AWARD NO. 1
CASE NO. 1

PUBLIC LAW BOARD NO. 6371

PARTIES	)	**BROTHERHOOD OF RAILWAY CARMEN DIVISION,**
	)	**TRANSPORTATION COMMUNICATIONS UNION**
TO	)	
	)	
DISPUTE	)	**COLORADO & WYOMING RAILROAD COMPANY**

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SYNOPSIS

Because of the number of issues raised by the parties and because of the detail needed to address the parties' positions, a brief synopsis of our determination is in order. In this case, we find:

1. Because there is no safety claim before this Board. the Carrier is not entitled to an evidentiary hearing. However, out of fundamental fairness in light of positions taken by the Organization, the Carrier's proffered exhibits shall be received in the record.

2. On the merits. Claimants did not quit their employment with the Carrier when they refused to cross picket lines established by another union. By not permitting Claimants to return to work after the other union's picket lines were taken down. the Carrier disciplined Claimants. However, under the terms of the Grievances Rule of the Agreement ("[n]o employee shall be disciplined without a fair hearing "), the Carrier was contractually obligated to give Claimants a hearing before disciplining them. By failing to give Claimants a hearing as required by the Agreement. the disciplinary actions against Claimants were void.

3. Although the Carrier had the right to permanently replace Claimants when they refused to cross the picket lines, the Carrier did not do so prior to Claimants' offer to return to work on December 31, 1997.

4. In order to make Claimants whole and restore the status quo ante. Claimants shall therefore be entitled to reinstatement to their former positions with backpay, benefits and seniority entitlements retroactive to the day Claimants offered to return to work (December 31, 19971. This relief shall include reimbursement to Claimants for any insurance or medical payments made by Claimants that would otherwise have been covered by their insurance coverage with the Carrier. Claimants' backpay entitlements shall be offset by earnings received by Claimants at other employment during the period December 31, 1997 until Claimants are reinstated under the terms of this award.

STATEMENT OF CLAIMS

Claim No. JPB-180-01-98

1. That the Colorado & Wyoming Railway Company violated the controlling Agreement, specifically General Rules 12, 20, 22 and 38; the rule headed "Grievances": and the Carmen Helpers' Special Rule titled "Upgrading Carmen Helpers and Apprentices" on December 31, 1997, when it refused to allow Carmen Steve Kuhn, Jerry Pardee, Dave Gronbach. Dennis Olguin. Robert Burin, and Leroy Poindexter to report for work, and continues to violate the Agreement by withholding Claimants from service.

2. That, accordingly, the Colorado & Wyoming Railway be required to compensate Messrs. Kuhn Pardee, Gronbach. Olguin. Burin. and Poindexter eight hours pay each per day of their regular work assignments, plus any overtime compensation to which they would have been entitled, for every day they are wrongfully held from service. Carrier shall further be required to reinstate all health and welfare benefits to Claimants as of December 31, 1997 and make Claimants whole for any health and welfare expenses incurred while improperly held from service.

Claim No. JPB-180-02-98

1. That the Carrier violated the Current Agreement of January 5, 1998. when it published a 1998 seniority roster with the names of Carmen Steve Kuhn, Jerry Pardee, Dave Gronbach, Dennis Olguin,

Robert Burin. and Leroy Poindexter improperly deleted.

2. That accordingly the Carrier shall now be required to restore Carmen Kuhn, Pardee, Gronbach, Olguin. Burin and Poindexter to their proper and rightful places on the 1998 Carmen Seniority roster, with dates as noted on the 1997 roster at Positions #2, #4, #6, #7, #9, and #11, respectively. Carrier shall also be required to give Claimants open access to any and all positions that may have been bulletined and awarded to junior employees from the time Claimants were dropped from the roster until such time that they are restored. Carrier shall further be required to re-establish "Helper Dates" and "Advanced Helper Dates" (as per the 1997 roster) for all helpers on the roster, and correct Helper Mayo's service date.

OPINION OF BOARD

A. Facts

The Carrier operates a short line railroad in Pueblo, Colorado operating primarily within a steel mill complex on the property of CF&I Steel ("CF&I"). Claimants are Carmen who worked for the Carrier and were covered by the Agreement between the Carrier and the Organization. The United Steelworkers of America ("USWA") represent the employees of CF&I.

By letter dated September 22, 1997 and in anticipation of a strike by USWA against CF&I, the Carrier advised its employees, including Claimants, that beginning October 1, 1997 they would be required to enter and exit the plant through the Old Fountain Asphalt Gate and they were not to use the any other access to the plant. Org. Exh. A-l: Car. Exh. 12. That letter further stated *(id.):*

> Please be reminded 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 notice dated September 30, 1997, the Carrier advised its employees that "[i]n the event of a strike by the CF&I Steelworkers, and if you have decided to honor that strike, be certain to remove all of your personal belongings from the Company property prior to midnight tonight." Org. Exh. A-2: Car. Exh. 13.

By letter dated September 30, 1997, the Organization, through its General Chairman T. M. Lell, advised the Carrier as follows (Org. Exh. A-3; Car. Exh. 11):

> As an employer with multiple businesses within the plant, CF&I, if struck, is required to provide a neutral gate and safe access for employees of the other companies, such as the C&W Railway.
>
> Be further advised that any pickets at the so-called neutral gate will constitute an unsafe condition. Your statement that security will be available and thus provide protection for your employees is noted, and while it may be a well-intentioned gesture, it cannot provide sufficient protection for your workers. Also, contrary to your statement that "A few pickets waving signs

> does not constitute a threat to the employees, " it is up to each employee to evaluate the threat to his safety and act accordingly.
>
> Retribution for employees crossing a picket line takes many forms and can be visited upon the employee or his family at any time. present or future. Striking employees will note the identity of anyone crossing the lines and Pueblo is a close-knit community. A strike breaker, or his family, will not be soon forgotten.
>
> Providing a safe, neutral gate for employees is the Carrier's responsibility, and if you provide same— without pickets-employees will report for work. 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 Section 212 of the Railroad Safety Act, and the Organization will actively defend their decision.

On October 3, 1997, the USWA struck CF&I and established picket lines at the mill. Org. Exh. A-9: Car. Exh. 29.

