Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39309
Docket No. MW-39451
08-3-NRAB-00003-060043
(06-3-43)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement and 49 U.S.C., Section 20109 were violated when the Carrier terminated Claimant V. Sereda from service on September 12, 2001 in connection with reporting track safety defects to his immediate supervisor.

(2) As a consequence of the violation referred to in Part (1) above, Claimant V. Sereda shall be restored to service, compensated for all time lost, including overtime, as well as all fringe benefits, his record cleared of any charges leveled against him and he shall also be afforded the remedy outlined in 49 U.S.C. Section 20109."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was hired by the Carrier in 1973 and since that time worked in the Burlington, Iowa, area as a Trackman, Foreman, and, most recently, as a Track Inspector. He had spine surgery at the L4-L5 level in 1990 and then, a second time, in 1993. Both surgeries were performed at the Spine Diagnostic & Treatment Center at the University of Iowa. The Claimant was released by the surgeon to "return to full duty with 35-40 lb. weight restriction" in November 1993. Thereafter he continued to work as a Track Inspector, performing all duties of his job. His job was to inspect track for defects, make minor repairs, and report any defects found.

On September 13, 2001, the Claimant's Supervisor gave him a letter removing him from service pending a medical evaluation. He was directed to see the Field Manager, Vocational Rehabilitation Services, who informed the Claimant to make an appointment with a particular doctor in Iowa City, Iowa, for a medical evaluation before he could return to work. The Claimant obtained an appointment for October 19, 2001.

Following his visit to the doctor selected by the Carrier, the Claimant received a letter dated November 21, 2001, from M. R. Jarrard, M.D., M.P.H., the Carrier's Corporate Medical Officer, who stated that the Claimant's case had been reviewed "and the following permanent workplace activity restrictions are approved based on medical evidence obtained to date: · Occasional lifting up to 30 pounds · Occasional carrying 40 pounds." The letter further stated:

> "Your supervisor has been informed of these permanent restrictions. They have also been instructed to contact Bob Hosutt, *Field Manager Vocational Rehabilitation Services . . . to determine if* these restrictions can be accommodated within your current job requirements. If accommodation is not possible, the Field Manager will work with you to find another position within your craft and seniority district. If no position can be found, the Field Manager

will work with you to find alternative employment, within BNSF, if possible."

A few weeks later the Claimant received a letter dated December 10, 2001, from Division Engineer R. Roskilly, who stated that he had received the Claimant's "permanent workplace activity restrictions as outlined by BNSF Corporate Medical Department in Fort Worth" and was "sorry to inform [the Claimant] that we are currently unable to accommodate the restrictions noted." The letter suggested that the Claimant "discuss vocational options with Bob Hosutt, our Regional Manager in the Medical Department."

The Claimant disputed the Carrier's medical disposition of his situation because he had been performing the full duties of his Track Inspector job since his second back surgery in 1993. He therefore sought a second medical opinion from the group of surgeons that had performed back surgery on him in 1991 and 1993. He was evaluated by the University of Iowa Back Care staff on March 18, 2002. Thereafter he received the following letter of evaluation dated March 19, 2002, on the stationery of University of Iowa Health Care, University of Iowa Hospital and Clinics UI Back Care, Department of Orthopedic Surgery:

"Dear Mr. Sereda:

Staff at UI Back Care saw you for a Physical Work Performance Evaluation on March 18, 2002. Your dynamic strength, position tolerance, mobility, coordination and endurance were measured. You also had a consultation with the vocational rehabilitation specialist.

You participated fully in 21 of 21 tasks and demonstrated no self-limitation. According to self-reported job demands, your abilities do not match 3 tasks in the job requirements. Specifically, you were unable to meet the 50-pound lifting requirements from floor to waist, waist to eye level, and the bilateral carry.

Based on the evaluation, you are capable of performing physical work at the medium level for an 8-hour day, as defined by the U.S. Department of Labor in the Dictionary of Occupational Titles.

You successfully performed the work tasks of a track inspector for 9 years following an L4-L5 decompression and fusion surgery on your back prior to being placed on medical leave in September of 2001.

It is unclear what prompted your referral for further assessment, as you apparently have been able to perform your job duties by modifying some tasks without compromising the quality of your work. Apparently, it was only recently that your ability to perform your job was called into question.

We recommend that you return to your job as a track inspector and use modifications to lifting, as you have done in the past. We caution you to pay attention to proper body mechanics in order to maintain the health of your back.

We understand that you wish to continue working until such time as you are ready to retire. We would be happy to discuss your situation further with your supervisor should this be necessary. We are confident, however, that you should be able to perform the tasks you have done in the past without compromising your job or your physical well being.

If you have any questions, please do not hesitate to call us. We wish you the best.

Sincerely,

/s/ John Glaser, MD
Orthopedic Surgery

/s/ Donna Chandler, MA
Associate Rehabilitation Director
Vocational Rehabilitation Specialist"

On September 27, 2001, the Organization, by its Vice General Chairman, filed a claim on behalf of the Claimant alleging that the Carrier violated Rules 1, 2, 5, 9, and 55 of the Agreement when it removed the Claimant from service on September 13, 2001, "due to the fact he had a restriction concerning a limit on the amount of weight he could lift." The letter asserted that "the Claimant has had restriction placed on him that did not allow him to lift over forty pounds since 1993.

During this entire time period the Claimant has performed his normal duties as a Track Inspector without any problems." "When the Carrier removed the Claimant from service on September 13, 2001 without any medical evidence to support this action," the letter continued, "they were in clear violation of the above Rules." The Organization asserted, "The Claimant is totally capable of performing his Track Inspection duties as he had done for many years prior to being removed from service. Obviously, the Carrier removed the Claimant from service without any valid reason." The letter requested that the Claimant "be returned to service immediately and that he be paid for all losses suffered from September 13, 2001 and continuing until such time as the Claimant is returned to service."

The Carrier, by letter dated October 17, denied the September 27 claim based on a letter dated October 1, 2001, from the Division Superintendent in Galesburg, Illinois, to the Vice General Chairman. The Division Superintendent stated in his letter that the Vice General Chairman apparently had not been informed of the facts because the Claimant "notified his supervisor that he could not operate the power equipment that he is required to operate to make simple repairs when he finds a defect while inspecting track. Mr. Sereda stated that he had a lifting restriction that would keep him from operating the tools." The Carrier had no choice but to remove the Claimant from service and instruct him to provide medical documentation concerning his condition, the Division Superintendent asserted, when he stated that he could not perform the work assigned to his position.

On November 16, 2001, the General Chairman appealed the Carrier's decision to deny the claim, alleging that "Rules 1, 2, 5, 9 and 55, but not limited thereto, were violated beginning on September 13, 2001 and continuing when the Carrier removed the Claimant from service without providing due process under the Agreement." The appeal letter incorporated by reference thereto as part of the record the original claim letter dated September 27, 2001, by the Vice General Chairman.

In a letter dated January 9, 2002, the General Director Labor Relations rejected the appeal and denied the claim in its entirety. The Carrier reaffirmed the letter of October 1, 2001, from the District Superintendent. It stated that it found no relationship between Rules 1, 2, 5, 9, and 55, cited in the claim, and the Claimant's medical and physical condition. "It is apparent," the Carrier stated, "the Claimant should have invoked Rule 41 of the Agreement, and the record is void

of any action by the Claimant or Organization to follow this rule." The Carrier's letter quoted paragraph A. of Rule 41:

> "RULE 41 - PHYSICAL DISQUALIFICATION
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> A. When an employe is withheld from duty because of his physical condition, the employe or his duly accredited representative may, upon presentation of a dissenting opinion as to the employe's physical condition by a competent physician, make written request upon his employing officer for a Medical Board."

The remaining paragraphs of Rule 41 provide for the Carrier's physician and the employee's physician to "appoint a third neutral physician, who shall be an expert on the disability from which the employe is alleged to be suffering." The three physicians constitute a Medical Board, who, pursuant to Rule 41, are to examine the employee. "The decision of the Medical Board on the physical condition of the employe shall be final," Rule 41 states.

Paragraph E. of Rule 41 states, "If there is any question as to whether there was any justification for restricting the employe's service or removing him from service at the time of his disqualification by the company doctors, the original medical findings which disclose his condition at the time disqualified shall be furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification." Paragraph E provides that "[I]f it is concluded that the disqualification was improper, the employe will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Section A of this rule."

As evidence that the Claimant was off due to medical restrictions that did not allow him to perform his assigned duties in a safe manner, the General Director Labor Relations attached a statement dated September 12, 2001, from the Roadmaster who supervised the Claimant. The Roadmaster's statement said that on the morning of that date the Claimant told him that the surfacing crew was needed to go to Biggsville, Illinois, on main track No. 2 to tamp six ties off of the east end of the bridge at mile post 194.5. The statement said the surfacing crew was

in Mount Pleasant, Iowa, and had already been instructed to go further west to mile post 257.4 to work on an existing slow order. The Roadmaster, according to his statement, told the Claimant to use a jack and bar tamp the six ties himself and that he (the Roadmaster) would bring the surfacing crew back as soon as he could.

The Claimant, the Roadmaster's statement said, "replied that he could not use a jack because he had a forty pound lifting restriction." According to the statement the Claimant also said that he was informed at a safety meeting that week that a track jack weighed 42 pounds; and that he could not use a bar to tamp "because of the force used; and he could not change cracked angle bars because of the weight of a bar and probably should not even be tightening frog bolts due to the amount of force required."

