No. 13-60382

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANNY L. GRIMES,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellee.

Appeal From the United States District Court
for the Northern District of Mississippi

BRIEF OF APPELLEE BNSF RAILWAY COMPANY

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September 3, 2013

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Rules of this Court have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellee

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BNSF Railway Company is a wholly owned subsidiary of Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC is an indirectly wholly owned subsidiary of Berkshire Hathaway, Inc., a publicly traded company.

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STATEMENT REGARDING ORAL ARGUMENT

This matter involves routine application of settled issue preclusion principles to a garden variety Federal Railroad Safety Act ("FRSA") claim. In a well-reasoned opinion, the district court correctly and narrowly found issue preclusion was warranted here. This judgment should be affirmed both under applicable issue preclusion principles and under binding Fifth Circuit precedent holding that the findings of an arbitrator acting under the Railway Labor Act ("RLA") are entitled to substantial deference. As such, BNSF Railway Company ("BNSF") does not believe that oral argument is necessary to affirm the district court's decision.

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STATEMENT OF ISSUES

1. Is Grimes precluded from arguing that he reported his injury to BNSF in good faith, and so engaged in protected activity under the FRSA, where the issue of whether Grimes reported his injury honestly was vigorously contested in a procedurally fair arbitration governed by the Railway Labor Act and the arbitration board expressly found Grimes had been dishonest?

2. Is there a genuine issue of material fact as to whether Grimes engaged in protected activity under the FRSA where the arbitration board's findings are entitled to substantial deference and Grimes does not dispute that he told management that he had misrepresented the cause of his injury?

3. Does the Election of Remedies provision in FRSA § 20109(f) prohibit Grimes from seeking relief under the FRSA for BNSF's discipline decision where Grimes first challenged the discipline decision in arbitration under the Railway Labor Act?

STATEMENT OF THE CASE

Plaintiff-Appellant Danny Grimes filed a FRSA complaint with the Secretary of Labor in November of 2010 alleging that BNSF's decision to dismiss him violated the FRSA, 49 U.S.C. § 20109. (USCA5 109.) On June 11, 2012, before the Secretary had issued a final decision, Grimes filed suit in federal district court pursuant to Section 20109(d)(3). (USCA5 1.)

On March 22, 2013, BNSF moved for summary judgment, arguing that Grimes's FRSA retaliatory discharge claim failed as a matter of law because Grimes could not show that he engaged in any "protected activity." (USCA5 196.) BNSF also asserted collateral estoppel barred Grimes from arguing that he reported his injury in good faith, and that the FRSA's Election of Remedies provision prohibited Grimes's claim because he had previously elected to seek relief under the Railway Labor Act ("RLA"). (USCA5 196.) The district court held that collateral estoppel applied, and granted BNSF's motion in a thorough, carefully reasoned memorandum opinion on May 6, 2013. (Record Excerpt ("RE") 4, USCA5 1384.) Grimes timely appealed. (RE 2, USCA5 1458.)

STATEMENT OF FACTS

A. Statutory Background

This case involves both the FRSA, under which Grimes sought relief before the Secretary of Labor and the district court, and the Railway Labor Act ("RLA"), under which Grimes challenged his dismissal in arbitration.

1. The Railway Labor Act

The RLA governs labor relations in the railroad and airline industries and provides a procedural framework "for peaceful settlement of labor disputes between carriers and their employees." *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 609 (1959). The "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes'" in order to "safeguard the vital interests of the country" in uninterrupted rail service. *Tex. & N.O.R.R. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930); *see also* 45 U.S.C. § 151a(1). To that end, the RLA provides several different mechanisms for the resolution of labor-management disputes. *See Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 34, 39, 42 & n.24 (1957). In particular, the RLA provides that "minor disputes"—which are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation," *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994)—must first be handled through a series of "on-property" grievance steps "up to and including the chief operating

officer of the carrier." 45 U.S.C. § 153 First (i); *see also Ryan v. Union Pac. R.R. Co.*, 286 F.3d 456, 459 (7th Cir. 2002) (explaining on-property process). Challenges to employee discipline are considered "minor disputes" under the RLA. *See Allied Pilots Assn. v. Am. Airlines, Inc.*, 898 F.2d 462, 464 (5th Cir. 1990). The statute requires that minor disputes not resolved on-property may only be reviewed in final, binding arbitration. *Int'l Bhd. of Teamsters v. Sw. Airlines Co.*, 875 F.2d 1129, 1133 (5th Cir. 1989) (en banc). Of course, an employee may at any time elect to accept the carrier's decision and end the appeal process without pursuing his claim through arbitration.

Arbitration under the RLA is statutory: the parties may proceed before the National Railroad Adjustment Board ("NRAB"), which is a permanent board created by the RLA and funded by the federal government. *See* 45 U.S.C. § 153 First. Or, they may agree to proceed before a special board of adjustment called a "public law board" ("PLB") which is created in accordance with RLA § 3 Second, 45 U.S.C. § 153 Second. Public law boards have the same jurisdiction as the NRAB, and their procedures are specified by statute. *See* 45 U.S.C. § 153, First (l); 153, Second. An award rendered by an RLA § 3 arbitration board is "final and binding." 45 U.S.C. § 153 First (m). The railroad industry is distinct in that the "compulsory character" of this arbitration scheme "stems not from any contractual

undertaking between the parties but from the [Railway Labor] Act itself." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 323 (1972).

The mandatory arbitration of disputes over the interpretation or application of railroad labor agreements is central to the RLA and is necessary to Congress's purpose of promoting "stability in labor-management relations" and avoiding interruptions to commerce. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam). Accordingly, the RLA § 3 arbitration scheme, when applicable, 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." *See Andrews*, 406 U.S. at 322-26.

2. The Federal Railroad Safety Act

The FRSA regulates various aspects of railroad safety. *See* 49 U.S.C. § 20109. In 1980, Congress amended the FRSA to provide that railroads may not retaliate against railroad workers who file complaints about or refuse to work in hazardous conditions. *See* Pub. L. No. 96-423, 94 Stat. 1811, 1815 (1980). The 1980 amendments further provided that railroad employees could seek relief for alleged violations by bringing a claim through RLA § 3's arbitration procedures. *Id.*

In 2007, Congress amended the FRSA again ("2007 amendments"). *See* 49 U.S.C. § 20109. The 2007 amendments expanded the range of protected conduct

under the Act. *Id.* The FRSA currently provides, in relevant part, that a railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" for (among other bases) "notify[ing] . . . the railroad carrier . . . of a work-related personal injury." 49 U.S.C. § 20109(a)(4). This provision protects an employee only when he makes his report in "good faith." *See* 49 U.S.C. § 20109(a)&(a)(4). "[F]raudulent or dishonest notification" is not protected conduct under the FRSA. *See* ALJ's Decision and Order, *Griebel v. Union Pac. R.R. Co.*, Docket No. 2011 FRS 11, 23 (ALJ Jan. 31, 2013).

The 2007 amendments also transferred responsibility for resolving employee complaints to a procedure overseen by the Department of Labor ("DOL"). A railroad employee may file a complaint alleging a violation of the FRSA with the Secretary of Labor. § 20109(d). The Secretary has delegated his authority to investigate complaints to the Occupational Safety and Health Administration ("OSHA"). *See* 29 C.F.R. § 1982.100. Following an investigation, OSHA either may dismiss the complaint or make findings on behalf of the Secretary, and issue a preliminary order granting relief. 29 C.F.R. § 1982.105. The carrier or the employee may then object to the preliminary order and seek a *de novo* hearing before an administrative law judge ("ALJ"). 49 U.S.C. § 20109(d); 29 C.F.R. § 1982.105 (2012). ALJ decisions are subject to review by DOL's Administrative Review Board ("ARB"). 29 C.F.R. § 1982.110. A decision by the ARB

constitutes final agency action by the Secretary, and is subject to direct appeal to the United States Circuit Courts of Appeal. 49 U.S.C. § 20109(d)(4).

In addition, the FRSA provides that if more than 210 days have passed without a final decision by the Secretary, the employee may unilaterally withdraw his complaint from the DOL administrative process and file an action in federal district court (unless the delay is due to the employee's bad faith). § 20109(d)(3).

The FRSA also includes an express "Election of Remedies" provision that limits an employee's right to obtain relief under the FRSA. The provision was originally adopted in 1980, along with the provision that made it unlawful for a railroad to retaliate against an employee for engaging in protected conduct. *See* Pub. L. No. 96-423, 94 Stat. at 1815. The provision was revised in 1994,[1] and again in 2007, but only trivial changes were made. The current Election of Remedies provision states:

> **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. § 20109(f).

[1] The 1994 version read "An employee of a railroad carrier may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the carrier." Pub. L. No. 103-272, 108 Stat. 745, 867-68 (1994).

