



**In the Matter of:**

**MARCUS KRUSE,**

**COMPLAINANT,**

**v.**

**NORFOLK SOUTHERN RAILWAY  
COMPANY,**

**RESPONDENT.**

**ARB CASE NOS. 12-081  
12-106**

**ALJ CASE NO. 2011-FRS-022**

**DATE: January 28, 2014**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Robert B. Thompson, Esq. and Robert E. Harrington, III, Esq.; *Harrington, Thompson, Acker & Harrington, Ltd.*; Chicago, Illinois**

*For the Respondent:*

**Joseph P. Sirbak, II, Esq.; *Buchanan Ingersoll & Rooney PC*, Philadelphia, Pennsylvania; and Jeffrey S. Berlin, Esq. and Mark E. Martin, Esq.; *Sidley Austin LLP*, Washington, District of Columbia**

**Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado concurs in the decision.**

**FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson/West Supp. 2013). Marcus Kruse filed a complaint alleging that Norfolk Southern Railway Company (NSRC) violated the FRSA when it suspended him in retaliation for an injury he reported to a NSRC supervisor.

On June 22, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) concluding that NSRC violated the FRSA. On August 14, 2012, the ALJ issued a Supplemental Decision and Order Awarding Attorney's Fees (S. D. & O) to Kruse as the prevailing party. NSRC appealed both rulings in separate Petitions for Review to the Board. We consolidate the two petitions for purposes of issuing one final decision. For the following reasons, we affirm the ALJ's rulings.

## BACKGROUND

NSRC employs Kruse as a freight train conductor. He sustained an injury on March 31, 2010, and was unable to return to duty until August 11, 2010. Upon his return, NSRC supervisor David Arnovitz told Kruse that injuries were "not tolerated" and that he could "ill afford to have another [injury]." Transcript (Tr.) at 22, 56. Prior to his injury, Kruse received only occasional in-person supervision from NSRC management personnel. When he returned to work, he was "subjected to an increase in supervision well above and beyond anything he had ever previously experienced, including nearly daily in-person contact for ten days to two weeks, and daily telephone contact for almost a month." D. & O. at 28.

In September 2010, Kruse worked on the L61 train with Jack Lawson, an NSRC engineer who controlled the train's engine. During a review of locomotive reports, NSRC managers noticed that the L61 train had been speeding on several occasions. NSRC charged Kruse and Lawson with a single excessive speeding incident (operating train at over 19 mph for 21 seconds) that occurred on September 7, 2010. As the conductor on the train on that date, Kruse did not have access to the same instruments as Lawson for monitoring the train's speed. According to NSRC Road Foreman Joseph Eveland, he chose the September 7 incident because it was the only instance where he could not only charge the engineer, but also "nail" Kruse. Tr. at 128. Kruse received a thirty-day suspension without pay, and the charge against him was categorized as a major offense. In response to the discipline, Kruse's union initiated a collective bargaining agreement (CBA) grievance on his behalf.<sup>1</sup>

On January 18, 2011, Kruse filed a FRSA complaint with the Occupational Safety and Health Administration (OSHA). OSHA dismissed the complaint and Kruse requested a hearing. Prior to the hearing, NSRC moved for summary decision, contending that because Kruse sought relief under a collective bargaining agreement, his FRSA complaint was barred by the election of remedies provision set out at 49 U.S.C.A. § 20109(f). The ALJ denied NSRC's motion on November 4, 2011. The ALJ, relying on the ARB's decision in *Mercier v. Union Pacific R.R. Co.*,<sup>2</sup> held that Section 20109(f) "does not encompass grievances filed pursuant to a collective bargaining agreement, which is not another provision of law but is instead a contractual agreement." ALJ Order Denying Summary Decision, slip op. at 5-6. The ALJ observed that the "*Mercier* decision is binding precedent." *Id.* at 6.

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<sup>1</sup> An arbitration board reduced Kruse's penalty to a deferred suspension and ordered NSRC to pay him for all time lost. D. & O. at 8. He is not seeking any other lost wages in this case.

<sup>2</sup> ARB Nos. 09-101, 09-121; ALJ Nos. 2008-FRS-003, -004 (ARB Sept. 29, 2011).