On October 6, 1997, the Carrier advised its employees that they were required to enter and exit the plant through the East Gate and not through any other gates. Org. Exh. A-4: Car Exh. 14. The Carrier again advised the employees that their contract had not expired and that "... any failure to report to your scheduled and assigned duty could result in your replacement". *Id.*

On or about October 11, 1997, USWA picketed the East Gate. Claimants refused to cross the USWA picket lines and did not report to work for the duration of the USWA/CF&I strike. Org. Exhs. A-4, A-5, A-7; Car. Exhs. 14, 24, 27.

By letter dated October 20, 1997, the Carrier advised Claimants (Org. Exh. A-5; Car. Exh. 24):

> This letter will confirm that you have refused to cross the USWA picket line to perform your job for The Colorado & Wyoming Railway Company. Since you ceased work on October 11, 1997. your wages will, of course, cease on that date and your benefits will cease, as of October 31, 1997. You may be eligible for COBRA continuation coverage for your medical benefits. COBRA information will be forwarded to you shortly.

By letter dated October 30. 1997 (with copies to Claimants), the Carrier advised the Organization that a preliminary injunction had been obtained against USWA members from engaging in violent acts or intimidation: the Carrier had made arrangements to provide transportation of its employees to and from work which a number of its employees were using; and there was no basis for Claimants to reasonably believe any hazardous conditions exist supporting a refusal to work. Org. Exh. A-6, Car. Exh. 23. The Carrier further advised the Organization as follows (*id.*):

> Because of the C&W's need and obligation to provide rail service to all of Its customers, Including CF&I, the failure of your members to report to work necessitates that the C&W hire replacement workers to perform the

> duties and functions that would otherwise be performed by those employees. Accordingly, you are hereby notified that any members who have refused to come to work are subject to being permanently replaced as employees of the C&W. In that regard, you are also hereby notified that the C&W has begun hiring permanent replacements.

At various times during the picketing, Claimants gathered outside the East Gate. Car. Exhs. 1, 80-84.

At various times during the picketing, Claimants called in to the Carrier and reported off. Org. Exhs. A-9, A-12; Car. Exhs. 29, 33.

USWA ended the strike on December 31, 1997. By letter of the same date, the Organization advised the Carrier that Claimants, "... who have been honoring those picket lines out of fear for their safety" had offered to return to work and further (Org. Exh. A-7: Car. Exh. 27):

> Please note for the record that Carmen Dennis Olguin, Steve Kuhn, Robert Burin, Dave Gronbach. Leroy Poindexter, and Jerry Pardee were available for service at 7:00 a.m. December 31, 1997. As such, and in line with the requirements of Rules 32 and 36 of the General Rules of the Controlling Agreement: Rule I of the Carmens' Special Rules; and Rule 4 of the Carman Helpers' Special Rules, please make arrangements to return these men to service immediately.

Claimants were not allowed to return to work. Org. Exh. A-8, Car. Exh. 28.

By letter dated January 20, 1998, the Carrier responded to the Organization reiterating the history of the dispute and the asserted safety reasons previously raised and concluded (*id.*):

> As a result of their continued refusal to work in the absence of any hazardous condition justifying such refusal, your members to whom copies of this letter are being sent have effectively relinquished their employment with the C&W, and permanent replacements have been and are being hired. Accordingly, your request to 'make arrangements to return these men to service immediately" is respectfully denied.

By letter dated January 23, 1997, Claimants wrote the Carrier advising (Org. Exh. A-9; Car. Exh. 29):

> As you know, we continued to report to the gate and called off on a daily basis, reporting an unsafe entrance to Mr. Robert Larson our Car Foreman. It was never our intention to quit our jobs or relinquish our employment. Our intention was to gain safe access to our jobs. and to perform our work as we have always done in the past. As you know, we attempted to return to work as soon as the pickets were removed on December 30, 1997. However, you required us to take a "back to work" physical which we promptly did on December 31, 1997. We remain committed to render service in good health and request to do so.

The Organization asserts that in lieu of reinstating Claimants, the Carrier continued to employ two Carmen Helpers (G. Mayo and R. Walters) and, in July 1998, while still refusing to reinstate Claimants, the Carrier hired two new employees (B. Williams and C. Howell) as Carmen Helpers. Org. Submission at 6.

The Organization then filed three claims:

JPB-180-1-98 (January 10, 1998) alleges that the Carrier violated Rules 12, 20, 22, 38, Special Rule 4 and the Grievances Rule by failing to notify the Organization of a reduction in force or job abolishment which would have resulted in the Carrier's failure to take Claimants back to work: failing to provide Claimants with a fair hearing with respect to discipline: violated Rule 38 by hiring at least two and then four Carmen Helpers without providing the Organization with the specific information required by the Rule: and by upgrading Carmen Helpers and Apprentices by allowing the Carmen Helpers it had upgraded to Journeyman status during the strike to remain in those posts in violation of the Special Rule on Upgrading Carmen Helpers and Apprentices. Org. Exh. A-10: Car Exh. 55.

JPB- 180-02-98 (January 16, 1998) alleges that the Carrier violated Rule 22 when it published the January 1998 seniority roster which did not list Claimants. Org. Exh. A-19; Car. Exh. 56.

JPB- 180-06-98 (February 19, 1998) alleges that the Carrier violated the Federal Railroad Safety Act ("FRSA") by discharging and/or discriminating against Claimants for refusing to work under hazardous conditions created by the presence of USWA pickets at the East Gate. Org. Exh. A-28: Car. Exh. 30. This claim was withdrawn by letter dated July 20, 1998. Org. Exh. A-29: Car. Exh. 42.

B. NRAB Proceedings

The two remaining claims were then docketed with the National Railroad Adjustment Board ("NRAB") Second Division on January 13, 1999 (Second Division Dockets 13418 and 13419).

As part of the NRAB proceedings, the Carrier took the position on August 6, 1999 that an evidentiary hearing was necessary in order to resolve issues arising under FRSA. Org. Exh. A-34. By letter dated August 20, 1999, the Organization objected to an evidentiary hearing on the basis that it had not submitted a FRSA claim to the NRAB. Org. Exh. A-35.

There was a delay in agreement upon a referee to hear the case. However, ultimately, the undersigned neutral was selected from a list. Org. Exhs. A-30 - A-33.

By letter dated June 7, 2000 from the Chairman and Vice Chairman of the Second Division of the NRAB to the National Mediation Board

("NMB"), the NMB was advised (Org. Exh. A-36):

> These dockets involve the application of the Federal Rail Safety Act (FRSA). In its ex parte submission to the Board, the Carrier had requested evidentiary hearings to resolve a number of FRSA issues. The need for an evidentiary hearing in FRSA disputes has been recognized by the First Division, NRAB in a similar case (98-l-C-4752. docket 44754)
>
> The parties have met and selected Mr. Ed Benn to hear these dockets. Tentative dates of December 12-13, 2000 have been selected for handling in Chicago. Please advise what the NMB will undertake (in the case noted above the NMB underwrote the referee expenses). Also it is requested that your certify Mr. Benn to handled these dockets.

By letter dated June 29, 2000, the Organization noted its previously filed August 20, 1999 objection to the need for an evidentiary hearing. Org. Exh. A-37.

By letter dated August 16, 2000. the NRAB Second Division advised the parties that request for hearing had been granted in Dockets 13418 and 13419 and that the hearing would be held on December 12 and 13, 2000. Org. Exh. A-38. The Second Division further informed the parties (id.):

> Hearing will be held for the purpose of considering evidence that has been submitted, hearing argument, and rendering an award in this case.
>
> Additional written or oral evidence may not be presented at the hearing as the docket is complete in accordance with Circular No. 1. ...

By letter dated November 22, 2000, the Carrier advised the NRAB that because the disputes have been pending before the Board for more than 12 months, the Carrier was exercising its prerogative under Section 3. Second of the Railway Labor Act ("RLA") to withdraw the disputes from the Second Division. Org. Exh. A-39. The Carrier then requested the establishment of a special board of adjustment. Id.

By letter dated December 1, 2000, the Organization proposed the establishment of a public law board, with the undersigned as the designated neutral. Org. Exh. A-40. The Organization's proposed agreement for the public law board specified at ¶7 that (Org. Exh. A-41):

> (7) The parties may present oral argument and/or submissions in support of their respective positions presented on the property with regard to each case being considered by the Board. However, additional written or oral evidence may not be presented at the hearing in accordance with NRAB Circular No. 1. ...

The parties were not able to agree upon the terms for the public law board. However, the parties did agree that the undersigned act as the neutral member. Org. Exh. A-46. The difference between the parties was set forth as follows (id.):

> TCU maintains that these employees were denied seniority rights and disciplined by the C&W in violation of various provisions of the collective bargaining agreement. C&W maintains that the employees effectively abandoned their positions and that this dispute also involves the application of the Federal Railway Safety Act (FRSA), and, accordingly, that an evidentiary hearing is required. TCU does not agree that FRSA is applicable or that an evidentiary hearing is appropriate.

By letter dated January 16, 2001, the undersigned neutral was appointed as the procedural/merits neutral for this Board. Org. Exh. *47.*

In accord with conferences with the parties, it was agreed that the procedural issues would be heard first and, if the undersigned neutral determined that a evidentiary hearing concerning FRSA was not required, the merits of the Organization's claim would be immediately heard. If it was determined that an evidentiary hearing was required for FRSA matters, then that hearing would be held at a later date.

C. Court **Proceedings**

The adjudication of this dispute moved to Federal Court. The Carrier instituted an action against the Organization, individual officers of the Organization, Claimants, the NMB and the NRAB. On May 27, 1999, the U. S. District Court dismissed the Carrier's action for lack of subject matter jurisdiction in Colorado and Wyoming Railway Company *v. TCU,* et *al,* Civil No. 99-M-516 (D. Colo., Matsch, J.) (Org. Exh. B-l; Car. Exh. 45):

> [u]pon legal conclusion that the issues in dispute are not restricted to a claimed violation of the Federal Railroad Safety Act, and that the matters in dispute are subject to arbitration under the jurisdiction of the National Railroad Adjustment Board

On June 10, 1999, the District Court dented the Carrier's motion to alter or amend judgment. Org. Exh. B-2: Car. Exh 46.

On June 23, 2000, the Tenth Circuit Court of Appeals affirmed the District Court's dismissal of the suit filed by the Carrier. *Colorado &* Wyoming Railway Company *v.* National Conference of Firemen and Oilers, et *al.,* Nos. 99-1296, etc. Org. Exh. B-3: Car Exh. 48. In pertinent part, the Court held, slip opinion at 14-15, 17-18 [footnote omitted]:

> We reject C&W's initial argument that the grievances filed on behalf of the individual defendants do not rise under the RLA. The nexus between those claims and the collective bargaining agreements is plain. As the TCU aptly notes in its brief,
>
> > [t]he TCU's contractual grievances allege violations of the seniority rules and disciplinary procedures set forth in the collective bargaining agreement. The grievances further assert that the six named carmen are entitled to reinstate-

> ment to their positions because C&W failed to follow the contractual rules governing the posting and filling of vacancies. Finally, the TCU asserts that C&W has violated the Carmen Helpers' Special Rule by using carmen helpers while carmen journeymen remain on furlough... .The claims on their face rest upon the meaning and application of specific provisions of the parties' collective bargaining agreement.
>
> We emphasize, however, that an adjustment board — not a federal court — ultimately must determine whether the claims asserted in the grievances have merit. An adjustment board also must assess the merit of C&w's assertion that the absence of a specific provision addressing "safety-based refusals to return to work" precludes the TCU from relying on the collective bargaining agreements.
>
> * * *
>
> ... TCU [is] not alleging either that the individual defendants engaged in "protected conduct" under the FRSA or that C&W violated the FRSA, and C&W is essentially attempting to use the statute to preempt the individual defendants' contract claims.
>
> In addition, a finding that the FRSA somehow preempts or supersedes the individual defendants' contract claims would make little sense.
>
> * * *
>
> [C]ontrary to C&W's arguments, the case does not present a manifest conflict between the FRSA and the RLA. The only potential "conflict," at least from C&W's perspective, is that the collective bargaining agreements may provide the individual defendants with procedural rights above and beyond those provided in the FRSA. This purported "conflict", if it exists at all, stems from contractual agreements into which C&W freely entered — not from the text of the RLA. We therefore reject C&w's contention that the FRSA precludes the TCU from asserting contractual claims on behalf of the individual defendants.

D. Proceedings Before This Board

On March 1, 2001, this Board convened for two purposes. First, argument was held on whether the Carrier was entitled to an evidentiary hearing concerning FRSA aspects of this case. As earlier agreed, if it was determined that the Carrier was entitled to an evidentiary hearing, that hearing would be held at a later date. If it was determined that an evidentiary hearing would not be held, the merits of the dispute would immediately be considered.

For reasons discussed in detail below at (E), this Board determined and advised the parties that the Carrier was not entitled to an evidentiary hearing. The parties then argued the case on the merits.

E. The Carrier's Entitlement To An Evidentiary Hearing

The Carrier argues that it is entitled to an evidentiary hearing. Car. Submission at 11-14. The Organization disagrees. Org. Submission at 20-35. This Board finds that the Carrier is not entitled to an evidentiary hearing.

The basis for the Carrier's request for an evidentiary hearing is

that the reasons advanced by the Organization and Claimants justifying Claimants' refusal to come to work during the USWA strike against CF&I were based on alleged safety concerns. That being the case, the Carrier argues that FRSA entitles it to a hearing and that "... FRSA places the burden of proof squarely on employees to establish that they are justified under the statute in refusing to work." Car. Submission at 11.

At first blush, the Carrier makes an appealing argument. One of the claims filed by the Organization specifically raised FRSA alleging that the "Carrier violated the Railroad Safety Act on December 31, 1997 when it refused to allow [Claimants] ... to report for work ..." Org. Exh. A-28. Having raised the claim, it seems to follow that the Organization must therefore submit to an evidentiary hearing on that claim under FRSA standards — something that the Second Division recognized in its June 7, 2000 letter. Org. Exh. A-36 ('The need for an evidentiary hearing in FRSA disputes has been recognized by the First Division, NRAB in a similar case . ...").

However, on July 20. 1998, the Organization withdrew the FRSA claim. Org. Exh. A-29: Car. Exh. 42. Therefore, the only claims remaining before this Board are the two claims alleging violations of the Agreement. As in ordinary proceedings before the NRAB, special boards of adjustments and public law boards, contract disputes are to be handled in accord with NRAB Circular No. 1. Under Circular No. 1, there is no entitlement to an evidentiary hearing.' Proceedings under Circular No. 1 are essentially appellate in nature and the only "hearing" is oral argument on the basis of the established record. It therefore follows, as the Organization argues, that because the FRSA claim was withdrawn, there is no FRSA claim before this Board and thus there is no basis to grant the Carrier an evidentiary hearing. We so find.

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1 In relevant part, Circular No. 1 states (Org. Exh. A-42):

> Position of Carrier: Under this caption the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any: and all dam submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

The same evidentiary requirements exist for the Organization. *Id.*

However, in its submission to this Board, the Carrier appended extensive evidence (consisting of affidavits, videotapes, etc.) which it desires this Board to consider. As stated by the Carrier during argument, that evidence is the type of evidence that it would produce if granted an evidentiary hearing. The Organization objected to consideration of that evidence on the basis that such evidence goes to the FRSA claim (which is not before this Board) and was not exchanged on the property.

Technically, the Organization is correct. However, to preclude the Carrier from offering that evidence proffered with its submission for our consideration would allow the Organization to achieve what amounts to a procedural sucker punch. From the commencement of the strike, the Organization argued that Claimants did not come to work out of safety concerns. Moreover, the Organization filed a FRSA claim. The Carrier's responses naturally addressed the alleged safety concerns. Even after the strike was over, in its December 31, 1997 letter where an offer to return to work was made, the Organization states that Claimants "... have been honoring those picket lines out of fear for their safety ...." Org. Exh. A-7: Car. Exh. 27. As set forth in Claimants' January 23, 1997 letter to the Carrier, the alleged safety reason advanced by Claimants for their pre-December 31, 1997 conduct was still maintained as Claimants advised the Carrier that the reason they did not cross the USWA picket lines was that "[o]ur intention was to gain safe access to our jobs . ..." Org. Exh. A-9; Car Exh. 29. But notwithstanding the Organization's prior efforts to paint Claimants as withholding their services due to safety concerns. the Organization now seeks to portray Claimants as "sympathy strikers". In the Organization's letter of March 27, 1998, the Organization states that "Claimants were sympathy strikers." Org. Exh. A-21; Car. Exh. 36. See *also*, Org. Submission at 49 ("Claimants were engaged in protected conduct, as sympathy strike[r]s").

Under the circumstances presented here, the Organization initially portrays Claimants as withholding services due to safety concerns; lulls the Carrier into responding on the basis of those concerns: files a claim alleging a FRSA violation; and then changes direction and withdraws the FRSA claim and then seeks to portray Claimants as

"sympathy" strikers and not "safety" strikers. Although the Organization is technically correct that evidence not exchanged on the property should not be considered by this Board, we believe that it would be manifestly unfair to reject the affidavits and videotapes offered by the Carrier with its submission in this case. The bottom line function of this process is to allow the parties to present their case to this Board without either side being ambushed. We believe that under the circumstances, given the changed positions taken by the Organization, we must allow the Carrier to present this evidence for our consideration. No evidentiary hearing will be allowed, but the Carrier's proffered evidence is received.[2]

F. The Merits Of The Dispute

We shall now turn to the merits of the dispute.

1. What This Case Is Not About

To say the least, much has been presented for our consideration.[3] Aside from arguing issues under the Agreement, the parties argue issues under FRSA, the National Labor Relations Act ("NLRA"), the RLA, and whether Claimants were safety strikers or sympathy strikers under various the statutes. Indeed, the Carrier argues that "... the underlying dispute between the parties was based on a statute . ..." Car. Submission at 30. We find this is not a statutory dispute. Rather, it is a contractual dispute.

References to FRSA, NLRA, RLA and Claimants' status as strikers may be helpful in putting this case Into context (and we have and will make reference to statutory concepts and doctrines under those acts concerning strikes and the status of strikers).[4] However, it is the arbi-

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[2] We recognize that with receipt of this evidence, the Carrier has effectively achieved its desire to present evidence on the safety claim that it would have presented through an evidentiary hearing, had one been permitted. Such may be the result. However, under the. circumstances, fundamental fairness requires it.

However, the effect of Claimants' status as safety strikers or sympathy strikers in deciding the merits of this dispute is discussed below at F(5).

[3] The Organization filed a 59 page submission and 101 exhibits/attachments. The Carrier filed a 34 page submission and 84 exhibits/attachments. The parties' arguments and evidence in this matter weighed in excess of 25 pounds.

[4] See Brotherhood of Railroad *Trainmen v.* Jacksonville Terminal Co., 394 U.S. 369, 390, note 24, 89 S.Ct. 1109 (19691, *reh. den.* 394 US. 1024 ("The right to strike finds support, not only in analogy to the NLRA, but in the history of, and decisions under the Railway Labor Act itself."). The use of these analogies to put this case into context is recognized by the Carrier. Car.

[footnote continued]

tral function of this Board to only decide whether there has been a violation of *the Agreement.*[5] Matters of statutory concern are for the courts.[6]

2. The Threshold Contract Issue

Culling through all that the parties have given us, in order to determine whether there has been a violation of the Agreement, we find the material facts to be as follows:

- On September 22. 1997, in anticipation of a strike by the USWA against CF&I, the Carrier, informed Claimants that "... any failure to report to your scheduled and assigned duty could result in your permanent replacement." Org. Exh. A-l: Car. Exh. 12.

- On September 30, 1997, the Organization took the position that "[s]hould 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 Section 212 of the Railroad Safety Act . . .." Org. Exh. A-3; Car. Exh. 11.

[continuation of footnote]
Submission at 16 ("Decisions under the National Labor Relations Act may make useful analogies for situations under the Railway Labor Act, but one must be cautious not to import the analysis wholesale" kiting Jacksonville *Terminal]*).

Hawaiian Airlines, Inc. *v.* Norris, *etc.*. 512 U.S. 246, 114 S.Ct. 2239 (1994) cited by the Carrier (Car. Submission at 30) supports this position. 512 U.S. at 254. 114 S.Ct. 2244 [citations omitted]:

> [A]djustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights.

[6] See Alexander *v.* Gardner-Denver. Co., 415 U.S. 36. 57.94 S.Ct. 1011. 1024 (1974):

> [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land [T]he resolution of statutory or constitutional issues is a primary responsibility of courts

Further, see Wright *v.* Universal Maritime Service Corp., et al.. 525 U.S. 70, No. 97-889, (November 16, 1998), slip opinion at 7 ("... [A]rbitrators are in a better position than courts to interpret the terms of a [collective bargaining agreement].").

The Carrier's citation to G&P *Trucking* Co. *v.* NLRB, 539 F.2d 705 (4th Cir.. 1976) and *NLRB v.* Union Carbide Corp., 440 F.2d 54 (4th Cir. 1971) therefore do not change our analysis. See Car. Submission at 16-17. Those cases dealt with the scope of protection provided by Section 7 of the NLRA. Again, it is not this Board's function to decide statutory issues — that is for the courts. Our function is to decide the contract issues. We find these cases cited by the Carrier which decide NLRA issues irrelevant to that task. For the same reasons, the Carrier's reliance upon *Plain Dealer* Publishing Co. *v.* Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975) is not on *(footnote* continued]

[continuation of footnote]
point. Car. Submission at 19. Plain *Dealer* addresses the application of the Norris-Laguardia Act, 29 U.S.C. §104. Other cited cases are also not dispositive of the contract claims. Boston *and Maine* Corporation *v. Lenfest*, 799 F.2d 795 (1st Cir., 1986) addresses whether a work stoppage under claimed FRSA violations can be enjoined and *RLEA v. Boston & Maine Corporation. 808* F.2d 150 (1st Cir., 1986) addresses injunction issues under the RLA. Car. Submission at 18; Car. Exh. 62. Similarly. Chicago *& North Western Railway* Co. *v. United* Transportation Union. 402 U.S. 570. 91 S.Ct. 1731 119711. Herring *v.* Delta *Air Lines*, 894 F.2d 1020 (9th Cir. 1990) and Rachford *v.* Evergreen. 596 F.Supp. 384 (N.D. Ill, 1984) cited by the Carrier (Car. Submission at 19-20), address statutory matters related to the RLA. This is a contract dispute. not a statutory one.

- On October 3, 1997, the USWA struck CF&I and established picket lines. Org. Exh. A-9: Car. Exh. 29.

- On October 6, 1997, the Carrier advised Claimants that "... any failure to report to your scheduled and assigned duty could result in your replacement". Org. Exh. A-4: Car. Exh. 14.

- Commencing October 11. 1997. Claimants refused to cross the USWA picket lines. Org. Exhs. A-4, A-5, A-7; Car. Exhs. 14, 24. 27.

- On October 20. 1997. the Carrier advised Claimants that "[s]ince you ceased work on October 11, 1997, your wages will, of course, cease on that date and your benefits will cease, as of October 31, 1997 . . .." Org. Exh. A-5: Car. Exh. 24.

- On October 30. 1997, the Carrier advised the Organization and Claimants that arrangements had been made to provide transportation of employees to and from their residences and work site; there was no basis for them to believe that there was a hazardous condition: Claimants' "failure to report to work necessitates that the C&W hire replacement workers to perform the duties and functions that would otherwise be performed ..." by Claimants: "... any members who have refused to come to work are subject to being permanently replaced as employees of the C&W: and "... you are hereby notified that the C&W has begun hiring permanent replacements." Org. Exh. A-6: Car. Exh. 23.

- At various times during the picketing, Claimants gathered outside the East Gate. Car. Exhs. 1. 80-84.

- At various times during the picketing, Claimants called in to the Carrier and reported off. Org. Exhs. A-9. A-12; Car. Exhs. 29.33.

- On December 31, 1997. USWA ended its strike against CF&I. Org. Exh. A-7: Car. Exh. 27.

- On December 31, 1997. Claimants, although stating that they had "... been honoring those picket lines out of fear for their safety . . .." made an offer to immediately return to work. *Id.*

- Claimants were not allowed to return to work. Org. Exh. A-8: Car. Exh. 28.

- On January 20, 1998. the Carrier took the position that "[a]s a result of their continued refusal to work in the absence of any hazardous condition justifying such refusal, your members . . . have effectively relinquished their employment with the C&W, and permanent replacements have been and are being hired." *Id.*

- On March 27. 1998, the Organization took the position that Claimants . "were sympathy strikers." Org. Exh. A-21: Car. Exh. 36.

The threshold issue is the one raised by the Carrier's January 20, 1998 letter where it states that Claimants "... have effectively relinquished their employment with the C&W . ..." Org. Exh. A-8: Car Exh. 28. The Carrier's position was reiterated in its May 22, 1998 letter, where it states that Claimants "... voluntarily resigned their positions." Org. Exh. A-15; Car. Exh. 39. That position is further maintained by

the Carrier before this Board where the Carrier states "[b]y refusing to work for almost three months, the Individual Claimants abandoned their jobs . ..." Car. Submission at 22.

That position is taken for good reason. If Claimants "effectively relinquished their employment" or "voluntarily resigned their positions", then they "quit". If Claimants quit, then they were entitled to no relief under the Agreement. Specifically, if Claimants quit, they were no longer employees and they had no right to a hearing under the Grievances Rule and this case is over.[7]

So, the threshold question to be answered is did Claimants quit?

3. Does The Evidence Show That Claimants Quit?

We find, as fact, that the evidence does not show that Claimants quit.

Prior to and during the USWA strike against CF&I, the Carrier repeatedly advised Claimants that if they did not cross the USWA picket lines and come to work, they were subject to being "permanently replaced". Commencing October 11, 1997, Claimants did not cross those picket lines and did not offer to return to work until December 3 1, 1997. Therefore, according to the Carrier, "[b]y refusing to work for almost three months, the Individual Claimants abandoned their jobs and any corresponding protection they may have had under the collective bargaining agreement." Car. Submission at 22. We disagree.

"... [A]n employee must clearly intend and desire to sever the employment relationship in order to effect a voluntary resignation."[8] That intent must be "unequivocal". *PLB* 3969. Award 7 at 4 ("... a resignation must be unequivocal"]. A clear and unequivocal intent to sever the employment relationship by Claimants does not exist in this case.

First, in and of itself, an employee's refusal to cross a picket line does not demonstrate a clear and unequivocal intent to *sever* the employment relationship. The fact that there is a strike may alter the

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7 See *Third Division Award* 10404 quoted in *Second Division* Award 6573:

> The issue in this case is whether Claimants were dismissed or whether they voluntarily quit the service. If they quit their jobs, they were no longer employees and the contract they had worked under no longer covered, and of course no investigation was required.

8 Elkouri and Elkouri, *How* Arbitration *Works* (BNA, 5th ed.), 895.

employer-employee relationship, but it does not end it.[9]

Second, the Carrier is not without recourse to deal with an employee who participates in a strike. As the Carrier advised Claimants, by not crossing the USWA picket lines, Claimants were subject to being "permanently replaced".[10] But, an employee's being "permanently replaced" does not amount to a severing of the employment relationship." Thus, Claimants' continued refusal to cross the USWA picket lines after the Carrier advised Claimants that if they did not do so they would be subject to being "permanently replaced" does not, in and of itself, demonstrate a clear and unequivocal intent by Claimants that they desired to sever their employment relationship with the Carrier. At most, given the Carrier's continued advice to Claimants that they could be permanently replaced, Claimants' refusal to return to work and cross the USWA picket lines showed an intent to take that chance of being permanently replaced. However, Claimants' actions did not constitute a clear and unequivocal intent to quit.

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9 Air Line Pilots Association International *v.* United Air Lines, Inc., 614 F.Supp. 1020, 1045 (N.D. Ill, 1985) *aff'd* in part, *rev'd* in part. 802 F.2d 886 (7th Cir., 1986) [citing *Railway* Clerks V. Florida East *Coast Railway* Co., 384 U.S. 238 (1966)]:

> The employer-employee relationship is "not destroyed by the strike. as the strike represents only an interruption in the continuity of the relation". Florida East Coast *supra,* 384 U.S. at 246-47, 86 S.Ct. at 1424-25.

10 See *e.g.,* N.L.R.B. *v.* Mackay Radio & *Telegraph Company, 304* U.S. 333, 345-346 (1938) (arising under the National Labor Relations Act]:

> Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. [I]t does not follow than an employer, guilty of no act denounced by the statute. has lost the right to protect and continue his business by supplying places left vacant by strikers. And he Is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment in order to create places for them. The assurance by respondent to those who accepted employment during the strike that If they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. .

See *also, Trans World* Airlines. Inc.. *v.* Independent Federation *of Flight* [*footnote* continued]

[continuation *of footnote1*
Attendants, 489 U.S. 426, 437, 442 (1989) under the RLA noting "... the employer's right to hire permanent replacements in order to continue operations . . .." during a strike and finding that the RLA did not prohibit the "crossover policy employed by TWA" which treated junior employees who returned to work during a strike as replacements for more senior employees who remained on strike.

I [1] Mackay Radio supra. 304 U.S. at 346 (under the NLRA, "... the strikers retained, under the Act, the status of employes"). See also, *ALPA v.* United Airlines, supra, 614 F.Supp. at 1046.

Third, as of December 31, 1997 when Claimants made an offer to return to work (after the USWA strike ended), Claimants had never been advised that the Carrier was taking their actions of not returning to work and crossing the picket lines as a manifestation of their intent to quit. The Carrier repeatedly told Claimants that they were subject to being permanently replaced, but, prior to Claimants' December 31, 1997 offer to return to work, the Carrier did not tell Claimants that their employment relationship with the Carrier was going to be treated as severed. It was not until January 20, 1998 that the Carrier, for the first *time*, informed Claimants that by not crossing the USWA picket lines during the strike they "... effectively relinquished their employment with the C&W . ..." But the Carrier's so advising Claimants that it was considering their actions as an intent to quit occurred three weeks *after* Claimants offered to return to work. The Carrier's retroactive viewing of Claimants' having quit came too late. On December 31, 1997, Claimants made an offer to return to work — an act which is inconsistent with an intent to sever their employment relationship.

Fourth, the Carrier strongly argues that, to a layman, the Carrier's repeated statements to Claimants prior to December 31, 1997 that they were subject to being permanently replaced should they not cross the picket lines was the same as telling Claimants that if they did not cross the lines and return to work their actions would be viewed as a quit on their part.

We can make no such finding. "Permanently replaced" and "quit" are, as the Organization argues, words or art carrying, as just discussed, substantially different ramifications. A permanently replaced employee remains an employee — an employee who quits does not. It is fair to conclude that those involved in labor relations, much less a strike situation, are keenly aware of the differences. Moreover, it was the same individual — the Carrier's Vice President and Chief Operating Officer Robert Porter -who informed Claimants prior to December 31, 1997 that they were subject to being "permanently replaced" and who informed them on January 20, 1998 that they had "effectively relinquished their employment with the C&W". *Compare* Org. Exhs. A-l, A-6, A-14; Car Exhs. 12, 14, 23 with Org. Exh. A-8: Car. Exh. 28. That individual, acting on the Carrier's behalf, chose the different characterizations of Claimants'

conduct. If there was an ambiguity concerning whether "permanently replaced" meant the same as "quit" to a layman, that confusion was created by the Carrier and not by Claimants.

Further, this was not just a circumstance of a layman speaking to laymen. In the Carrier's October 30, 1997 letter advising Claimants that they were "... subject to being permanently replaced . ..", Mr. Porter advised the Organization and Claimants that "... my lawyer tells me that there is no case which holds that the presence of pickets, by itself, presents an imminent hazard within the meaning of the Safety Act." Org. Exh. A-6: Car. Exh. 23. Mr. Porter was obviously getting legal advice — indeed, labor law advice. Under the circumstances, we simply cannot find that Mr. Porter was merely acting as a layman and conveyed to Claimants prior to December 3 1, 1997 that their failure to cross the picket lines and return to work would be treated as a declaration of an intent to quit. On the contrary, we are satisfied, and we find, that prior to December 31, 1997, the Carrier treated Claimants' actions only as conduct which could allow Claimants to be permanently replaced.

Fifth, the Carrier points to its October 20, 1997 letter to Claimants which states that "... you ceased work on October 11, 1997 . ..." and argues that Claimants were clearly on notice that the Carrier considered them to have quit. Org. Exh. A-5: Car. Exh. 24. But, if the Carrier was of the opinion that Claimants had severed their employment relationship as of October 11, 1997, why would the Carrier notify Claimants on October 30, 1997 that arrangements had been made to transport them to and from their residences and again remind them that they were subject to being permanently replaced? Org. Exh. A-6; Car. Exh. 23. If the Carrier was of the opinion that Claimants quit, one would expect the Carrier to clearly state that rather than discussing transportation to and from work and permanent replacement. The Carrier's offering to transport Claimants to and from work is not consistent with a position that the Carrier viewed Claimants as having severed their employment relationship.[12]

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[12] In his affidavit supplied by the Carrier to this Board, the Carrier's Vice President and Chief Operating Officer Porter states that even after the Carrier tells us that it determined that Claimants had quit (October 11. 1997), as of October 29 and 30. 1997 it offered to transport employees to work and *[footnote continued]*

Sixth, the record shows that during the strike, Claimants gathered outside the East Gate and further called in. Although perhaps self serving on Claimants' part to engage in that conduct, if the Carrier was of the opinion that Claimants had voluntarily severed their employment relationship, one would expect something affirmative from the Carrier in response to Claimants' activities stating that such conduct on their part was not necessary because they no longer were employees. There is nothing to that effect in this record. The only response from the Carrier prior to its January 20, 1998 letter stating that Claimants had quit was to take the position that Claimants were subject to being permanently replaced. The Carrier's silence in response to Claimants' actions of coming to the East Gate and calling in must therefore be taken to be that it viewed Claimants as subject to being permanently replaced and not that they quit. [13]

Seventh, the Carrier's reliance upon *Second Division Award 6573, supra* does not change the result. Car. Submission at 22-23. In that case, the employees were told prior to engaging in a work stoppage that if they did not work they would be considered as having quit. *Id.* at 2 ("The discussion ended on the assertion by Carrier's representative that any men who refused to go to work under the circumstances would be considered to have quit."). The Board found that positive warning to the employees that if the employees did not work they would be considered as having quit "... persuades us that Claimants had been adequately informed that if they did not return to work on November 1 lth they would be considered as quits . . . and we find that the Carrier properly

[continuation of footnote]
"[n]ot one of the individuals who refused to cross the picket line chose to take advantage of the transportation offered by C&W [and f]or a period of approximately three weeks, C&W did in fact provide transportation back and forth for its employees." Car. Exh. 1 at 2. ¶8. Again, if the Carrier had determined that Claimants had quit. why would the Carrier offer to transport them to and from work? The only answer is that the Carrier had *not* determined that Claimants had quit.

[13] The Carrier was aware that Claimants were gathering outside the East Gate. The Carrier videotaped Claimants' activities. Car. Exhs. 80-84. Additionally, the Carrier's Vice President and Chief Operating Officer Porter states 'in his affidavit that "... everyday I saw the former C&W employees who refused to cross the line standing in the vacant lot across the street from the gate. I specifically remember seeing Leroy Poindexter. Bob Burin, Dennis Olguin and Steve Kuhn . . .." Car. Exh. 1 at 3. ¶11. Further, it must be assumed that even if Claimants only left messages on an answering machine when they called in. a Carrier official was apprised of those messages.

construed their behavior as resignation and terminated their employment status." *Id.* at 2-3. That is not this case. Here, Claimants were not informed at any point during the USWA strike that if they did not come to work and cross the picket lines they would be considered as having quit. Instead, Claimants were only Informed that they could be permanently replaced. Claimants were not informed that their actions would be considered as a quit until after the strike was over and Claimants made an offer to return to work.

In sum then, contrary to the Carrier's position, we find that Claimants did'not voluntarily resign their positions or quit when they did not come to work during the USWA strike against CF&I.

4. Did The Carrier Violate The Agreement When It Did Not Give Claimants A Hearing Under The Grievances Rule?

The Grievances Rule found in the Agreement provides (Org. Exh. A-49):

Grievances

> Prior to assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shut-down by the employer nor a suspension of work by the employees.
>
> No employee shall be disciplined without a fair hearing by designated officer of the carrier. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duty-authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any. resulting from said suspension or dismissal, and reinstatement of all health and welfare benefits.