B. Facts and Procedural History

1. Background on BNSF and Employee Grimes

BNSF is a "carrier" within the meaning of the RLA, 45 U.S.C. § 151 First. BNSF engineers, who are tasked with operating freight locomotives "safely and efficiently," are represented by the Brotherhood of Locomotive Engineers and Trainmen ("BLET"). (USCA5 234; USCA5 229.) BLET is a "representative" of these BNSF employees within the meaning of the RLA, 45 U.S.C. § 151 Sixth. BNSF and BLET are parties to various collective bargaining agreements ("CBAs") that set forth the wages, rules, and working conditions of BLET-represented BNSF employees. (USCA5 1100-06.)

At the time of the incident at issue, Grimes had been employed by BNSF for seven years. (USCA5 437 at Tr. 27-28.) He was working as a locomotive engineer and was a member of BLET. (USCA5 438 at Tr. 33.) In March of 2008, two years before the incident at issue here, Grimes reported a workplace injury. He was not charged with any rule violations or otherwise disciplined in connection with this previous injury report. (USCA5 442 at Tr. 46-47.)

2. The Incident that Caused Grimes's Injury

On the evening of April 18, 2010, Grimes was working with two other union represented employees, including switch foreman Seawood Johnson and switch helper Stephen Burpo. They were to "couple," or join together, three locomotives

for an outbound train. (USCA5 438-39 at Tr. 33-37.) Grimes was the only member of the crew who was a certified locomotive engineer and, as such, the only member permitted to operate a locomotive under BNSF rules and federal regulations. (USCA5 439 at Tr. 35; USCA5 459 at Tr. 114; 49 C.F.R. § 240.1.) The "[c]rew members," Johnson and Burpo, were required to "obey the engineer's instructions that concern operating the engine." (USCA5 234.) In particular, BNSF's "Core Safety Rules" required that Grimes direct a "job safety briefing before beginning work" to discuss the "general work plan" for the task. (USCA5 228.) Grimes did not formally conduct this required safety briefing with both Johnson and Burpo. Instead, he spoke with Burpo alone who relayed information about the crew's task separately to Johnson. (USCA5 458 at Tr. 110-12.) Burpo also shared additional information with Johnson over the radio, which Grimes overheard. (USCA5 458 at Tr. 111.)

After the conversation with Burpo, Johnson began to move a consist (an engine and train cars) to a new location so that Grimes could connect it to another locomotive. (USCA5 440 at Tr. 39-40.) At the same time, Grimes boarded a different consist to prepare to connect it to Johnson's consist. (USCA5 439 at Tr. 36-37.) The two consists were being operated along the same track so that they could be "coupled" or connected together. Grimes knew that Johnson was operating the engine, (USCA5 440 at Tr. 36), but he had not confirmed that

Johnson was certified to operate it, (USCA5 998). Burpo gave Johnson instructions to ensure that Johnson's consist would "come to a stop some distance before the coupling." (USCA5 796 at Tr. 82.) However, as Grimes was walking along a catwalk to the head of a locomotive in his consist, Johnson's locomotive did not stop. Instead, it continued at a rate of six miles per hour, and collided with Grimes's consist in a "rough coupling." (USCA5 440-41 at Tr. 41-42; USCA5 110; USCA5 797 at Tr. 83.) The "rough coupling" caused Grimes to fall, and he sustained several injuries including lacerations on his face and shin. (USCA5 110; USCA5 816 at Tr. 109.)

As part of BNSF's common practice, the crew's radio communications at the time of the incident were recorded, and a camera in Grimes's locomotive also captured the incident. (USCA5 887; USCA5 895.)

Johnson and Burpo responded to assist Grimes. (USCA5 441 at Tr. 44.) Burpo offered to call an ambulance, but Grimes declined. (USCA5 817 at Tr. 110.) Grimes then himself called his supervisor, trainmaster Brian Hauber, and yardmaster Kenny Davis to advise them of the incident. (USCA5 441 at Tr. 44-45; USCA5 498-99 at Tr. 9-11; USCA5 963.) During the call, Hauber asked Grimes if he needed any emergency care, and Grimes responded that he could wait. (USCA5 499 at Tr. 10.) Hauber arrived approximately 30 or 45 minutes later; again he asked Grimes whether he needed emergency care, and again Grimes responded

that he could wait. (USCA5 820 at Tr. 127.) Hauber then asked how Grimes was injured, and Grimes told him that he "misstepped and fell off the locomotive." (USCA5 505 at Tr. 35.) Hauber surveyed the scene of the incident as Grimes sat in Hauber's truck, and then drove Grimes to the hospital where Grimes's wife worked to obtain treatment. (USCA5 505-08 at Tr. 36-49.) Grimes did not appear impaired to Hauber because he carried on a "normal conversation" during the ride. (USCA5 509 at Tr. 51; *see also* USCA5 448 at Tr. 70.)

While Grimes waited in the hospital waiting room for an examination room to become available and before he received medication or treatment, Hauber asked Grimes if he was able to fill out an injury report. (USCA5 510 at Tr. 55-56.) Grimes agreed. (USCA5 510 at Tr. 56.) At this time, Grimes had been filling out other hospital admission paperwork and, as before, appeared lucid. (USCA5 511 at Tr. 58.) In the injury report, Grimes repeated his initial description of how he was injured. Specifically, he wrote that he hurt himself when he "misstepped going from Loco to Loco." (USCA5 253.) He also checked "no" to the question of whether the injury was caused by another person. (USCA5 253.) Grimes appeared to be his "normal jovial self" at the hospital, and did not appear to have trouble filling out the report. (USCA5 935.)

That same evening, both Johnson and Burpo also filled out written statements about the incident. (USCA5 1042 (Johnson's statement); USCA5 1041

(Burpo's statement).) Neither Johnson nor Burpo revealed that Johnson was driving a locomotive or that Grimes's injury occurred when Johnson's locomotive collided with Grimes's locomotive. (USCA5 881-82.) Instead, both Johnson and Burpo stated that the crew was merely "hostling engines" (moving locomotives to be "coupled together" or to a locomotive serving area) when they noticed Grimes on the ground. (USCA5 881-82.)

The following morning, Hauber returned to the rail yard to attempt to reconstruct how the incident had taken place. (USCA5 883.) Hauber called Grimes on the phone to see if he had additional information because Grimes's version of events did not appear plausible based on the physical evidence. (USCA5 883.) Grimes reiterated the same description of the incident as he had relayed the night before: that he "might've been crossing" between two locomotives when he fell. (USCA5 883.) Hauber concluded the call by informing Grimes that BNSF was securing the radio and video recordings from the incident. (USCA5 883.)

Hauber, still skeptical about Grimes's story, called Grimes again that evening and asked him if he would come to the rail yard to reenact how he had fallen. (USCA5 884.) At this time, Grimes confessed that his previous description of the incident was not the full story. He explained that Johnson and Burpo were "hostling" consists when one of the locomotives ran into the locomotive he was on,

causing him to fall. (USCA5 884.) Grimes also told Hauber that he did not disclose this information the day before because he "was trying to help Steve and Seawood out." (USCA5 934.)

Hauber then called Burpo, who confirmed Grimes's new explanation of the events, and said that Grimes was injured when Johnson failed to stop the consist he was operating before it collided with Grimes's locomotive. (USCA5 885; USCA5 831 at Tr. 141.)

Hauber relayed his conversations with Grimes to the superintendent of operations Ed Ferris, his immediate supervisor, in phone conversations on the day of the incident and on the following day. (USCA5 520 at Tr. 94-96; USCA5 616 at Tr. 18-21, USCA5 614 at Tr. 9 (job title).) Ferris, in turn, shared this information with his supervisor, Bob McConnaughey. (USCA5 619 at Tr. 29; USCA5 622 at Tr. 43.) However, neither Ferris nor McConnaughey were directly involved in the initial inquiries into the cause of Grimes's injuries. They did not personally interview witnesses or accompany Hauber to view the scene of the incident. (USCA5 625 at Tr. 53 (Ferris); USCA5 734 at Tr. 44 (McConnaughey).) After conversations with Hauber, Ferris determined Grimes may have violated a number of BNSF rules related to negligence and dishonesty, and recommended to McConnaughey that Grimes be charged with violations of these rules. (USCA5 627 at Tr. 63-64.) McConnaughey approved the recommendation. (USCA5 627 at

63-64; USCA5 1020-21.) This led to initiation of the on-property investigation process mandated by the parties' CBA.

3. The On-Property Investigation and BNSF Internal Review Process

Pursuant to the CBA between BNSF and BLET, Grimes was notified to attend an investigation hearing to determine his responsibility, if any, for violating BNSF's rules related to conducting job briefings and dishonesty on the date of his incident. (USCA5 254; USCA5 867.)

