleging a violation of the RLA would support federal question jurisdiction, a claim alleging a violation of a CBA is not the same as a claim alleging a violation of the RLA. *See id.* at 774-76. "[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." *Id.* at 776.

The RLA does not establish standards for interpreting CBAs, but instead grants arbitral boards (not federal courts) the power to interpret CBAs. *See id.* Just as a dispute regarding the interpretation or application of a CBA does not arise under the RLA for federal jurisdiction purposes, it does not arise under a provision of the RLA within the meaning of FRSA's election of remedies provision.[6]

The purpose of the RLA supports this conclusion. The RLA states that its purpose is, among other things:

> To avoid any interruption to commerce or to the operation of any carrier engaged therein [and] . . . to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the

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[6] *Cf. Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 16, 29 (1982) (concluding that the Urban Mass Transportation Act, which required state or local governments to make agreements with transit workers to preserve existing CBAs as a precondition to receiving federal assistance in acquiring a private transit company, did not create a federal cause of action to support federal jurisdiction for breaches of such agreements or CBAs). The Court in *Jackson Transit Auth.* rejected the unions' argument that such agreements and CBAs were creations of federal law by virtue of the statute and that the rights and obligations in those contracts were federal in nature. *See id.* at 23-28. While the statute seemed, in some ways, to make such contracts creatures of federal law by requiring "fair and equitable" agreements, requiring approval by the Secretary of Labor of such agreements, and specifying protective provisions that had to be included in the agreements, the Court noted that the legislative history was clear that such contracts, between transit workers and local governments, were to be governed by state law. *See id.* at 23-27. Because these contract disputes were governed by state law, there was no federal jurisdiction. *See id.* at 29. Thus, even where a federal statute governs certain aspects of labor contracts, disputes over those contracts do not necessarily arise under the federal statute.

> interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. 151a. The Supreme Court has summarized the RLA's purpose as "promot[ing] stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines*, 512 U.S. at 252; *see Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 42 (1979) (the RLA's goal "is to facilitate collective bargaining and to achieve industrial peace"). It achieves this goal by establishing mandatory dispute resolution mechanisms. *See Hawaiian Airlines*, 512 U.S. at 252. It follows from this purpose that the RLA imposes procedural obligations such as, for example, the duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working condition, and to settle all disputes", 45 U.S.C. 152 First, and the requirement that disputes be considered expeditiously, *see id.* at 152 Second, and provides procedural rights such as, for example, employees' right to designate representatives without interference or coercion, *see id.* at 152 Third.[7]

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[7] Additional RLA provisions show that the RLA establishes the process by which disputes are resolved: employees have the right to organize and bargain collectively through representatives of their own choosing, 45 U.S.C 152 Fourth; railroad carriers are barred from requiring prospective employees to join or not join a labor organization, *see id.* at 152 Fifth; upon the request of employees or railroad carriers, their respective representatives must confer concerning disputes arising out of grievances or the interpretation or application of agreements, *see id.* at 152

The Assistant Secretary's research has revealed no case in which a court has concluded that a substantive right provided in a CBA is required by the RLA. Indeed, as noted *supra*, the Supreme Court recognized that the RLA does not establish what the working conditions must be. *See Terminal R. Ass'n*, 318 U.S. at 6. Rather, the "heart" of the RLA is the duty "'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working condition, and to settle all disputes[.]'" *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969) (citing 45 U.S.C. 152 First); *see Consol. Rail Corp.*, 491 U.S. at 310 ("core duties imposed upon employers and employees by the RLA" are "to make and maintain agreements and to settle all disputes") (internal

