

# Whistleblower Protections of the Federal Rail Safety Act: An Overview

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Claims in the field of railroad law may be broadly broken into two categories: those that are governed by the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, and those that are governed by the whistleblower protections of the Federal Rail Safety Act ("FRSA"), codified at 49 U.S.C. § 20109. Unlike the FELA, which protects railroad employees from on-the-job injuries caused by the negligence of their railroad employer, the FRSA protects railroad employees from being discriminated against in the course of their employment.

This article seeks to provide a brief history of the FRSA, an overview of the elements of an FRSA claim, a discussion of how FRSA claims are litigated, and discuss the still-developing jurisprudence employed by both the Department of Labor and Article III courts in litigation of FRSA claims.

## I. History of the FRSA

Congress first enacted the FRSA in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."<sup>2</sup> Ten years later, Congress added a substantive anti-retaliation cause of action, protecting railroad workers from the discrimination that they faced working for the rail carriers.<sup>3</sup> Only seven cases were filed under the 1980 anti-retaliation measures between their enactment and 2007, and only one was successful.<sup>4</sup>

In 2007, Congress held a series of hearings regarding rail safety and retaliation. As a result of these hearings, the House Transportation and Infrastructure Committee received evidence confirming that (1) railroad accidents, incidents, and injuries were being underreported to the Federal Railroad Administration; (2) management practice of harassment of injured railroad employees was epidemic in the railroad industry; (3) the GAO, National Transportation

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<sup>2</sup> Federal Railroad Safety Act (FRSA) of 1970, Pub. L. No. 91-458, § 101, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101 (2012)).

<sup>3</sup> Federal Railroad Safety Act (FRSA) of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1815 (codified as amended at 49 U.S.C. § 20109(a) (2012)).

<sup>4</sup> *See Cusack v. Trans-Global Solutions, Inc.*, 222 F.Supp.2d 834, 842 (S.D. Tex. 2002).

Safety Board, and Department of Transportation concluded that inaccurate reporting compromised rail safety; and (4) railroad employees were pressured not to report injuries by their supervisors whose compensation was partially based on limiting the number of FRA injury reports.<sup>5</sup> Former Congressman James Oberstar, then-chair of the House Transportation and Infrastructure Committee, stated:

We have 200 individual cases with documentation of alleged management intimidation following injury reports[.] . . . [The] FRA found 352 violations of Federal law for under-reporting in the largest category: failure to report employee injuries. That is only the number of under-reported injury events that FRA was able to identify. Maybe just the tip of the iceberg. The associate administrator of FRA for safety said she believed that supervisory pressure on employees to not report injuries is *a significant issue*. When the agency receives complaints, FRA does investigate reports. But the associate administrator maintained that FRA simply does not have the resources, meaning people, to investigate the extent of the harassment issue.<sup>6</sup>

The Committee found that something needed to change because “under-reporting or withholding of reporting . . . denies regulators and . . . Congress a full understanding of the nature and extent of safety problems in the rail industry and that is vital to improving safety.”<sup>7</sup>

In order to curb this industry-wide discrimination, Congress enacted wide-sweeping amendments to strengthen the FRSA. The 2007 amendments (1) ended Section 3 tribunal jurisdiction over FRSA complaints, authorized the Department of Labor to investigate the complaints, ALJ adjudications, and ARB precedential decisions interpreting the statute; provided relief in federal courts; relaxed standards of proof and causation; and specified that the FRSA does not preempt or diminish any other rights that an employee may have.<sup>8</sup>

The FRSA’s whistleblower protections, in their current form, provide that a railroad carrier “may not discharge, demote, suspend, reprimand, or in *any other way* discriminate against an employee if such discrimination is due, *in whole or in part*” to the employee’s engagement in

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<sup>5</sup>*Impact of Railroad Injury, Accident and Discipline Policies on the Safety of America’s Railroads: Hearing before the H. Comm. on Transp. & Infrastructure*, 110th Cong. v-xiii (2007).

<sup>6</sup> *Id.* at 2-3 (statement of Rep. Jim Oberstar, Chairman, H. Comm. on Transp. & Infrastructure) (emphasis added).

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Implementing Recommendations of the 9/11 Commission Act of 2007*, Pub. L. No. 110-53, § 1521, 121 Stat. 444 (codified as amended at 49 U.S.C. § 20109 (2012)).

one or more expressly enumerated protected activities.<sup>9</sup> Examples of protected activity range from notifying the railroad carrier of a work-related personal injury; accurately reporting hours on duty; refusing to assist in the violation of Federal law, rule, or regulation relating to railroad safety or security; or reporting a hazardous safety or security condition in good faith.<sup>10</sup> The act also explicitly makes it illegal for a railroad carrier to “deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment.”<sup>11</sup>

## II. Elements of an FRSA Claim

Unlike most employment-discrimination cases, which employ the *McDonnell-Douglas* burden-shifting framework, the FRSA’s whistleblower protections incorporate the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), which governs whistleblower claims in the aviation industry.<sup>12</sup> In order to prevail on an FRSA claim, a railroad employee must establish by a preponderance of the evidence that he or she (1) engaged in a protected activity as defined by the statute, (2) that the railroad knew that the employee engaged in the protected activity, (3) that the employee suffers an unfavorable personnel action, and (4) that the protected activity was a contributing factor in the unfavorable action.<sup>13</sup> Unlike the “motivating” or “substantial” factor standard applied in other discrimination cases, courts have established “contributing factor” to be a much easier burden to carry, defining it as “any factor which, *alone or in connection with other factors*, tends to affect in *any way* the outcome of the decision.”<sup>14</sup>

Importantly, an FRSA plaintiff “*need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to

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<sup>9</sup> 49 U.S.C. § 20109(a) (2012) (emphasis added).