The CBA provides that "no Engineer will be . . . discharged . . . without a fair and impartial investigation." (USCA5 1100.) The CBA also provides that "the Engineer involved may be represented by an Engineer of his choice" at the investigation hearing, and that the Carrier will arrange for the presence of witnesses with "material knowledge of the incident." (USCA5 1101.) The Engineer too can request that "additional witnesses" participate in the investigation. (USCA5 1101.)

Grimes chose to be represented in the investigation proceedings by BLET representative George Haskins. (USCA5 454 at Tr. 96.) The investigation hearing was held on September 2, 2010 before conducting officer Ferris. Hauber and Grimes both testified about the incident, along with claims agent Johnny Graham and yardmaster Davis. (USCA5 867.) Haskins cross-examined Hauber at length, and also cross-examined Graham and Davis. (USCA5 904-30 (cross-examination

of Hauber); USCA5 982-90 (Graham); USCA5 965-72 (Davis).) Grimes did not request that any additional witnesses, including either Johnson or Burpo, testify at the hearing. (USCA5 1017.) After the hearing concluded, BNSF determined "through testimony and exhibits brought forth during the investigation" that Grimes had violated BNSF rules, and dismissed him. (USCA5 1075.)

The other members of Grimes's crew, Johnson and Burpo, were also charged with similar rule violations, attended investigation hearings, and were dismissed. (USCA5 462 at Tr. 127; USCA5 258 (Johnson's dismissal); USCA5 256 (Burpo's dismissal).)

BNSF's internal processes require that, before an employee can be dismissed, the case must be reviewed by a member of BNSF's Labor Relations staff, the director of employee performance. (USCA5 1069.) The director reviews the transcript and evidence presented at the investigation hearing to determine if there was sufficient evidence of rule violations and, if so, the appropriate level of discipline warranted, if any. (USCA5 1143.) A senior management team—the Policy for Employee Performance and Accountability ("PEPA") Board—also later reviews a statement prepared by the director of employee performance as to the dismissal to ensure that it is consistent with BNSF policy. (USCA5 1069.) Here, the PEPA Board upheld Grimes's dismissal. (USCA5 1080.)

Grimes appealed the dismissal on-property as the CBA permits. Haskins provided written submissions challenging the discipline decision and attended a meeting where BNSF formally reviewed the decision. (USCA5 1088-96.) Company officer McConnaughey considered and declined Haskins's contentions, reasoning that the discipline was "fair and appropriate." (USCA5 1109).

4. Public Law Board Arbitration

Under the RLA, after exhaustion of the on-property appeals process, a party may then elect to challenge the BNSF discipline decision before a statutory arbitration board. The parties had the choice of arbitration before the NRAB, established under RLA § 3 First, or the PLB established by BNSF and BLET, RLA § 3 Second.

The parties elected to arbitrate Grimes's discipline decision before PLB 7092, which was composed of a BLET member, a BNSF member, and neutral member who served as the chairperson. (RE 6, USCA5 229, 231.) The neutral member was appointed and funded by the federal Mediation Board. 45 U.S.C. § 153 Second. RLA arbitration of the discipline decision was not required. Instead, Grimes could have sought relief including reinstatement and other damages in an action under federal law, such as the FRSA. *See, e.g.*, 49 U.S.C. § 20109(e).

The PLB considered the "entire record and all of the evidence" and issued a decision on April 23, 2012. (RE 6, USCA5 229, 231.) The PLB concluded that there was "substantial evidence" to support the discipline. It reasoned:

> We now know that the injury suffered by [Grimes] did not occur in the manner he first described to Trainmaster Hauber. His misrepresentation of those facts was not the result of his confusion on the day of the accident . . . It is evidence that Claimant was attempting to cover up the fact that he had let an unqualified employee operate a locomotive.

(RE 6, USCA5 230.) Nevertheless, the PLB exercised leniency. It ruled that the "discipline imposed upon Claimant was excessive in light of his prior record," and ordered him reinstated, "with seniority rights unimpaired, but without compensation for time lost." (RE 6, USCA5 231.) On June 25, 2012, BNSF restored Grimes to service in accordance with the PLB's award. (USCA5 445 at Tr. 60.)

5. The FRSA Complaint and District Court Proceedings

Shortly after BNSF disciplined Grimes in November of 2010, Grimes filed a FRSA complaint with OSHA, claiming that BNSF violated the FRSA by dismissing him in retaliation for reporting an injury. (USCA5 109.) Then, two months after the PLB issued its decision reinstating him, Grimes withdrew his FRSA complaint from administrative review, and filed suit in federal court pursuant to 49 U.S.C. § 20109(d)(3).[2]

[2] The FRSA also provides a "railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during

The parties conducted extensive discovery. *See, e.g.*, D.E. 36, 37, 38, 39, 50. Thereafter, BNSF filed a motion for summary judgment arguing that it was entitled to judgment on Grimes's FRSA claim. (USCA5 296.) Among other arguments, BNSF asserted (1) that Grimes had not met his burden to prove that he engaged in any "protected activity" under the FRSA because he did not report his injury in "good faith" as a matter of undisputed fact; (2) Grimes was barred from relitigating the factual finding that he had not reported his injury honestly by collateral estoppel and thus could not show he engaged in any "protected activity"; and, (3) the FRSA's Election of Remedies provision barred Grimes's suit. (USCA5 296; USCA5 304.)

The district court granted BNSF's motion. In a thorough and carefully reasoned decision, the court held the PLB's finding that Grimes was dishonest when he reported his injury should be accorded collateral estoppel effect. (RE 4, USCA5 1395.) The district court evaluated the procedures available in the investigation hearing, and found that "the arbitral proceedings, including the investigation and review, were procedurally adequate." (RE 4, USCA5 1393.) Specifically, the district court noted that Haskins, Grimes's union representative, cross-examined each of BNSF's witnesses, and declined to add any further

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the course of employment." 49 U.S.C. § 20109(c)(1). Despite allegations that Hauber delayed in taking Grimes to the hospital, *see, e.g.*, Appellant Br. at 15, Grimes did not allege in his Complaint that BNSF violated the FRSA by failing to provide him prompt medical treatment, (USCA5 108-16).

testimony or other evidence for the conducting officer's consideration. (RE 4, USCA5 1391.) The district court also found the PLB's determination that Grimes was dishonest when he reported his injury met all the traditional requirements for collateral estoppel under *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991). (RE 4, USCA5 1393.) Specifically, the issue of whether Grimes dishonestly reported his injury "is identical to the issue now before the court," and this issue was "painstakingly" explored at the hearing. (RE 4, USCA 1393.) In addition, the issue was fully litigated as "Grimes' representative did an exceptionally thorough job, cross-examining each witness with detailed exacting questions related to the issue." (RE 4, USCA5 1393.) The previous determination was "necessary" for the judgment as it was "virtually the only issue that was to be determined." (RE 4, USCA5 1394.) And, lastly, Ferris and McConnaughey "were involved to some extent" in examining the cause of the incident before the investigation took place, "but neither were so involved as to render the investigation and hearing unfair." (RE 4, USCA5 1394-95.) Accordingly, the district court found that Grimes was "estopped from arguing that he reported his injury in good faith," and could not carry his burden under 49 U.S.C. § 20109. (RE 4, USCA5 1394-95.)

SUMMARY OF ARGUMENT

Issue preclusion prevents a plaintiff from relitigating a fact that was fully and fairly decided in an earlier arbitral proceeding. The district court, in its discretion, concluded that the arbitration board's factual finding that Grimes was dishonest—and not merely confused—when he reported his injury to BNSF precluded Grimes from asserting again that he reported his injury in good faith. This decision is supported by the arbitral record and fully consistent with federal case law barring relitigation of arbitral factual findings.

Grimes's claim also fails for the additional reason that he cannot show there is a genuine issue of material fact as to whether he engaged in "protected activity" under the FRSA. The arbitration board's determination that he was dishonest when he filed his injury report is entitled to deference, and Grimes does not dispute that he admitted to "covering up" the cause of his injury. The fact that he does not remember his admission cannot create a genuine issue of material fact for trial.

Lastly, even absent the arbitral award, Grimes may not now bring a FRSA claim because that Act's express Election of Remedies provision prohibits an employee from seeking relief under the FRSA when he elected to first seek relief under another provision of law. Here, Grimes first challenged BNSF's decision to dismiss him in RLA arbitration and, thus, he cannot again challenge the same dismissal under the FRSA.

STANDARD OF REVIEW

"The application of collateral estoppel from arbitral findings is a matter within the broad discretion of the district court," and, accordingly, is reviewed for abuse of discretion. *Univ. Am.*, 946 F.2d at 1137.

