NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6161

Parties to Dispute:	)	
	)	
NATIONAL CONFERENCE OF FIREMEN AND OILERS	)	OPINION AND AWARD
and	)	Case No. 1
	)	Award No. 2 - MERITS
COLORADO AND WYOMING RAILWAY COMPANY	)	"Paul Salinas Reinstatement"

STATEMENT OF CLAIM:

"1.) That in violation of the current agreement, Mr. Paul Salinas, laborer, Pueblo, Colorado, was unjustly terminated on October 13, 1997.

2.) That accordingly, the Colorado and Wyoming Railway Company be ordered to reinstate Mr. Paul Salinas to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired with compensation for all time lost (October 13, 1997 continuing until settled) plus 5% annual interest; reimbursement of all losses sustained account of loss of coverage under Health and Welfare and Life Insurance; and the mark be removed from his record."

SYNOPSIS:

The Colorado and Wyoming Railway Company ("Carrier" or "C&W") is a short-line railroad headquartered at Pueblo, Colorado. Interchanging with the Union Pacific and the Burlington Northern and Santa Fe lines, C&W provides rail service chiefly to CF&I Steel, L.P., known as Rocky Mountain Steel Mills ("CF&I" or "Mill") and maintains its shops and offices within the Mill's fenced complex at the site.

Prior to the incidents giving rise to this dispute, Paul Salinas ("Claimant") had served as a regularly employed laborer for the Carrier at the Mill since June 15, 1981. On October 3, 1997, Mill employees represented by the United Steelworkers of America ("USWA") struck their employer. On October 11, 1997, picketing spread to the established reserve gate. On October 13, 1997, Claimant's first scheduled shift thereafter, he refused to report for work as assigned.

On or about December 31, 1997, Carrier notified Claimant that he was deemed to have "quit" or "voluntarily relinquished his employment" as a result of his refusal to cross the picket lines of the striking union. This Claim was submitted on Claimant's behalf by the National Conference of Firemen and Oilers (the "Organization" or "NCFO") on November 26, 1997 contesting that action and seeking reinstatement with full back pay.

THE ISSUE:

The issue before the Board is whether Carrier's action violated the controlling Agreement.

PROCEDURAL HISTORY:

The Organization's initial submission alleged that Carrier's failure to maintain a "safe gate" and its refusal to give Claimant a hearing before dismissing him violated the terms of the Agreement. On December 5, 1997, Trainmaster Virant responded, advising the Organization's General Chairman that Claimant had been permanently replaced, not dismissed. On December 15 the Claim was appealed to Carrier Superintendent Cesario asserting the same contentions. Carrier denied the Claim again on December 19 on the grounds initially stated. On January 6, 1998, the Organization took further appeal to Carrier Vice President Porter, repeating its earlier arguments. On February 20, 1998, Porter denied the Claim.

On April 16, 1998, the Organization proposed that a Public Law Board be established to resolve the dispute. When the parties were unable to agree on the issue, the Organization on June 3, 1998 petitioned the National Mediation Board ("NMB") for creation of a Procedural Board to determine what law should apply in resolving the merits of the Claim. On September 10, 1998, the NMB certified Neutral Thomas N. Renaldo to serve as Third and Procedural Member of Public Law Board No. 6161 and to designate the procedures to be followed should it become necessary to convene a Merits Board to resolve the merits of the case. On December 12, 1998, PLB No. 6161, with Mr. Renaldo sitting as Chairman and

Neutral Member, issued Award No. 1 setting forth eighteen questions for resolution by this Merits Board. [1]

Following an unsuccessful attempt at securing preliminary injunctive relief, [2] Carrier on February 4, 1999, sought a declaratory judgment in the United States District Court for the District of Colorado and a preliminary injunction staying this arbitration on grounds that the Board lacked subject matter jurisdiction. [3] C&W maintained in that action that the Claim did not pose a "minor dispute" within the meaning of the Railway Labor Act, ("RLA")[4] and that the Organization and Claimant had made an election of remedies pursuant to the Federal Railroad Safety Act ("FRSA")[5] barring presentation of their Claim to this Board because Salinas had justified his failure to report solely out of fear for his safety. On May 27, 1999, the court denied Carrier's motion to stay and granted summary judgment for the Organization, concluding in material part that:

> "...the issues raised by the plaintiff here are properly within the jurisdiction of an Adjustment Board under the Railway Labor Act and that the plaintiff's claim that the Federal Railroad Safety Act is the exclusive remedy for any action taken by the plaintiff with respect to the defendant Paul Salinas is without merit." [6]

The Board is informed that Carrier has taken that ruling to the United States Court of Appeals for the Tenth Circuit. On date of hearing in this proceeding, that appeal remained pending.

Pursuant to the terms of Award No. 1, and after due notice to the parties, a one-day hearing was held on September 30, 1999 at the offices of Dufford and Brown, PC in

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[1] See "Attachment 'A'" hereto.
[2] The Colorado & Wyoming Railway Company v. National Conference of Firemen & Oilers et al., Civ. Act. No. 98-M-1375.
[3] The Colorado & Wyoming Railway Company v. National Conference of Firemen & Oilers et al., Civ. Act. No. 99-M-232.
[4] 45 U.S.C. §§151, et seq. (1988).
[5] 49 U.S.C. § 20109.
[6] Order Granting Defendants' Motion For Summary Judgment in Civ. Act. No. 98-M-1375, May 27, 1999 at p. 2.

Denver, CO. The following appearances were noted: David W. Furgason, Esq., Dufford and Brown, P.C. for Carrier; and Newton G. McCoy, Esq., St. Louis, MO for the Organization. Both sides were afforded a full opportunity to present evidence and argument of their choosing on the issues discussed herein. A verbatim transcript was made of the proceedings. Simultaneous post-hearing briefs were exchanged on November 30, 1999; reply briefs were posted on December 14, 1999. Without regard to whether specifically referenced, all documents and video-tape materials received in evidence and all argument advanced in support of the respective positions of the parties, excepting new evidence not presented in case handling on the property, has been considered in the preparation of this Opinion and Award. Signature by concurring or dissenting Members of the Board does not necessarily denote agreement with or dissent to all aspects of this Opinion and Award.

FACTUAL BACKGROUND:

The following facts are not in dispute.

Carrier is solely owned by CF&I, Inc., which in turn is the general partner in CF&I Steel, L.P., the owner and operator of the steel mill, Carrier's predominate customer. It supplies rail service to the Mill, which recycles steel into rail, reinforcing bars and other products at its Pueblo facilities. Carrier's relations with its employees are governed by the Railway Labor Act. The labor relations of the Mill fall under the nation's other primary labor statute, the National Labor Relations Act.[7]

On September 22, 1997, C&W Vice-President Robert Porter advised all employees that in the event USWA-represented Mill personnel should call a strike, C&W personnel were to report to work exclusively through a "safe gate," the East gate on Pueblo Boulevard, until further notice. "Please be reminded," his letter continued, "that our contracts do not expire on September 30, 1997, and accordingly, any failure to report to your scheduled and assigned duty could result in your permanent replacement." By follow-up letter dated September 30, 1997 Porter advised C&W employees that "if you have decided to honor

[7] 29 U.S.C.§ 151, et seq. (1988).

[the CF&I Steelworkers] strike, be certain to remove all your personal belongings from Company property..."

Upon commencing their work stoppage on October 3, 1997, strikers posted pickets at the main entrance to the Mill complex. Approximately a week later, on or about October 10, 1997, picketing spread to the "safe gate" designated for use by the Mill's non-striking tenants, including employees of the Carrier. Carrier continued to maintain operations, using regular employees who persisted in reporting to work through the safe gate as well as a number of replacements.[8] Commencing on October 13, 1997, Claimant's next scheduled workday, he refused to report and perform services for the Company. According to the uncontested representations of the Organization, he did, however, inform his Shop Foreman, Mr. Skull, each day during the first week of his absence that it was unsafe for him to report. Thereafter, Claimant left a daily message to the same effect on an answering machine in his shop.