<sup>10</sup> 49 U.S.C. §§ 20109(a)-(b) (2012).

<sup>11</sup> 49 U.S.C. § 20109(c)(1) (2012).

<sup>12</sup> See 49 U.S.C. § 42121(b) (2012) (describing AIR-21 procedures); see also 49 U.S.C. § 20109(d)(2)(A) (2012) (providing that FRSA whistleblower actions “shall be governed under the rules and procedures set forth in section 42121(b)”).

<sup>13</sup> See 49 U.S.C. § 42121(b)(2)(B)(iii) (2012) (defining criteria for Secretary of Labor to find violation of AIR-21); *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 157 (3rd Cir. 2013) (identifying essential elements of FRSA whistleblower claim); *Rudolph v. Nat’l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-15, slip op. at 11 (ARB March 29, 2013).

<sup>14</sup> *Araujo*, 708 F.3d at 158 (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)) (emphasis added); see also *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008) (regarding a Sarbanes-Oxley whistleblower complaint).

establish that his disclosure was a contributing factor to the personnel action.”<sup>15</sup> The contributing factor standard was “intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor” in a personnel action.<sup>16</sup> Therefore, an FRSA plaintiff need not show that protected activity was the only or even predominant reason for the unfavorable personnel action, but rather may prevail by showing that the reason for the adverse action offered by the railroad, “while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity.<sup>17</sup>

This contributing factor standard may be satisfied by circumstantial evidence, which may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.<sup>18</sup>

Accordingly, the FRSA whistleblower protections are different from other whistleblower statutes in that the FRSA adopts a burden-shifting framework “*distinct* from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claims.”<sup>19</sup> This framework has two parts; to wit:

[o]nce the plaintiff asserts a prima facie case, the burden shifts to the employer to demonstrate by *clear and convincing evidence*, that the employer *would* have taken the *same* unfavorable personnel action in the absence of that behavior.<sup>20</sup>

The burden imposed on the plaintiff under AIR-21 and the FRSA is “much easier for a plaintiff to satisfy” and is “much more protective of plaintiff-employees” than many employment

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<sup>15</sup> *Id.* (emphasis in original) (quotation omitted).

<sup>16</sup> *Id.*.

<sup>17</sup> *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20, slip op. at 5 (ARB May 31, 2013); *see also Araujo*, 708 F.3d at 158 (“The plaintiff-employee need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.”).

<sup>18</sup> *DeFrancesco v. Union Pacific R.R.*, ARB No. 10-114, ALJ No. 2009-FRS-9, slip op. at 3 (ARB Feb. 29, 2012).

<sup>19</sup> *Allen*, 514 F.3d at 476 (emphasis added).

<sup>20</sup> *Araujo*, 708 F.3d at 159 (emphasis added) (quotation omitted).

statutes.<sup>21</sup> In other words, “[c]ausation or ‘contributing factor’ in an FRSA whistleblower case is not a demanding standard.”<sup>22</sup>

Once the employee meets this burden, the burden shifts to the employer to demonstrate, “by *clear and convincing* evidence, that the employer would have taken the *same* unfavorable personnel action in the absence of that behavior.”<sup>23</sup> In discussing the Energy Reorganization Act, 42 U.S.C. § 5851—a statute that uses a similar burden-shifting framework to that employed by the FRSA—the Eleventh Circuit noted “[f]or employers, this is a tough standard, and not by accident.”<sup>24</sup> “The Eleventh Circuit stated that the standard [under section 5851] is ‘tough’ because Congress intended for companies in the nuclear industry to face a difficult time defending themselves, due to a history of whistleblower harassment and retaliation in the industry.”<sup>25</sup> *Araujo*, 708 F.3d at 159 (quotation omitted). And the Federal Courts have adopted the same construction of the 2007 amendments to the FRSA, “due to the history surrounding their enactment.”<sup>26</sup>

### **III. Procedural Litigation of FRSA Claims**

“An employee who alleges discharge, discipline, or other discrimination in violation of [the FRSA’s Whistleblower protections] may seek relief in accordance with the provisions of [section 20109], with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.”<sup>27</sup> The Secretary of Labor has designated OSHA as the originating board to receive these complaints. Unlike the three-year statute of limitations applicable to injury cases under the FELA, FRSA Whistleblower complaints are subject to a strict 180-day statute of limitations.<sup>28</sup>

There is no particular form of complaint when asserting a violation of the FRSA at the administrative level.<sup>29</sup> While complaints can be submitted online, it is this author’s practice to

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<sup>21</sup> *Id.* at 158-59.

<sup>22</sup> *Hutton*, ARB 11-091 at pg. 7.

<sup>23</sup> *Araujo*, 708 F.3d at 159 (emphasis added).