Grimes erroneously contends the "abuse of discretion standard is applied only when the district court has 'refused to offensively apply collateral estoppel,'" and that de novo review is applied when reviewing the application of collateral estoppel on summary judgment. (Appellant Br. at 39-40.) It is true that the Fifth Circuit has not uniformly applied a single standard of review to collateral estoppel decisions. *See Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 284 (5th Cir. 2006). But, the Fifth Circuit has regularly evaluated the application of defensive collateral estoppel on summary judgment under the abuse of discretion standard. *See, e.g.*, *Cigna Ins. Co. v. Simmons*, 35 F.3d 561, *4 (5th Cir. 1994); *J.M. Muniz, Inc. v. Mercantile Tex. Credit Corp.*, 833 F.2d 541, 543 (5th Cir. 1987). Other circuits likewise have reviewed the precise issue here—whether defensive collateral estoppel was appropriate based on arbitral findings—for abuse of discretion. *See Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985) (reviewing application of estoppel on summary judgment). In any event, as discussed below in section I, the district court's conclusion that

defensive collateral estoppel was appropriate should be affirmed regardless of whether the standard of review is abuse of discretion or de novo.

In addition, the court is free to affirm a grant of summary judgment "on any grounds supported by the record." *Lifecare Hosp., Inc. v. Health Plus of La., Inc.*, 418 F.3d 436, 439 (5th Cir. 2005). Summary judgment is properly granted when "viewing the evidence in the light most favorable to the nonmoving party, the record indicates that there is 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id*. (citing Fed. R. Civ. P. 56).

ARGUMENT

I. GRIMES IS PRECLUDED FROM RELITIGATING THE PUBLIC LAW BOARD'S FACTUAL FINDING THAT HE DISHONESTLY REPORTED HIS INJURY.

The district court correctly concluded Grimes was precluded from relitigating the PLB's finding that he was dishonest with trainmaster Hauber, and not merely confused, when he initially reported his injury. (RE 4, USCA5 1393.) Accordingly, Grimes may not argue that he reported his injury in good faith and thus cannot show that he engaged in any "protected activity." Absent "protected activity," Grimes's FRSA claim for retaliatory discharge fails.

A. Issue Preclusion is Appropriate

1. Arbitral Findings Can Have Preclusive Effect in a Subsequent Action

As an initial matter, it is well-established that collateral estoppel (also called issue preclusion) precludes a party from relitigating an arbitral finding in a subsequent action if the arbitration "afforded litigants the 'basic elements of adjudicatory procedure.'" *Univ. Am.*, 946 F.2d at 1137 (citing *Greenblatt*, 763 F.2d at 1360); *see also Benjamin v. Traffic Exec. Ass'n Eastern R.Rs.*, 869 F.2d 107, 113 (2d Cir. 1989). Indeed, the Fifth Circuit has long held that a plaintiff may not relitigate in federal court an issue conclusively decided in arbitration. *See Gardner v. Shearson, Hammill & Co.*, 433 F.2d 367, 368 (5th Cir. 1970) (per curiam).

Issue preclusion based on arbitration board's findings serves several purposes, including "minimizing the possibility of inconsistent decisions," "conserving resources and fostering finality." *Benjamin*, 869 F.2d at 110-11 (citation omitted); *see also* Restatement (Second) of Judgments § 84(3) and comment c (1982) ("there is good reason to treat the determination of the issues in an arbitration proceeding as conclusive in a subsequent proceeding" including "[e]conomies of time and effort"). Accordingly, preclusion is particularly appropriate where there is a strong federal policy in the finality of the underlying arbitration. This is especially true here. The Supreme Court has held that "[a]

party who has litigated an issue [in RLA arbitration] on the merits may not relitigate that issue in an independent judicial proceeding." *Andrews*, 406 U.S. at 324; *see also* 45 U.S.C. § 153, First (q) (providing the "findings and order [of the arbitration board] shall be conclusive on the parties"); *Summerville v. Trans World Airlines, Inc.*, 219 F.3d 855, 858 (8th Cir. 2000) (applying collateral estoppel to arbitral finding in suit under Americans with Disabilities Act). The finality of RLA arbitration advances the important purpose of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein." *Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 242 (1950) (citing 45 U.S.C. § 151a); *see also Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637, 640 (5th Cir. 1985) (noting "congressionally declared policies of deference to, and finality of, arbitration proceedings in labor disputes subject to collective bargaining agreements").

2. The Traditional Elements of Issue Preclusion Are Met Here

Issue preclusion requires (a) "that the issue under consideration be identical to the issue previously litigated;" (b) "that the issue was fully and vigorously litigated in the primary proceeding;" (c) "that the previous determination of the issue was necessary for the judgment in that proceeding;" and (d) "that no special circumstances exist that would render preclusion inappropriate or unfair." *Univ. Am.*, 946 F.2d at 1136; *Summerville*, 219 F.3d at 858 (holding that same

"traditional elements of issue preclusion" are considered when applying defensive estoppel to arbitration award). As the district court held, these elements are plainly met here.

The parties agree that elements (a) and (c) are met here. As to element (a), Grimes does not contest that the factual issue under consideration in his FRSA suit—whether he honestly reported his injury—is the same as the issue adjudicated by the arbitration board. *See Univ. Am.*, 946 F.2d at 1136. And, the issues are plainly the same. To establish a violation of the FRSA, Grimes must prove that he filed his injury report in "good faith." 49 U.S.C. § 20109(a)&(a)(4); *Griebel*, 2011 FRS at 22-23 ("[T]he FRSA does not protect fraudulent or dishonest notification."). The PLB expressly found that Grimes was dishonest when he reported his injury. It concluded that BNSF's charge that Grimes was "dishonest[ ] regarding the incident resulting in his personal injury" was proven because "the injury suffered by [Grimes] did not occur in the manner he first described to Trainmaster Hauber," and the "misrepresentation of those facts was not the result of his confusion on the day of the accident." (RE 6, USCA5 230.)

And, as to element (c), Grimes also does not contest that the "previous determination of the issue was necessary for the judgment in that proceeding." *Univ. Am.*, 946 F.2d at 1136. It is clear that the PLB's finding that Grimes was dishonest when he reported his injury was necessary to the judgment that there was

substantial evidence proving BNSF's charge of dishonesty against Grimes. *See id*.[3]

Grimes argues that elements (b) and (d) are not satisfied here, but this argument lacks merit. As to element (b), Grimes contends the issue was not "fully and vigorously litigated" in the arbitration because he could not obtain "pre-hearing discovery" to impeach witnesses in cross-examination. (Appellant Br. at 52.) The record demonstrates that the issue of whether Grimes honestly reported his injury was "fully and vigorously" litigated during the arbitral proceedings. *See Univ. Am.*, 946 F.2d at 1136. Hauber and Grimes both testified at length in the investigation hearing about the events immediately following the incident, including the severity of Grimes's injury. (*See* USCA5 907-12; USCA5 1003.) Conducting officer Ferris also reviewed physical evidence from the incident, including the recording of Grimes's radio communications at the time of the incident, a video of the incident filmed from a camera attached to the locomotive Grimes was on at the time, and Grimes's injury report. (USCA5 895; USCA5 887; USCA5 993-94.) In addition, Grimes's union representative Haskins had the opportunity to cross-examine BNSF's witnesses and did so. For example, Haskins

[3] Grimes claims that, although he did not raise the issue below, there may be a distinction under the FRSA as to whether an employee was dishonest about the existence of the injury or whether he was merely dishonest about its cause. (Appellant Br. at 41.) Good faith notification plainly requires honesty as to both of these elements. *See* 49 U.S.C. § 20109. The cause of an injury is a critical fact that must be accurately reported both so that unsafe conditions can be corrected and because rail carriers may be liable for workplace injuries under the Federal Employers Liability Act ("FELA"), in which causation is generally the critical question. *See, e.g.*, *Rivera v. Union Pac. R.R.*, 378 F.3d 502, 509 (5th Cir. 2004) (addressing causation under FELA).

extensively questioned Hauber on why he believed Grimes had violated BNSF regulations, (USCA5 942), as well as whether Grimes was competent to file an injury report the night of the incident, (USCA5 907-12). There is no record evidence that Grimes "sought a particular procedure and [was] denied it." *Benjamin*, 869 F.2d at 113 (concluding that procedures were adequate to protect plaintiffs' rights and applying collateral estoppel based on arbitral finding). And, Grimes had the opportunity to raise this issue of the fairness of the investigation hearing before the PLB. *See* 29 C.F.R. § 301.2.