On October 20, Porter advised Claimant that he was being placed in non-pay status and that his medical benefits would expire at the end of that month. The following day the Organization wrote Porter to request that a "safe gate" be restored so that Claimant could report to work. On October 29, Porter replied that a preliminary injunction was in place against acts of violence by striking USWA members; that the C&W had made arrangements to transport its employees safely between their residences and jobs; [9] that other employees were reporting without incident; and that there appeared to be no basis for believing conditions were so hazardous as to constitute an "imminent danger" under the Federal Railroad Safety Act. Notwithstanding, Claimant did not report to work for the duration of the steelworkers' strike.

[8] According to the Organization, the Mill had also hired approximately 600 replacement employees and continued to operate. It further represents that the National Labor Relations Board has issued a complaint, as yet unresolved, on the question of whether this strike was precipitated by unfair labor practices on the part of the Mill. If the answer to that question is ultimately determined to be yes, the hiring of replacements by the Mill may constitute an unfair labor practice, but as between C&W and Claimant, that issue is irrelevant.

[9] Claimant contends he was never aware of Company-provided, free transportation arrangements. It is undisputed that such services commenced about a week after the safe gate was picketed.

The strike ended on December 30. When Claimant showed up for work the following day, Carrier directed him to undergo a physical exam and complete an application for employment as a candidate for hire. He did so. His return to work physical revealed no significant health issues, but when he returned on the ensuing workday he was informed that he would be considered for re-employment when a suitable vacancy occurred. Salinas is the senior employee in the craft.

POSITIONS OF THE PARTIES:

The Organization

The Organization first contends that through action and inaction, C&W's "corporate parent" "deliberately destroyed the "safe gate", leaving Claimant with no recourse but to stay out for his own personal safety. The Organization explains that CF&I had issued blue passes to C&W employees and red passes to Mill workers for use in entering the facility. After security forces permitted a Mill worker to pass through the safe gate using his red pass, the USWA began picketing that entrance. CF&I never took steps to revise its procedures to prevent a recurrence of such gate misuse, and never created another safe gate. As a result, the Pueblo Boulevard gate became the site of much threatening activity, such as a "wall of shame" featuring pictures of "scabs" and other intimidating behavior. Succinctly, Carrier's owner itself created such "chaotic conditions" that Claimant was justified in not crossing the steelworkers' picket lines.

The Organization next maintains that dismissing Salinas without holding the fair and impartial hearing required by the rules deprived him of his right to present his side of the story. In doing so, Carrier committed such a fundamental breach of contractual obligations that, in accordance with the holdings of several prior awards, this Claim must be sustained. Had Carrier heard out the Claimant, as discussed more fully below, it would have learned that after the striking steelworkers polluted the safe gate by picketing it, Claimant was no longer able to reach his work area safely. According to Claimant, conditions at that entrance were highly confrontational:

> "...the things were the aggressiveness that the steelworkers, the picketers were displacing...the hitting the vehicles, the screaming, hitting of vehicles,

> spitting, pointing, the video cameras filming myself and my vehicle. There's, as I say, numerous articles of gasoline being poured around homes, people being chased, racial remarks. There were people, even C&W workers, that had nails repeatedly thrown in their driveways of the people that did cross."

Lastly,[10] the Organization emphasizes that it is not and has never rested its Claim on or sought relief under the Federal Railroad Safety Act. The Claim is a straightforward minor dispute. Despite the chaos, Claimant called in to his shop daily to advise that he had tried to report but was dismissed without cause. Carrier's attempts to fend off consideration of the merits on preemption grounds reflect a tortured reading of the law. Citing extensive case authority, the Organization asserts that the dispute can and must be resolved pursuant to the terms of the applicable labor agreement.

Colorado & Wyoming

The Carrier argues that this dispute arises for one reason only: For more than three months, beginning on October 13 and at all times since, Paul Salinas refused to cross a stranger picket line and then incredibly attempted to justify his job abandonment on grounds that coming to work presented a hazardous condition.

As the Carrier views the matter, in the absence of express provisions in the collective bargaining agreement, issues of refusal to work because of alleged safety concerns are governed exclusively by the FRSA. In now seeking arbitration of this Claim before this Board, the Organization ignores well-established law holding that only the courts have jurisdiction to construe and apply that statute. This is not a minor dispute, dependent for its resolution on an interpretation of the collective bargaining agreement. The parties' collective bargaining agreement does not address issues of refusal to work for safety reasons, and the RLA vests jurisdiction in this Board only to resolve minor disputes arising "out of grievances or out of the interpretation or application of [collective bargaining] agreements." [11]

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[10] We find the one further argument put forward by the Organization—that the common ownership of the Mill and Carrier should be read as imputing liability to the railroad for the Mill's inability to maintain its reserve gate—cannot be taken seriously.

[11] 45 U.S.C. § 153 First (i).

The Claim here is a sham, posed to this Board for the sole purpose of avoiding the very clear and controlling law under the FRSA. That Act disfavors Salinas because he cannot possibly meet its standards for determining what constitutes an unsafe condition justifying withholding services. Claimant's own testimony makes it clear that the Claim arises under the FRSA; he has relied solely and continuously on safety reasons for refusing to work. Accordingly, because the courts have held that FRSA disputes and minor disputes are mutually exclusive, his Claim is preempted by the FRSA and this Public Law Board has no jurisdiction to hear it.

Since this dispute involves exclusively FRSA-preempted questions of workplace safety, and a hearing is mandatory prior to discharge only when the grievance is based upon application of the labor agreement, the hearing requirement has no application in this instance.

Lastly, as a matter of equity, given that Salinas repeatedly asserted fear for personal safety as his sole reason for refusing to work, C&W argues that it should be allowed to rely on that professed justification and match the assertion with the appropriate legal standard, FRSA's hazardous condition test. If not, it is left defending potentially inconsistent and mutually exclusive claims. The doctrines of election of remedies and estoppel should apply in such circumstances to prevent just such prejudicial effect. The Board must find that the Organization's efforts to belatedly tart the Claim up in the clothing of a minor dispute are barred by those equitable doctrines.

DISCUSSION:

Jurisdiction

Our threshold concern is jurisdiction. For the reasons stated below, we reject Carrier's view that a determination on the merits is neither required nor permitted and find that this Claim presents a minor dispute, resolvable on its merits by the Board without offense to the terms of the FRSA.

As Carrier emphasizes, the FRSA protects railroad employees who refuse to work when faced with a "hazardous condition" and by its terms establishes the applicable standards

governing refusals to work based on safety concerns.[12] The statute further sets forth provisions designed to promote judicial efficiency and eliminate duplicative litigation over such issues:

> "Election of remedies. —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."[13]

Stripped bare, Carrier's reasoning is that because Claimant relied exclusively on fear for his safety in refusing to report, and the Act sets forth an election of remedies clause, he must litigate his claim in federal court. The federal court at trial level summarily rejected that thinking, and this Board finds it equally unpersuasive.[14]

First, Carrier asserts an unconfirmable half-fact in stating that the Claim relies only on safety considerations as Salinas' justification for refusing to work. His November 26, 1997 Claim expressly sets forth two reasons for his actions:

> "The Claimant, *fearful for his safety and that of his family, along with respect for the picketing workers*, has not crossed the picket lines." (Emphasis added.)

Thus, the Claim posits dual motives, and in airbrushing the second, Carrier appears to invite us into an area where the preemption argument simply loses its vigor.