<sup>24</sup> *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997), *quoted in Araujo*, 708 F.3d at 159.

<sup>25</sup> *Araujo*, 708 F.3d at 159 (quotation omitted).

<sup>26</sup> *Id.*

<sup>27</sup> 49 U.S.C. § 20109(d)(1).

<sup>28</sup> 49 U.S.C. § 20109(d)(2)(ii).

<sup>29</sup> 29 C.F.R. § 1983.103(a).

send the complaints via United States Mail, along with a certificate of service and a cover letter explaining that the complaint is to be considered filed as of its postmark date.<sup>30</sup>

When a complaint is filed with OSHA, the administration's Office of Whistleblower Protection assigns the file to an investigator who will conduct an investigation. OSHA investigators will receive a written response from the railroad, and may interview the employee, coworkers, managers, and any other witnesses. While OSHA will work on collecting the relevant documentation, OSHA investigators do not have subpoena power. Following its investigation, OSHA issues written findings on whether a violation of the FRSA has occurred. In the event that OSHA determines that the railroad did violate the statute, it will order all remedies necessary to make the employee whole.<sup>31</sup>

After the OSHA findings are issued, the parties have 30 days in which to object to the findings.<sup>32</sup> If either or both parties object, the case will proceed to a de novo evidentiary hearing before a federal administrative law judge ("ALJ"). In such a case, the preliminary relief awarded by OSHA will be automatically stayed, other than a reinstatement order, which will only be stayed on the railroad's motion to the Office of Administrative Judges.<sup>33</sup> Appeals from the ALJ's determination are heard by the Administrative Review Board ("ARB") in Washington, D.C. On such an appeal, an ALJ's factual findings, if supported by substantial record evidence, are afforded deference, while legal conclusions are reviewed de novo.<sup>34</sup>

Following decision from the ARB, an aggrieved party may petition the applicable circuit court of appeals to review the decision within sixty days.<sup>35</sup> On such a review, "factual determinations by the Department of Labor must be affirmed if they are supported by substantial

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<sup>30</sup> See 29 C.F.R. § 1982.103(c), (d).

<sup>31</sup> OSHA Fact Sheet: Whistleblower Protection for Railroad Workers, available online at <https://www.osha.gov/Publications/OSHA-factsheet-whistleblower-railroad.pdf>.

<sup>32</sup> 29 C.F.R. § 1982.106(a).

<sup>33</sup> 29 C.F.R. § 1982.106(b). In practice, however, railroad's frequently refuse to honor the reinstatement order, even in the absence of the Department of Labor or the Article III federal courts granting such a motion. See, e.g., "Rail Workers Raise Doubts About Safety Culture as Oil Trains Roll On," Oregon Public Broadcasting, July 2, 2014, available online at <http://www.opb.org/news/article/workers-question-safety-culture-in-railroads-hauli/>.

<sup>34</sup> *Bailey v. Consol. Rail Corp.*, ARB 13-030 & 13-033, slip op. at 2 (ARB Apr. 22, 2013) (factual findings); *Hutton v. Union Pac. R.R. Co.*, ARB 11-091, slip op. at 4 (ARB May 31, 2013) (legal conclusions).

<sup>35</sup> 49 U.S.C. § 20109(d)(4).

evidence, which is more than a scintilla, but less than a preponderance, of the evidence.”<sup>36</sup> This is a highly deferential standard, under which the reviewing court “must uphold the [ARB’s] findings . . . even if the court would justifiably have made a different choice had the matter been before it de novo.”<sup>37</sup> Legal conclusions, meanwhile, are reviewed de novo.<sup>38</sup>

While it may be reviewed by the Federal appeals court, the decision of the ARB constitutes the final decision of the Secretary of Labor. As such, at any point prior to the ARB issuing its decision, the employee may elect to file his or her FRSA claim in Federal Court.<sup>39</sup> In order to trigger this so-called “kick out” provision of the statute, an FRSA claim must have been pending before the Department of Labor (at any stage—OSHA, ALJ, or ARB) for at least 210 days without a decision, and the delay must not be due to any bad faith on the part of the employee.<sup>40</sup> The Federal Court has jurisdiction over such FRSA claims “without regard to the amount in controversy,” and while the decision to trigger the kick-out provision lies solely with the employee, either party may elect to have the case tried to a jury.<sup>41</sup>

#### **IV. Common Defenses Argued by the Railroads**

The primary defense argued by the railroad in response to FRSA Whistleblower claims is that the railroad would have taken the same disciplinary action even in the absence of the employee’s protected activity. As an affirmative defense, the burden rests on the railroad to establish this fact, and Congress has decreed that the railroad must meet this tough standard by showing “clear and convincing evidence” that it “would have taken the *same* unfavorable personnel action in the absence of” the employee’s protected activity.<sup>42</sup> Importantly—and unlike some other employment discrimination claims—the railroad cannot avoid liability simply by showing that it had a legitimate business reason for discharging the employee.<sup>43</sup> Clear-and-convincing evidence in the FRSA context requires that the railroad establish that it is “highly probable or reasonably certain” that *identical* actions *would* have taken place *absent* the

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<sup>36</sup> *Consol. Rail Corp. v. U.S. Dep’t of Labor*, 567 F. App’x334, 337 (6th Cir. 2014) (quotation omitted).