Grimes's contention that pre-hearing discovery would have made his cross-examination of BNSF's witnesses at the investigation hearing more effective lacks merit. In the district court proceedings, Grimes deposed numerous BNSF employees, propounded interrogatories, document requests, and requests for admission. (*See* RE 1, USCA5 3-11 (D.E 36, 37, 38, 39, 50).) Yet, even with the benefit of this extensive discovery, Grimes identifies *no new evidence* that tends to discredit the BNSF witnesses' testimony at the hearing.[4] Moreover, Grimes *could have* challenged Hauber's testimony about Grimes's state of mind immediately following the incident by calling witnesses on his own behalf. The CBA expressly provides that an employee may request "additional witnesses" to attend the

[4] In Grimes's Statement of Facts, Grimes describes a few allegedly helpful admissions Hauber made in his deposition including, for example, that he had not seen a formal BNSF document "explaining what counts as gross dishonesty." (Appellant Br. at 28.) These admissions are not new "impeachment" evidence. Grimes could have asked the same questions of Hauber during his cross-examination at the investigation hearing.

investigation hearing. (USCA5 1101.) Johnson and Burpo were with Grimes at the time of the incident and had firsthand knowledge as to whether Grimes was disoriented or confused when Hauber questioned him. But, Grimes identifies no record evidence that Grimes asked either man to testify. Thus, Grimes's unsupported assertion that pre-hearing discovery could have been helpful in discrediting BNSF's witnesses does not demonstrate that the arbitral procedures were inadequate. *See Benjamin*, 869 F.2d at 113.

And, as to element (d), Grimes argues that company officer McConnaughey and conducting officer Ferris could not have impartially reviewed the evidence against him to determine whether discipline was warranted because they both were involved in the initial investigation and had lost bonus compensation as a result of Grimes's injury. (Appellant Br. at 51.)[5] Grimes is wrong. There are no "special circumstances" that would make it unfair to apply preclusion based on the factual finding that Grimes was dishonest when he reported his injury. *Univ. Am.*, 946 F.2d at 1136. Ferris's and McConnaughey's involvement in both the initial inquiries into the cause of the incident and the decision to discharge Grimes do not show that the arbitral proceedings were "biased" against Grimes for two reasons:

[5] Grimes also generally asserts that when BNSF first learned of Grimes's injuries, it was more concerned with documenting the injury than with ensuring that Grimes received medical attention. (*See, e.g.*, Appellant Br. at 50.) These facts are irrelevant to the issue preclusion analysis. Whether BNSF's preliminary review of the incident was "fair" is a separate question from whether the arbitration proceeding itself was fair and allowed Grimes the opportunity to "fully and vigorously" litigate whether he honestly reported his injury.

First, Grimes identifies no record evidence—apart from his own unsupported statements—that Ferris and McConnaughey lost incentive pay because of Grimes's injury, and were thus motivated to punish Grimes.

Second, there is no evidence that Ferris and McConnaughey's involvement in the initial investigation of the incident tainted the arbitral proceedings. The conduct of the investigation hearing is governed by the CBA. *See Edwards v. St. Louis-San Francisco R.R.*, 361 F.2d 946, 953-54 (7th Cir. 1966). And, the investigation hearing complied with the CBA: the parties' negotiated CBA does not require that the conducting officer and the company officer have no outside knowledge of the grievance at issue. (*See* USCA5 1100-01.) Courts "assume that rational actors fearing future disagreement would not contract for a biased forum to settle their differences." *Univ. Am.*, 946 F.2d at 1137. Thus, presumably, if BLET believed that such involvement seriously undermined the fairness of the investigation hearing and the ability of its members to vindicate their rights under the CBA, it would have negotiated a provision that prohibited involvement.

Moreover, McConnaughey's finding that Grimes was dishonest when he reported his injury was upheld in RLA arbitration. The PLB, "upon consideration of the entire record and all of the evidence," similarly concluded in a reasoned decision that Grimes misrepresented the cause of the incident and that this misrepresentation "was not the result of his confusion on the day of the accident."

(RE 6, USCA5 229-30.) Accordingly, preclusion based on the factual finding that Grimes was dishonest when he reported his injury is not unfair. *See Benjamin*, 869 F.2d at 113 (noting that arbitral procedures adequate where decision "was presented in a reasoned, detailed opinion").

B. Grimes's Arguments Against Applying Issue Preclusion Lack Merit

1. Applying Preclusion Here Does Not Implicate Any "Federal Interests Warranting Protection"

Grimes argues that applying issue preclusion based on the arbitration board's factual finding is improper because he is seeking to vindicate a federal statutory right provided by the FRSA. This argument fails. It is true that when a plaintiff seeks to enforce a federal statutory right, the court must also consider the ""federal interests warranting protection"" in deciding whether estoppel is appropriate. *Univ. Am.*, 946 F.2d at 1136 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985)). But, the relevant "federal interests warranting protection" do not include the vindication of a statutory right. They are limited to "the congressional intent that plaintiffs obtain *judicial* resolution of federal [ ] claims." *Bustamante v. Rotan Mosle, Inc.*, 802 F.2d 815, 817 n.3 (5th Cir. 1986) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985)); *see also Greenblatt*, 763 F.2d at 1361 (similar). Thus, in short, an arbitration board's factual finding *may* preclude a plaintiff from relitigating the same fact in a subsequent federal suit (where the traditional requirements of

preclusion are met) so long as the statute at issue does not provide that the federal district court must make all factual findings. *See id*. *Cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58 (2009) (holding that federal statutory claims are arbitrable unless statutory language expressly provides that federal courts alone can resolve the claim).

Here, there are no "federal interests warranting protection" at issue that make applying issue preclusion based on the PLB's factual finding inappropriate. The plain language of the FRSA does not mandate that federal district courts make all factual findings relevant to retaliation claims under the Act. In fact, the FRSA expressly contemplates the *non-judicial* resolution of retaliatory discharge claims. As discussed *supra* Statement of Facts A.2, the FRSA assigns the Secretary of Labor authority to investigate retaliatory discharge claims and make factual findings in *administrative* proceedings. *See* 49 U.S.C. § 20109(d)(1)&(2)(A) (providing enforcement actions are "initiated by filing a complaint with the Secretary of Labor" and are governed by "rules and procedures set forth in section 42121(b)"); 49 U.S.C. § 42121(b)(2)(A) ("the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit" and make "findings"). These factual findings are subject to limited "substantial evidence" review in the United States Courts of Appeal. *See id*. at § 42121(b)(4)(A) (providing for review in the United States Courts of

Appeal); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) ("Factual findings [made pursuant to Section 42121] are subject to substantial evidence review."). And, only if the Secretary of Labor fails to timely issue a final decision on the complaint may the employee bring suit in federal court to enforce the statute. 49 U.S.C. § 20109(d)(3).[6] This scheme for administrative review of retaliatory discharge claims is further evidence that the FRSA does not require a federal district court to make all factual findings relevant to a statutory claim in the first instance. Accordingly, granting the PLB's findings preclusive effect in the FRSA suit does not implicate "federal interests warranting protection." *Univ. Am.*, 946 F.2d at 1136.

2. *Alexander v. Gardner-Denver Co.* and its Progeny Do Not Address Whether Preclusion of Factual Findings is Permissible

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and its progeny—*Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. West Branch*, 466 U.S. 284 (1984)—do not, as Grimes contends, hold that preclusion is inappropriate because he is seeking to vindicate a statutory

[6] Specifically, the FRSA provides that "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States." *Id*. Contrasted with the provisions allowing for review of a Secretary's final decision in the Courts of Appeal, *see* §§ 20109(d)(4), 42121(b)(4)(A), this provision clarifies that any preliminary finding by the Secretary under section 42121(b)(2) is not accorded deference. *See City of Arlington, Tex. v. FCC*, 668 F.3d 229, 249 (5th Cir. 2012) (holding that the meaning of statutory language is determined "by referencing the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.")

right. These cases did not address the issue here: whether an arbitrator's *factual finding* could preclude relitigation of the same factual issue in a subsequent suit. Rather, these cases addressed whether an unsuccessful arbitration could entirely preclude an employee's *federal statutory claim*. Specifically, *Gardner-Denver* held that "an individual does not forfeit his *private cause of action* if he first pursues his grievance to final arbitration" under a CBA. 415 U.S. at 49 (emphasis added). *Barrentine* concluded that a Fair Labor Standards Act "*claim* [was] not barred by the prior submission the[ ] grievances to the contractual dispute-resolution procedures." 450 U.S. at 745 (emphasis added). And, lastly, *McDonald* considered whether an employee's "First Amendment *claims* were barred by res judicata and collateral estoppel." 466 U.S. at 287 (emphasis added). The Eleventh Circuit has recognized the important distinction between preclusion of *claims* and preclusion of *factual findings*, holding that even if estoppel would be inappropriate as to the plaintiff's entire federal statutory claim because that claim was not arbitrable, estoppel could be appropriate as to the factual findings regarding the claim's "underlying acts, particularly if such findings are within the panel's authority and expertise." *Greenblatt*, 763 F.2d at 1361 (applying collateral estoppel to arbitral finding in federal RICO suit). As discussed below in section II, the finding here that Grimes was dishonest was particularly within the RLA arbitration board's expertise.