Second, with Claimant banking on safety issues as but one of two grounds, Carrier errs

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[12] 49 U.S.C.A.§20109 (b).
[13] 49 U.S.C §20109 (d).
[14] Swimming beneath the surface of Carrier's arguments is its concern that if Claimant's remedies are not restricted to one forum or the other it runs the risk of getting conflicting or inconsistent determinations on these important issues. But that is not a new problem or one unique to this dispute. First, in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court unanimously reversed lower court rulings on election of remedies issues and held that an employee represented by a union could bring a Title VII action even after submitting a grievance under his CBA and losing his case--which involved both contractual and statutory claims--at arbitration. The Court found that Title VII was aimed at supplementing, not supplanting, other protections, and that a private cause of action is not forfeited by first pursing a grievance to arbitration as a contractual dispute. In short, the grievance does not waive statutory rights; the filing of a public claim does not waive the right to arbitration; and the arbitrator has the right to resolve questions of contract violation which are similar to or duplicative of statutory rights, subject to judicial review. Significantly, only the employee in the Title VII context—and presumably in the context of FRSA actions as well—enjoys this "two-bites-at-the-apple" arrangement, since neither Title VII nor the FRSA encompass employer rights against the employee. Second, in any event there is nothing to prohibit the Board from imposing the federal standards in the context of its case.

in relying upon Hawaiian Airlines.[15] There, in the words of the Supreme Court, the "only source" plaintiff relied upon in pressing his claim was state tort law. This case makes it clear that employees can enjoy rights derived independently from collective bargaining agreements and statutory law, and that the RLA does not preempt most individual statutory claims. Applied to our case, Hawaiian Airlines says that several sources assure Claimant of his right not to be terminated wrongfully for refusing to work in unsafe conditions. They include the FRSA and Claimant's collective bargaining agreement, but the only source Claimant points to here is his asserted right under the CBA to safe working conditions and to engage in sympathy strikes.[16] Claimant's assertion that he was

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[15] In Hawaiian Airlines, Inc. v Grant T. Norris et al, 512 U.S. 246 (1994), an airline mechanic, dismissed for refusing to execute maintenance records certifying an aircraft as safe and "whistleblowing" to the FAA, challenged his termination in state court. The Court rejected RLA preemption, citing its earlier observation in Terminal Railroad Ass'n. of St. Louis v. Railroad Trainmen, 318 U.S. 1 (1943) that although presumably "a railroad adjustment Board would have jurisdiction under the RLA over this dispute," state workplace laws were nonetheless enforceable by plaintiff employee since he asserted rights independent of the agreement. Accord, Missouri Pacific v. Norwood, 283 U. S. 249 (1931). Importantly, the Court noted that in Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) the RLA was held to preempt a state court action for wrongful discharge grounded exclusively on breach of the labor agreement "because [plaintiff] asserted no right independent of that agreement." In refusing to give preclusive effect to the RLA's minor dispute resolution mechanism, Hawaiian Airlines seems to dictate that a union-represented employee cannot be compelled to arbitrate individual statutory claims. It assuredly does not stand for the principle of statutory preemption of such conventional CBA rights as those precluding discharge without cause or the ouster of Board jurisdiction to consider claims asserting such rights.

[16] Carrier cites Boston and Maine v Lenfest, 799 F. 2d 795, for the proposition that FRSA and RLA remedies are mutually exclusive. There, in a case the First Circuit describes as one of first impression, the court in the context of injunctive proceedings found a minor dispute posed by the UTU's claim that inconsistent flagging represented a danger under FRSA § 10 (b). The court held:

> "This entire dispute, including the nature of the hazard faced, whether the Committee complied with the statutory requirements of notice, and the retaliatory actions of the B&M in firing the leaders of the work stoppage and disciplining others, must be submitted to the National Railroad Adjustment Board."

While the core holding of this case is consistent with the pronouncements of the Supreme Court, as Carrier notes the court expresses the view that a §10 (b) work stoppage cannot be a minor dispute. That observation appears to be idiosyncratic, but in context must be read as an attempt to clarify the lower court's lack of jurisdiction under the RLA to examine the merits of the underlying dispute prior to exhaustion of the arbitration process. While the opinion is somewhat confusing, the holding of Boston and Maine is entirely in line with Supreme Court authority and with our conclusions here. In short, the case holds only that for purposes of federal court jurisdiction in injunctive proceedings, the district court was empowered to enjoin a rail strike over safety issues called under § 10 of the FRSA pending resolution of the underlying dispute by an RLA adjustment board under broad principles of equity, but erred in making findings of fact in that context that this was an illegal strike. Importantly for purposes of this case, the court found that "[o]nly the availability of injunctive relief can ensure that the FRSA will operate consistently with its purpose—which is to give employees the right to avoid hazardous conditions on the railroad, *and to channel any such dispute into binding arbitration.*" Ibid at 802.(Emphasis added.)

"dismissed" in violation of his CBA is clearly "arguable," and not "obviously insubstantial," and so presents a classic minor dispute within the primary jurisdiction of this Board.[17]

Third, even if accurate, characterization of the dispute as purely safety-related does not in our view mechanically exempt it from handling pursuant to the RLA's mandatory dispute resolution mechanism. As the trial court held in the prior litigation on this issue, "the issues raised by [Salinas] here are properly within the jurisdiction of an Adjustment Board under the Railway Act." Although no rationale accompanied its ruling, few principles of labor law are better established than the policy favoring arbitration of labor disputes. As the court implies, and as the Supreme Court long ago found, arbitration of labor-management disputes is strongly encouraged, and "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[18] More recently, the Court stated, "[W]here the [collective bargaining] contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to private settlement mechanisms without dealing with the merits of the dispute."[19]

At the risk of owls to Athens, in this instance that presumption is particularly powerful. The terms of § 20109 (c), which Carrier's reading of the FRSA appears to us to scant, explicitly incorporate Section 3 of the RLA, providing for mandatory arbitration of "minor disputes" by Boards of Adjustment. Thus, the statue itself plainly installs the familiar procedure whereby the Board is to judge the legality of an employee's asserted rights—

[17] Consolidated Rail Corp. v. Railway Labor Executives' Assoc., 491 U.S. 299, 307 (1989).
[18] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574, 582-83 (1960). See also United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Co., 363 U. S. 593 (1960) (the "Steelworkers trilogy").
19 United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987).

here to refrain from working—according to well-recognized standards of our labor laws, but subject always to judicial review. [20]

Lastly, both preemption and preclusion of federal statutory remedies are matters of congressional intent. Legislative history can be a kind of silly putty, drowning intent in diatribe, but to the extent cited by the Organization in this dispute, and reading the sounds of silence from Carrier on the point, it appears beyond doubt that Congress contemplated the established grievance machinery as the primary forum for resolving workplace safety disputes when it enacted legislation that paralleled the OSHA for general industry. Thus, this from the Congressional Record during House committee discussion of the authorization bill for appropriations on September 22, 1980:

> "Representative Florio: Under this provision, refusal to work must be in good faith. Obviously, many jobs in the industry involve inherently hazardous activities. Rail workers are often called upon to work in inclement weather. They must often deal with hazardous chemicals. Obviously, the employer has the responsibility to provide appropriate protection. But, assuming appropriate protection is provided this remedy should not be available merely because of the inherent hazardous nature of the job.
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> Under this provision, an employee who was fired or felt he was discriminated against could file a grievance through the existing Railway Labor Act grievance machinery. The grievance board could order the employee reinstated, and under already existing practice, award back pay."[21]

Failure to Hold Investigation and Hearing

We next must decide the Organization's procedural question: whether the Carrier's actions in permanently replacing Claimant without a hearing is fatal to its position and should compel Salinas' reinstatement without further analysis. The applicable rule provides in part:

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[20] The Organization plausibly maintains that the election of remedies provision of the FRSA was intended to require railroad employees to elect between FRSA and OSHA protection, not between the FRSA and an RLA adjustment board. Whether or not the case, §20109 (d) cannot possibly be read to pose a choice between the FRSA and RLA without rendering meaningless the provisions of 20109 (c) incorporating the Section 3 procedures of the RLA.