On June 22, 2012, following a hearing, the ALJ ruled that NSRC violated the FRSA in retaliation for reporting his injury. The ALJ ruled in the D. & O. that Kruse is entitled to \$4,000 in compensatory damages and NSRC must expunge Kruse's personnel file of discipline related to the September 7, 2010 speeding incident. D. & O. at 33. The ALJ ruled in the S. D. & O. that NSRC must pay Kruse's attorneys \$49,550 in fees and costs. S. D. & O. at 1-2.

NSRC filed a Petition for Review seeking reversal of the D. & O. based solely on the argument that the FRSA's "election of remedies" provision, 49 U.S.C.A. § 20109(f),<sup>3</sup> bars Kruse, who has challenged his discipline in Railway Labor Act (RLA) arbitration, from challenging the same discipline in a complaint proceeding under the FRSA. See also NSRC Br. at 8, n.12 ("NSR has not sought review of any other ruling by the ALJ or of findings made only in the ALJ's June 22, 2012 decision and order itself."). The company filed a separate Petition for Review seeking reversal of the S. D. & O. because the parties' Joint Stipulation Regarding Complainant's Attorney Fees and Costs allows NSRC to defer payment of those fees and costs until the exhaustion of "all lawfully provided appeals."

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions upon appeal of Administrative Law Judge decisions under the FRSA.<sup>4</sup> The ARB reviews the ALJ's factual determinations under the substantial evidence standard and conclusions of law de novo.<sup>5</sup>

### **DISCUSSION**

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.<sup>6</sup> The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b)(West 2007). To prevail, an FRSA complainant must establish by a preponderance of

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<sup>3</sup> The provision reads as follows: "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."

<sup>4</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110 (2012).

<sup>5</sup> 29 C.F.R. § 1982.110(b); *Michael Ben Graves v. MV Transp., Inc.*, ARB No. 12-066, ALJ No. 2011-NTS-004 (ARB Aug. 30, 2013).

<sup>6</sup> See 49 U.S.C.A. § 20109(a), (b).

the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.<sup>7</sup>

The ALJ concluded that Kruse proved that NSRC retaliated against him for reporting a work-related injury. The ALJ found that Eveland's desire to "nail" Kruse and the company's inconsistent explanations of the discipline imposed upon Kruse, were persuasive evidence that Kruse's reporting of his injury was a contributing factor in his suspension. D. & O. at 30. The ALJ also concluded that NSRC failed to prove that it would have disciplined Kruse in the absence of his protected activity. The ALJ found "no credible evidence that NS's ordinary practice is to hold conductors equally responsible for an engineer's speeding, where the conductor does not have access to a speedometer." D. & O. at 31. The record supports the ALJ's findings and conclusions.

We first address NSRC's appeal of the D. & O. The sole issue NSRC raises is whether the FRSA's "election of remedies" provision, 49 U.S.C.A. § 20109(f), bars Kruse from challenging his suspension in a proceeding under the FRSA because he sought relief in a grievance process set out in a collective bargaining agreement. Petition for Review (of the D. & O.) at 1. Citing our ruling in *Mercier*,<sup>8</sup> NSRC argues that our interpretation of § 20109(f) in that case "is contrary to the plain terms of the statute and wrong as a matter of law, and it should not be followed." Brief of Respondent Norfolk Southern Railway Company at 12. This argument lacks merit. We held in *Mercier* 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. *Id.*, slip op. at 6. We concluded that "the fact that a party relies on the law to enforce a right in a collective bargaining agreement is not the same as a right created under a provision of law." *Id.* (citing *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 697 F.2d 771, 776 (7th Cir. 1983)).

NSRC further argues that our ruling in *Mercier* is "flatly contrary" to the Supreme Court's ruling in *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*.<sup>9</sup> *Dispatchers* involved the interpretation of a statute allowing a carrier participating in certain transactions under the Interstate Commerce Act to be "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . ." 49 U.S.C.A. § 11341(a). The Court held that the exemption in § 11341(a) from "all other law" included the carrier's legal obligations under a collective bargaining

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<sup>7</sup> *Henderson v. Wheeling & Lake Erie R.R.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). See 49 U.S.C.A. § 42121(b)(2)(B)(iii).