Moreover, Grimes's reliance on the Seventh Circuit's decision in *Kulavic v. Chicago & Illinois Midland Railway*, 1 F.3d 507 (7th Cir. 1993), to support his position is misplaced. *Kulavic*'s holding that estoppel was inappropriate because the arbitral procedures were not "sufficiently protective of [plaintiff's] federal statutory right to recover under the FELA" was based on the criticism of arbitral procedures in the *Gardner-Denver* line of cases. *Id*. at 515-17 (holding that preclusion based on PLB's decision inappropriate because the RLA arbitral "procedures do not provide sufficient guarantees for reliable factfinding" and "this same rationale formed part of the basis for the Supreme Court's decisions in *Gardner-Denver*, *Barrentine*, and *McDonald*."). The Supreme Court has since held, however, that the *Gardner-Denver* triology's "broad dicta that were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights . . . rested on a misconceived view of arbitration that this Court has since abandoned." *Pyett*, 556 U.S. at 265. Accordingly, *Kulavic* is no longer persuasive authority because it rests on this now discredited dicta. *See id*. at 269 (noting that "[a]n arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims.").

Thus, even assuming that FRSA retaliatory discharge *claims* cannot be barred by an unsuccessful arbitration under a CBA, estoppel is still appropriate as to a *factual finding* regarding a FRSA claim's "underlying acts" when the

traditional elements of preclusion are met. *Greenblatt*, 763 F.2d at 1361; *see also Summerville*, 219 F.3d at 858 (applying collateral estoppel to arbitral finding in suit under Americans with Disabilities Act). As discussed *supra* section I.A.2, these elements are met here. Indeed, precluding relitigation of factual findings does not jeopardize Grimes's rights under the FRSA. Grimes's federal statutory rights are appropriately "safeguard[ed]" because his FRSA claim is adjudicated by a federal court which determines the appropriate legal standards and how they should apply to the facts; the arbitral factual findings alone are binding. *McDonald*, 466 U.S. at 290.

3. Preclusion is Entirely Appropriate even though the Proceedings Applied Different Legal Standards

Grimes finally asserts that collateral estoppel is inappropriate unless the legal standard applied in both proceedings is the same. (Appellant Br. at 50 (*citing Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 233 (5th Cir. 2005)).) It is true that estoppel is inappropriate where the party asserting estoppel faces a more stringent legal standard in the second proceeding than it faced in the first proceeding. For example, estoppel does not bar the government from proving civil forfeiture of property by a preponderance of the evidence where it failed in a criminal proceeding to demonstrate beyond a reasonable doubt that the criminal defendant smuggled the property. *See One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 233-34 (1972) (per curiam). But, this rule *does not apply*

where the party asserting estoppel bears a lighter burden of proof in the second proceeding than it did in the first. *See Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 125 F.3d 18, 21 (1st Cir. 1997) (holding defensive collateral estoppel appropriate where party asserting estoppel bore burden of proof in first proceeding and did not bear burden of proof in second proceeding); *Guenther v. Holmgreen*, 738 F.2d 879, 888 (7th Cir. 1984) (same).

BNSF bore the burden of proof in the RLA arbitration to demonstrate by substantial evidence that Grimes was dishonest when he reported his injury. (USCA5 230). In this suit, however, BNSF does not bear the burden of proof as to whether Grimes reported his injury in good faith. Grimes alone bears the burden of showing this "protected activity." *See Allen*, 514 F.3d at 475. Thus, collateral estoppel is entirely appropriate here. *See Bath*, 125 F.3d at 21.

II. IN THE ALTERNATIVE, GRIMES'S FRSA CLAIM FAILS BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER GRIMES ENGAGED IN "PROTECTED CONDUCT."

Even if issue preclusion does not apply, Grimes's FRSA claim fails for the additional reason that he cannot demonstrate any genuine issue of material fact as to whether he engaged in "protected conduct."

This Court, in *Gonzalez*, 773 F.2d 637, held that an RLA arbitration board's factual finding that an employee filed a false injury report is entitled to controlling deference and alone may defeat an employee's retaliatory discharge claim. *Id*. at

644-45 (citing *Gardner-Denver*, 415 U.S. at 60 (noting that arbitral decision may be "accorded such weight as the court deems appropriate.")); *cf. Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 119 (5th Cir. 1997) (holding district court abused discretion in excluding arbitral decision under CBA); *Owens v. Texaco*, 857 F.2d 262, 266 (5th Cir. 1988) (concluding district court's factual findings were clearly erroneous because they failed to accord proper deference to arbitral decision under CBA). The PLB's similar conclusion that Grimes was dishonest when he filed his injury report is also entitled to great deference. *See Gonzalez*, 773 F.2d at 645. And, considered with Grimes's admission to Hauber that he misrepresented the cause of his injury to protect his crew members, Grimes cannot show a genuine issue of material fact as to whether he engaged in "protected conduct" under the FRSA. *See* 49 U.S.C. § 20109(a)&(a)(4) (providing that only injury reports made in "good faith" constitute "protected conduct").

Gonzalez considered whether an employee could maintain a retaliatory discharge claim in light of the RLA arbitration board's finding that he had filed an intentionally misleading injury report with his employer. *Gonzalez*, 773 F.2d at 645. It held that deference to an RLA arbitration board's finding was uniquely warranted because of "Congress's command that arbitration awards in employment disputes be final and binding." *Id*. at 639. In addition, the Court reasoned that the "facts warrant such deference, *id*. at 644, because evaluation of whether the injury

report was false was a "straightforward matter of fact untinged by legal interpretation that might exceed the arbitrator's competence" and the issue was "the central question before the arbitrator and so received his 'full consideration,'" *id*. at 645. Moreover, "[r]esolution of the question depends particularly on a knowledge of work place custom" as to injury reporting practices. *Id*. These practices fell within the "law of the shop" that is the arbitrator's "special expertise." *Id*. And, lastly, the record did not show the hearing was "procedurally unfair." *Id*. Based on these factors, *Gonzalez* concluded that the "employee's conduct, as determined by the arbitrator, falls outside the Act," and thus the employee's claim failed. *Id*.

The identical issue is presented here.[7] Grimes similarly brings a retaliatory discharge claim, and the RLA arbitration board has similarly found that Grimes was dishonest when he filed his injury report. As in *Gonzalez*, whether Grimes was dishonest is a "straightforward" matter that was the "central question" before the panel. *See id*. at 645. Grimes's motivation to misrepresent the cause of his injury "depends particularly on a knowledge of work place custom" including what information should have been conveyed in the pre-task job briefing and the significance of permitting an uncertified employee to operate a locomotive, which illustrates Grimes's motive to lie about the cause of his injury. *Id*. And, lastly, as

[7] Notably, Grimes does not cite or otherwise distinguish *Gonzalez*.

discussed *supra* section I.A.2, the record does not show that the hearing was procedurally unfair. *Id*. Thus, *Gonzalez* is controlling, and this Court too should accord great weight to the RLA arbitration board's finding. *See id*. [8]

Further showing that the arbitration board's finding warrants great—if not controlling—deference, Grimes does not dispute the veracity of much of Hauber's testimony at the investigation hearing. Specifically, at the investigation hearing, Grimes did not deny that he told Hauber the day following the incident that he initially misrepresented the cause of his injury to protect his crew members. (USCA5 1011.) Rather, contrary to Grimes's claim on appeal that he denied making this statement or otherwise "concoct[ing] a story," (Appellant Br. at 22 (citing USCA5 1010-11)), Grimes merely stated that *he could not remember* whether he made this statement, (USCA5 1010-11). Nor did Grimes deny making this confession to Hauber at his deposition when asked to review Hauber's testimony for inaccuracies. (USCA5 457 at Tr. 106-07 (identifying different "inaccuracy" by Hauber on same page of investigation transcript as statement about misrepresenting cause of injury but not identifying cause of injury statement). Grimes's equivocal statement—that he couldn't remember—cannot create a genuine issue of material fact as to whether he confessed misrepresenting

[8] *Gonzalez's* dicta that collateral estoppel and res judicata are generally inapplicable when a plaintiff raises a federal claim is not persuasive here. *Id*. at 643. That dicta, like the Seventh Circuit's decision in *Kulavic* discussed *supra* section I.B.2 expressly rests on *Gardner-Denver*'s criticism of arbitral factfinding. *Pyett* held that this skepticism "rested on a misconceived view of arbitration that this Court has since abandoned." *See Pyett*, 556 U.S. at 265.

the cause of his injuries to Hauber. *See Fitch v. Reliant Pharm., LLC*, 192 Fed. App'x 302, 303-04 (5th Cir. 2006) (per curiam) (holding that plaintiff's responses that she "could not recall" conduct that led to discharge were "equivocal statements . . . insufficient to create a genuine issue of material fact sufficient to survive summary judgment."); *FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 205 F.3d 66, 71 (2d Cir. 2000) (holding that defendant's statement that he could not "recall" whether he was informed of fraudulent conduct "does not place this issue in genuine dispute.").