> "No employee shall be disciplined without a fair hearing by designated officer of the carrier. Suspension in proper cases pending a hearing shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly-authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

Plainly, we add nothing to the Parties' understanding in recalling that grievances may concern not only the interpretation but also the application of collective bargaining agreements.[22] And we betray no trade secrets in repeating that one important purpose of on-property hearings is to winnow and sift issues of CBA applicability—and there is no question but that this issue was imbedded in the dispute. Accordingly, passing without remark sound labor relations and the quasi-appellate nature of railroad arbitration, anything that tends to burden or qualify Salinas' right to a hearing is presumptively suspect. Carrier's argument that the hearing requirements of the CBA have no application to his problem because he made an election to rely on a safety defense, which only the courts can assess, appear to this Board both casuistic and incompatible with those principles.

The Board believes the better rule is that except in narrow, carefully confined circumstances, doubts about omitted hearings should be resolved in favor of requiring them, lest access to dispute resolution mechanisms be foreclosed, valuable rights forfeited and the general purposes of the RLA frustrated. That said, we conclude there are two reasons for finding that failure to hold one under the circumstances here should not act as a baffle to Board consideration of the merits. First, as prior authority suggests, where the conduct in dispute is in the nature of job abandonment, or actions in kind, the Carrier's response in context may arguably not constitute discipline in the conventional sense. The Organization argues hard that the Agreement makes no provision for such "self-executing"

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[21] Federal Railroad Safety Authorization Act of 1980: Hearings on H.R.7104 Before the Committee on Interstate and Foreign Commerce , 96th Cong. 2nd Sess. September 22, 1980 (statement of Rep, Florio, N.J.).

[22] Although not by name, minor disputes are those arising out of RLA § 2 Sixth and § 3 First (i), requiring compulsory arbitration procedures for disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

terminations. But Claimant took initial action here; his conduct speaks volumes, and his failure to even request a hearing bolsters the suspicion that this dispute lacks the usual "Carrier-acts-Claimant-reacts" complexion of the normal disciplinary matter.

Second, even if Claimant's actions are not classified as job abandonment and the Claim is instead viewed as belatedly asking whether Salinas had an inherent CBA right to safe working conditions as an incident of the employment relationship, and whether resort to self-help in vindication of that right was a breach of his employment obligations, it does not necessarily follow that a lack of investigation and hearing is fatal to Carrier's case. It is obvious from a review of the arbitral jurisprudence that a totally uniform view of what remedy should apply when a hearing is bypassed in analogous circumstances has not developed.[23] Guided by the awards provided, the arguments of the parties and our own research, we find for the reasons below that the anomalous facts of this matter put the case squarely within the narrow class of cases that warrant exceptional treatment, and conclude that the merits of the Claim are not barred from our review on account of the bypassed investigation and hearing.

The Organization offers rail arbitration authority holding that it is of no consequence that a hearing may not have yielded any facts exonerating Claimant. We agree with that wholesome general statement, and are strongly inclined to think that a hearing would not have illuminated anything here, since even at these proceedings, conducted almost two years after he stopped working, aside from robust and creative argument, only Claimant's deposition and a collection of newsclips were produced in support of his safety claims. On the other hand, there is ample basis in the record for concluding that Claimant would not

[23] See, e.g., Florida East Coast & BMWE (Hall) (Carrier's action in terminating Claimant without hearing for failing to protect assignment while incarcerated upheld; forfeiture of seniority was by voluntary act of Claimant, not discharge, and hearing issue thus irrelevant.); BRAC & MP (O'Brien) (Claimant's admission of guilt prior to investigation and 30-day suspension for failing to protect assignment held to obviate necessity for hearing as it would amount to an exercise in futility.) Contra First Division Award No. 9561 (Fox) ("The agreement must be construed to mean that where, upon demand.. an investigation and fair hearing are not accorded...the right to reinstatement 'with full time...for all time lost' exists"). See also the resolution offered by First Division Award No. 24244 (Twomey) (1993) (In dispute over whether termination was a result of whistleblowing to FRA or refusal of fellow employees to work with Claimant, and no conference took place on property, Board remands matter to

have attended a hearing had one been scheduled, requiring a hearing *in absentia*. And that *is* consequential.

The crucial issue question on this procedural point is whether the merits of this dispute should go by default for failing to hold a hearing on the property to discuss why the Claimant would not come onto the property while USWA picket lines were up. The practical impossibility of holding a hearing under such circumstances--where Claimant had liberally demonstrated that as Local Chairman for the NCF&O he would be sitting it out until the strike was settled--cannot be winked at. There is no valid basis in the Agreement, and abundant support in the cases, for concluding that forfeiture should not be worked where Claimant himself was responsible for his fugitive status. If the sturdy equitable maxims of "clean hands" and "the law does not require useless acts" ever had application, it is in precisely these circumstances. Thus, where the record is clear that Claimant had no intention of covering his assignment until the USWA strike was settled, the argument that Carrier's must lose by default for not attempting a futility simply gets no traction. The Board concludes that in the absence of any explicit contractual penalty, and lacking any demonstrated injury or prejudice to the Organization's case resulting from what might be considered Carrier's technical misapplication of the hearing rule, default in favor of Claimant is not warranted.

Merits: Claimant's Refusal to Work

Unsafe Conditions:

We have examined this record microscopically in attempting to assess the *bona fides* of Salinas' contention that he could not report for over 80 days out of true concern for his safety. We conclude that Claimant's professed fear cloaks the real state of affairs.

The evidence reveals that "two or three weeks" prior to the expiration of the USWA contract, UTU-represented employees of C&W, then in negotiations with C&W on their own new agreement began to solicit support from co-workers to honor picket lines should a strike occur. According to one TCU employee, "it was well known that they were planning

parties for on-property handling and filing Notice of Intent in accordance with NRAB procedures prior to assertion

to use fear for their safety as a reason not to cross the picket line." On September 15, 1997, two weeks before the strike began, the UTU put Carrier on official notice of its position by letter reading in material part as follows:

> "[UTU] members are protected by Section 212 of the Federal Railroad Safety Act, 49 U.S.C. §20109, which directs your railroad to provide a safe place to work. Accordingly, should pickets appear at the site, and our members do not feel safe in crossing the picket line, we will defend any decision they make under the Safety Act."[24]

On September 22, 1997, apparently concerned by these developments, Carrier distributed and posted a bulletin directing all C&W employees to use the "Old Fountain Asphalt Gate" from that date forward in reporting, and advising further that "...any failure to report to your scheduled and assigned duty could result in your permanent replacement." Claimant, then serving as Local Chairman for his union, was copied on this communication and testified that he received and read it.

A partial sampling of the experiences of Claimant's co-workers both before and after the strike commenced is informative. Approximately one week before the strike, one UTU-represented worker stated that a fellow employee advised him that:

> "...we could refuse to cross the picket line and rely on the Federal Railroad Safety Act to protect us...On...October 11, 1997...[t]he C&W guys were standing across the street from the gate. They were yelling 'scab' at me as I crossed the picket line and pointing me out to the steelworkers...It was annoying...but I never feared for my safety. I don't think that anyone was really afraid to cross, it was more of a sympathy strike in my opinion."

The record is clear that other C&W unions evidenced similar formal and informal support for the steelworkers. On September 30, 1997, the Brotherhood of Railroad Carmen advised Carrier in writing that "any pickets at the so-called neutral gate will constitute an unsafe condition...Should there be pickets and the Carmen choose not to cross the line, their actions are protected by Supreme Court decisions, the Railway Labor Act, and

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of Board jurisdiction.)

[24] Standing alone, this statement is neutral, reflecting only what the Organization professed to be its rights under FRSA. No broader inferences are intended or warranted on this record by this Board with respect to any action by that Organization or its members or the activities of other Organizations, some of whose members are quoted for context.

Section 212 of the Railroad Safety Act..." Notwithstanding that position, one Carman testified that despite threats of fines and blackballing from his union if he crossed, he reported for work three days after the strike began. His assessment of the situation was as follows:

> "I think that in the beginning everyone just wanted a few weeks off from work and that they thought they would be back before very long. I don't think that safety was a real issue, particularly after the first few days. I was never worried about my safety..."

Another C&W Carman stated that he was told by his Organization prior to the start of the USWA strike that if he crossed the steelworkers' lines he would be fined. He further stated:

> "I believe that the switchmen working for C&W were told the same thing...Before the strike began, [C&W employees "d" and "e"] told me that I could get out of crossing the picket line by saying that I 'feared for my safety if I crossed the picket line.' They said I could use the 'fear for my safety' as an excuse for staying away from work...For the first few days, I did not cross the line...I thought it would only last a few days...I reported to my supervisor that I would not cross the picket line because I feared for my safety, but this was just an excuse. I was not really afraid...By Wednesday of that week...I crossed the picket line and reported to work...I continued to cross the line for each of my scheduled shifts during the remainder of the strike. I never feared for my safety while crossing the picket line. I never felt threatened or intimidated by the steelworkers. It was the former C&W employees who refused to cross the picket line that caused most of the problems...The only trouble I had crossing the picket line during the entire strike was instigated by [a former C&W employee]. [He] pointed me out to the steelworkers. They surrounded my vehicle and started verbally harassing me."

Other C&W Organizations, notably the IAM, apparently voted to continue working and their members did so without serious incident, as did the majority of other C&W employees, including all management and all replacement workers. A short, partial sampling of their experiences, in their own words, is informative.

An unrepresented female intern, who initially used Company-supplied transportation to report to work daily and later drove herself, observed that "[i]t was not a pleasant

experience but I was not afraid to cross the picket line. Other than being called names. I was not threatened in any way."

A TCU member, who indicates he was directed by another Organization to stay out in a showing of solidarity, says:

> "[I]t was well known that they were planning to use fear for their safety as a reason not to cross the picket line....My union wanted me to honor the picket line and threatened me with fines for crossing..."

A Carman testified that prior to the strike he was threatened with fines and blackballing by his union if he crossed, and told that:

> "I could get out of crossing the picket line by saying that 'I feared for my safety if I crossed the picket line.' They said I could use the 'fear for my safety' as an excuse for staying away from work...I reported to my supervisor that I could not cross the picket line because I feared for my safety, but this was just an excuse. I was not really afraid...By Wednesday of that week...I crossed the picket line...I continued to cross the line for each of my scheduled shifts during the remainder of the strike. I never feared for my safety while crossing the picket line."

Another Carman testified that when he reported to work on October 11, 1997 at 6:00 a.m., there were about six picketers at the gate:

> "I had no trouble crossing the line and I stopped and talked with one of the picketers...Throughout the strike, I continued to cross the picket line on a daily basis. I was concerned that my vehicle might get damaged, but the worst thing that happened was getting yelled at by the picketers. I never felt threatened and I was never afraid to cross the picket line, it was just annoying."

One TCU affiant indicated that:

> "When the steelworkers set up the picket line at the East Gate, I continued to report to work and crossed the line on a daily basis. I never felt threatened and I was never afraid to cross the picket line."

A BMWE-represented worker testified that he initially stayed out when the East Gate was picketed because he had never been through a strike situation:

> "[I]was unsure how to deal with it. I stayed out for three days...I stood across the street from the East Gate with the other C&W employees who refused to cross the line. I do not remember any of these individuals discussing safety issues or indicating that they were afraid to cross the line.

> On the fourth day, I decided to cross the picket line...I never felt threatened and I was not afraid for my safety."

A member of the International Association of Machinists testified as follows:

> "[t]hroughout the strike, I continued to cross the picket line and report to work for my scheduled shifts. I never felt afraid to cross the line. The problems that did occur were caused by the C&W employees who refused to cross the line, not the steelworkers."

A member of the Sheetmetal Workers' International Union testified that prior to the strike he advised C&W employees soliciting his support that he intended to report to work:

> "I knew I could be replaced if I stayed out...I crossed the picket lines at the East Gate on a daily basis...Both the steelworkers and the UTU members who refused to cross the picket lines were yelling and making gestures at the C&W employees who were crossing. I just rolled up my windows and drove straight through. I was never threatened and I was not afraid to cross the picket line. Although it was not a comfortable situation, it was not a safety hazard."

Claimant's fellow NCF&O worker testified that he was involved in only one incident during the strike. He was at a store and his car battery went dead. A UTU member pulled up and asked if he needed help. When told no, the man indicated that:

> "[he] "wouldn't help [me] anyway. The next day we saw each other again and flipped each other off...I was never intimidated or afraid to cross the picket line. I don't believe that anyone was really afraid to cross the picket line, it was just an excuse. I think those that refused to cross just wanted a few days off work."

A member of the BMWE testified that he saw only two pickets on the first day of the strike at 6:10 a.m. and approximately four the next day.

> "At the height of the picketing activity, there were only about 6-8 pickets at the east Gate...[t]he picketers did not make any verbal threats or threatening gestures. They just walked slowly back and forth across the entrance. Later in the strike they increased their verbal attacks and began yelling, "scab" at those who crossed the line, but they never threatened anyone. One of the steelworkers called me a "scab" one day as I went through the gate. He apologized to me when I told him that I was not a steelworker. I never felt like the picket line was dangerous and I was never afraid to cross the line."

Another UTU member testified as follows:

> "I was never afraid to cross the picket line and I don't think anyone else was either. Those who stayed out did so out of sympathy more so than fear."

An IAM-represented Locomotive Shop Foreman testified that on Saturday, October 12, he saw about six picketers when he passed through the East Gate around 6:30 a.m.

> "[t]hroughout the strike, there were usually only 4-5 picketers at the East Gate at any given time. The C&W employees who refused to cross the picket line stayed across the street from the gate. There were usually 10 of them there. Mostly engineers and switchmen...My vehicle was spit on once as I was crossing the picket line, but I never experienced any direct threats or real problems. I was never apprehensive or nervous about crossing the picket line, it was just aggravating...I do not believe that any of the former C&W employees who refused to cross the picket line were genuinely afraid. I think they felt that if they could shut down the railroad it would help the steelworkers."

A TCU-represented employee:

> "I crossed the steelworkers' picket line every day during the steelworkers' strike...The...picket line was often annoying but I was never afraid for my safety because of the steelworkers."

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October 13 was Claimant's first scheduled workday after the USWA broadened its picketing to include the East Gate. Beginning on that date and continuing for the next five days, Claimant and certain other C&W personnel reported to their supervisors that they were unable to come to work because they were afraid to cross steelworker picket lines. As suggested by the excerpted testimony quoted above, several C&W employees who had initially held out returned to work shortly thereafter and, according to the testimony of Carrier's President and COO, conceded that the safety concerns they initially voiced were synthetic and that "no one was really afraid of crossing the picket line or of any consequences." By the end of the first week, most C&W workers were back working. The only other C&W employee in Claimant's class and craft crossed the picket line daily throughout the strike without incident.

By letters dated October 29 and October 30, Carrier gave all C&W employees, including Claimant, notice that free transportation to and from work would be provided

for anyone interested. Although some employees took advantage of that offer, Claimant and apparently some other employees who chose to honor the picket lines did not do so. Some employees who initially utilized the service concluded after about 3 weeks that it was unnecessary and resumed taking their own vehicles across the picket lines to and from the Mill. C&W's offer to reimburse its employees for damages incurred in coming to work resulted in no claims for such damages, nor did any C&W employee report to Carrier a single physical injury during the strike.

The Organization cautions this Board to avoid wrongly attributing the actions of other C&W employees to Claimant in making common cause with lawful strikers. Claimant did not attempt to convince others to refuse to cross, it maintains, and there is no evidence that he ever threatened his co-workers. Those are deserving arguments. But no such attribution is required to find that Claimant's actions in remaining away from work for nearly 80 days and reporting to the safe gate for 10-15 minutes each day, taken in context with pre-strike events and bolstered by 5 separate videotapes depicting conditions on the picket lines at various times in October and November, are difficult to reconcile with any realistic "fear for personal safety."

Because fear is highly subjective, the same circumstances that that might reasonably intimidate a young office worker may not frighten a hard-bodied section hand. As John Steinbeck had it, no two journeys are alike. Thus the Board feels it prudent to stir with a long spoon the competing contentions of the disputants here that the picket-line activity was either Easter week in the convent or a kind of WWF Smackdown.

While there is some evidence, chiefly in the form of press clippings[25], that picket line activity was occasionally energetic, Claimant from all appearances is a robust laborer. We

[25] The Organization sponsored 24 pages of newsclips covering the strike period in support of Salinas' claim of unsafe conditions. (See, Organization Exhibits P-9 through P-32.) Taken as a whole, they pretty much puree the argument that the safe gate was a dangerous place. Only 14 of the 24 press reports reference picket line misconduct or strike-relate violence. There is one undated report from an unidentified journal describing a burglary at the home of a CF&I employee who crossed the picket line (P-19). The earliest dated clipping (P-10) is from October 12, 1997, source unidentified. It quotes UTU Vice President John Garcia somewhat cryptically describing the reasons rail employees were staying out: "It's not a railroad strike; it's not a matter of honoring the picket lines at all; it's concerns for our personal safety. We know that by crossing the picket line, it would heighten the

have scoured this record for signs of misconduct that might reasonably stimulate fear in his mind while at the same time causing no such apprehension on the part of his coworkers, including women, young interns, clericals and replacement workers. At the end of the analysis, the facts totally refute the cant.

It is evident from the testimony and the substantial volume of film received into evidence that both C&W employees and to a lesser extent striking steelworkers at the East Gate sometimes hollered, made obscene gestures, and were a general irritation to people trying to come to work for the railroad. But while no one likes to be yelled at, the record in this particular case is devoid of compelling evidence establishing any safety risk in crossing

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tensions...There's a sense that the private security force presents a threat to us as well," Garcia said. The remainder of these clippings are dated well after Claimant made his decision to stop working and could not have been relied upon in making that decision. The next article chronologically (P-14) is dated October 30, 1997 and describes a striker's report that someone drove towards him at a high rate of speed while he was picketing. The rest are in November and December: November 8, 1997 (P-20: Pueblo *Chieftain* reports railroad worker's complaint of threatening phone calls); November 9, 1997 (P-21: *Chieftain* reports two strikers claim they were struck by a hit and run vehicle); November 10, 1997 (P-22: Unidentified source reports that District Attorney is asked to file charges against one of the two hit and run victims for false reporting; police indicate they are not investigating the other incident as hit and run); November 14, 1997 (P-24. *Chieftain* reports picket line patrols stepped up in response to alleged hit and run); November 20, 1997 (P-26. *Chieftain* reports that "Company and Union Trade Complaints," including individuals "threatening employees seeking ingress and egress to employer's facilities."); November 20, 1997 (P-27.*Chieftain* reports that CF&I strikers yelled racially harassing remarks at three black replacement workers; USWA leaders indicate such actions will not be tolerated.); November 21, 1997 (P-28. Colorado Springs *Gazette* reports that steel company accuses strikers of breaking the law by refusing to negotiate and including "picketing the home of an employee" and "following the vehicles of employees in a threatening manner..."); November 27, 1997 (P-29. *Chieftain* reports that railroad machinist complains of nails on his driveway.); December 24, 1997 (P-30. *Chieftain* reports under headline "Mayhem at CF&I" charges of falsely reporting vehicular assaults; increased incidents of nails being thrown to deflate tires; "keying" of cars; speeding vehicles and replacement workers taunting strikers by flashing $100 bills.) Exhibits P-31 and P-32 from the *Gazette* and the Denver *Post* report same story under headlines "Pueblo Beefs Up CF&I Security," and "Picket Violence Decried," with the latter article citing incidents of egg throwing and the wife of a striker allegedly struck by a car entering the plant as under investigation." In short, in a long strike and in a community as small as Pueblo, CO, where roguishness presumably is news, there are 14 print media discussions of strike-related mischief over a period of nearly three months, one of which (P-10) is in the nature of a policy statement from a UTU official on October 12 and only two of which (P-20 on November 8 [telephone calls] and P-29 on November 27 [nails at residence]) involved Carrier employees, the latter occurring six weeks into Claimant's job action, and neither occurring at the safe gate. Of the remaining 11 articles, two (P-21 and P-22) involved false reports; three (P-30-31-32) concerned increased security in late December prompted principally by the events described in the November reports; two are general rehashes or position summaries of the partisans with anecdotal reference to misconduct; and four reflected incidents of genuine misconduct, none involving Carrier personnel and all apparently occurring after Claimant decided to suspend his work. (P-9, suspected arson attempt on December 8; P-14, speeding car on October 20; P-19, burglary, date unspecified; P-27, racial remarks on November 27.) It would take willful

USWA picket lines--not by application of common sensible norms, and even less so under the rigorous FRSA "imminent danger of death or serious injury" standards upon which Claimant in part staked his bet.[26] Indeed, his own testimony in deposition, while frequently somewhat hedging, fairly well concedes the point:

> "Q. Was there yelling by them [steelworkers] at cars going through the gate"
>
> A. There was yelling. I don't what they were yelling at...I don't recall what they were yelling...I don't know if they were yelling at each other or anything else.
>
> ***
>
> Q. So what would be the typical time [that you would spend in this lot]?
>
> A. Ten minutes.
>
> Q. Did you ever go back to that lot or by that gate during other times of the day?
>
> A. Never...
>
> ***
>
> Q ...Did you watch other cars go through the gate?
>
> A. I noticed other cars go through, yes.
>
> Q. Did you ever observe other drivers being assaulted while that was happening?
>
> A. Other than verbally and spit at and cars being hit, but not—that was it.
>
> Q. When you say, 'cars being hit,' what do you mean?
>
> A. Struck.
>
> Q. Just banged on the side of the car?
>
> A. Banged, objects being pointed towards them.
>
> Q. What kind of objects?

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perversity to find in this history conditions so intimidating as to excuse three months of inactivity based upon safety concerns.

[26] The NLRB and the courts have frequently disagreed about how much leeway strikers are entitled to on the picket lines, with the Board holding that threats unaccompanied by physical acts or gestures are not sufficient to place strikers outside the protection of the Act, and the Circuits often rejecting that standard as erroneous. Nevertheless, while outcomes depend on individual circumstances, the Board generally does not consider mere verbal threats standing alone "striker misconduct" sufficient to remove strikers from the protection of the Act and allow an employer to impose discipline. See, e.g., W. C. McQuaide, Inc., 220 NLRB 593 (1975). But see 552 F. 2d, denying enforcement.

A. I don't know what they were.

Q. Picket signs?

A. There were signs, yes, that I saw.

Q. Probably not very pleasant?

A. No, not at all.

Q. But you never saw anyone physically assaulted?

A. I never saw anyone, no."

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Q. Were you afraid of the other railroaders?

A. No.

Q. Did you ever hear them threaten anybody?

A. No...I never heard anybody threaten anybody.

Q. Do you know of any C&W employees that were physically assaulted during this period that the picket lines were up at the Northern Avenue gate?

A. I don't know of anybody that personally—I heard comments.

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Q. You don't know whether that involved a physical assault or not?

A. I have no idea. [27]

To the extent the cases yield any generally recognized standard in this very sensitive area, it is that conditions must have been so difficult, dangerous or unpleasant that a reasonable person in the employee's shoes would have felt compelled to stay home. [28] While

[27] On critical detail, Claimant's testimony as a deponent is sometimes difficult to navigate. The result is a story that often seems cobbled together: He heard people screaming, but doesn't know who screamed or what they were screaming at; saw cars behind him in the turn lane for the gate, but doesn't know who they were or if they passed through the gate; never discussed any of this with any other NCF&O-represented employee, including whether he intended to report; was afraid of the steelworkers but "does not know" if any one of them ever threatened him; saw sheets of plywood with names and addresses at the safe gate, which made him afraid, but believes the names were those of steelworkers; did not want to be seen by his neighbors as taking someone else's job, but admits he would not be doing so by working his own; and, despite a grievance asserting he was fearful "for the safety of himself and my family," testified that he was never fearful for his own personal safety but only that of his family, although he knew of no families that had been molested..

[28] We give Claimant on this point generous running room In point of fact, under the provisions of §502 to which the Organization would have us analogize, "the quitting of labor by an employee or employees in good faith

picket lines may be places of high adrenaline and may feature impulsive acts or even violence, record evidence from which an objective fact finder could conclude that circumstances here were hazardous or intolerable is in short supply. If that is not clear from Claimant's testimony,[29] the fallacy in his theme can be found in several objective, undisputed facts: the majority of employees worked without problems; the safe gate was patrolled by security guards; there was not a single documented incident of physical violence on the picket lines during the strike; no injuries or property damage were reported by Carrier employees; Claimant was at no time subjected to picket line violence, nor did he ever witness any. Moreover, his complaints of "clammy hands" and "upset stomach" at merely seeing the pickets is not compatible with congregating daily at the scene to chatted casually with other C&W employees who did not work. He never once troubled to ask his supervisor about alternate means of coming to work, in good part itself a revealing case study. On balance, the tale of fear over perilous conditions at the gate is not a credible story. It hangs there like a wen; the more picked at, the worse it looks.

In sum, the record falls short of establishing conditions so risky as to permit an inference that a reasonable person in Salinas' position would have believed he was in danger. He says he felt uncomfortable, but viewing that claim against the pre-strike background, his own testimony, the actions of fellow employees and the significant videotaped evidence of the environment at the safe gate, an imaginative leap is required to find real danger or the realistic apprehension of such, let alone "abnormally dangerous" conditions on this record. Carrier was entitled to set its own and higher standards for

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because of abnormally dangerous conditions for work...[shall not] be deemed a strike." (Emphasis added.) See, Gateway Coal Co. v. United Mine Workers, 414 U. S. 368, 386-87 (1974) (Union seeking to justify a work stoppage on safety grounds "must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.' " See also Teamsters Local 79 v. NLRB, 325 F. 2d 1011 (D.C. Cir. 1963), cert. denied, 377 U.S. 905 (1964) ("[w]hat controls is not the state of mind of the employee...but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous' "). There is some debate here as to whether, post-FRSA, a subjective test is any longer appropriate for judging a refusal to work because of safety concerns, or whether the objective standard of that Act should apply exclusively. For our purposes, the question is moot in view of our findings that Claimant cannot on this record satisfy either test.

[29] Claimant's references to "the hitting of vehicles" and to "numerous articles of gasoline being poured around homes" were not substantiated by record evidence.

reporting, standards above the "discomfort" line drawn by Claimant. His conduct did not measure up to those standards. Accordingly, the Board concludes that there is abundant record evidence to support Carrier's determination that the USWA picket lines did not constitute an unsafe condition justifying Claimant's failure to report for work.

Sympathy Strike

Having found that Claimant's safety concerns were synthetic, and that refraining from work on account of purported health hazards camouflaged more heartfelt motives, we turn to his second professed justification for failing to cover his assignment: "respect for the picketing workers."[30]

While the issue of reasonable apprehension is fact intensive and potentially somewhat subjective, the question of Claimant's right to demonstrate his respect by engaging in a sympathy strike, and Carrier's right to respond as it did, is a purely legal one. And while the law in respect to parts of the question is far from settled, it is reasonably clear on the big pieces of who can do what under the circumstances presented by this Claim.

Both sides urge analogizing to the NLRA on aspects of this case. As an initial matter, as the parties are aware, significant differences exist between the rights of employees under the NLRA and the RLA to engage in sympathy strikes. Succinctly, the NLRA places no restrictions on the right of employees to honor the picket lines of other unions, even during the term of their collective bargaining agreement, typically stimulating employers to negotiate "no strike" clauses.[31] While an employer may discharge employees who engage in unprotected strikes if it does so properly, the range of protected activity is broad, including, as the Organization emphasizes, the quitting of labor over safety issues.

[30] As noted above, the Organization's Claim dated November 26, 1997 asserts this as one of two bases, although Claimant himself at various times has expressly disclaimed any sympathy for striking steelworkers

[31] In Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970) the Court held that the Norris La-Guardia Act does not bar injunctions in aid of enforcing contractual no strike clauses. In Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) the Court refused to apply Boys Markets to permit injunctions of sympathy strikes on grounds that when such strikes are solely in sympathy with the disputes of another union they are not over arbitrable issues. Accordingly, under the NLRA the courts are without jurisdiction to enjoin sympathy strikes. In contrast, as indicated, they may generally be enjoined under the RLA on a minor dispute theory, with the Norris LaGuardia Act prohibitions held inapplicable due to the Act's emphasis on strike avoidance.

The RLA, in contrast, puts the accent on continuity of service, strike avoidance and the minimization of interference with or disruption to national air and rail transport. Given that emphasis, a number of district and circuits court, though not all, have enjoined sympathy strikes under the RLA on the "minor dispute" theory, i.e., if the express and implied provisions of the collective bargaining agreement can be arguably construed to require employees to report for work, the work stoppage can be enjoined pending an arbitral determination of the contract's meaning. [32]

The NLRA extends great latitude to employers to dismiss employees who engage in unlawful strike activity.[33] Employees who respect another union's picket lines, absent a binding no-strike clause, are normally viewed as engaging in protected activity under §7 and are immune from discharge.[34] Similarly, because the Railway Labor Act puts a premium on the "continuance of the employer's operations and the employer employee relationship," the courts generally have not tolerated the discharge of RLA employees who strike in violation of the Act.[35]

The Board need not get entangled directly in those issues here, but as subtext, the principles are meaningful and have portentous ramifications for Claimant. While discharge of strikers appears to be impermissible under both statutes, replacement of strikers is allowed under the NLRA.[36] The policy interests underlying the RLA, the duties that statue places on common carriers to provide uninterrupted service, and the reported cases

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[32] See, e.g., Southeastern Pa. Transp Auth. V. Brotherhood of R.R. Signalmen, 882 F. 2d 778, 786-87, (3d Cir. 1989), cert. denied, 493 U. S. 1044 (1990) (Sympathy strike gives rise to minor dispute and may be enjoined.) Contra, BLFE v. Florida E. Coast Ry., 346 F. 2d 673, 675-76 (5th Cir. 1989) (dissolving injunction and holding that under the circumstances refusal to cross picket lines was a part of the major dispute at the primary carrier.)

[33] See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). Unlike under the RLA, however, such discharges are subject to challenge through the unfair labor practice machinery. NLRA cases draw an important disunction between discharge of employees engaged in an unlawful strike and permanent replacements hired in place of lawfully striking employees. In the later case, the lawful striker retains his status as an employee, subject to returning when and if the replacement leaves.

[34] See, Hardin, "The Developing Labor Law," 3rd Ed., 1992 at 149. Terminations under the NLRA for sympathetic striking are, however, permitted when justified by overriding "legitimate business considerations."

[35] See National Airlines, Inc., 308 F. Supp. 179 (S.D. Fla.1970). Rev'd on other grounds, 430 F. 2d 957 (5th Cir. (Fla) 1970) cert. denied, 400 U.S. 992 (1971). (Mass discharge of wildcat strikers held not justified by needs of service; replacement would have been compatible with the needs of the service.)

[36] See, NLRB v. Mckay Radio & Telegraph Co., 304 U.S. 333 (1938).

establish that airlines and railroads may also lawfully hire permanent replacements for employees who engage in lawful, authorized economic strikes.[37] Worker replacement in RLA-covered industries is not common, and is less common still in the context of work stoppages occurring outside the permissible period of self-help. The authority on the parties' rights and obligations in terms of sympathy strikes is thus less well developed. But it is no less clear, for if replacement is sanctioned in response to lawful strikes, there is illogic in prohibiting it in response to *unauthorized* strikes. As one court has held in the context of an unlawful RLA job action, "The permissible bounds of self-help...[is defined as] not including mass discharges, but limited to employing replacements to the time the strike would have ended."[38] And, since Claimant left work without authorization in order to assist an unaffiliated union representing employees of another employer in support of its targeted objectives, those are exactly the facts here.

In analyzing Claimant's conduct, we are intensely conscious of the historic importance of picket lines in the railroad industry, and recognize as well the competing obligations placed on the employer as a common carrier to maintain its operations. The first proposition--the tradition among organized employees to respect picket lines--has a long and distinguished pedigree. It is a labor heritage often recognized by the courts, and one the Organizations value highly. And for obvious reasons. In the words of Learned Hand:

> "When all other workmen in a shop make a common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in 'concerted activity' for 'mutual aid' although the aggrieved workman is the only one of them that has any stake in the outcome. The rest know that by their action, each one of them assures support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. So, too, of those engaging in a 'sympathetic strike,' or secondary boycott, the immediate quarrel does not itself concern them, but by extending the number of those who will

[37] See, e.g., Florida East Coast, 384 U.S. at 344, 346; IFFA v. TWA, 819 F. 2d 839, 842 (8th Cir. 1987); ALPA v. United Air Lines, 802 F. 2d 886, 907 (7th Cir. 1986); Empressa Ecuatoriana de Aviacion v. District Lodge No 100, 669 F. 2d 838, 844 (11th Cir. 1982); Flight Eng'rs v. Eastern Air Lines, 208 F. Supp.182, 194 (S.D.,N.Y), aff'd, 307 F. 2d 510 (2d Cir.1962); Eastern Air Lines v. ALPA, 920 F.2d 722 (11th Cir. 1990) cert. denied 502.U.S. 901 (1991).

[38] National Airlines, 430 F.2d. 957,959.

> make the enemy of one the enemy of all, the power of each is vastly increased." [39]

In bypassing the established claim procedures of his Agreement and resorting to self-help on October 13, 1997, Claimant's conduct was consistent with the support for a sister union acknowledged by Justice Hand.[40] Governing oneself in accordance with passionate commitment, achieving the arduous task of autonomy, living in harmony with one's philosophy, and acting courageously are all respectable goals.

But that said, the rail transportation industry teaches this leveling lesson: trains should run on time. In the railroad world's bazaar of choices, moral dedication to ideals and political loyalty are not principles necessarily superior to safe and reliable operations or the settlement of differences in an orderly fashion. As Carrier in this instance plausibly asserts, "...the nature of the rail business is you can't just shut off inbound and outbound shipments like you turn off a light switch...[o]ur other customers demanded some services...they could care less about the strike." Thus, as the courts have recognized repeatedly, when it comes to questions of who may refuse to perform work as agreed under the RLA, "[t]he emphasis of the Act is on an orderly, prescribed procedure."[41]

For those reasons, if the right to walk off due to genuine concern over abnormal health hazards is protected activity under the RLA, when, as here, an employee feigns fear in order to strike for other reasons, he takes matters into his own hands in violation of the status quo commanded by the Act. In doing so, he exceeds the bounds of permissible conduct, triggers the employer's reciprocal right to engage in its own self-help, and at least temporarily forfeits any claim to his job.

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[39] NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F. 2d 503, 505-06 (2d Cir. 1942) (L. Hand, J.). But see, Eastern Air Lines v. Air Line Pilots Association, supra.

[40] Although the Claim itself asserts respect for picket lines, Claimant and his union at times seemingly both declare and deny any intent to honor USWA picket lines in this proceeding. The employee and his union discussed the subject of honoring the picket lines, and "what that meant to unionism in general" prior to the strike. (T-239). But in his deposition, Claimant insisted that prior to the strike he intended to continue to work, counting on the safe gate, "even if it offended the steelworkers...I wasn't worried about offending them...I had no concern about it." As suggested, the Board accepts the terms of the Claim, in the context of the surrounding circumstances, as the more reliable evidence on the point.

[41] National Airlines, supra, 308 F. Supp. 179, 183 (S.D. Fla. 1970).

In this instance, one important additional consideration bolsters our conclusion. The parties' collective bargaining agreement contains the following provision:

> "Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will be neither a shut-down by the employer nor a suspension of work by the employees."

Interestingly, the Organization reads this language as providing that since he was not inspired to strike for reasons related to a dispute with Carrier, i.e., he struck over a non-arbitral issue, his actions were not prohibited by the Agreement.[42] Carrier construes the contract as neither clearly prohibiting nor protecting Salinas' conduct, and, trusting in its preemption theory, in turn argues that the grievance procedures of the Agreement are not applicable to this dispute. The Board rejects both positions. Our reasons lie in the above-quoted language: a suspension of work is at least arguably not permitted before the grievance procedure is exhausted. The positions staked out by the parties constitute a dispute over whether this is a proper interpretation of the contract language, or whether the Agreement even applies. By its attributes, that is an arbitrable dispute. If the Board determines that it has jurisdiction, the further question of Claimant's unilateral right to quit work in order to pull shoulder to shoulder with unaffiliated striking workers—a question of contractual rights—is then faced.[43]

All of this, obviously, is a kind of round-the-world way of suggesting that in our opinion Claimant, as often in such situations, appears to be good man, but a casualty in the fog of war. The conclusion is inescapable that if he thought he enjoyed the right to walk off the job during the life of his labor agreement in support a group of unrelated strikers, it was incumbent on him to test the notion and have it ratified by a Board of Adjustment. He was twice warned prior to the steelworkers' strike that if he did so, he would be replaced. The

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[42] This thinking gave birth to fears of potentially non-arbitrable "price-of-peanut-butter" strikes thirty years ago in the airline industry when pilots threatened to strike over various government policies to protest agency certification of aircraft with two-person cockpit crews.

[43] The arbitration award in Northwest Airlines, Inc. and ALPA, (Brown) (1972), which the parties have read and briefed, involved just such a situation and is instructive. There, in a court-ordered arbitration, the board found no contractual prohibition in the CBA interfering with the union's right to honor picket lines, although it expressly found that such action might be prohibited by law. The merits of that matter are of no concern; the point is the parties were required to get their issue determined by arbitration, not self-help and not litigation.

Board concludes that Carrier was warranted both in terms of the Agreement and external law in following through on its warnings.

The Board would be derelict if it did not commend counsel on both sides of this matter for their cooperation and courtesies throughout, but particularly for the high quality of their presentations.

FINDINGS:

1. The Claim is not preempted by the Federal Railroad Safety Act.

2. The Railway Labor Act is applicable to the Claim.

2. The Board has jurisdiction of the Claim.

4. The Claim poses a minor dispute.

5. The parties herein are Carrier and Employee as defined by the Railway Labor Act.

6. Due notice of the hearing thereon has been given to the parties.

7. Substantial record evidence exists to find that Claimant's refusal to work was not based on a good faith belief that conditions on the safe gate were so difficult, dangerous or unpleasant as to justify such refusal.

8. Substantial record evidence exists to find that conditions on the safe gate did not satisfy FRSA standards for justifying Claimant's refusal to work.

8. Substantial record evidence exists to find that Claimant withheld his services in sympathy with striking steelworkers.

9. Substantial record evidence exists to find that Carrier's failure to hold a hearing prior to replacing Claimant under the circumstances of the case does not result in default on the merits.

10. Substantial record evidence exists to find that Carrier's decision to permanently replace Claimant does not violate the Parties' Agreement.

AWARD:

The Claim is respectfully denied.

James E. Conway – Neutral Member

Roger A. Burrill – Employee Member
(Concurring) (Dissenting)

Thomas Lawrence III – Carrier Member
(Concurring) (~~Dissenting~~)

March 19, 2000