<sup>8</sup> ARB Nos. 09-101, -121; slip op. at 4-9.

<sup>9</sup> 499 U.S. 117 (1991) (*Dispatchers*).

agreement.<sup>10</sup> But the Court subsequently clarified that the holding in *Dispatchers* was limited to the particular statute at issue in that case.<sup>11</sup>

Other courts have agreed with our holding in *Mercier* that the election of remedies provision does not bar an employee from seeking protection under the FRSA whistleblower provision where the employee pursues relief under a collective bargaining agreement. For example, the court of appeals most recently held in *Reed v. Norfolk Southern Ry. Co.*, that the “plain meaning of the statute tells us that [the employee] is not precluded from obtaining relief under FRSA simply because he appealed his grievance to the Public Law Board 6394” under a collective bargaining agreement.<sup>12</sup> We therefore reject NSRC’s sole challenge to the D. & O.

We next address NSRC’s appeal of the S. D. & O. Because Kruse prevailed on his complaint, the ALJ directed him to submit a petition for attorney’s fees and costs. Kruse’s counsel filed a Brief in Support of Complainant’s Petition for Attorney’s Fees and Costs with the ALJ on July 9, 2012. NSRC raised objections to the fee petition, but counsel on both sides reached a voluntary resolution of their disagreement. As a result, on July 27, 2012, the parties filed with the ALJ a Joint Stipulation Regarding Complainant’s Attorney Fees and Costs.

The ALJ reviewed the fee petition and Joint Stipulation and issued the S. D. & O. ordering NSRC to pay Kruse’s attorney a total of \$49,550 in fees and costs. NSRC does not challenge that amount but nevertheless asks us to reverse the ALJ’s S. D. & O. According to NSRC, “[t]he parties agreed that no payment of attorney’s fees and costs would be made until the exhaustion of all lawfully provided appeals. However, the parties did not include in their Joint Stipulation a provision expressly addressing the timing of the payment of attorney’s fees and costs.” Petition for Review (of the S. D. & O.) at 2. NSRC asks us to reverse the ALJ solely on that basis, but nothing in the Joint Stipulation persuades us to do so. We therefore reject NSRC’s challenge to the S. D. & O.

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<sup>10</sup> 499 U.S. at 133.

<sup>11</sup> See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229, n.6 (1995) (discussing *Dispatchers* and 49 U.S.C.A. § 11341(a) and holding that “that statute and case are not comparable to the statute and case before us” because *Dispatchers* “concerned the authority of the Interstate Commerce Commission (ICC) to approve rail carrier consolidations.”).

<sup>12</sup> *Reed v. Norfolk Southern Ry. Co.*, \_\_\_ F.3d \_\_\_, 2014 WL 117479 at \*4 (7th Cir. 2014). See also *Ray v. Union Pacific Ry. Co.*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 529172, \*8 (S.D. Iowa 2013) (district court “agrees with *Mercier*, *Reed*, and *Ratledge* that Plaintiff’s FRSA claims are not barred by the election of remedies provision in § 20109(f) merely because he elected to pursue an enforcement action under the RLA for rights that substantively arise under Defendant’s collective bargaining agreement”); *Ratledge v. Norfolk Southern Ry. Co.*, 2013 WL 3872793, \*12-\*17 (E.D. Tenn. 2013); *Battenfield v. BNSF Ry. Co.*, 2013 WL 1309439 (N.D. Okla. 2013) (district court discussing FRSA Section 20109(f) election of remedies provision and granting motion to amend complaint to incorporate FRSA retaliation claim).

## CONCLUSION

Accordingly, the ALJ's June 22 and August 14, 2012 Decisions are **AFFIRMED**. NSRC shall expunge Kruse's personnel file of any disciplinary record or negative references related to the September 7, 2010 speeding incident, pay Kruse compensatory damages in the amount of \$4,000, and pay Kruse's attorney \$49,550 in fees and costs.

As the prevailing party, Kruse is also entitled to costs, including reasonable attorney's fees, incurred before the Board. Kruse's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the Board, with simultaneous service on opposing counsel. Thereafter, counsel for NSRC shall have 30 days from its receipt of the fee petition to file a response.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**Judge Corchado, concurring.**

I concur in the decision to affirm.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**