<sup>37</sup> *Id.* (quotation omitted) (omission and alteration in original).

<sup>38</sup> *Id.*

<sup>39</sup> *See* 49 U.S.C. § 20109(d)(3).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See Araujo*, 708 F.3d at 158-59 (emphasis added).

<sup>43</sup> *Barker v. Ameristar Airways, Inc.*, ARB 05-058, at pg. 8 (ARB Dec. 31, 2007).

protected activity.<sup>44</sup>

In addition to the clear-and-convincing-evidence affirmative defense established by the statute, railroads around the country have attempted to argue that the terms of the Railway Labor Act (“RLA”) in conjunction with various legal doctrines inoculate them from liability under the FRSA. The RLA governs labor relations in the railroad and airline industries by seeking to provide a procedural framework “for peaceful settlement of labor disputes between carriers and their employees.”<sup>45</sup> The “major purpose of Congress in passing the [RLA] was to provide a machinery to prevent strikes” so to “safeguard the vital interests of the country” in a continuous rail service.<sup>46</sup>

The RLA creates two classes of disputes: “minor disputes” are defined as “controversies over the meaning of an existing collective bargaining agreement in a particular fact situation”; “major disputes,” meanwhile, are disputes concerning the making or modification of the CBA itself.<sup>47</sup> Minor disputes, including challenges to employee discipline, must first be handled through an on-site, internal grievance process “up to and including the chief operating officer of the carrier.”<sup>48</sup>

Minor disputes not resolved through the internal process may only be reviewed in final arbitration.<sup>49</sup> Parties proceeding through this arbitration go to either the National Railroad Adjustment Board (“NRAB”), which was created by the RLA and is funded by the federal government, or a Public Law Board (“PLB”), created in accordance with the RLA and has the same jurisdiction as the NRAB and statutorily specified procedures.<sup>50</sup> An award rendered by a PLB through the RLA is “final and binding.”<sup>51</sup> The “compulsory character” of the RLA’s

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<sup>44</sup> See *DeFrancesco v. Union R.R. Co.*, ARB 10-114, at pg. 8 (ARB Feb. 29, 2012) (discussing clear-and-convincing evidence as denoting “a conclusive demonstration”).

<sup>45</sup> *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 609 (1959).

<sup>46</sup> *Tex. & N.O.R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930); *see also* 45 U.S.C. § 151(a)(1) (2014).

<sup>47</sup> *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994).

<sup>48</sup> 45 U.S.C. § 153(i) (2014); *see also* *Ryan v. Union Pac. R.R. Co.*, 286 F.3d 456, 459 (7th Cir. 2002) (explaining internal grievance process); *Allied Pilots Assn. v. Am. Airlines, Inc.*, 898 F.2d 462, 464 (5th Cir. 1990) (holding that challenges to employee discipline are minor disputes).

<sup>49</sup> *Int’l Bhd. Of Teamsters v. Sw. Airlines Co.*, 875 F.2d 1129, 1133 (5th Cir. 1989) (en banc).

<sup>50</sup> *See* 45 U.S.C. § 153(l).

<sup>51</sup> 45 U.S.C. § 153(m).

arbitration process is unique in that it “stems not from any contractual undertaking between the parties but from the [RLA] itself.”<sup>52</sup> Finality of arbitration disputes regarding the interpretation or application of CBAs is central to the RLA, and accordingly the arbitration process is exclusive and “[a] party who has litigated an issue [in RLA arbitration] on the merits may not relitigate that issue in an independent judicial proceeding.”<sup>53</sup>

**a. Collateral Estoppel**

In recent years, railroads have begun to argue that when a railroad employee proceeds to arbitration under the RLA before either a PLB or the NRAB, the collateral-estoppel doctrine lends PLB factual findings preclusive effect in a subsequent FRSA claim.

In *Grimes v. BNSF Ry. Co.*, a railroad engineer was injured while working with two co-employees on a nonmoving train.<sup>54</sup> The injury occurred when one of the other employees operated a locomotive despite not being certified to do so.<sup>55</sup> The engineer initially reported that he could not recall what had happened, but later acknowledged that the other employee was operating the train.<sup>56</sup> The railroad held an investigation and eventually terminated all three employees, concluding that they had covered up for each other in violation of a railroad rule that prohibited employees from withholding information or failing to give “all the facts regarding unusual events, accidents, personal injuries, or rule violations.”<sup>57</sup> The engineer appealed the determination to the PLB, which found that the engineer had been dishonest but ordered that he be reinstated after concluding that dismissal was not warranted.<sup>58</sup>

Alongside his appeal to the PLB, the engineer brought a claim under the FRSA, alleging in relevant part that the railroad had discharged him due, in whole or in part, to his lawful, good-faith act done to notify the railroad of his work-related injury.<sup>59</sup> On the railroad’s motion, the district court magistrate judge gave preclusive effect to the PLB’s factual finding that the engineer had been dishonest, and therefore granted the railroad’s motion for summary

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<sup>52</sup> *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 323 (1972).

<sup>53</sup> *Id.* at 322-26.