In the statement the Roadmaster said that he had no previous knowledge of the Claimant's 40 pound lifting restriction and that he asked the Claimant to stay in the section house and call the Carrier's Medical Department and anybody else he dealt with at the time of his surgery to get evidence of his alleged restriction. In an addendum dated September 13, 2001, to the statement the Roadmaster wrote, "I removed [the Claimant] from service due to the fact that no evidence suggested that he did in fact have any restrictions to bar him from performing his duties and his statement that he could not perform the duties required."

In his letter of January 9, 2002, denying the Organization's appeal, the General Director Labor Relations stated:

> "It would be hard for you to deny that medical determinations are best left in the hands of medical practitioners - not arbitrators. Therefore, it is obvious that Rule 41 provides the only practical way to settle this dispute. Obviously, arbitrators cannot make medical determinations."

The Claimant did not request a Rule 41 Medical Board. He did apply for disability retirement with the Railroad Retirement Board. A document in the record from the Railroad Retirement Board dated July 31, 2003, shows that the Claimant was in permanent disability status as of that date. The document also appears to show that permanent disability status began on March 12, 2002. As of

the date of the hearing before the Board the Claimant was receiving a permanent disability annuity from the Railroad Retirement Board.

The Carrier's Submission to the Board acknowledges that conferences were held on the claim after the Organization's November 11, 2001 appeal letter. The Carrier's Submission states that at the parties' March 21, 2002 claims conference the Carrier handed the Organization's representatives certain medical documentation regarding the Claimant. At the May 15, 2002 conference between the parties the Organization handed the Carrier the March 19, 2002 report from the University of Iowa Health Care Clinic.

Both the Carrier and the Organization included with their Submissions to the Board a copy of a decision dated March 17, 2005, by the Chief Judge of the United States District Court for the Southern District of Iowa, Central Division, granting summary judgment to the Carrier in a suit for wrongful discharge by the Claimant against the Carrier. The decision states that it involves a "wrongful termination action [by] plaintiff Victor Sereda . . . [who] claims that he was discharged from his job as a track inspector for defendant [Carrier] in violation of an alleged Iowa public policy prohibiting retaliation against employees for reporting their employer's railroad safety violations." The complaint was originally filed in an Iowa county court and was removed to the federal district court by the Carrier based on diversity of citizenship.

Before granting summary judgment in favor of the Carrier the federal district court stated the facts that "either are not in dispute or are viewed in a light most favorable to Sereda." The Board will here recite pertinent facts from the court's opinion. Although the Claimant had a permanent lifting restriction of between 35 and 40 pounds as a result of his back surgery in the early 1990s, he nevertheless "was working at full duty in January 2001 when John Rotness became his roadmaster and direct supervisor." The Roadmaster's supervisor was Division Engineer R. Roskilly.

The following three paragraphs are taken directly from the court's opinion, with the citations to the court record omitted. It is important to remember that the facts are stated by the court in the light most favorable to the Claimant, as the court is required to do when ruling on a motion for summary judgment made by the other

party. Many of the facts stated by the court are disputed by the Carrier's witnesses. The Board now quotes from the opinion of the federal district court:

> "On [the Roadmaster's] first day of work, [the Claimant] informed him about defective conditions on a curve near the Amtrak depot in Burlington. [The Roadmaster] told [the Claimant] that the problem would be corrected. [The Claimant] then told [the Roadmaster] he had a lifting restriction, but received no response.
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> [The Claimant] continued to report track defects and hazardous conditions near the Burlington depot throughout 2001. The reports were passed on to [the Roadmaster] and [the Roadmaster's Supervisor], as well as to other [Carrier] superiors and the Federal Railroad Administration ("FRA"). In August of 2001, [Carrier] officials inspected the track near the Burlington Amtrak depot and determined that it needed to be fixed soon. A few days later [the Roadmaster's Supervisor] expressed anger with [the Claimant] over his reports, telling him "You nearly got my butt fired." [The Claimant] contends that [the Roadmaster's Supervisor] was angry because he and [the Roadmaster] were criticized by the [Carrier] officials for not having fixed the Burlington track problem.
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> On September 12, 2001, [the Claimant] asked [the Roadmaster] to send a team to perform repairs on track near Biggsville, Illinois. [The Roadmaster] ordered [the Claimant] to perform the repairs himself and to use a hydraulic tamper for the job. When [the Claimant] informed [the Roadmaster] that the weight of the tamper exceeded his lifting restriction, [the Roadmaster] replied that he was unaware of the restriction and instructed [the Claimant] to refrain from working until he received the relevant [Carrier] documentation. Although [the Claimant] provided [the Roadmaster] a copy of his lifting restrictions the very next day, [the Roadmaster] had already spoken to [his Supervisor] about the situation and [the Claimant] was immediately placed on medical leave. Despite the permanent nature of his lifting restrictions, [the Carrier] continues to renew [the Claimant's] leave of absence, effectively terminating his employment short of outright dismissal."

The District Court ruled that the Claimant's suit for retaliation was preempted by the whistleblower protection remedy of the Federal Railroad Safety Act ("FRSA") 49 U.S.C. §20109 (a) (c). That provision states as follows:

> "(a) Filing complaints and testifying. - A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has-
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> > (1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety, chapter 51 or 57 of this title; or
> > (2) testified or will testify in that proceeding.
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> * * *
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> (c) Dispute resolution. - 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). In a proceeding by the National Railroad Adjustment Board, a division or delegate of the Board, or another board of adjustment established under section 3 to resolve the dispute, grievance, or claim, the proceeding shall be expedited and the dispute, grievance, or claim shall be resolved not later than 180 days after it is filed. If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than $20,000."

Citing Rayner v. Smirl, 873 F.2d 60, 65, where the Court of Appeals held that "[t]his specific remedial scheme [49 U.S.C. §20109 (a) (c)] illustrates a congressional intent that the FRSA remedy for railroad 'whistleblowers' be exclusive," the federal District Court held that the Claimant's wrongful discharge claim was preempted by §20109 of the FRSA. The District Court declared, "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."

It is important to note that the preemption doctrine applies not only to reporting violations to a government agency, such as the Federal Railroad Administration, but also to retaliation for internal complaints, for example, a railroad worker to his supervisor. In Rayner v. Smirl, 873 F.2d 860 (4th Cir. 1989) which was relied on by the District Court as a precedent for dismissing the Claimant's wrongful discharge suit, the employee alleged that he observed several safety violations and reported them to his superiors at the railroad. He claimed that he was known as a "whistleblower" that refused to overlook serious Rules infractions and was told by his superiors that he should learn to get along with the people around him. He alleged that his employer "removed and reassigned him in retaliation for safety complaints about the operation of the railroad."

The employee in Rayner claimed that the statute did not apply to him because it "does not speak to intra-corporate complaints and therefore does not provide him a remedy." The Court of Appeals rejected his argument, stating, "As with all safety legislation, the Act should be broadly construed to effectuate the congressional purpose." The Court added, "In short, it was Congress' intent to protect all railroad employees who report safety violations. The distinction between intra-corporate complaints and those made to outside agencies is therefore an 'artificial' one. . . . Both serve to promote rail safety and both are within the contemplation of [the statute]." 873 F. 2d 60 at 63, 64.

In the present case the District Court dismissed the Claimant's complaint on March 17, 2005. On January 20, 2006, the Organization filed a claim with the Board, alleging that "The Agreement and 49 U.S.C., Section 20109 were violated when the Carrier terminated Claimant V. Sereda from service on September 12, 2001 in connection with reporting track safety defects to his immediate supervisor." That was the first time that a claim was made before the Board alleging retaliatory termination of the Claimant or in any way claiming that the Carrier's actions regarding the Claimant were punishment for his reports of track safety defects.

The Carrier contends that the Organization failed to prove that the Carrier violated any provision of the Agreement. Regarding the statutory claim of a violation of the FRSA, 49 U.S.C. §20109, the Carrier maintains that the Board lacks

jurisdiction to consider the retaliation or whistleblower issue because it was not raised during on-property handling. Both the Agreement and the Railway Labor Act, the Carrier argues, exclude the consideration of any issue not raised on the property. There is no evidence on the record, the Carrier asserts, concerning an FRSA violation.

The Carrier views the January 20, 2006, claim filed with the Board as an amendment to the claim filed with the Carrier and argues that "this claim amendment comes too late, and must be dismissed as untimely under the Railway Labor Act and the Labor Agreement." Citing 49 U.S.C. §20109 (c) the Carrier argues that "the Claimant was required to arbitrate his FRSA claim under the provisions of Section 3 of the Railway Labor Act (45 U.S.C. 153)." It notes that instead of proceeding under the Railway Labor Act, the Claimant attempted to adjudicate his claim in court. "[N]ow–five years later–", the Carrier contends, "it is too late to amend his labor claim in order to add the FRSA charge."

The Carrier also contends that the Claimant's claim on the FRSA issue is barred because it was not handled "in the usual manner" in accordance with Section 3, First (i) of the RLA, thereby depriving the Board of jurisdiction to consider the charge. It is also barred, according to the Carrier, because the FRSA claim was never conferenced on the property. In addition, the Carrier contends, the FRSA claim was not timely filed within the 60 day time limit for filing claims set forth in Rule 42A of the Agreement between the parties. Finally the Carrier contends that the FRSA claim is barred under NRAB Circular 1, which, the Carrier asserts, requires the Organization to "affirmatively show the same to have been presented to the Carrier. . . ." That language, the Carrier asserts, requires the Organization to show that the evidence offered was previously presented to the Carrier during on-property handling and made part of the record. That did not happen in this case, the Carrier asserts.

The Organization takes the position that the Board is here entering "uncharted waters" because of the failure of Congress to attach procedures or grant specific rule-making authority when it assigned a "dispute, grievance, or claim arising under" §20109 "to resolution under section 3 of the Railway Labor Act (45 U.S.C.153)." Because "a fairly extensive record" already exists in this case through court discovery, the Organization asserts, "this Board need not concern itself with the knotty and as yet unsolved problem of how to generate a record in cases under

this law, and whether any discovery or subpoena power can be created absent any enabling legislation. . . ."

