



In the Matter of:

LATONYA MILTON,

ARB CASE NO. 11-076

COMPLAINANT,

ALJ CASE NO. 2011-FRS-004

v.

NORFOLK SOUTHERN RAILWAY CO.,

RESPONDENT,

and

BRANDY THOMPSON,

ARB CASE NO. 11-077

COMPLAINANT,

ALJ CASE NO. 2011-FRS-015

v.

DATE: September 30, 2011

NORFOLK SOUTHERN RAILWAY CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant LaTonya Milton:

Willard J. Moody, Jr., Esq. and Michael R. Davis, Esq., *The Moody Law Firm*, Portsmouth, Virginia

For the Respondent Norfolk Southern Railway Company (Milton):

Samuel J. Webster, Esq. and Bryan C. R. Skeen, Esq., *Wilcox & Savage, P.C.*, Norfolk, Virginia

***For the Respondent Norfolk Southern Railway Company (Thompson):
E. Scott Smith, Esq., Fisher & Phillips, LLP, Atlanta, Georgia***

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge

FINAL DECISION AND ORDER DENYING INTERLOCUTORY REVIEW

The Complainants, Latonya Milton and Jeff Thompson, each filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA).¹ Milton and Thompson each alleged that Norfolk Southern violated the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson/Reuters 2011), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No.110-53. In each case, a Labor Department Administrative Law Judge (ALJ) issued a pre-hearing ruling denying dispositive motions Norfolk Southern filed.

The ALJ in *Milton* (ALJ No. 2011-FRS-004) ruled that the FRSA's election of remedies provision at 49 U.S.C.A. § 20109(f) does not bar Milton's complaint even though she also pursued a grievance procedure under her union's collective bargaining agreement with Norfolk Southern. Therefore, the ALJ denied Norfolk Southern's motion for summary disposition. The ALJ in *Thompson* (ALJ No. 2011-FRS-015) likewise ruled that the FRSA's election of remedies provision does not bar Jeff Thompson's complaint although he also pursued a grievance and arbitration procedure under his union's collective bargaining agreement. The ALJ thus denied Norfolk Southern's motion for summary disposition.

The ALJs in *Milton* and *Thompson* granted Norfolk Southern's requests for interlocutory appeal and certified the election of remedies issue for appeal under 28 U.S.C.A. § 1292(b). The ALJs specifically noted the Administrative Review Board's September 16, 2009 Order granting interlocutory review in *Mercier v. Union Pacific R.R. Co.* (ARB Case No. 09-121) and consolidating that case with the then-pending appeal in *Koger v. Norfolk Southern Railway Co.* (ARB Case No. 09-101).

On August 16, 2011, the ARB received Norfolk Southern's petition for interlocutory appeal and request that the ARB consolidate *Milton* with the pending

¹ The Administrative Law Judge in *Thompson* indicates that the named Complainant, Brandy Thompson, is the surviving spouse of Jeff Thompson who initiated the complaint. Order Denying Respondent's Motion to Dismiss for Lack of Jurisdiction and Denying Respondent's Motion to Preclude Complainant from Seeking Punitive Damages and Granting Respondent's Request for Certification of Interlocutory Appeal (Aug. 9, 2011), at 1, n.1.

interlocutory appeals in *Mercier* and *Koger*. LaTonya Milton filed a response in which she agreed with the request for interlocutory review. On August 18, 2011, the ARB received Norfolk Southern's petition for interlocutory appeal and request that the ARB consolidate *Thompson* with *Mercier* and *Koger*.

DISCUSSION

The Administrative Review Board (ARB or Board) has the authority to hear interlocutory appeals of administrative law judge orders under the FRSA in exceptional circumstances. See Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, 3925 para. 5 (c) (48) (Jan. 15, 2010).

The ARB recently held, in *Mercier v. Union Pacific R.R. Co.*, ARB No. 09-121, ALJ No. 2008-FRS-004 (Sept. 29, 2011), that the FRSA's election of remedies provision at 49 U.S.C.A. § 20109(f)² does not bar *Mercier*'s complaint even though he previously pursued a grievance and arbitration procedure provided in his union's collective bargaining agreement with his employer. The Board reasoned that "the plain meaning of 'another provision of law' does not encompass grievances filed pursuant to a 'collective bargaining agreement,' which is not 'another provision of law' but is instead a contractual agreement." *Mercier*, ARB No. 09-121, slip op. at 6. The ARB determined that the election of remedies provision does not bar a FRSA whistleblower claim because of a previously filed or pending collective bargaining grievance. Accordingly, the Board affirmed the ALJ's order allowing *Mercier*'s complaint to proceed and denied Union Pacific Railroad Company's request that we dismiss it. Given our ruling in *Mercier*, we reversed the ALJ's dismissal of *Koger*'s complaint. The ARB thus remanded the *Mercier* and *Koger* cases to the Office of Administrative Law Judges for further proceedings on the complaints.

In support of its petitions for interlocutory review, Norfolk Southern characterizes the above-captioned cases as involving the "identical" controlling legal issue. See Petition for Interlocutory Appeal (*Milton*), at 2, 5; Petition for Interlocutory Appeal (*Thompson*), at 2, 5. Given our decision in *Mercier* resolving the FRSA election of

² The FRSA's election of remedies provision reads as follows:

(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.

49 U.S.C.A. § 20109(f).

remedies issue presented here, we **DENY** Norfolk Southern's petitions for interlocutory review and **REMAND** the *Milton* and *Thompson* cases to the Office of Administrative Law Judges for further proceedings consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI,
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge