IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

VICTOR SEREDA, Plaintiff, vs. BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, Defendant.	* * * * * * * * * * *	CIVIL NO. 4:03-cv-10431 RULING GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this wrongful termination action, plaintiff Victor Sereda ("Sereda") claims that he was discharged from his job as a track inspector for defendant Burlington Northern Santa Fe Railroad Company ("BNSF") in violation of an alleged Iowa public policy prohibiting retaliation against employees for reporting their employer's railroad safety violations. The complaint[1], originally filed in the Iowa District Court for Polk County, was removed to this court by BNSF based on

[1] Sereda's complaint contained an additional claim alleging that he was discharged because of a disability in violation of the Iowa Civil Rights Act, Iowa Code Chapter 216. That claim has since been dismissed with prejudice in accordance with the parties' stipulation. Fed. R. Civ. P. 41; (Clerk's #33.)

diversity of citizenship. See 28 U.S.C. §§ 1332, 1441, and 1446. BNSF now moves for summary judgment based on two alternative grounds. First, BNSF argues that Sereda's state wrongful discharge claim is preempted by the whistleblower protection remedy of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109(c). Second, BNSF contends that even if the FRSA does not preempt state common law claims, Sereda cannot establish that Iowa public policy protects whistleblowers from retaliation.

Sereda resists BNSF's motion and moves the court to certify the preemption and public policy questions to the Iowa Supreme Court pursuant to Iowa Code Section 684A.1. See also LR 83.1 (providing procedure for certification of question of state law to highest appellate court of the state.) BNSF resists Sereda's motion for certification. Both motions are fully submitted and ready for ruling. For the reasons articulated below, the court will grant BNSF's motion for summary judgment. Sereda's motion for certification will therefore be dismissed as moot.

BACKGROUND

The following facts either are not in dispute or are viewed in a light most favorable to Sereda. Sereda began his

career with BNSF in 1973, and since that time has worked in the Burlington, Iowa area as a trackman, foreman, and most recently as a track inspector. (Def.'s App. at 002-04.) Sereda's track inspector duties required him to inspect the railroad track and remedy defects, either by himself or with assistance from "section" workers - a team devoted to track repairs in a particular geographic area. Id. at 004-06. Remedial actions include manual labor, such as raising joints and replacing angle bars, and the issuance of orders, such as an order to remove a track from service. Id. at 006.

Back surgery in the early 1990s left Sereda with a permanent lifting restriction of between 35 and 40 pounds. Id. at 010, 086; (Pl.'s Suppl. App. at 858.) Nevertheless, Sereda was working at full duty in January 2001 when John Rotness became his roadmaster and direct supervisor. (Pl.'s Suppl. App. at 799, 806, 809-10, 829, 836-38, 858.) Rotness's supervisor was division engineer Rollie Roskilly, with whom he had previously worked from 1977 to 1987 in a different BNSF division. (Def.'s App. 052, 054.)

On Rotness's first day of work, Sereda informed him about defective conditions on a curve near the Amtrak depot in Burlington. Id. at 810; (First Am. Compl. ¶ 26.) Rotness

told Sereda that the problem would be corrected. (Pl.'s Suppl. App. at 811.) Sereda then told Rotness he had a lifting restriction, but received no response. Id.

Sereda continued to report track defects and hazardous conditions near the Burlington depot throughout 2001. Id. at 788, 834. The reports were passed on to Rotness and Roskilly, as well as to other BNSF superiors and the Federal Railroad Administration ("FRA"). Id. at 773-74, 788. In August of 2001, BNSF officials inspected the track near the Burlington Amtrak depot and determined that it needed to be fixed soon. Id. at 789-91. A few days later Roskilly expressed anger with Sereda over his reports, telling him "You nearly got my butt fired." Id. at 830-35. Sereda contends that Roskilly was angry because he and Rotness were criticized by the BNSF officials for not having fixed the Burlington track problem. (First Am. Compl. ¶ 29.)

On September 12, 2001, Sereda asked Rotness to send a team to perform repairs on track near Biggsville, Illinois. (Def.'s App. at 091.) Rotness ordered Sereda to perform the repairs himself and to use a hydraulic tamper for the job. (Pl.'s Suppl. App. at 837-38.) When Sereda informed Rotness that the weight of the tamper exceeded his lifting

restriction, Rotness replied that he was unaware of the restriction and instructed Sereda to refrain from working until he received the relevant BNSF documentation. Id. at 816, 837. Although Sereda provided Rotness a copy of his lifting restrictions (Def.'s App. at 089-90) the very next day, Rotness had already spoken to Roskilly about the situation, and Sereda was immediately placed on medical leave. Id. at 091;(Pl.'s Suppl. App. at 818-21.) Despite the permanent nature of his lifting restrictions, BNSF continues to renew Sereda's leave of absence, effectively terminating his employment short of outright dismissal. (Pl.'s Suppl. App. at 712-14.)

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the record, viewed in the light most favorable to the nonmoving party, presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The burden is on the moving party to set forth sufficient evidence to show there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the moving party carries its burden under Rule

56(c), then the party resisting the motion must "go beyond the pleadings, and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. at 324 (internal citation omitted). If the resisting party fails to do so, then the moving party is entitled to summary judgment. Id. at 322.

DISCUSSION

The Supremacy Clause of the Constitution, U.S. Cont. art. VI, cl. 2, is the wellspring of preemption doctrine. Chapman v. Lab One, Inc., 390 F.3d 620, 624 (8th Cir. 2004). The doctrine mandates that "state law must give way when it conflicts with or frustrates federal law." Id. "Pre-emption is fundamentally a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." English v. General Electric Co., 496 U.S. 72, 78-79 (1990) (internal citation omitted).

The FRSA protects railroad employees who report safety concerns from discrimination and provides a mechanism for the resolution of claims of retaliation against employee whistleblowers. 49 U.S.C. § 20109(a), (c). Although the FRSA

contains a general preemption provision, 49 U.S.C. § 20106[2], Congress' intent to preempt state common law claims is best evidenced by the explicit terms of § 20109(c), which mandates that "[a] dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. 153)." As the Fourth Circuit Court of Appeals concluded in Rayner v. Smirl, 873 F.2d 60, 65 (4th Cir. 1989), a decision which squarely addresses the question of FRSA preemption of a state common law claim for wrongful discharge, "[t]his specific remedial scheme illustrates a congressional intent that the FRSA remedy for railroad 'whistleblowers' be exclusive."

Sereda attempts to undercut the validity of the Rayner decision in a number of ways, none of which the Court finds

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[2] In CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 675 (1993), the Supreme Court held that 49 U.S.C. § 20106 (as then in effect) authorized the Secretary of Transportation to issue regulations preempting state common-law claims. Because the public policy underlying Sereda's wrongful discharge claim is substantially subsumed by the employee protections of § 20109, id. at 664, rather than by regulations promulgated by the Secretary, the court will focus its analysis on the specific preemptive effect of § 20109, rather than on the general preemptive effect of § 20106. See also Cearley v. Gen. Am. Transp. Corp., 186 F.3d 887, 890 (8th Cir. 1999) (finding FRSA preemption where regulations established by the Secretary under § 20106 subsumed the subject matter of plaintiff's state law tort claim).

persuasive. These include: post-Rayner Supreme Court opinions such as English, which he contends implicitly overruled Rayner; federal and state decisions post-English which he contends refuse to follow Rayner; statutes with similar employee whistleblower protections held not to preempt state common law claims; legislative history allegedly indicating Congressional intent to avoid FRSA preemption; and the election of remedies provision of § 20109(d), which he asserts contradicts any suggestion of Congressional preemptive intent. Because the question of FRSA preemption of state law tort claims alleging whistleblower retaliation is apparently one of first impression in our circuit, see Thomas v. Union Pacific R.R. Co., 308 F.3d 891, 893-94 (8th Cir. 2002) (affirming grant of summary judgment in favor of employer on former employee's claim of whistleblower retaliation in violation of alleged Iowa public policy, but failing to reach the issue), the court will address Sereda's arguments in some detail.

FRSA preemption in light of English

In English, the Supreme Court addressed the "question of whether a state law tort claim is pre-empted by § 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a)," Schweiss v. Chrysler Motors Corp., 922 F.2d 473, 474 (8th Cir.

1990)[3], a provision which, like 49 U.S.C. § 20109(a), prohibits employers from discriminating against employees who report safety violations. The Court, noting the absence in the statute of any explicit preemptive language, see English, 496 U.S. at 80 ("It is undisputed that Congress has not explicitly pre-empted petitioner's state-law tort action by inserting specific pre-emptive language into any of its enactments governing the nuclear industry"), held that "petitioner's claim for intentional infliction of emotional distress does not fall within the pre-empted field of nuclear safety . . . [n]or does it conflict with any particular aspect of § 210." Id. at 90. That conclusion was buttressed by the statute's lack of any "special features warranting pre-emption," such as a specific suggestion in the text or legislative history revealing a clear congressional purpose to supplant state law causes of action. Id. at 88. The text and legislative history of § 20109, however, clearly indicate a

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[3] Schweiss applied the principles of English to conclude that section 11(c) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c), did not preempt plaintiff's state law claim for wrongful discharge. Schweiss, 922 F.2d at 475. The FRSA's employee protections differ markedly from the Energy Reorganization Act ("ERA") and the OSHA in both text and legislative history, however, as illustrated below.

congressional preemptive intent absent from the Energy Reorganization Act ("ERA") and similar statutes protecting whistleblowers in other fields.

Text and Legislative History of § 20109

As noted previously above, any claim by a railroad employee which invokes the FRSA's whistleblower protections is subject to mandatory dispute resolution under § 20109(c). See 49 U.S.C. § 20109(c) ("A dispute . . . arising under this section is subject to resolution under section 3 of the [RLA]"); see also Consol. Rail Corp. v. United Transp. Union, 947 F. Supp. 168, 171 (E.D. Pa. 1996) ("When Congress added the employee safety provisions in 1980, it intended that they were to be enforced 'solely through the existing grievance procedures provided for in Section 3 of the Railway Labor Act . . . .'" (quoting H.R. Rep. No. 96-1025, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832)). The mandatory phrasing of § 20109 stands in stark contrast to the permissive language employed in similar statutes with employee protection remedial provisions, such as the ERA, 42 U.S.C. § 5851(b)(1), the OSHA, 29 U.S.C. § 660(c)(2), and the Commercial Motor Vehicle Safety Act ("CMVSA"), 49 U.S.C. § 31105(b)(1). Under those statutes, an aggrieved employee "may" file a complaint

with the Secretary of Labor if the employee believes there has been discrimination based on whistleblowing activities. Such permissive language implies that a covered employee remains free to pursue a claim under any available remedy, whereas the FRSA's language directs a railroad employee who wishes to invoke the FRSA's whistleblower protections to utilize the specific remedy provided by § 20109(c).

The conclusion that the FRSA preempts state common law remedies protecting railroad whistleblowers is not undermined by the statute's inclusion of an election of remedies provision. See 49 U.S.C. § 20109(d) ("An employee . . . may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the carrier"). The provision is addressed not to the character or motivation of the employer's allegedly unlawful act, but to the act itself. Accordingly, § 20109(d) allows an aggrieved railroad employee to pursue either a § 20109(c) proceeding alleging wrongful discharge for reporting an employer's safety violations or a claim alleging wrongful discharge for some other reason - disability discrimination, for example - protected under another provision, but not both, as both would be predicated on the same allegedly unlawful discharge. If,

however, the railroad employee elects to proceed on the theory that the discriminatory act was in retaliation for whistleblowing, the procedure of § 20109(c) must be utilized. See also Rayner, 873 F.2d at 66 n.1. (examining the legislative history and finding that § 441(d), the prior equivalent of § 20109(d), addressed only "federal statutes and regulations, not the common law remedies of the fifty states," and was "therefore not a general election of remedies provision.").

The FRSA's legislative history unmistakably supports the conclusion that Congress intended § 20109(c) to serve as the exclusive means for enforcing whistleblower retaliation claims advanced by railroad employees. A report of the House Committee on Interstate and Foreign Commerce concerning the 1980 amendments to the FRSA that first granted whistleblower protection to railroad employees states, in pertinent part:

> The Committee has been informed of many complaints over the years of harassment in situations where a worker notifies authorities of violations, testifies in safety proceedings or institutes an action against a railroad. According to these complaints, harassment includes, but is not limited to, firing, verbal abuse, disproportionate dangerous assignments, and constant and unrelenting supervision. Such retaliatory actions by employers are not to

> be tolerated in the work place. Section 10 of the bill provides protection for the rail worker under these circumstances. The legislation would forbid discrimination against an employee for, among other things, reporting such violations. . . .
>
> **The protections provided for in the paragraph above would be enforced solely through the existing grievance procedures provided for in section 3 of the Railway Labor Act**, including the adjustment board, its divisions, and the 'public law boards'.

H.R. Rep. No. 96-1025, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832 (emphasis added).

The legislative history accompanying later amendments to the FRSA indicates Congress's intent to preserve the preemptive force of § 20109(c). In 1988, Congress amended the FRSA employee protections via the Rail Safety Improvement Act ("RSIA"). Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 5, 102 Stat. 624 (1988). The amendment provided for the "expediting of any proceeding with respect to a dispute, grievance or claim for improper discharge or discrimination . . . which arises from an employee's filing of a complaint, institution of a proceeding, or testifying regarding the enforcement of the railroad safety laws." S. Rep. No. 100-153, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 695, 706. Once again, Congress stated its intent that "[a]ny

such dispute shall be resolved by the Adjustment Board or any other Board of Adjustment created under section 3 of the Railway Labor Act . . . ." Id.

On June 28, 1990, a little more than three weeks after the English ruling, the Senate Committee on Labor and Human Resources recommended passage of the Employee Health and Safety Whistleblower Protection Act. See S. Rep. No. 101-349, 1990 WL 258967 (accompanying S. 436). The Act would have provided a private right of action in federal court for employees in fields with no existing whistleblower protection legislation. Id. The Committee, relying on English, took the view that "[e]xisting federal whistleblower protection statutes do not supersede the rights and remedies available under state statutes and common law." Id. The minority opposing the bill, however, thought the proposed legislation "would engender a proliferation of duplicative state and federal lawsuits by failing to preempt state laws." It is uncertain whether the whole Congress agreed with the Senate Committee's sweeping view of the absence of preemptive force accorded federal whistleblower protection statutes, however, as the bill was never enacted. S. 436, 101st Cong., 1st Sess. (1989).

Congress later amended the FRSA in 1994 as part of a revision and codification of Title 49 of the United States Code, and declared "this bill makes no substantive change in the law." S. Rep. No. 103-265, at 5 (1994), 1994 WL 261999. The lack of any substantive changes in the 1994 amendment, or, for that matter, any clarification concerning the preemptive effect of § 20109(c) is notable, coming as it did after the decisions in Rayner and English. Congress was surely aware of the Fourth Circuit's decision, yet it evidently saw no need to amend the FRSA to address what Sereda contends was a mistaken statutory analysis, or to provide a measure of clarity in light of English, which he contends implicitly overruled Rayner. The lack of action is all the more curious when one considers that Congress found it necessary to insert a nonpreemption provision into 42 U.S.C. § 5851 despite the Supreme Court's refusal to grant § 5851 preemptive effect in English. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(e), 106 Stat. 2776 (1992); H.R. Conf. Rep. No. 102-108, at 364 (1992), 1992 U.S.C.C.A.N. 2472 (inserting subsection (h), entitled "Nonpreemption"). In any event, the FRSA's text and the legislative history accompanying its *enacted* amendments, both before and after English, demonstrate

Congress's intent that § 20109(c) serve as a railroad employee's exclusive remedy against whistleblower discrimination.

Continued Judicial Reliance on Rayner

Sereda cites a number of post-English cases which he contends have refused to follow Rayner, including two District Court decisions out of the Fourth Circuit, Kelly v. Norfolk & S. Ry. Co., 80 F. Supp. 2d 587 (S.D.W.Va. 1999), and Bailey v. Norfolk & W. Ry. Co., 842 F. Supp. 218 (S.D.W.Va. 1994), an Illinois District Court decision, Mason v. Norfolk S. Co., 1997 WL 733901, 157 L.R.R.M. (BNA) 2511 (N.D. Ill. 1997), and a decision by a Florida Court of Appeals, Roland v. Florida E. Coast Ry., LLC, 873 So. 2d 1271 (Fla. 3d. DCA 2004). He further cites Eighth Circuit decisions such as Schweiss and Iowa, Chi. & E. R.R. v. Wash. County, 384 F.3d 557 (8th Cir. 2004) as support for a finding of FRSA nonpreemption. Sereda's reading of these cases is well wide of the mark, as none even remotely cast doubt upon Rayner, while some expressly adopt its conclusion.

In Kelly, for instance, the court clearly recognized the continued vitality of Rayner. See Kelly, 80 F. Supp. 2d at 590 n.3 ("If the Court finds that § 20109 does in fact provide

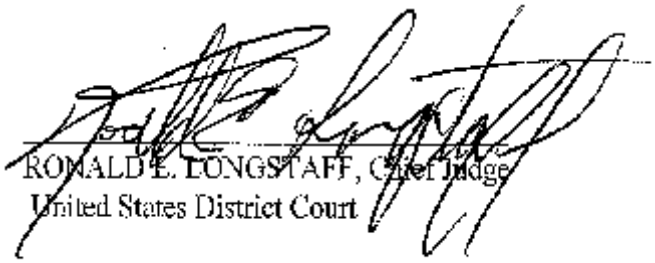
Kelly a remedy, the Court has no doubt that Kelly's claims for intentional infliction of emotional distress would be preempted. See Rayner, 873 F.2d at 64-66."). Roland, upon which Sereda's brief in opposition to summary judgment places much reliance, was not only vacated, see Florida E. Coast Ry., LLC v. Roland, 886 So. 2d 226 (Fla. 2004) ("earlier decision vacated"), but states, "The Rayner court is correct that the election of remedies provision prohibits a railroad employee from electing a state common-law remedy, such as a state wrongful discharge claim." Roland, 873 So. 2d at 1274 n.4. In short, the authorities Sereda presents are entirely unpersuasive on the issue of FRSA preemption of his state wrongful discharge claim.

CONCLUSION

Sereda presents ample evidence in support of his claim, and his allegations, if true, are troubling. His remedy, however, is in a proceeding under section 3 of the RLA. Because the Court concludes that Congress intended § 20109(c) to serve as the exclusive means by which railroad employees could obtain relief from discrimination based on their reporting of employer safety violations, BNSF's motion for summary judgment is **GRANTED**. Sereda's motion for

certification is **DISMISSED** as moot.

Dated this 17th day of March, 2005.



RONALD E. LONGSTAFF, Chief Judge
United States District Court