<sup>54</sup> 746 F.3d 184, 186 (5th Cir. 2014).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

judgment.<sup>60</sup> The Fifth Circuit reversed the summary judgment award, concluding that the arbitral procedures utilized by the PLB were inadequate to allow for the collateral-estoppel doctrine to apply.<sup>61</sup>

The Fifth Circuit based its analysis on its earlier decision in *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991), which in turn relied heavily on the Eleventh Circuit's decision in *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985). In evaluating this precedent, the Fifth Circuit established a two-prong inquiry regarding whether collateral estoppel following arbitration is appropriate:

Collateral estoppel is not improper regarding underlying acts “particularly if such findings are within the panel’s authority and expertise” and where the arbitration procedures “adequately protected the rights of the parties.” As to the second prong, “[w]hen an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings.”<sup>62</sup>

The Court found that collateral estoppel was inappropriate in the *Grimes* case because “the investigation and hearings were conducted by the railroad” while “the PLB only reviewed the record from that investigation” and accordingly “the procedures of the PLB did not afford [the engineer] the basic procedural protections of a judicial forum.”<sup>63</sup> “The fact that a subsequent panel of neutral arbitrators reviewed the record of the internal investigation and hearing and concluded that the railroad had reached the correct result *is not enough* to insulate the underlying, employer-conducted proceedings from scrutiny.”<sup>64</sup> By holding that PLB findings under the RLA do not have preclusive effect in subsequent FRSA hearings, the Fifth Circuit incorporated the anti-preclusion FELA holdings of *Kulavic v. Chicago & Illinois Midland Ry. Co.*, 1 F.3d 507 (7th Cir. 1993), and *Graves v. Burlington N. & Santa Fe Ry. Co.*, 77 F.Supp.2d 1215 (E.D. Okla. 1999), into the FRSA arena.<sup>65</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *See, generally, id.* at 186-91.

<sup>62</sup> *Id.* at 188. (citations omitted).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 188-89 (emphasis added).

<sup>65</sup> *Id.* at 191 (agreeing with *Graves* and *Kulavic* and citing those cases with approval).

### a. Election of Remedies

Railroads have also argued that employees' FRSA claims are precluded under the statute's election-of-remedies provision by operation of the employee having sought earlier internal review of the discipline under the collective bargaining agreement reached between the railroad and the employee's union. The FRSA provides that a railroad employee "may not seek protection under both [section 20109] and another provision of law for the same allegedly unlawful act of the railroad carrier."<sup>66</sup> The railroad's election-of-remedies argument is based on its assertion that by pursuing his or her rights under the collective bargaining agreement to file a grievance of the railroad's termination of his or her employment, the employee waives his or her right to allege that the termination was in violation of the FRSA. But this argument has been continuously rejected by OSHA, the Office of Administrative Law Judges, the Administrative Review Board, various district courts around the country, and every federal appellate court to have considered the question.<sup>67</sup>

The defense bar's argument to the contrary notwithstanding, an employee's grievance under a CBA does not constitute seeking protection under "another provision of law" as the term is used in Section 20109(f). The very language of the FRSA indicates that Congress took the time to distinguish relief under "any Federal or State law" from relief under "any collective bargaining agreement."<sup>68</sup> An employee alleging that the termination of his or her employment was in violation of a CBA therefore does not constitute seeking protection under "another provision of law" sufficient to trigger the FRSA's election-of-remedies provision.

The Department of Labor's Administrative Review Board has similarly held that the FRSA's election-of-remedies provision does not bar FRSA claims. "[T]he 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."<sup>69</sup> In other words, the FRSA's election-of-remedies provision "cannot be read to bar

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<sup>66</sup> 49 U.S.C. § 20109(f) (2014).

<sup>67</sup> See, e.g., *Reed v. Norfolk S. Ry. Co.*, 740 F.3d 420 (7th Cir. 2014); *Grimes*, 746 F.3d at 184 (5th Cir. 2014); *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507 (6th Cir. 2015).

<sup>68</sup> See 49 U.S.C. § 20109(h) (2014) ("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.*" (emphasis added)).

<sup>69</sup> *In re Mercier v. Union Pac. R.R. Co.*, ARB Case No. 09-121, 6-8 (A.R.B. Sept. 29, 2011).

concurrent whistleblower and collective bargaining claims,” and an employee bringing an FRSA claim is entitled to maintain such an action regardless of whether the employee also pursued a grievance under the union’s CBA.<sup>70</sup> Courts that have reviewed the *Mercier* decision have similarly reached the conclusion that the interpretation of Section 20109(f) advanced by the defense bar is not supported by the statutory language or the legislative history.<sup>71</sup> Earlier this year, the ARB renewed the authority of the *Mercier* decision, rejecting a railroad-employer’s argument that *Mercier*’s interpretation of the election-of-remedies provision “is contrary to the plain terms of the statute and wrong as a matter of law” as being without merit.<sup>72</sup>

Nor does the defense bar’s argument that an employee seeks protection under “another provision of law” by pursuing the matter under the RLA save the railroad’s argument. While the RLA “establishes a mandatory arbitral mechanism[,]” it does not create any rights; rather simply providing the mechanism for an employee to “enforce[]” the contractual rights awarded to the employee by way of the collective bargaining agreement.<sup>73</sup> This RLA mechanism for “invoking contract-based rights” is not a forum for addressing “employment-related disputes . . . based on statutory or common law.”<sup>74</sup> “The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of” a similar factual occurrence.<sup>75</sup> Analogizing the RLA to other federal labor laws, the Court can easily find that there is no “suggestion that Congress, in adopting [the RLA] wished to give the substantive provisions of private agreements the force of federal law.”<sup>76</sup> Holding otherwise would suggest that *every* private contract between diverse parties takes on the effect of federal law simply because federal law provides a forum for resolution of disputes arising under that contract.

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<sup>70</sup> *Id.* at 8.

<sup>71</sup> *See, e.g.,* Ratledge v. Norfolk S. Ry. Co., No. 1:12-cv-402, 2013 WL 3872793, at \*12-18 (E.D.Tenn. July 25, 2013) (providing a lengthy analysis of its holding that the grievance was not brought under another provision of law); Battenfield v. BNSF Ry. Co., No. 12-cv-213, \*2-4 (N.D. Okla. Mar. 26, 2013) (recognizing the colorable arguments from *Mercier* and otherwise deferring decision on the issue); Norfolk S. Ry. Co. v. Solis, 915 F.Supp.2d 32, 43-45 (D.D.C. Jan. 3, 2013) holding that FRSA does not clearly and mandatorily require an election of remedies and *Mercier* had at least a colorable reading of the statute).

<sup>72</sup> *In re* Kruse v. Norfolk S. Ry. Co., ARB Case No. 12-081, 4 (A.R.B. Jan. 28, 2014).

<sup>73</sup> *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994).

<sup>74</sup> *Id.* at 253-54.

<sup>75</sup> *See Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745-46 (1981).

<sup>76</sup> *See Hawaiian Airlines*, 512 U.S. at 260 (citation and quotation omitted).

Plaintiff did not “seek protection” under the RLA by filing his grievance any more than a federal-court plaintiff seeks protection under Title 28 of the U.S. Code when filing an appeal with the appropriate circuit.<sup>77</sup>

Over the past twelve months, this issue has arisen in various federal appellate courts around the country, and the railroad’s argument has fared no better before these appellate tribunals.<sup>78</sup> The *Reed* court rejected the very argument advanced by the railroad, stating that *even if* one were to assume that the RLA was sufficient to trigger the “another provision of law” language of section 20109(f), “it is strained to say that [a railroad employee] sought protection under [the RLA] by appealing his grievance to the special adjustment board.”<sup>79</sup> Therefore, “[t]he election-of-remedies provision only bars railroad employees from seeking duplicative relief under overlapping antiretaliation or whistleblower statutes” the court concluded, “it does not diminish their rights or remedies under collective bargaining agreements in *any way*.”<sup>80</sup>

Not only does an employee’s grievance procedure under the applicable CBA not “seek protection under . . . another provision of *law*,” but CBA grievances also do not concern “the same allegedly unlawful act” as the employee’s FRSA claim. A CBA grievance is based on the railroad’s alleged breach—intentional or otherwise—of a private collective bargaining agreement. In contrast, an FRSA action is based on the railroad’s discriminatory treatment of the

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<sup>77</sup> See 28 U.S.C. § 1291 (2014) (providing that courts of appeals have jurisdiction of appeals from decisions of district courts of the United States), 1294(1) (providing that decisions of a United States district court be taken to the court of appeals for the circuit embracing the district).

<sup>78</sup> See, e.g., *Reed*, 740 F.3d at 424 (“By appealing to [the adjustment board], Reed did not seek protection under the [RLA] any more than a litigant seeks protection under the jurisdictional statute for the Court of Appeals for the Federal Circuit when he files an appeal from a final decision of the United States Court of Federal Claims.” (citation omitted)).

<sup>79</sup> *Id.* at 425.

<sup>80</sup> *Reed*, 740 F.3d at 426 (emphasis added); see also *Grimes*, 746 F.3d at 191 (citing *Reed* with approval and adopting holding that employee pursuing a grievance under the collective bargaining agreement seeks protection under the agreement and not the RLA); *Perez*, 778 F.3d at 513 (“Both the Fifth and Seventh Circuits have construed § 20109(f) in largely the same way, and we see no need to vary significantly from their approach.”). In addition to the Fifth and Sixth Circuit decisions, the *Reed* decision has been cited with approval by district courts from the Fourth and Eighth Circuits. See *Pfeifer v. Union Pac. R.R. Co.*, No. 12-CV-2485, 2014 WL 2573326 at \*5 (D.Kan. June 9, 2014); *Koger v. Norfolk S. Ry. Co.*, No. CIV.A 1:13-12030, 2014 WL 2778793 at \*3 (S.D.W.Va. June 19, 2014).

employee that allegedly violates federal statute. “*Wholly apart from any provision of the [collective bargaining agreement], [the railroad] ha[s] a [federal]-law obligation not to fire [its employees] . . . in retaliation for whistle-blowing.*”<sup>81</sup> An intentional act done by the railroad in response to a protected activity is entirely different than an allegedly unintentional act of contract breach. An FRSA claim therefore targets different allegedly unlawful acts than the grievance under the collective bargaining agreement, and an employee exercising his or her grievance rights under the RLA does not bar a subsequent or simultaneous FRSA action under the election-of-remedies provision of the statute.

In summary, Section 20109(f) only bars FRSA claims if and when the employee (1) has already sought protection under (2) another provision of law (3) for the same allegedly unlawful conduct. A railroad employee’s grievance under a collective bargaining agreement fails to meet any of these three required elements.<sup>82</sup>

#### **V. Damages in FRSA Cases**

An employee who prevails in any action under the FRSA’s enforcement provisions is “entitled to all relief necessary to make the employee whole.”<sup>83</sup> Relief in a successful FRSA action must include “reinstatement with the same seniority status that the employee would have had, but for the discrimination” and “any back pay, with interest.”<sup>84</sup>

The statute also provides for punitive damages not in excess of \$250,000 as “possible relief” for an FRSA violation.<sup>85</sup> Punitive damages in FRSA cases may be assessed in such cases

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<sup>81</sup> *Cf. Hawaiian Airlines*, 512 U.S. at 258 (emphasis added).

<sup>82</sup> *See Reed*, 740 F.3d at 426 (holding that section 20109(f) “is concerned with provisions of law that grant workers substantive protections, not with federal or state law writ large” and that the RLA “is not such a provision”). The FRSA’s election-of-remedies provision is currently pending in the District of Minnesota on an employee’s effort to strike the affirmative defense under Fed. R. Civ. P. 12(f) and in the Western District of Washington on an employee’s motion for partial summary judgment on the defense. *Bjornson v. Soo Line R.R. Co.*, No. 0:14-CV-04596-JRT-SER (D. Minn.) (Dkt Nos. 10-15, 18, 22, 29); *Rookaird v. BNSF Ry. Co.*, No. 2:14-CV-176-RSL (W.D.Wash.) (Dkt Nos. 38-39, 45-46, 52-53)

<sup>83</sup> 49 U.S.C. § 20109(e)(1) (2014).

<sup>84</sup> 49 U.S.C. § 20109(e)(2)(A)-(B) (2014); *see also* Note 33, *supra*.

<sup>85</sup> 49 U.S.C. § 20109(e)(3) (2014).

to punish wanton or reckless conduct and to deter such conduct in the future.<sup>86</sup> “In determining whether punitive damages are appropriate, factors to assess include the degree of [the railroad’s] reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the [the railroad’s] actions; and the sanctions imposed in other cases for comparable misconduct.”<sup>87</sup>

Finally, a successful FRSA plaintiff is entitled to "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."<sup>88</sup> A prevailing party in a whistleblower case under the FRSA is entitled to recovery of legal expenses, including attorneys' fees at the hourly rate for the relevant market.<sup>89</sup> Generally, the relevant market is where the case is tried, but may be broadened if the market where the case was tried would not produce capable attorneys to undertake representation.<sup>90</sup> And while the district court retains discretion to determine what constitutes a reasonable fee, a district court must abide by the procedural requirements for calculating those fees articulated by the Supreme Court and applicable circuit court of appeals.

Many circuits adopt a hybrid lodestar/multiplier approach expressed by the Supreme Court in *Hensley v. Exkerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983), as the proper method for determining the amount of fees under fee-shifting statutes such as the FRSA. This approach has two steps: first, the court must determine the "lodestar" amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. The party seeking the fee award must submit evidence supporting the hours worked and rate claimed, and a district court should exclude from the lodestar amount only those hours that were not reasonably expended because they were "excessive, redundant, or otherwise unnecessary."<sup>91</sup> Second, a court may adjust the lodestar either upward or downward using a "multiplier" based on factors not

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<sup>86</sup> See *Petersen v. Union Pac. R.R. Co.*, 2011-FRS-00017, 32 (O.A.L.J. Aug. 7, 2013) (citing *Johnson v. Old Dominion Sec.*, 1986-CAA-3, 4-5 (Sec’y May 29, 1991)), *aff’d* No. 13-090 (ARB Nov. 20, 2014).

<sup>87</sup> *Id.*

<sup>88</sup> 49 U.S.C. § 20109(e)(2)(C) (2014).

<sup>89</sup> See *U & I Sanitation v. City of Columbus*, 112 F.Supp.2d 902, 904 (D. Neb. 2000).

<sup>90</sup> *Perdue v. Kenny A.*, 559 U.S. 541, 552 (2012); see also *Moysis v. DTG Datanet*, 278 F.3d 819, 828-29 (9th Cir. 2002).

<sup>91</sup> *Hensley*, 461 U.S. at 434.

subsumed in the initial calculation of the lodestar. But because "[t]he lodestar amount is presumptively the reasonable fee amount . . . a multiplier may be used to adjust the lodestar amount upward or downward only in rare and exceptional cases, supported by both specific evidence on the record and detailed findings . . . that the lodestar amount is unreasonably low or unreasonably high."<sup>92</sup>

A current topic of litigation in federal caselaw is whether an attorney-fee award is tied at all to the amount received by a successful FRSA plaintiff. Railroads have argued that when an FRSA plaintiff receives only a monetary award, district courts are required to consider the amount of damages received by the plaintiff in assessing its attorney-fee and cost awards.<sup>93</sup> This argument is based on Ninth Circuit, non-FRSA caselaw decisions in *McCown v. City of Fontana*, 565 F.3d 1097 (9th Cir. 2009), and *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805 (9th Cir. 1994).

But this argument stands in direct conflict with the Second Circuit's opinion in *Millea v. Metro North R. Co.*, 658 F.3d 154 (2nd Cir. 2011). In *Millea*, a plaintiff brought two claims under the Family Medical Leave Act—one arguing interference and another arguing retaliation—and a claim for intentional infliction of emotional distress.<sup>94</sup> The jury returned a verdict in favor of the employee on the interference claim, awarding him \$612.50 in compensatory damages, but found in favor of the employer-railroad on the other two claims.<sup>95</sup> The plaintiff requested \$144,792 in attorneys' fees, which the Second Circuit noted was "presumably the lodestar [amount]," but the district court awarded only \$204 in fees.<sup>96</sup>

The Second Circuit found that the district court had abused its discretion, in part because "the district court impermissibly reduced its initial fee award based on an incorrect conclusion

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<sup>92</sup> *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (quotation omitted).

<sup>93</sup> *See, e.g.*, Brief of Appellant, *Wallis v. BNSF Ry. Co.*, No. 14-35448 (9<sup>th</sup> Cir. 2014). The author is respondent's appellate counsel. The *Wallis* matter is currently pending at the Ninth Circuit on this exact issue; to wit, whether a successful FRSA plaintiff should have an attorney-fee award reduced based on the amount of the jury's award of damages for a railroad's violation of the statute.

<sup>94</sup> 658 F.3d at 160.

<sup>95</sup> *Id.* at 161.

<sup>96</sup> *Id.* at 161, 167.

that [the employee’s] victory was ‘de minimis.’”<sup>97</sup> The appellate court noted that “[i]f an expense of time is required to obtain an award that is not available by voluntary compliance or offer of settlement, the expense advances the purposes of the statute.”<sup>98</sup> The Second Circuit further noted that “litigation outcomes are *only* relevant to fee award calculations when they are a direct result of the quality of the attorney’s performance.”<sup>99</sup>

The Administrative Review Board reached a similar conclusion in the matter of *Furland v. Am. Airlines, Inc.*, ARB Case Nos. 09-102, 10-130, ALJ Case No. 2008-AIR-011 (A.R.B. July 27, 2011). Under the markedly similar structure of the AIR-21, the ARB rejected the defendant-airline’s argument in opposition to the amount of a fee award, noting that “the [ARB] had declined to reduce attorney’s fee awards solely because the amount is larger than the damages recovered.”<sup>100</sup> That fee awards should not be reduced simply because the fees surpass the amount of compensatory damages was also raised—and rejected—as a defense under the FRSA in *Bala v. Port Auth. Trans-Hudson Corp.*, 2010-FRS-026 (OALJ, Feb. 27, 2014). In *Bala*, the complainant received only \$1,010, plus interest, as compensation for the railroad impermissibly suspending him in violation of the FRSA.<sup>101</sup> Despite this comparatively small award, complainant’s counsel was awarded \$45,958.08 in fees and costs for proceedings before the ALJ and an additional amount of \$26,118.75 in fees for proceedings before the ARB, for a total of over \$72,000.<sup>102</sup>

## VI. Conclusion

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<sup>97</sup> *Id.* at 168.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Furland*, ARB Case Nos. 09-102, 10-130, at 11.

<sup>101</sup> *Bala*, 2010-FRS-026, at 3.

<sup>102</sup> *See id.* at 4; *Bala v. Port Auth. Trans-Hudson Corp.*, ARB Case No. 12-048, ALJ Case No. 2010-FRS-026 (A.R.B. Mar. 5, 2014). In January 2015, the Third Circuit granted the railroad’s petition challenging the ARB’s merits decision in *Bala* and remanded the case to the ARB with instructions that the case be dismissed. *Port Authority Trans-Hudson Corp. v. United States Dep’t of Labor*, 776 F.3d 157, 169 (3rd Cir. 2015). The Third Circuit’s decision was based solely on the Labor Department’s interpretation of the FRSA, specifically whether 49 U.S.C. § 20109(c)(2) applied to off-duty injuries. The Third Circuit was not asked to consider the amount of the fee award portion of the order, and the ALJ and subsequent ARB’s decision on such award in *Bala* remains relevant.

The 2007 amendments to the FRSA were designed to protect the men and women working for the nation’s railroads by improving the safety of railroad culture. Given that claims must first be filed with the over-burdened Department of Labor, we are only now beginning to see a rich development of federal caselaw as parties and attorneys craft allegations, responses, and policies. Only the employee—and not the railroad—has the ability to remove a case from the administrative process and commence a de novo action in Article III Federal Court.<sup>103</sup> As a result, Article III jurisprudence may seemingly shift in favor of the railroad carriers as employees who have received compensation and/or reinstatement through the Department of Labor may be less likely to exercise this “kick-out” option. Courts and practitioners should heed caution, however, not to misconstrue this development—should it occur—as having a chilling effect on FRSA litigation or imposing a heightened standard on an employee’s burden of proof. As the courts have acknowledged, the FRSA is “much more protective of plaintiff-employees” than many employment statutes.<sup>104</sup>

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<sup>103</sup> 49 U.S.C. § 20109(d)(3).

<sup>104</sup> Araujo, v. New Jersey Transit Rail Ops., Inc., 708 F.3d 152, 158-59 (3rd Cir. 2013).