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Sixth; railroad carriers and employee representatives are circumscribed in their ability to change the rates of pay, rules, or working conditions embodied in the agreements, *see id.* at 152 Seventh and 45 U.S.C. 156; railroad carriers must notify employees how all disputes will be handled, 45 U.S.C. 152 Eighth; the National Mediation Board shall resolve any disputes regarding who the employees' designated representatives are, *see id.* at 152 Ninth; a railroad's willful refusal to comply with certain terms of the RLA is a misdemeanor, *see id.* at 152 Tenth; union shop agreements are permissible, *see id.* at 152 Eleventh. 45 U.S.C. 153 establishes the National Railroad Adjustment Board and outlines its powers and duties, sets forth how disputes are to be handled, provides for limited judicial enforcement and review of Adjustment Board decisions, and permits railroad carriers and employees to establish voluntarily public law boards rather than utilizing the National Railroad Adjustment Board. 45 U.S.C. 154 and 155 establish the National Mediation Board and outline its powers and duties, and permit employees and railroad carriers to invoke its services in resolving disputes in certain circumstances.

quotation marks and citation omitted); *Virginia Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 542-43, 548 (1937) (RLA encourages resolution of labor disputes in expeditious and least disruptive fashion). It therefore logically follows that the significant RLA cases address the procedures required by the RLA. *See, e.g., Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 695 (1963) (because the RLA imposed the requirement on railroad carriers to comply with arbitral awards, an action to enforce an arbitral award arose under the RLA); *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (the RLA's provision permitting CBAs to include union shop agreements was valid); *Virginia Ry. Co.*, 300 U.S. at 548 (concluding that the RLA required the railroad carrier to recognize the duly authorized representative of its shop workers and to exert every reasonable effort to make and maintain agreements with the union).

Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991) ("*Dispatchers*"), upon which the railroad carriers rely (Norfolk Southern's Br. at 9, 20-21; Union Pacific's Br. at 18-19), does not compel a different conclusion. In *Dispatchers*, the Supreme Court addressed the authority of the Interstate Commerce Commission ("Commission") to approve railroad consolidations under the Interstate Commerce Act ("ICA"). *See* 499 U.S. at 119. The ICA provided that a railroad carrier participating in a Commission-approved consolidation is

"'exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that [railroad] carry out the transaction[.]'" *See id.* at 127 (quoting 49 U.S.C. 11341(a)). The Supreme Court concluded that the exemption in section 11341(a) from "all other law" exempted a railroad carrier from its legal obligations under the RLA, which extended to the carrier's obligations under a CBA. *See* 499 U.S. at 119.

This conclusion is necessarily unique to the statutory exemption in the ICA. As the Supreme Court noted in *Dispatchers*, Congress deemed the consolidation of railroad carriers to be important to promote the health and efficiency of the railroad industry. *See* 499 U.S. at 119. As such, the ICA gave the Commission the exclusive authority to examine, condition, and approve consolidations, consistent with the public interest. *See id.* at 119-20. In conjunction with establishing the Commission's role in overseeing consolidations, carriers participating in an approved consolidation were deemed exempt from anti-trust and "all other law" necessary to let the carrier carry out the transaction. *See id.* at 120 (citing 49 U.S.C. 11341(a)). The Court concluded that, under this statutory scheme, the exemption effectively suspended the RLA, and the CBAs thereunder. *See id.* at 131-32. The Court noted that:

> Our determination that [the statutory exemption] supersedes collective-bargaining obligations via the RLA as necessary to carry out an approved transaction 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). Further, the ICA required the Commission, when approving a consolidation, to impose labor-protective conditions on the transaction to protect employees' interests as much as possible. See *id.* at 133 (citing 49 U.S.C. 11344, 11347). With these interests protected to the extent possible, the statutory exemption guaranteed that

> obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If [the statutory exemption] did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve.

Id. at 133. 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 Commission has determined that the consolidation is in the public interest. *See id.* at 133.[8] *Dispatchers* does not stand for the proposition

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[8] *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963) is similarly distinguishable. The issue before the Supreme Court was whether an action seeking enforcement of an award by an airline system board of adjustment arises under the RLA for federal jurisdiction purposes. *See id.* at 684-85. (The

that the RLA provides employees the substantive rights that employees seek to protect through a grievance or arbitration. While the RLA imposes the obligation to make and maintain agreements, it does not guide the interpretation or application of the CBA (i.e. the determination of whether a discharge or discipline violated the terms of the applicable CBA).