Thus, considering the RLA arbitration board's finding that Grimes was dishonest, along with Grimes's failure to deny that he confessed this dishonesty to Hauber, there is no genuine issue of material fact as to whether Grimes engaged in "protected activity" under the FRSA.[9]

III. THE FRSA'S ELECTION OF REMEDIES PROVISION PREVENTS GRIMES FROM SEEKING RELIEF UNDER THE FRSA BECAUSE HE FIRST SOUGHT RELIEF UNDER THE RLA.

The district court's decision should be affirmed on issue preclusion grounds and on the basis of this Court's decision in *Gonzalez*, 773 F.2d 637. Grimes's FRSA claim also fails as a matter of law for the *entirely independent reason* that he

[9] Grimes argues that the burden shifting framework of *McDonnell Douglass v. Green*, 411 U.S. 792 (1973), does not apply to evaluation of FRSA claims. This issue was not decided by the district court, *see* (RE 4, USCA5 1389), and need not be decided here, *see Kimbell v. United* States, 371 F.3d 257, 270 (5th Cir. 2004). In any event, BNSF maintains that the *McDonnell Douglass* framework *does* apply to FRSA claims in this Circuit. *See Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 566-67 (5th Cir. 2011) (applying *McDonnell Douglass* framework to AIR21 claims); 49 U.S.C. § 20109(d)(2) (adopting AIR21 burdens of proof for FRSA claims).

chose to appeal his dismissal to the PLB pursuant to the RLA's statutory grievance framework. Under the plain language of the FRSA's Election of Remedies provision, 49 U.S.C. § 20109(f), Grimes may either challenge his dismissal in arbitration under the RLA, or in a complaint with the Secretary of Labor under the FRSA, but he may not do both. Of course, the Court need not address whether the FRSA's Election of Remedies provision bars Grimes's claim if it agrees with BNSF's argument on issue preclusion or on the effect of *Gonzalez*, 773 F.2d 637.

A. The Plain Meaning of the Election of Remedies Provision Prohibits Pursuing Duplicative Claims for Relief

Statutory construction begins with the plain text of the statute and, if that text is unambiguous, it ends there as well. *Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1363 (5th Cir. 1993) ("if the language is unambiguous on its face" then the "judicial inquiry is complete"). Thus, when the statute's language is plain, "the sole function of the courts" is to "enforce it according to its terms." *United States v. Johnson*, 632 F.3d 912, 924 (5th Cir. 2011) (citing *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

The FRSA's Election of Remedies provision provides that a railroad 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) (emphasis added). This language is clear and unambiguous. By its plain terms, Section 20109(f) prohibits a FRSA claim whenever three conditions are

met: the employee has (1) sought "protection" (2) under "another provision of law" (3) for the "same allegedly unlawful act" by the railroad. Grimes, who challenged his discipline in RLA arbitration before the PLB, satisfies all three.

First, by challenging discipline decision in an RLA arbitration, the employee is obviously "seek[ing] protection" within the plain meaning of Section 20109(f). *Id*. § 20109(e). Both an RLA arbitration and a FRSA complaint are attempts by an employee to obtain a remedy for a carrier's alleged unlawful action.

Second, an employee seeks protection under "another provision of law" within the plain meaning of Section 20109(f) when he challenges the discipline decision in RLA arbitration. Arbitration under Section 3 First (i) of the RLA is governed by statute, not contract. *See Andrews*, 406 U.S. at 323 (the "compulsory character" of RLA arbitration "stems not from any contractual undertaking between the parties but from the Act itself"); *see also, e.g., Yawn v. S. Ry. Co.*, 591 F.2d 312, 314 (5th Cir. 1979) (noting that the RLA provides a "*statutory* grievance procedure") (emphasis added). Accordingly, when an employee challenges a carrier's discipline decision in RLA arbitration, he is by definition seeking relief under a "provision of law"—Section 3 First (i) of the RLA. *See Gonero v. Union Pac. R.R. Co.*, No. 2:09-2009, 2009 WL 3378987, at *4-5 (E.D. Cal. Oct. 19, 2009) (concluding that the phrase "another provision of law" is broad and includes "'all law, whether it be statutory law, common law, or constitutional law'")

(quoting *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1180-81 (9th Cir. 1998)).[10]

Third, an employee who challenges a discipline decision under both Section 3 of the RLA and Section 20109 of the FRSA is seeking protection "for the same allegedly unlawful act" of the railroad. 49 U.S.C. § 20109(f). The plain meaning of the term "unlawful act" addresses the allegedly unlawful conduct at issue and not the employee's legal theory of recovery or the particular remedy he seeks. *See Sereda v. Burlington N. Santa Fe Ry.*, No. 4:03-cv-10431, 2005 WL 5892133, at *4 (S.D. Iowa Mar. 17, 2005) (noting that the FRSA election of remedies provision "is addressed not to the character or motivation of the employer's allegedly unlawful act, but to the act itself.").[11]

In this case, BNSF took a single "allegedly unlawful act" with respect to Grimes: it disciplined him by dismissing him from employment. Grimes sought "protection" under RLA arbitration by challenging his dismissal before a PLB created under RLA § 3 Second, 45 U.S.C. § 153 Second. (USCA5 1086.) (Indeed,

[10] *Gonero* addressed the distinct question of whether state law claims were barred if an employee had first filed a FRSA complaint with the DOL. It did not address the issue here—whether a FRSA claim is barred by the fact that the employee first sought relief under another provision of law. *Id*.

[11] *Sereda* construed the FRSA's Election of Remedies provision as it stood before the 2007 amendments. *Id*. That language is the same in every material respect as the language enacted in 2007, found in Section 20109(f). *Supra* Statement of Facts A.2. *Sereda* held that the Election of Remedies provision reinforced the court's holding that THE FRSA preempted an employee's claim under state law. The 2007 amendments, by enacting Section 20109(g) (discussed below), have overruled *Sereda*'s preemption holding, but not its interpretation of the Election of Remedies provision.

Grimes received some relief and was reinstated. *Id*.) Yet now, Grimes again seeks protection by challenging the same dismissal under the FRSA. (USCA5 108-15.) This he cannot do. The FRSA's Election of Remedies provision expressly prohibits his effort to seek protection under both the RLA and the FRSA for the same allegedly unlawful act of the railroad carrier.

B. The Plain Meaning of Section 20109(f) Reflects a Rational Congressional Choice

The plain meaning of Section 20109(f) is consistent with the policies that underlie the RLA's grievance resolution procedures. It has long been established that arbitration under the RLA is final and binding. *See* 45 U.S.C. § 153 First (q); *Gonzalez*, 773 F.2d at 642-43. Under the RLA, an arbitration award is subject to review only in a federal district court under a standard of review that is "among the narrowest known to the law." *Sheehan*, 439 U.S. at 91 (internal quotes and citation omitted). And, once a claim has been submitted to arbitration, a party is prohibited from litigating the validity of the discipline in court. *Union Pac. R.R. Co.*, 360 U.S. at 616 (RLA's "statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board"). This finality is central to labor relations in the railroad industry. *Id*.; *see also Andrews*, 406 U.S. at 322-26; *Slocum*, 339 U.S. at 243-44.

Interpreting Section 20109(f) to allow an employee to proceed under both the FRSA and the RLA would undercut finality. Any individual who is dissatisfied with the results of an RLA arbitration could try for a different result before the Secretary of Labor. Railroads would be forced to defend their discipline decisions multiple times, in different forums, and with potentially inconsistent results. Congress included the Election of Remedies provision to avoid this problem. The express purpose of the provision was 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." *See* 126 Cong. Rec. 26532 (Sept. 22, 1980) (statement of Rep. Florio noting that purpose of identical Election of Remedies provision is to avoid "unneeded litigation and inconsistent results"). Thus, employees have an initial choice as to which procedure to use, but once they make that election, they do not get a second bite at the apple.

C. The Department of Labor's Interpretation of Section 20109(f) Conflicts with the Plain Meaning of the Statutory Language

The DOL is charged with enforcing Section 20109. When it first examined this issue, the DOL Solicitor Office agreed that Section 20109(f) reached the same interpretation advanced here—that the provision means what it says. In an undated draft memorandum apparently issued shortly after the 2007 Amendments were enacted, the Associate Solicitor of Labor advised the Director of the Office of the Whistleblower Protection Program that the election of remedies provision "bars a

whistleblower claim with OSHA when an employee, or the employee's union acting on the employee's behalf, has initiated arbitration pursuant to a CBA." (USCA5 259-64.)