One of the ways in which this case is different from the ordinary case which comes before the Board, the Organization contends, is that the "Board is a finder of fact, just as a judge is in a 'bench trial,' it is not doing appellate review of facts found by a carrier investigation." The Organization asserts that Section 20109 of the FRSA was expressly modeled after the whistleblower provision of the OSHA statute and suggests that the Board use the same elements of proof to establish a prima facie violation of an employee's rights under the statute and, if a prima facie case is made, to then shift the burden of going forward to the Carrier to show a legitimate nondiscriminatory reason for an employment decision adverse to the complaining employee.

The Organization argues that the Claimant reported serious track safety defects which violated the Carrier's engineering regulations, FRA regulations, and Iowa State rail regulations. In a little more than two weeks after making these reports, the Organization notes, his employment was effectively terminated. His Roadmaster and the Division Engineer, who were the Claimant's immediate superiors, the Organization asserts, adamantly refused to consider allowing him to continue to work subject to his 1993 restrictions, although he had been doing so without a problem for eight years. Their motive in terminating the Claimant's employment, the Organization contends, was to retaliate for his reporting of the track safety defects to Carrier management.

Evidence that the Claimant's superiors acted in retaliation, the Organization contends, is found in the fact that they blamed him for getting them in trouble as a result of the defective tracks. The Organization cites deposition testimony that the Division Engineer's managers had instituted an emergency repair program for a section of track that the Claimant had reported defective and that previously had been the site of a derailment involving a fatality and serious injuries. According to that testimony, the Division Engineer was being blamed for the condition of the track, which had not been properly repaired since the time of the derailment.

The Claimant testified in a deposition that immediately after the emergency repairs were made the Division Engineer angrily told him, "You almost got my butt fired." The Organization also cites deposition testimony by the Claimant that the

Division Engineer told him that if he went down, the Roadmaster would go down, and also the Claimant. Those statements to the Claimant by the Division Engineer, plus the fact that the Claimant was removed from his job within two weeks of the emergency repairs and the strong criticism of the Division Engineer, are seen by the Organization as evidence of retaliatory motivation on the part of the Claimant's superiors. The Organization also perceives discriminatory motivation on the part of the Claimant's immediate superiors in the fact that they deny many material facts in the case that independent witnesses all testify are true.

On the medical issue, the Organization contends that the evidence shows that the Claimant worked with a 35-40 pound lifting restriction since 1993 and that, despite this restriction, he performed all duties of his Track Inspector job. The deposition evidence shows, the Organization argues, that most of the time the Claimant did the work exactly as everyone did it, but that on those occasions where something heavier was involved, he found a different way of doing it within his lifting restriction. An example cited by the Organization, based on deposition testimony, is that "with angle bars rather than lift and carry, he would shove them off the truck and drag them over to the track." The Organization cites testimony from the deposition of a prior Roadmaster which the Organization contends corroborates the Claimant's testimony that he did all duties of his job despite his lifting restriction.

The Organization disputes the Carrier's contention that the Claimant's immediate superiors at the time of his termination of employment, the Roadmaster and the Division Engineer, did not know of the Claimant's lifting restriction. It cites the Claimant's deposition testimony that he personally informed the Roadmaster of his medical restriction in two prior conversations. The Organization also notes the testimony of the Claimant's previous Roadmaster that he accepted the restriction slip from the Claimant, sent it to the Carrier's Medical Services Department, and put a copy of the medical release in the Claimant's file in Burlington, Iowa.

Citing deposition testimony, the Organization contends that the equipment the Roadmaster instructed the Claimant to use on September 12, 2001, an hydraulic tamper, is not something that other Track Inspectors are required to use. It notes testimony by other Track Inspectors that the task the Roadmaster ordered the Claimant to perform cannot be done safely by one person and would require a Rule violation to perform. The Organization quotes the deposition testimony of the

Claimant that on prior occasions, using a track jack and a tamper bar, he had accomplished the same task the Roadmaster wanted him to perform on September 12 with the heavier hydraulic tamper. According to deposition testimony cited by the Organization, other Track Inspectors also use the track jack and tamping bar for similar assignments when working alone. The Organization contends that the Roadmaster changed his story and that after originally asserting that the Claimant refused to use an hydraulic tamper, he then switched his story and said that the Claimant said that he could not use a bar tamp.

Additional evidence that the Claimant's termination of employment was retaliatory, the Organization argues, is that the Carrier is unable to provide any written requirements of the Track Inspector job that the Claimant was not able to meet. Further evidence, the Organization contends, is found in the fact that there has been no material change in the Track Inspector job since 1993 when the Claimant was originally given a 35-40 pound lifting restriction.

To accept the Carrier's position that the termination of the Claimant's employment was not retaliatory, the Organization contends, requires the Board to reject virtually all testimony of independent witnesses and contemporaneous documents. It also requires, the Organization argues, "the credibility stretch of accepting the position that the local officials knew nothing of Claimant's restrictions, that there was no significant emergency repair program . . . , nor were the local officials upset about upper management reaction, had no animosity toward Claimant for reporting the defects at the exact site, and it was sheer coincidence that, a little over two (2) weeks following the emergency repair program, the local officials discovered for the first time Claimant's medical restrictions and instantly decided these disqualified Claimant."

The Organization urges that the foregoing contains "too many jumps" and is "an impossible list of irrational steps for any reasonable trier of fact to take." It argues that "[t]he Board cannot reject out of hand the testimony of all independent witnesses, involved, nor may the Board disregard common sense."

The Organization's claim filed with the Board alleges violations of both the Agreement and 49 U.S.C. 20109. The Board will first consider the claim that the Agreement was violated. The Carrier argues that "in the five years since this claim was filed, [the Organization] has never presented any evidence at all that [the

Claimant] had such a restriction prior [to] his removal from service in 2001." On the property, however, the Claimant presented evidence from the University of Iowa Health Care that in the early 1990s he had L4-5 decompression and fusion surgery. That certainly is consistent with his statement to the Carrier prior to being placed on medical leave of absence that he had a 35-40 pound lifting restriction.

In addition, however, in the record filed with the Board pursuant to the Claimant's Section 20109 claim, the Organization included a medical release dated November 5, 1993, from the surgeon who performed back surgery on the Claimant stating, "May return to full duty with 35-40 lb weight restriction." A copy of this release was obtained by the Claimant from the Carrier's Manpower Department and, according to the Claimant's deposition in the Section 20109 proceeding, shown to the Roadmaster by the Claimant before he was given a letter placing him on medical leave of absence. Because the record in the Section 20109 claim is properly before the Board and involves the same Claimant and the same Carrier as in the proceeding based on the alleged violation of the Agreement, we believe that it is proper to consider the release document obtained from the Carrier's own files. Even, however, without the medical release, given the undisputed history of serious back surgery undergone by the Claimant, the Board finds credible his representation to the Carrier that he had a 35-40 pound lifting restriction since the time of his surgery in the early 1990s.

The Carrier argues that a "message to the Claimant from Occupation Nurse Mary Butcher, dated December 3, 1993, . . . indicates that the Claimant was released for service without any restriction." The letter from the nurse to the Claimant thanks him for "allowing [her] to work with [him] during the recovery phase of [his] on the job injury." It then states, "Since you have continued to do well on full duty, I no longer need to contact you regarding your medical management." The Board finds the nurse's letter to be ambiguous. It could be interpreted, as the Carrier does, to indicate that the Claimant had no medical restriction. It is equally consistent, however, with the interpretation that despite his medical restriction, the Claimant, with the nurse's help, had learned how to accommodate his medical condition so that he was able to perform the full duties of his job.

The Carrier argues that the report from the University of Iowa Health Clinic "is not probative evidence, because it depended upon the Claimant's self-serving assertions instead of actual knowledge of the Claimant's job." However, the

University Health Clinic's report on its face shows that the Claimant was honest in describing his job. This is evident from the second paragraph of the report where, after referring to the Claimant's "self-reported job demands," the report states, "Specifically, you were unable to meet the 50–pound lifting requirements from floor to waist, waist to eye level, and the bilateral carry." The quoted sentence shows that the Claimant did disclose the lifting requirements of his job. The letter also recommended that the Claimant "use modifications to lifting," further evidence that the Claimant was honest about the nature of his job with the UI Back Care staff who examined him. Despite the Claimant's full disclosure of the lifting requirements of the job, the orthopedic surgeon and vocational rehabilitation specialist who wrote the letter concluded, "We are confident, however, that you should be able to perform the tasks you have done in the past without compromising your job or your physical well being."

The Carrier criticizes the UI Back Care staff for not contacting the Carrier about the contents of the Claimant's job, stating, "There is no evidence that Health Care made any site-visit to observe real-life work of track inspection, nor that Health Care even so much as contacted the Carrier or reviewed any materials concerning the Claimant's functions . . ." We note, however, that the letter, which was provided to the Carrier, stated, "We would be happy to discuss your situation further with your supervisor should this be necessary." There is no evidence that the Carrier availed itself of this invitation.

Two salient facts prevent the Board from accepting at face value the Carrier's contention that the Claimant's medical restrictions prevent him from performing the full duties of his job. The first is the fact that an orthopedic surgeon and a vocational rehabilitation specialist from a reputable, if not a premier, medical facility have issued a medical opinion in writing that they are confident that the Claimant should be able to perform the tasks of his job without compromising the job or his own physical well being. The second important fact is that for eight years prior to his medical disqualification the Claimant was able to perform his job by using modifications to lifting without any evidence of injury to himself or of compromising his job. There is no evidence in the record to contradict the Claimant's statement that he was able to do the full duties of his job during that period or to show that the requirements of the job changed so as to account for the Claimant's sudden disqualification.

There is a third consideration which also cannot be overlooked. In its Submission the Organization argues that the Roadmaster changed his story about what kind of tools the Claimant told the Roadmaster he was unable to use to perform the assignment on September 12, 2001. There is evidence that was presented on the property that supports the Organization's contention. In a letter dated October 1, 2001, to the Vice General Chairman, answering the Organization's appeal, the Division Superintendent wrote as follows:

> "Apparently, you have not been informed of all the facts in this case. Mr. Sereda notified his supervisor that he could not operate the power equipment that he is required to operate to make simple repairs when he finds a defect while inspecting track. Mr. Sereda stated that he had a lifting restriction that would keep him from operating the tools."

Three months later, however, in a letter to the General Chairman dated January 9, 2002, the General Director Labor Relations enclosed a "statement from John Rotness, Roadmaster, and the Claimant's supervisor concerning Mr. Sereda advising him of his medical restrictions." In that statement there is no mention of an inability or refusal to operate power equipment but, rather, simple manual equipment:

> ". . . I . . . told him [the Claimant] to use a jack and bar tamp the six ties and we would bring the surfacing crew back as soon as we could. Mr. Sereda replied that he could not use a jack because he had a forty pound lifting restriction. He also stated that in the safety meeting he attended on the morning of the 11th which covered track tools that a track jack weighed 42 pounds. He could not use a bar to tamp because of the force used and he could not change cracked angle bars because of the weight of a bar and probably should not even be tightening frog bolts due to the amount of force required."

On the other hand there is a critical fact that prevents the Board from finding that the Claimant is able to perform the duties of the Track Inspector job with the modifications that he learned to practice. The Board refers to the fact that the Claimant applied for and was approved to receive a disability pension. He continues this day to receive a disability annuity. Moreover, although invited by the

Carrier's General Director Labor Relations in a letter to the Organization dated January 9, 2002, to request a Rule 41 Medical Board for determination by a neutral doctor as to whether his disqualification from duty was justified, the Claimant made no effort to take up the Carrier's offer.

Even if one were to accept that the Claimant may have applied for a disability pension because his disqualification from duty deprived him of a livelihood, he had nothing to lose by asking for a Rule 41 Medical Board. If he was disqualified, he would be no worse off. If the neutral doctor agreed with the Claimant's physician, then he would be reinstated to work.

The Board accepts the position of the General Director Labor Relations as stated in his answer dated January 9, 2002, to the Organization's appeal:

> "It would be hard for you to deny that medical determinations are best left in the hands of medical practitioners—not arbitrators. Therefore, it is obvious that Rule 41 provides the only practical way to settle this dispute. Obviously, arbitrators cannot make medical determinations."

The Board finds that a Rule 41 Medical Board should be convened promptly after receipt by the parties of this Award. However, the Board is of the opinion that all physicians on the Medical Board, including the neutral doctor, should be informed of the facts regarding the Claimant's performance of the duties of the Track Inspector job for eight years prior to his disqualification by means of modifications to lifting that he practiced in doing the job. The appropriate question for the Medical Board, including the neutral physician, is not whether, as an abstract proposition, his disqualification was proper, but whether it was proper taking into account the modifications to lifting that the Claimant used. In addition, in view of the time that has passed from the date of the Claimant's original disqualification to the present time, the Medical Board should be asked to make its determination regarding disqualification both as of the original date of the disqualification and as of the present time. In other words, the Medical Board should also be empowered to determine whether at the present time, taking into account the modifications to lifting that the Claimant had been using, the Claimant is physically qualified to perform the Track Inspector job.

The Board adds the following proviso. The Claimant shall be given a reasonable opportunity (no longer than 30 days) to choose between being examined by the Medical Board and remaining on physical disability annuity. Should he choose to continue receiving his annuity, he shall forfeit any claim for reinstatement to his former job.

The Board now turns to the Claimant's Section 20109 claim. The Claimant's counsel argued before the Board that the claim was not filed too late both because §20109 of the FRSA has no time limit and because the doctrine of laches does not apply in the absence of a showing of prejudice. There was no prejudice to the Carrier as a result of the delay, the Claimant contends.

The absence in the statute itself of an express limitation period for filing a §20109 claim, however, does not mean that there is no limitation period. The United States Supreme Court, in Wilson v. Garcia, 471 U.S. 261 (1985), stated the applicable law as follows: "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." 471 U.S. at 266-267.

There is a federal Court of Appeals decision right on point on the question of the appropriate statute of limitations for a retaliatory discharge case in the State of Iowa, where the Claimant lives and where he was headquartered while working for the Carrier. In Vrban v. Deere & Co., 129 F.3d 1008 (8th Cir. 1997), the sole issue on appeal before the court was "whether, under Iowa law, a two-year or five-year statute of limitations applies to a wrongful discharge case." 129 F.3d at 1009. The case involved a suit by an employee against his employer claiming that he was discharged in retaliation for filing a workers' compensation claim against the employer. The Court ruled, "We hold that the five-year statute of limitations applies."

The Court of Appeals explained the basis on which the Iowa Supreme Court applied a five-year statute of limitations with regard to a complaint of retaliatory discharge for filing a workers' compensation claim:

> "The Iowa Supreme Court recognized the cause of action for wrongful discharge in Springer v. Weeks and Leo Co., 429 N.W.2d

> 558, 560 (Iowa 1988) (Springer I). Springer I involved an at-will employee that alleged her employer retaliated against her for seeking workers' compensation benefits. Id. At 558. The court held that 'a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state.' Id at 560. Because Iowa has a well-recognized policy that encourages employees to seek workers' compensation benefits, the court permitted the action. Id at 561."

Iowa also has a well-recognized policy that encourages the safe operation of railroads including the inspection and proper maintenance of rail track. See, for example, Iowa Code §327c.4:

> "INSPECTION - - NOTICE TO REPAIR.
>
> The department [of Transportation of State of Iowa] shall inspect the condition of each railroad's rail track, and may inspect the condition of each railroad's rail facilities, equipment, rolling stock, operations and pertinent records at reasonable times and in a reasonable manner to insure proper operations. . . . If found unsafe, the department shall immediately notify the railroad corporation whose duty it is to put the same in repair, which shall be done by it within such time as the department shall fix. . . ."

In addition the Iowa Administrative Code in Chapter 810, Railroad Safety Standards, §761-810.1 (327C) Track standards, states, "The department adopts the railroad track safety standards contained in 49 CFR Part 213 (October 1, 2002)." The Iowa statutes and Administrative Code demonstrate a well-recognized policy to promote track safety. A retaliatory discharge of a Track Inspector for reporting track defects would contravene such a policy. It is therefore appropriate in the Board's view to apply the same five-year statute of limitations in a case claiming retaliatory discharge for reporting track defects as would apply in a case of retaliatory discharge for filing a workers' compensation claim. The Board so finds.

The Carrier contends that "[t]he Board lacks jurisdiction to consider the belatedly added issue of the Carrier's alleged violation of the Federal Railroad

Safety Act ("FRSA") 49 U.S.C. §20109, inasmuch as that charge was not raised *during on-property handling, and is consequently excluded under provisions of both* the Labor Agreement and the Railway Labor Act; and there is no evidence on the record concerning an FRSA violation."

The Board finds it ironic that the Carrier should contend that the Board lacks jurisdiction to consider the issue of the §20109 alleged violation when the Carrier spent almost two years litigating, and prevailed, in the federal District Court in its position that the only tribunal with jurisdiction to hear the Claimant's §20109 claim was the Board. If this were a dispute arising under the parties' Agreement or a grievance, then the Carrier would be right that the issue had to be raised on the property and conferenced between the parties in order for the Board to have jurisdiction. Section 152 First and Second of the Railway Labor Act have been interpreted to require that a conference be held between the parties in an effort to settle contract and grievance disputes before such disputes are brought before the Board.

The five prior Awards included by the Carrier in its Submission as precedents where the Board found that it did not have jurisdiction to hear the case because a conference had not been held or the issue had not been discussed on the property prior to submitting it to the Board all involved claims arising under a collective bargaining agreement: Third Division Awards 30821, 30114, 30260, 35455, and 37279. By contrast, the present dispute arises under a statute, 49 U.S. C. §20109, which expressly states, "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). . . ."

In a memorandum to the Board by the Carrier representative on the Board, Third Division Award 31773 is cited and relied on. Award 31773 involved a claim that the employee was illegally dismissed in violation of 45 U.S.C. 441 (the predecessor of §20109) and of the parties' collective bargaining agreement because he reported FRA safety violations. The carrier took the position before the Board that the Board lacked jurisdiction to consider the statutory discrimination claim because contrary to the requirements of Section 153 First (i) of the Railway Labor Act, no conference was held on the property with respect to the claim. The Carrier further contended that "Circular No. 1 of the Third Division of the Railroad Adjustment Board clearly states that the Board lacks jurisdiction to consider any

claims which have not been subject to a conference on the property." The claim of retaliatory discharge in violation of the statute was made for the first time by the employee when he filed his claim with the Board some 17 months after a formal hearing in his case. The Board dismissed the claim on the grounds argued by the carrier.

Perusal of §153 First (i) of the Railway Labor Act does not turn up any reference to holding a conference. The carrier and the Board must have had reference to the language stating that disputes and grievances "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ." The "usual manner" of handling would include a conference.

Plainly, however, reliance on §153 First (i) is misplaced in a proceeding before the Board pursuant to 49 U.S.C. 20109. This is so because paragraph (i) by its terms, applies to "disputes between an employee or group of employees and a carrier or carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ." (Emphasis added) Paragraph (i) has no pertinence to a dispute like the Claimant's in this case, which derives from a statute, 49 U.S.C. 20109, and not a grievance or an Agreement.

The foregoing interpretation finds support in Rayner v. Smirl, 873 F.2d 60 (4th Cir. 1989) the leading case on preemption under 49 U.S.C. 20109, and the case primarily relied on by the District Court in dismissing the Claimant's case on preemption grounds. The Court of Appeals stated, "The FRSA's incorporation of the RLA in Sec. 441 [the predecessor of Sec. 20109] is limited to the RLA's dispute resolution procedures. 45 U.S.C. Sec. 441 (c). The FRSA borrows the administrative complaint procedures of the National Railroad Adjustment Board, but not its definition of employee or necessarily its jurisdictional limitations. . . ." 873 F.2d at 64. (Emphasis added)

Further support for the interpretation that there is no requirement that a conference be held on the property in order to be able to file a retaliatory discharge claim with the Board is found in the following statement by the Court of Appeals:

". . . The parties may petition for a hearing before the National Railroad Adjustment Board and may be represented by counsel. . . ." 873 F. 2d at 65. The Court did not add a proviso requiring prior compliance with a procedural regulation, such as one mandating an attempt at settlement through a conference with the Carrier, as a condition of being permitted to seek relief before the Board. Nor is the Court's characterization of the statute as a "broad federal remedy for railroad 'whistleblowers,'" 873 F.2d at 64, and its statement that "the Act should be broadly construed to effectuate the congressional purpose," Id at 63, consistent with the placement of procedural roadblocks in the way of obtaining relief from the Board.

This is not a case where the parties had no discussions between themselves about the claim before the Organization brought it to the Board. They were litigating the Claimant's claim of retaliatory discharge in the state and federal courts for almost two years before the matter was filed with the Board. There was ample opportunity to settle the case prior to the filing with the Board if the parties were inclined to do so. This is not a case like Third Division Award 31773 where 17 months after a hearing was held the claimant, in filing his claim with the Board, for the first time made a claim of retaliatory discharge. Here the parties were actively litigating the issue of retaliatory discharge in other forums for approximately two years before the Organization filed a §20109 claim with the Board on behalf of the Claimant. The Board finds that the claim of retaliatory discharge of the Claimant in alleged violation of 49 USC 20109 is properly before the Board.

The Board carefully considered the evidence and arguments of both parties and of the Claimant. The Claimant and the Organization are asking the Board to find that the Carrier violated §20109 of the FRSA without the benefit of an evidentiary hearing and based solely on court depositions. The Board finds no precedent either in its own proceedings or in any comparable statute to permit it to make a ruling of guilt or innocence of a statutory violation where there has been no hearing before a judge or a Hearing Officer and where the material facts of the case are strongly contested.

In effect the Claimant and the Organization are asking the Board to grant summary judgment in favor of the Claimant based on the depositions that have been taken and the documentary evidence in the record. The District Court, in the

Claimant's case against the Carrier which was dismissed on preemption grounds, summarized the law with regard to when summary judgment may be granted:

> "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. [Citation]. . . ."

In the present case there clearly are issues of material fact. For example, the Claimant states that the Roadmaster requested him to perform the assignment in question on September 12, 2001, with a hydraulic tamper. The Roadmaster asserts that he told the Claimant to use a jack and a bar tamp. A second issue of material fact is whether the repairs on the track where there had been a previous derailment with a fatality and serious injuries were performed on an emergency basis in August 2001, or the repairs had been scheduled long in advance.

A third material factual issue is whether the Division Engineer complained to the Claimant that the latter had almost gotten him fired. A fourth issue of material fact is whether the Roadmaster or the Division Engineer knew before September 12, 2001, that the Claimant was working with a lifting restriction. A fifth issue of material fact is whether the Claimant is presently physically able to perform all duties of the Track Inspector job without compromising his health or safety or the job.

Plainly there are issues of material fact in this case. Due process therefore requires that the evidence be heard by a trier of fact before a decision can be made as to whether there has been a violation of the statute. For example, the Organization argues in its Submission to the Board that the OSHA whistleblower provision, 29 U.S.C. §660(c), is the model for the FRSA whistleblower provision, 49 U.S.C. §20109. The OSHA provision requires the Secretary of Labor to file a complaint in federal district court if its investigation leads it to believe that the statute has been violated. The federal district court will then decide whether or not there has been a violation. If there are genuine issues of material fact, the district court will have to hold a trial and hear witnesses before it can make a decision.

Similarly, in the present case, because there are genuine issues of material fact this Board cannot, without violating the rights of the parties, decide this case on the basis of the discovery in the district court proceeding.

Paragraph (k) of §153 First states, "Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division. . . ." That language, in the Board's opinion, would permit the Board to conduct a hearing, take evidence from witnesses, make findings of fact, and issue a decision and order on the Claimant's claim that his employment was terminated in violation of 49 U.S.C. §20109. The Board finds that because there are genuine issues of material fact in dispute the statute requires that an evidentiary hearing be held by the Board on the Claimant's §20109 claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of September 2008.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 39309; DOCKET MW-39451

(Referee Sinclair Kossoff)

The Majority devotes so much of this Award trying to explain why 49 U.S.C. Section 20109, as well as the Railway Labor Act, mean something other than what they say. And through the mental gymnastics that the Majority goes through to reach its decision, only one thing is clear from this Award – the willingness of the Majority to ignore not only well-established arbitral precedent, but Federal law as well.

In the claim presented to the Carrier, the Organization essentially said that the Carrier improperly used Claimant Sereda's medical evaluation to remove him from work without Agreement due process. However, in the claim filed with the Board – five years later – the Organization is saying that Claimant Sereda was removed from service in violation of 49 U.S.C. Section 20109 for reporting track safety defects. The Organization impermissibly changed its claim, entirely, from medical evaluations to the "whistleblower" statute. That is a material change to the claim that was handled on the property between the Organization and the Carrier. Arbitral precedent mandates that such cases should be dismissed. As the Board stated in Third Division Award 35967:

> "The Board routinely dismisses claims framed for arbitration materially differently than the dispute that was handled between the parties on the property. See Third Division Awards 16607, 19031, 20518 and 28627."

The central fact that the Majority repeatedly ignored is that there was never any conference on the issue of the "whistleblower" statute. The Organization changed its claim subsequent to the statutorily required claims conference – which was held only to discuss Claimant Sereda being withheld from service due to his medical evaluations. At no time was there ever a discussion between the parties regarding the "whistleblower" issue.

This was simply the Organization's attempt to circumvent the requirement under Section 152, Second of the Railway Labor Act, to conference the claim. But despite the Majority's holding, the failure to conference the claim that is actually the subject of the arbitration is still fatal to the Board's jurisdiction – both from an RLA perspective as well as from 49 U.S.C. Section 20109. See Third Division Awards 30114 (Mason) 31773 (Eischen) and 35455 (Benn) as well as First Division Award 25942 (Kenis).

But even if there were no statutory jurisdiction bar to the claim, the Organization would still be precluded from its tactic by Rule 42 of the parties' Agreement, which bars the amendment of claims after 60 days from their occurrence - a jurisdictional objection raised by the Carrier.

Statutory conflicts with the Majority's decision are summarized in the following discussion:

I. BMWE'S FAILURE TO CONFERENCE THE SECTION 20109 CLAIM IS FATAL.

Disputes that cannot be resolved on the property are subject to arbitration under Section 153 of the RLA, 45 U.S.C. § 153. Section 153, First (i) provides:

> "[Disputes] . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

45 U.S.C. § 153, First (i). Before a dispute may be submitted to arbitration, however, the dispute must be considered in conference in accordance with Section 152, Second. Section 152, Sixth specifies a default time and place for these pre-arbitration conferences, subject to alternative arrangements in the parties' collective bargaining agreements. 45 U.S.C. § 152, Sixth.

Claimant Sereda cannot prevail because the Organization failed to conference his Section 20109 claim. The Board analyzes the scope and procedural requisites of an arbitrated Section 20109 claim somewhat in reverse. According to the Board, Section 153 does not encompass Section 20109 claims and, therefore, Section 153 procedural requisites do not apply to such claims. Even if that were the correct analytical path, the undersigned would – for reasons set out more fully below – disagree with the Majority's conclusion. But that argument is secondary to a much more fundamental one: Section 20109 itself mandates that all Section 153 procedures be applied in adjudicating Section 20109 claims.

Instead of going to Section 153 to determine whether it contemplated Section 20109, the Board should have started with Section 20109. When that is done, the conferencing requirement is clear. Section 20109 states:

> "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)."

45 U.S.C. § 20109(c).

The meaning of that sentence could not be clearer - any claim arising under Section 20109 must be resolved using all procedures set out in Section 153 of the RLA. Not only is that position supported by the plain language of Section 20109(c)'s first sentence, but by common sense and other language in the statute as well.

The Board assumes that the RLA Section 153 language, which had its last major procedural amendment in 1966, should square perfectly with Section 20109 (a statute not even enacted at that time). That is simply incorrect. Instead, one would expect the more recent statute - Section 20109 - to incorporate the terms and conditions of the well-established Section 153 procedural schemes already in existence.

Moreover, the Carrier's argument is bolstered by the fact that only its interpretation (that conferencing must occur) ensures that the parties are not deprived of their right to proceed before a Public Law Board. Section 153 allows for either the Adjustment Board or a PLB. 45 U.S.C. § 153, First (i); §152, Second (a decision between a PLB or an NRAB panel is made after conferencing and decision by the Carrier's highest-designated officer; describing the procedure to send to a PLB any issue "otherwise referable to the Adjustment Board. . . ." Here, conferencing and then, if conferencing fails, posting the claim to the forum of the posting party's choice ensures that no statutory right is undermined. The second sentence of Section 20109(c) also contemplates posting to either the NRAB or a PLB. See 49 U.S.C., § 20109(c). So, the statute itself demonstrates that a claim cannot simply be appended to an existing Board as was done here. And there is no dispute that any procedure that deprives the posting party of its right to choose between a PLB and the NRAB violates the RLA. Brotherhood of Maintenance of Way Employes Division v. Union Pacific Corp., 460 F.3d 1277, 1284-86 (10th Cir. 2006) (district court's injunction violated RLA provision allowing posting party to choose between a PLB and the NRAB by forcing the parties to arbitrate new issues before an established Adjustment Board.)

Nor is it unusual that the claim was not conferenced during litigation. The litigation was progressed by Claimant Sereda's outside counsel (not the Organization) and was defended by the Carrier's outside counsel (not BNSF's

Labor Relations Department). But those two groups - the Organization and BNSF's Labor Relations staff - are the parties that conference any Section 153 claim in "the usual manner."

Moreover, the Board is correct that the unfiled Section 20109 claim was never conferenced under Section 153. And it would really stretch the imagination to put the burden on the Carrier to assume that a failed Court case would spawn a Section 153 arbitration and somehow force it to preemptively conference that claim with the Organization.

The statutory duty to conference is beyond dispute. In particular, Section 152, Second provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

45 U.S.C. § 152, Second (Emphasis added). Likewise, Section 152, First imposes a duty on carriers and employees to exert "every reasonable effort . . . to settle all disputes. . . ." 45 U.S.C. § 152, First (Emphasis added). These same requirements are reiterated in NRAB Circular No. 1. See 29 C.F.R. § 301.1.

For decades, courts, commentators and the Board have uniformly recognized that these provisions create a mandatory conferencing requirement in minor (as well as major) disputes. As the Supreme Court explained in Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945), adhered to on reh'g, 327 U.S. 661 (1946), "one of the [RLA's] primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it." 325 U.S. at 721 n.12 (citations omitted). The Court made it clear that the "duty to negotiate is imposed for both grievances and major disputes." Id. at 725. Similarly, in Edwards v. St. Louis-San Francisco R.R., 361 F.2d 946 (7th Cir. 1966) the Seventh Circuit explained that Congress described preliminary conferences "as a prerequisite to submitting a dispute to the Board." Id. at 954 (Emphasis added). And in Rutland Ry. v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), the Second Circuit held:

> "Section 2 First and Second impose a duty on both parties to make every reasonable effort to settle a dispute, whether it be major or

> minor, and, as a part of their efforts, to confer over their differences. . . . These conferences are to take place before a submission of the dispute to the Railroad Adjustment Board." Id. at 38-39 (Emphasis added and footnote omitted).

See also DOUGLAS L. LESLIE, THE RAILWAY LABOR ACT 262 (1995) ("The RLA requires the parties to meet and confer for the purposes of resolving minor disputes prior to submission of disputes to the appropriate Adjustment Boards.") Id. at 263 ("[T]he RLA's pre-arbitration conference requirements are more than statutory guidelines."). In keeping with these authorities, the NRAB has consistently held that conferencing is a statutory prerequisite to its exercise of jurisdiction over a dispute. Even if the statutory language were not clear, the Board's interpretation of the statute would be "due considerable respect." BRAC v. Denver & Rio Grande W. R.R., 1982 U.S. Dist. LEXIS 16479, at ¶ 5 (N.D. Ill. Dec. 23, 1982).

NRAB Circular No. 1 reinforces this conclusion. As noted above, Circular No. 1 expressly restates the requirements of Section 152, First and Section 152, Second, including the conferencing requirement. See 29 C.F.R. § 301.1. Notably, however, Circular No. 1 does not incorporate Section 152, Sixth. Thus, the Board clearly views Section 152, First and Section 152, Second as establishing a mandatory conferencing requirement in all cases. Circular No. 1 further provides that "[n]o petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act . . . ." 29 C.F.R. § 301.2(b). This makes it plain that the Board will not consider any petition until all RLA requirements - including the conferencing requirement - have been satisfied.

II. THE CLAIM AT ISSUE IS TIME BARRED.

The Board's statute of limitations logic suffers from a similar analytical detour as the failure to conference reasoning. Rather than assert that reliance on Section 153 "is misplaced," the Board need look no further than Section 20109 to determine that applying Section 153 time standards is mandatory.

Section 20109 itself provides the basis for determining the applicable limitations period. The statute states that any Section 20109 "dispute, grievance, or claim arising under this section is subject to resolution under Section 153 of the Railway Labor Act (45 U.S.C. 153)." 49 U.S.C. § 20109(c). With the statute itself mandating resolution via Section 153, the RLA provides only one set of procedures for settling a dispute or grievance - all claims are "handled in the usual manner." 45 U.S.C. 153, First (i). Case law unequivocally establishes that procedurally "the

usual manner" is the collectively bargained one established by the parties. Ryan v. Union Pacific, 286 F.2d 456 (7th Cir. 2002). As Judge Posner explained in Ryan:

> "The most natural and sensible reading of the statutory term 'in the usual manner' contrasts it with the provision governing the second, the arbitral, stage of resolving disputes over the meaning or interpretation of the collective bargaining agreement. The procedures for that stage are set forth in the statute; the anterior proceeding, the proceeding on the property, is to be conducted in the usual manner, that is, in the manner agreed upon by the railroad and the union. That stage is for them to design as well as to administer. So read, in accordance with such decisions as Pawlowski v. Northeast Illinois Regional Commuter R.R., 186 F.3d 997, 1000 (7th Cir. 1999); Kulavic v. Chicago & Illinois Midland Ry., supra, 1 F.3d at 515, and Landers v. National R.R. Passenger Corp., 814 F.2d 41, 46-47 (1st Cir. 1987), aff'd, 485 U.S. 652, 99 L. Ed. 2d 745, 108 S. Ct. 1440 (1988), the 'usual manner' provision allows the railroad and the union to prescribe in the collective bargaining agreement the manner in which grievance proceedings shall be conducted on the property, as the Union Pacific and the UTU did in 1978. For in a unionized workplace it is in the collective bargaining agreement that one finds the provisions creating the grievance procedures.

Id. at 458-59.

Here, the Agreement established that Claimant Sereda's claim is not timely. As the Board correctly notes, although his present claim initially accrued on September 12, 2001, it was not received by the Carrier until January 24, 2006, after the Organization filed its January 20 Notice of Intent with the NRAB.

In sum, taken to its logical limit, the Board's interpretation is that none of the procedural devices set out in Section 153 apply to Section 20109 claims. So instead of Congress providing procedural certainty by having such claimants use well-established Section 153 grievance procedures, Congress supposedly intended to provide no guidance on when and how a Section 20109 claim is progressed (leaving it all up to future Section 153 tribunals to fashion limitations and procedures from scratch). Such a willy-nilly approach to establishing whistle-blower claims procedures not only contradicts the plain language of Section 20109, it defies common sense as well.

III. SECTION 20109'S ELECTION OF REMEDIES LANGUAGE BARS THIS CLAIM.

Claimant Sereda's claim is barred based on his attempt to seek relief in federal court under the Iowa public policy tort. As the Board acknowledges, Claimant Sereda first sought relief for the events of September 2001 in the Iowa courts. Making that choice now bars him from pursuing a claim under Section 20109. Section (d) of that statute clearly provides:

> "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."

45 U.S.C. § 20109(d).

That portion of the statute does not say that a claimant may not recover under Section 20109 and another provision of law. It says that a claimant may not seek protection under Section 20109 and any other provision of law. Claimant Sereda sought protection under the Iowa statute. In doing so, he elected his remedy. That his choice in hindsight was a poor one does nothing to mitigate the unqualified nature of Section 20109's election of remedies bar.

Claimant Sereda's Section 20109 claim is thus barred by his own choice to seek redress first in court rather than pursuing – as he should have – a timely arbitration claim in the "usual manner" with the Carrier and then to a PLB or before the NRAB.

IV. ANY EVIDENTIARY HEARING MUST BE CONDUCTED UNDER SECTION 3.

Alternatively, even if Claimant Sereda were entitled to another hearing, which he is not, any new fact finding hearing would have to be conducted on the property, rather than an evidentiary hearing by the Board. Section 10(c) of the FRSA requires the Board to resolve such disputes in accordance with the process established "under Section 3 of the Railway Labor Act." The NRAB was created as an appellate process to fact finding by on-property Investigations/ Hearings. Contrary to the Majority's assertion, there is nothing in Paragraph (k) of 153, First that mandates evidentiary hearings by the NRAB - indeed that notion is antithetical to the history of the Section 153 process. It is quite telling that the Majority cites no authority - beyond its own opinion - for its premise that the RLA allows the Board to conduct the evidentiary hearing itself.

The practical effect of this radical presumption of such a function of the Board will be to strip the RLA of the capacity to resolve disciplinary dismissals under its own statutory process of on-property hearings, because that would allow claimants to simply plead a violation of the FRSA and funnel the evidentiary hearing directly to the Board. Clearly, it is one thing for the Majority to declare that it is empowered under FRSA to "hear the case," but quite another for it to ignore the RLA-imposed appellate nature of how it would hear the case. The logical approach, and one more consistent with Section 153, would have been for the Board to remand the case back to the property for a hearing on Claimant Sereda's FRSA claim, where a record could be made for the Board's appellate review.

For all these reasons, we believe that the Majority committed palpable error in its decision.

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September 29, 2008

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 39309, DOCKET MW-39451
(Referee Kossoff)

The Organization feels compelled to respond to the Carrier's Dissent, which is both substantively faulty and inappropriately pejorative. Rather than performing "gymnastics" as the Carrier sarcastically suggests, the Board obviously exercised considerable efforts to navigate this unexplored statute, resulting in a carefully reasoned and balanced result. The Board went to considerable lengths to protect the Carrier's rights and give it every benefit of the doubt. This is clearly seen in the Board ordering a factual hearing with live witnesses. While the Organization presented an extensive record with facts supported by non-party witnesses, the Carrier, on the other hand, offered little in the way of a record in its own behalf, other than the bare denials of the two alleged perpetrator officials. The Carrier did not request a factual hearing and relied on its technical defenses nevertheless, the Board declined to rule on the case as submitted and ordered a hearing where live witness credibility could be assessed.

The Carrier primarily complains that the Claimant did not "conference" this matter, nor grieve it in sixty (60) days as would be customary if it were a contract grievance. However, this is not a contract claim, and the Board, in its written Award, at PP. 22-24, thoroughly analyzes and rejects the Carrier's entire theory. The Board relies heavily on *Rayner v. Smirl*, 873 F.2d. 60 (4th Cir. 1989) as the basis for that rejection, pointing out that Rayner is, of course, the same case BNSF relied on in persuading the Federal Court to dismiss for lack of jurisdiction and sending the Claimant to this forum for a remedy. The Carrier can hardly turn around now and attack Rayner as wrongly decided.

Both the contractual time limits and the "conferencing" BNSF proposes appear in the Agreement because the Carrier and the Organization agreed to them and both have staff and officers who must protect the rights and duties of both sides under that Agreement. However, neither the Organization nor the Carrier has any contractual rights, duties, or authority, under the statute §20109.

The "election of remedies" argument is unsupported and contrary to the most fundamental principles of law governing that subject. This last issue is new and is not a fair criticism of this award since the Board had no opportunity to rule on it. The issue has no merit, in any event.

The Statute Involved, 49 U.S.C. §20109, Is Not A Part Of The Agreement And It Is Impossible To Treat It As If It Were. Both Of The Carrier's Procedural Arguments Are Fatally Flawed For That Reason.

The Carrier conflates this statutory claim with a contractual claim based on two misunderstood factors: the happenstance that the Organization agreed to file the statutory claim for the Claimant; and the statute's provision requiring claims for violations to use the NRAB as their exclusive forum, "in accordance with the procedures set forth in Section 153" [§20109)(c)]. The key assumption is that the phrase means, "exactly as if the statute was an article in the labor contract". Of course, it is not a part of the labor contract, and cannot be treated as if it were.

As to the latter concept, the Carrier repeats its Submission points but fails to refute (or even mention) the Board's incisive analysis. Addressing the "conferencing" non-issue, the Board held:

> "Plainly, however, reliance on §153 First (i) is misplaced in a proceeding before the Board pursuant to 49 U.S.C. 20109. This is so because paragraph (i) by its terms, applies to 'disputes between an employee or group of employees and a carrier or carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions....' (Emphasis added) Paragraph (i) has no pertinence to a dispute like the Claimant's in this case, which derives from a statute, 49 U.S.C. 20109, and not a grievance or an Agreement.
>
> The foregoing interpretation finds support in Rayner v. Smirl, 873 F.2d 60 (4th Cir. 1989) the leading case on preemption under 49 U.S.C. 20109, and the case primarily relied on by the district Court in dismissing the Claimant's case on preemption grounds. The Court of Appeals stated, 'The FRSA's incorporation of the RLA in Sec. 441 [the predecessor of Sec. 20109] is limited to the RLA's dispute resolution procedures. 45 U.S.C. Sec. 441 (c). The FRSA borrows the administrative complaint procedures of the National Railroad Adjustment Board, but not its definition of employee or necessarily its jurisdictional limitations....' 873 F.2d at 64. (Emphasis added)
>
> Further support for the interpretation that there is no requirement that a conference be held on the property in order to be able to file a retaliatory discharge claim with the board is found in the following statement by the Court of Appeals: '. . . The parties may petition for a hearing before the National Railroad Adjustment Board and may be represented by counsel....' 873 F. 2d at 65. The Court did not add

> "a provision requiring prior compliance with a procedural regulation, such as one mandating an attempt at settlement through a conference with the Carrier, as a condition of being permitted to seek relief before the Board. Nor is the Court's characterization of the statute as a 'broad federal remedy for railroad "whistleblowers,"' 872 F. 2d at 64 and its statement that 'the Act should be broadly construed to effectuate the congressional purpose,' Id at 63, consistent with the placement of procedural roadblocks in the way of obtaining relief from the Board." (Emphasis in original)

Nor does the willingness of the Organization to assist the Claimant here change it into a contractual claim. The Organization has no authority to represent employes under the statute and no authority to initiate statutory claims. The Organization can assist a member if it chooses to do so. The employes have no contractual or statutory authority to compel a hearing from the Carrier or to compel the Organization to file it for them. The Carrier has no contractual duty to hold a hearing under this law, or to "conference" it, and the contract gives no "whistleblower" protection to any schedule employes.

Indeed, Congress could not impose on an Organization the duty to represent members in statutory actions, anymore than it can require a Masonic lodge to handle personal business contract suits for their members. The on property time limits are contractual and were agreed to by the parties. These short times are feasible because Carrier officers must comply and the Organization has the duty to police the Agreement and to understand and protect the members' rights provided for in the Agreement. Copies of the contract are provided by the Carrier for all the workers, and there is an established claim process, but only for claims which arise under the Agreement. That is not at all the case with §20109 claims.

The Carrier has never, on the property, sent any initiative to the Organization about dealing with §20109 nor has it mentioned it at all in any of the many BNSF policies dealing with Federal Employment Law. This inaction speaks volumes as to the insincere nature of the Carrier's urging this be treated as if it were a routine claim. The Carrier knows how to comply with employment laws and adopt/incorporate them into their on-property process, when they feel like doing so, but they have excluded §20109 from that group.

The Carrier has policies on the ADA, Title VII, ADEA, FMLA, "harassment" and other illegal acts. These are detailed policies, stating the worker's rights and where they can go within the Carrier if they feel these rights have been violated. The Carrier puts out written policies, bulletins, manuals stating that they comply with those laws and that BNSF policy requires compliance.

As to §20109, the Carrier has never even acknowledged its existence. Never, in the dozens of bulletins and policies (and revised policies) month after month, year after year, has this Carrier ever mentioned §20109 nor the "whistleblower" rights it protects. Nowhere in any BNSF publication do they inform employes of their §20109 rights (compared to the extensive information put out to employes as to other federal employment laws). Obviously, BNSF does not want employes to be aware of it, nor to know how to enforce it, nor to know what time limit BNSF views to be applicable.

It is, then, duplicitous for the Carrier to then insist the employes abide by strict demands of the contract for claim filing, conferencing, and advancing on property as if it were in the contract, when the Carrier itself does not abide by these nor has it ever suggested to the workers that it would, for §20109.

It is equally dishonest to take such a position when the Carrier has ignored it so completely in its internal complaint procedures, while recognizing all other statutory employe protections. In fairness to the Carrier, it is likely they themselves that had no clear idea what they, the Organization, or employes were supposed to do with §20109. That said, it is also clear the Carrier was more than happy to leave §20109 just as it was: wholly unknown and wholly unenforced.

The Agreement was not designed for the enforcement of statutory rights and is uniquely ill-suited to that purpose. This has been confirmed by many courts, notably, the U.S. Supreme Court in *Alexander v. Gardner-Denver Company*, 415 U.S. 38 (1974) at PP. 47-58, (a comprehensive discussion). It is and was wholly unclear to anyone just how the NRAB was to devise adaptations of its exclusively contractual system to these statutory cases under §20109. The Board has done a masterful job of wrestling these issues with little to guide the way. The Board's generous act of ordering an evidentiary hearing, allowing BNSF to bolster the meager record it submitted, is an example of this effort.

Recognizing this difficulty and unfair burden on the NRAB, Congress in the recent amendments to §20109, (49 U.S.C. §20109 as Amended Aug. 1, 2007) removed it completely from NRAB jurisdiction and transferred it to the established administrative process at the Department of Labor through Administrative Law Judges and the complete procedural rules of DOL (the same forum where OSHA and other retaliation claims are handled).

The Carrier attempts to support their time limit and "conferencing" arguments with awards which hold contract claims should be "handled in the usual manner" but these cases actually support the Organization's position. All the cases deal with claims arising from rights created by the

> "Agreement and reject attempts to complain to a Court of a lack of due process, (for instance) while handled "in the usual manner". None relate to §20109, or rights arising under a statute.

The language the Carrier quotes at P.6 of its Dissent, proves the Organization's point. The Carrier quotes Judge Posner of the Seventh Circuit who states the most "sensible" reading of Section 153's "in the usual manner" language as a stage of resolving "disputes over the meaning and interpretation of collective bargaining agreements" is that it means "in the manner agreed upon by the railroad and the union." *Ryan v. UPPR*, 286 F.3d 456 (mis-cited by Carrier as 286 F.2d) cited at Carrier Dissent, P.6. The quote then adds from that decision "For in a unionized workplace it is in the collective bargaining agreement that one finds the provisions creating the grievance procedures." Id. 458-459.

These points only support the Organization, because this is not a grievance, it raises no rights under the contract. It is a statutory claim which must use the NRAB as its forum, for which the NRAB must adopt or develop procedures suited to a statutory claim, as the Board has done. As the Board pointed out: some, but by no means all, the §153 procedures can be used. The Carrier's idea of treating these law cases as if the statute were part of the contract would lead to ludicrous results, such as: the Carrier would have to file "charges" against itself, in order to hold a hearing and the statute would be subject to varying agreements, procedures, time limits and whims of managers under the one hundred-plus labor agreements in effect. Further, non-union rail workers (20% of U.S. rail workers) would have no right whatever to utilize the statute which would necessarily be limited to properties under a contract and subject to §153. That of course would be unconstitutional as well as in violation of many state laws. Here, the rights are created by Congress, the forum (NRAB) is statutorily forced by Congress, not agreed to by the parties, and the procedure is simply not specified, nor is any time limit included. Congress left woeful gaps in this law, which no doubt explains why it remained almost wholly unknown and unenforced for 37 years.[1/] This Board has written the most thorough and logical analysis of this law composed by any Court or Board to date. The Board correctly analyzed the statutory time limit as a statutory issue. This Board reasoned its way in a scholarly fashion through the problem presented by a federal right with no express limitation period. It followed the majority rule in selection of a limitation period.

[1/] The law was passed in 1970. Despite extensive safety problems in the industry, there was no known use of the law from 1970 through 1989 and only a tiny handful (4 or 5) of claims since then.

Labor Member's Response To
Carrier Members' Dissent
Award 39309

1. Election of Remedies

The Carrier argues for the first time that the Claimant, by filing in Court, elected a remedy and is barred now, even though he was merely dismissed without prejudice based on lack of jurisdiction. The short rebuttal to this attempt at argument is that it simply isn't the law. The universal rule under election of remedies law is that mere pursuit of a non-existent or inapplicable remedy does not constitute an election. The rule was stated plainly by the Missouri Court of Appeals in a 2004 decision:

> "'The purpose of the election of remedies doctrine is to prevent double recovery for a single injury.' *Whittom v. Alexander-Richardson P'ship, 851 S.W.2d 504, 506* (Mo. banc 1993). The doctrine is 'merely a legal version of the idea that one can't have his cake and eat it too.' Id. (quoting DAN B. DOBBS, REMEDIES, section 1.5 at 14 (1973)). See also *Moore v. Mo.-Neb. Exp., Inc., 892 S.W.2d 696, 706 (Mo. App. 1994)*. In particular, the doctrine of election of remedies maintains that one "may not obtain both damages for fraudulent inducement to enter into a contract and a remedy prohibiting the enforcement of the contract as written," i.e., rescission. *Harris, 766 S.W.2d at 87*. Thus, the Davises cannot obtain both actual damages on the contract and rescission. Id. The rule, however, is subject to the exception that, to constitute a bar, the remedy elected must be an appropriate and effectual one. *Bourguignon v. Thirteen-Fifty Inv. Co., 759 S.W.2d 300, 304 (Mo. App. 1988)* (citing *Hollipeter v. Stuyvesant Ins. Co., 523 S.W.2d 595, 598 (Mo. App. 1975))*. [**20] In other words, a distinction is recognized between pursuit of inconsistent remedies and 'pursuit of an imaginary or mistaken remedy.' *Hollipeter, 523 S.W.2d at 598*. Unlike pursuit of one of two or more inconsistent remedies, 'pursuit of an imaginary or mistaken remedy does not bar the subsequent pursuit of a viable remedy.' *Id. at 598-99. Davis v. Cleary Bldg Corp* 143 S.W. 3d 659 (Mo.App.2004)

Where the Claimant pursued a perceived remedy or cause of action, but found no cause or remedy actually existed, such is simply not an election. In this case there was no judgment on the merits; it was dismissed without prejudice and referred to the administrative forum, on grounds the Court lacked jurisdiction. Dismissal for lack of jurisdiction is never on the merits.

The elements for the election doctrine are:

> "An election of remedies is the 'choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts.' 25 Am Jur. 2d Election of Remedies 1 (1966). Three essential elements must exist

> "before the doctrine will be applied. First, two or more remedies must exist. Second, the remedies must be inconsistent. Third, one remedy must be chosen. Id. at 8. The doctrine of election of remedies prevents a plaintiff who obtained one remedy from pursuing another inconsistent remedy. See *Wynfield Inns v. Edward LeRoux Group Inc.*, 896 F. 2d 483, 488 (11th Cir. 1990) (plaintiff may not collect a judgment based on reliance theory after electing restitution damages). 25 Am. Jur. 2d, Election of Remedies, p. 664.

There was absolutely nothing inconsistent about the two remedies in this case. Both were based on the same element of proof, the same evidence, and claimed the same remedies. The Claimant did not "elect" a remedy because, as it turned out, there were not two to choose from, but only one. Thus the first element is not there, nor the other two. Put another way, where a wrong theory of law is attempted, there was no election to be made.

> American Jurisprudence also gives this example:
>
> In *Northern Assurance Co. v. Grand View Building Association*, supra, an action at law had been brought to enforce an insurance policy, but it was held that no recovery could be had on the policy as it stood.
>
> The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title.... But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but a hypothesis. 25 Am. Jur. 2d Election of Remedies, p. 664-665, citing 203 U.S. 106.

In the above-referenced case not only did the District Court dismiss without prejudice but it also noted it was a case of first impression in the District. Thus, there was no reason for the Claimant to have known earlier that there was no civil remedy available.

The Carrier's illogically argue that §20109's statutory language "pursue a remedy" rather than "obtain a remedy" proves conclusively that Congress intended this election of remedies provision to be an exception to the general rule in American Law. The general rule is that pursuit of an unavailable remedy simply is not an election. Congress meant no such thing. The concept of "election of remedy" is expressed in many ways, but all mean the same thing. All are governed by the same three (3) requisites.

Whether the phrase used is to choose between two "modes of procedure and relief" or "pursuit of a remedy" or "seek relief" or any other language, the concept expressed is the same "election of remedy doctrine" and the three (3) elements are the same and the applicable principles are meant to do nothing other than prevent double recoveries for the same wrong.

The Supreme Court of Vermont emphatically affirmed and applied the general rule in a case where the defendant argued that by filing for workman's compensation benefits, for which the compensation board determined he was ineligible, that he "elected his remedy" by and should not be allowed to pursue an inconsistent common law remedy in superior court. *Gallipo v. City of Rutland, et. al.*, 17304.223, 789 A. 2d 942, at 947 (Sup. Ct. Vt. 2001).

The Court went on to hold specifically:

> In any event, the application of the doctrine, at least in its modern version, would not go as far as defendants urge. We explained the doctrine in terms directly applicable here in *Sabourin v. Woish*:
>
> .....Election exists when a party has two alternative and inconsistent remedies, and is determined by a manifestation of choice; but the fact that a party wrongly supposed he had two such rights, and attempted to choose the one to which he was not entitled is not enough to prevent his exercising the other, if entitled to it. 117 Vt. 94, 98, 85 A.2d 493, 496 (1952) (citations omitted); see also *Lively v. Libbey Mem'l Physical Med. Ctr., Inc.*, 317 Ark. 5, 875 S.W.2d 507, 509 (Ark. 1994) (party does not "elect between inconsistent remedies when he actually only has one available"); *Patrick v. Highbaugh, 347 S.W. 2d 88, 90* (Ky. 1961) (election doctrine requires two valid but inconsistent remedies and is not applicable when only one in fact exists)."

The Supreme Court of Iowa applied the general rule in a case where the party had attempted foreclosure only to find that avenue was not open to him, and the defendant claimed that was an election. The Iowa Court unanimously disagreed, and cited the often-quoted discussion in American Jurisprudence: In 25 AmJur.2d, Election of Remedies, §22, Page 664, this appears:

> "The doctrine of election of remedies presupposes a choice between two or more remedies and a clear understanding of the nature of the remedies between which the election is made. A party is not barred from invoking a proper though inconsistent remedy when, in his first action, he has chosen and pursued, even to an unfavorable judgment, a remedy which was not available to him because either the facts turned out to be different from what he supposed them to be or the law applicable to the

> "facts was found to be other than supposed. If, in truth, the party has no such remedy as he invokes, his action in pursuing it does not constitute an election ***."

The Carrier's argument is defeated, in the first instance, by the plain language of §20109's election of remedies clause which plainly states, consistent with the general rule discussed, that election is limited to situations where the claimant is "afforded legal protection under both §20109 and another law or doctrine." The statute reads:

> "When an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law." (Emphasis added)

The Dictionary of Modern Legal Usage, (Garner, Ed. U. Oxford Press, 1995) defines the term "afford", in the law, as meaning "to furnish something as an essential concomitant" using as an example: "The 6th Amendment guarantees that a person brought to trial in any federal court must be afforded the right to assistance of counsel before he can be validly convicted".

A word is presumed to have its usual legal meaning when used in a statute. Thus, here, "afforded" clearly means that a law actually provides or furnishes the Claimant an available remedy as an essential concomitant of its terms. Here, the District Court ruled it lacked jurisdiction because Claimant's sole and exclusive remedy was under §20109; and no remedy at state law existed for him because of that exclusivity.

The use of the word "afforded" places §20109(d) squarely under the general rule which requires that, for election to apply, there must exist two (2) available remedies from two (2) different sources which are actually available to the Claimant. Here, there was only one (1): §20109. There is no indication anywhere that Congress somehow intended this "election" provision to be an anomalous exception to the general and well established law-governing election of remedies.

In summing up, the Organization notes in passing that no "election of remedies" issue was put before the Board by the Carrier in its Submission. As a result, for that reason, the issue was not decided or referenced in the Board's award, and it is doubtful whether any reviewable issue is preserved in that regard.

Labor Member's Response To
Carrier Members' Dissent
Award 39309

The Carrier's Dissent is faulty in its analysis and unfairly pejorative in tone. The Board carefully considered all of Carrier's points and found them lacking in merit. The Third Division Award 39309 is correct and stands as precedent.

Respectively submitted,

Roy C Robinson