The Supreme Court subsequently recognized in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), that the interpretation of "any other law" in *Dispatchers* was limited by the text and purpose of the provision of the ICA at issue in that case. *Wolens* involved the preemption provision of the Airline Deregulation Act, 49 U.S.C. 1305(a)(1), which provided that "[n]o state shall enact or enforce any law, rule, regulation, standard or other provision having the force and

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RLA governs the airline industry in addition to the railroad industry.) Section 204 of the RLA requires that airline carriers and employees' representatives establish a board of adjustment (similar to a public board that railroad carriers and unions can agree to establish) to resolve disputes arising under CBAs. 45 U.S.C. 184. In light of this statutory requirement, a contract between an airline carrier and union establishing such a board and outlining the final and binding nature of an award by such a board is a creation of the RLA. *See id.* at 691-92. Thus, the RLA governs the interpretation and enforceability of such a contract. *See id.* at 692. Importantly, the contract at issue in *Central Airlines* was not the CBA itself; rather, it was a section 204 contract carrying out the statutory requirement to establish an adjustment board. Concluding that an action to enforce such a contract arises under the RLA is entirely consistent with the purpose of the RLA to facilitate resolution of disputes and avoid interruptions to commerce. *Central Airlines* did not opine on whether an action to enforce a CBA arises under the RLA.

effect of law relating to rates, routes or services of any air carrier." The Court held that this provision did not preempt a state court action to enforce frequent flyer mile contracts. *See id.* at 222. The Court concluded that the terms and conditions in such a contract "are privately ordered obligations" and that "[a] remedy confined to a contract's terms simply holds parties to their agreements," and therefore an action to enforce such a contract should not be regarded as a requirement imposed under state law. *Id.* at 228-29. In reaching this conclusion, the Court rejected the notion that the interpretation of the word "law" in *Dispatchers* applied broadly to the use of that term in other statutes. *See id.* at 229 n.6.

In this case, unlike *Dispatchers*, in which the clear national policy of promoting railroad consolidations informed the interpretation of the statute, there is no similar statutory policy behind FRSA. Indeed, the policy underlying the whistleblower protections in FRSA is 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. That policy would be undermined if an employee had to forego rights guaranteed to him in his CBA when he seeks protection under FRSA based on his belief that he was retaliated against for whistleblowing activities. 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] It would be illogical for Congress to have given greater protections and remedies to railroad whistleblowers than they previously had, and at the same time to have effectively taken away a well-established and important means of efficiently resolving CBA disputes.

III. "Unlawful act"

Even if the Board concludes that "another provision of law" encompasses a grievance and/or arbitration to enforce rights guaranteed in a CBA, FRSA's election of remedies provision does not preclude a FRSA claim when an employee has already pursued a grievance or arbitration because a FRSA claim does not arise out of the same "allegedly unlawful act" as the grievance and/or arbitration. The "allegedly unlawful act" for which an employee seeks protection under FRSA is the retaliation. FRSA makes it

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[9] To the contrary, Congress explicitly preserved those remedies by including two new provisions in FRSA: 49 U.S.C. 20109(g) provides that nothing in this section preempts or diminishes Federal or State law protections against discrimination or retaliation; 49 U.S.C. 20109(h) provides that nothing in FRSA diminishes an employee's rights, privileges, or remedies under a CBA or any Federal or State law. The ALJ in *Mercier* relied on these two provisions, and in particular provision (h), in concluding that an individual who has filed a grievance pursuant to a CBA is not prevented from pursuing a complaint under FRSA. (Mercier ALJ Order at 2.)

unlawful to "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" for engaging in the specific activities protected by the act. 49 U.S.C. 20109(a), (b); *see* 20109(c)(2) (it is unlawful to "discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician"). An adverse action such as a discharge or discipline is not in and of itself unlawful. The adverse action is unlawful only if it is, at least in part, in retaliation for the employee having engaged in some protected activity.