The DOL subsequently adopted a different position. In a decision involving FRSA complaints against two railroads, the ARB concluded that Section 20109(f) does not apply when an employee seeks to proceed under both the RLA and the FRSA. *Mercier v. Union Pac. R.R. & Koger v. Norfolk S. Ry.*, ARB Case Nos. 09-121, 09-101 (Sept. 29, 2011) (USCA5 265-73). Because the meaning Section 20109(f) is plain and expressly addresses the question of whether pursuit of RLA § 3 arbitration is an "Election of Remedies" (it is), it precludes this Court from affording any deference to the Secretary's interpretation (it isn't). *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (holding no deference due to agency's interpretation that conflicts with plain language of the statute).

And, even if Section 20109(f) were ambiguous, the DOL's interpretation is incoherent on its own terms and due no deference. *See Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526, 529 (7th Cir. 1994) (rejecting agency interpretation of ambiguous statute because agency failed to "articulate a satisfactory explanation for its action."). *Mercier* concludes that an employee does not seek protection under "another provision of law" within the meaning of Section 20109(f) when he

challenges his discipline decision in RLA § 3 arbitration because this claim "rests on rights created by" a collective bargaining agreement and not on a "right created under a provision of law." *Mercier* at 6 (citing *Graf v. Elgin, Joliet & E. Ry. Co.*, 697 F.2d 771, 776 (7th Cir. 1983)). This is incorrect. As discussed above, it is well-settled that arbitration of grievances in the railroad industry—unlike in other industries—is established and governed by statute, not by contract. 45 U.S.C. § 153, First (i); 153, Second. *See also, e.g.*, *Andrews*, 406 U.S. at 323; *Masy v. N.J. Transit Rail Ops., Inc.*, 790 F.2d 322, 325-26 (3d Cir. 1996).[12]

Mercier's reliance on the 2007 amendments to the FRSA and, in particular, on Congress's addition of sections (g) and (h), is also misguided. *See Mercier* at 7, (USCA5 271). Sections (g) and (h) do not address the issue here: whether an employee may bring a FRSA claim after challenging his discipline under another provision of law. Specifically, Section (g) provides that "[n]othing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge . . . or any other manner of discrimination provided by Federal or State law." 49 U.S.C.§ 20109(g). And, Section (h) states that "[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement." 49

[12] The *Graf* decision is not to the contrary. That case dealt with the issue of whether a wrongful discharge claim "arises under" the RLA for purposes of establishing original federal court jurisdiction, not the issue of whether bringing a grievance under Section 3 First (i) is a procedure "governed by law." 697 F.2d at 774-76.

U.S.C. § 20109(h). *Mercier* concluded that these provisions "reflect Congress's apparent intent to eliminate any preemption or bar of retaliation claims when there is a concurrent grievance procedure pending under a collective bargaining agreement emanating from the same 'unlawful act.'" *Mercier* at 7, (USCA5 271). In other words, if Section (f) is interpreted to bar concurrent actions, it would preempt or "diminish" the rights of a person under the RLA, contrary to sections 20109(g) and (h).

But that is not so. The plain meaning of sections (g) and (h) is that an employee is free to choose to pursue a non-FRSA remedy, such as an RLA arbitration or a state law claim. In fact, the purpose of Section (g) was to override case law such as *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989), which held that the federal whistleblower remedy in Section 20109 preempted state whistleblower remedies. *See Abbott v. BNSF Ry. Co.*, No. 07-2441, 2008 WL 4330018 (D. Kan. Sept. 16, 2008), *aff'd*, 383 F. App'x 703 (10th Cir. 2010). Section (f), on the other hand, merely requires an employee *to choose* which one of the available options to pursue. Requiring an employee to elect among multiple available legal remedies does not "diminish" the available remedies—the employee retains full legal rights as to the option selected. In other words, sections (g) and (h) confirm that employees have the right to choose a path, and Section (f) specifies what happens

once they do so. Thus, Section 20109(f) can easily coexist alongside sections (g) and (h) under Section 20109(f)'s plain meaning.

By contrast, *Mercier*'s interpretation of sections (g) and (h) would effectively render Section (f) meaningless. Under *Mercier*'s logic, an employee's rights under a labor agreement are "diminished" if pursuing arbitration under the RLA foreclosed the option of pursuing a concurrent FRSA claim. If that were so, an employee's rights under a state whistleblower law would likewise be "diminished" if pursuing the state law remedy foreclosed pursuing a FRSA claim. Thus, under *Mercier*'s reading of sections (g) and (h), an employee can proceed under both Section 20109 and any other provision of law, notwithstanding the mandate in (f) that an employee "may not" do so. Such an interpretation makes Section (f) a virtual nullity and must be rejected. *See United States v. Medina-Torres*, 703 F.3d 770, 776 (5th Cir. 2012) (per curiam) (iterating the "well-established rule of statutory construction that courts must give effect, if possible, to every clause and every word of a statute").

Nor is Section 20109(f) merely a bar on double recoveries. *See Mercier* at 8, (USCA5 272). *Mercier* opines that "[t]he statutory 'election of remedies' provision is intended to protect an employer from having to pay the same types of damages to an employee multiple times . . . ." *Id*. at 9, (USCA5 273) (quoting a statement by the Federal Railroad Administration, 73 Fed. Reg. 8455 (2008)). In

this regard, *Mercier* analogizes Section 20109 to the judicial doctrine of election of remedies, which is intended to preclude double recoveries. *Mercier* at 8 (USCA5 272) (citing cases describing the common law doctrine). There are at least two significant problems with this interpretation:

First, Section 20109(f) provides that an employee may not "seek" protection under multiple laws. The plain meaning of "seek" is "to try to obtain" and "to ask for; request."[13] Thus, Congress clearly intended to limit an employee's ability to initiate and pursue multiple proceedings. The judicial doctrine of election of remedies, by contrast, does not limit an employee's options until a proceeding has reached a judgment. *See, e.g.*, *Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309, 1317. If, as *Mercier* concluded, Congress's intent had simply been to codify the judicial doctrine, then Section (f) would look very different. It would provide something along the lines of "an employee *may* seek protection under this section and another provision of law for the same allegedly unlawful act of the railroad carrier, *but may not obtain a double recovery for the same unlawful act*." Yet, the language of Section 20109(f) goes beyond merely prohibiting multiple recoveries; it prohibits multiple actions as well.

Second, Congress is presumed to draft legislation with consideration of established rules of common law. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 21

[13] Random House Webster's College Dictionary XX (1991).

(1999) ("It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."). Thus, it can be inferred that Congress's intent in enacting Section 20109(f) was not to codify the preexisting federal common law doctrine that limits multiple recoveries. It would have had no reason to do so—the doctrine obviously applies even in the absence of any explicit election of remedies provision—and Congress is presumed not to enact unnecessary legislation. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting.").

Moreover, it is unlikely that Congress was particularly concerned with codifying the prohibition against double recoveries in the FRSA because other federal whistleblower statutes do not expressly prohibit double recoveries. Those statutes generally contain equivalents to sections 20109 (g) and (h), but lack any equivalent to Section 20109(f).[14] If Congress were only concerned with double

[14] Examples of federal and state whistleblower laws that contain provisions analogous or identical to Sections 20109 (g) and (h) include the FDA Food Safety Modernization Act, 21 U.S.C. § 399D(a), (2); Affordable Care Act, 29 U.S.C. § 218c(b)(2); Surface Transportation Assistance Act, 49 U.S.C. § 31105(f), (g); National Transit Systems Security Act ("NTSSA"), 6

recoveries, as *Mercier* suggests, one would expect that Congress would have included language prohibiting double recoveries similar to Section (f) in those other laws. But, it did not. By taking a different approach under the FRSA, Congress clearly intended something beyond the preexisting judicial doctrine of election of remedies.

Accordingly, the plain language of the FRSA Election of Remedies provision prohibits Grimes from maintaining a FRSA action because he challenged his dismissal in an RLA arbitration.[15]

CONCLUSION

For the reasons stated above, the decision of the district court should be affirmed.

U.S.C. § 1142(f), (g) (same); and Sarbanes-Oxley Act, 18 U.S.C. § 1514A(d) (similar). The Energy Reorganization Act of 1974, 42 U.S.C. § 5851(h), contains a provision analogous to 49 U.S.C. § 20109(g).

[15] The Court of Appeals for the Seventh Circuit is currently considering a case in which this question is presented. *See Reed v. Norfolk S. Ry.*, Case No. 13-2307 (7th Cir. 2013). In addition, a handful of district courts in unpublished cases have also addressed the FRSA's Election of Remedies provision. *See, e.g.*, *Ratledge v. Norfolk S. Ry. Co*., No. 1:12-CV-402, 2013 U.S. Dist. LEXIS 104006 (E.D. Tenn. July 25, 2013); *Battenfield v. BNSF Ry.*, No. 12-cv-213-JED-PJC, 2013 U.S. Dist. LEXIS 42253 (N.D. Okla. Mar. 26, 2013).

Respectfully submitted,

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No. 13-60382 Danny Grimes v. BNSF Railway Company
USDC No. 1:12-CV-137

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