In contrast, the act for which an employee seeks protection through the grievance and/or arbitration process is for a violation of the CBA. An adverse action may violate the terms of the CBA even if it was not in retaliation for whistleblowing activities.[10] Thus, retaliation and a violation of the CBA are not the same unlawful acts. Indeed, an employee cannot seek protection through the grievance and/or 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

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[10] Presumably, the reverse is also true: an adverse action may be in retaliation for whistleblowing activities, even if it is consistent with the terms of the CBA (i.e. discipline was warranted because the employee did, in fact, break a rule, regardless of the fact that the discipline was motivated, in part, by retaliation).

interpretation of a CBA. *See, e.g., Hawaiian Airlines*, 512 U.S. at 257-59, 266 (the rights provided under a state statutory whistleblower retaliation law and state tort common law of wrongful discharge were independent of the 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] *Cf. Norman v. Mo. Pac. R.R.*, 414 F.2d 73, 82 (8th Cir. 1969) (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 it is not related to the interpretation or application of a CBA); NRAB First Div. Award No. 24913 (June 15, 1998) (rejecting union's

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[11] The Supreme Court concluded in *Hawaiian Airlines* that the 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 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 and arbitration process addresses is whether the employee in fact broke an operating rule.

claim for punitive damages for what the union argued was retaliatory discipline against employees for filing FELA lawsuits because such a claim was essentially a claim for retaliatory discharge under state tort law, and the Adjustment Board had no authority to consider state tort law or award punitive damages). Therefore, utilizing the grievance and/or arbitration process is not an election to seek protection for the unlawful act of retaliation.

This conclusion is bolstered by the 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 Health and Safety 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 Health and Safety 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) (emphasis added). Section 11(c) of the Occupational Health and Safety 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 different statutory schemes.[13] *But see Sereda v. Burlington N. Santa Fe R.R. Co.*, 2005 WL 5892133, at *4 (S.D. Iowa 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).

To interpret the phrase "allegedly unlawful act" otherwise unduly restricts an employee's right to the range of legal protections available to employees in other industries. Such an interpretation would be contrary to the intent of the 2007 amendment to FRSA, which was to protect railroad carrier employees "when reporting a safety or security threat or

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[13] It is worth noting that the legislative history from the Implementing Recommendations of the 9/11 Commission Act of 2007 does not contain any specific information as to the intended meaning or operation of the election of remedies provision in FRSA. The House Conference report that accompanied the bill stated only that the FRSA amendment modifies the whistleblower provisions and expands the protected acts of employees, and that it "enhances administrative and civil remedies for employees, similar to those in subsection 49 U.S.C. 42121 of title 49 [the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ('AIR21')]." *See* H.R. Rep. No. 110-259, 31 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 119. AIR21 does not contain an election of remedies provision. *See* 49 U.S.C. 42121. Therefore the statement in the legislative history that the employee protections in FRSA are modeled on AIR21 is of little value in interpreting FRSA's election of remedies provision.

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 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 119.

CONCLUSION

For the reasons set forth above, the Assistant Secretary respectfully requests that this Board interpret the election of remedies provision in FRSA as not precluding a FRSA claim when an employee has previously filed a grievance and/or arbitration alleging a violation of the applicable CBA.

Respectfully submitted,

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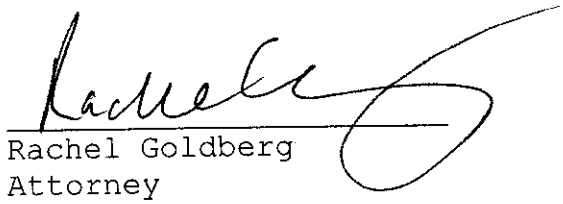

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