* • *

We have found under the terms of the Agreement that Claimants did not quit when they did not to come to work during the USWA strike against CF&I. Because they did not quit, each Claimant remained an "employee" under the Agreement. When the Carrier refused to permit Claimants to return to work after Claimants made an offer to do so on December 31, 1997, the Carrier disciplined Claimants for their conduct. The Carrier did not give Claimants a hearing concerning that discipline. Indeed, as of May 22, 1998, the Carrier maintained that "... there is no need for the for the application or Interpretation of the agreement." Org. Exh. A-15; Car. Exh. 39. However, because

Claimants were employees under the Agreement and because they were disciplined, the Carrier was *contractually* obligated to give Claimants a hearing under the Grievances Rule — "*[n]o employee* shall be disciplined without a fair hearing by designated officer of the carrier" [emphasis added]. By not giving Claimants a hearing, we find that the Carrier violated the Grievances Rule. [14]

The Carrier's argument that it "... never attempted to discipline the Individual Claimants for violating any provision of the collective bargaining agreement" is not persuasive. Car. Submission at 30. Claimants did not quit and the Carrier did not permit them to return to work after they offered to do so on December 31, 1997. As discussed below at F(6)(b)(2)(a), Claimants were also not permanently replaced. The only conclusion one can draw under the Agreement from the Carrier's refusal to permit Claimants to work when Claimants did not quit and were not permanently replaced is that Claimants were disciplined. Otherwise, Claimants are placed in some kind of labor limbo. Because the Carrier disciplined Claimants, the Carrier was contractually obligated to give Claimants a hearing under the Grievances Rule. Having failed to give Claimants that contractually required hearing, we find that the Carrier violated the Agreement. [15]

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[14] The Carrier argues that "[n]either the Individual Claimants nor the BRC made any request for a hearing in this matter." Car. Submission at 31. The obligation imposed by the Grievances Rule is not on the employee or the Organization to ask for a hearing. The obligation is on the Carrier as a pre-condition to discipline to give a hexing.

Nor do we find that the first paragraph of the Grievances Rule excuses the Carrier's obligation to give Claimants the contractually required hearing. That paragraph provides "[p]rior to assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shut-down by the employer nor a suspension of work by the employees." That paragraph precludes strike or shut down activity as a weapon by either party to force a concession on a particular grievance — *i.e.*, the parties agreed that there will be no strikes or shut downs to force the other side to concede on a dispute rather than go through the orderly grievance process. That is not what happened here. Claimants did not refuse to come to work in order to compel the Carrier to concede on a particular grievance. Indeed. the claims were not filed and the dispute did not arise until after the strike was over and the Carrier refused to permit Claimants to return to work.

[15] The Carrier cites us to *PLB* 6161, *Award 2*. Car. Submission at 30-31. We have considered that award between the Carrier and the Fireman and Oilers which arose out of the same strike and which involved an employee who did not cross the USWA picket lines. We find that award neither binding or persuasive.

First, that award did not arise under the Agreement before us in this case and therefore has no binding effect upon us.

Second. that award held that it was not a fatal error for the Carrier to fail to hold a disciplinary hearing for the employee. Id.

(footnote continued]

[continuation *of footnote]*
at 12-18, 31. While recognizing that arbitral authority exists that the failure to hold a hearing requires a sustaining of the claim (id. at 14, note 23: see *also,* note 20 of this award citing *PLB 4544, Award* 38 holding that failure to hold a hearing as required 'fatally flaws the termination"). *PLB 6161,* Award 2 concluded that notwithstanding the mandates of the Agreement to hold a hearing for disciplined employees, that case warranted "exceptional treatment". *Id* at 14. With all due respect to that Board. it is not the function of a public law board sitting in an appellate capacity to ignore or amend the terms of the parties' negotiated agreement. The parties agreed that in order to discipline an employee, there *must* be a hearing. To permit discipline to occur without a hearing effectively amends or ignores the parties' negotiated words. It is such reasoning that caused the Supreme Court to long ago caution that the arbitrator "... does not sit to dispense his own brand of industrial justice." *Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S.* 593, 597. 80 S.Ct. 1358, 1361 (1960). See also, *United Paperworkers* International *Union v. Misco, 484* U.S. 29. 38. 108 S.Ct. 364. 371 (1987) (The arbitrator may not ignore the plain language of the contract . . .."). In this case. we choose not to ignore the plain language of the Agreement — indeed, we have no authority to do so. Claimants were disciplined and were contractually entitled to a hearing. The failure to give them a hearing as required by the Agreement violates the Agreement. We may not like the result, but we certainly do not have the authority to amend or ignore the parties' words.

Third, *PLB 6161, Award* 2 further concluded that "... there is ample basis in the record for concluding that Claimant would not have attended a-hearing had one been scheduled, requiring a hearing in absentia. And that is consequential." Id. at 14-15. The Carrier makes the same argument to this Board. Car. Submission at 31. However, there is nothing in this record to even suggest that Claimants would not have attended a hearing had they been given one. The strike was over when the hearing should have been held and, if the hearing was held on the facility, there would have been no impediment to Claimants coming to a hearing. If this was a legitimate con-

[footnote continued]

5. Claimants' Reasons For Not Coming To Work

In their handling on the property and in their arguments to this Board, the parties spent a great deal of time addressing the question of whether Claimants were "safety" strikers or "sympathy" strikers. As earlier noted, throughout and even after the strike, the Organization took the position that Claimants were safety strikers. However, the

[continuation *of footnote]*
cern, a hearing could have been held away from the facility.

Fourth, it is not clear what PLB *6161,* Award 2 actually decided. The question presented to that Board was whether the employee in that case "was unjustly terminated . ..." ***Id. at*** 1. The award denied the claim *(id.* at 32), but found that the employee was "permanently replaced[d]" which did not violate the agreement. *Id.* at 3 1. As set forth above at F(3), employees who are permanently replaced are not terminated. It does not appear that the Board answered the question posed to it.

PLB *6161, Award* 2 is not binding upon us and is simply not persuasive. We cannot follow that award.

The Organization points us to *Colorado and* Wyoming Railway *and* United *Transportation Union, supra,* where a special board of adjustment considered FRSA allegations raised by the UTU out of the same strike involved in this case. Org. Submission at 37, note 8: Org. Exh. D-7. In that award, it was determined that the Carrier's position that in excess of 30 of the Carrier's employees represented by the UTU resigned during the period October 11 December 30, 1997 constituted discrimination prohibited by FRSA and those employees were ordered reinstated and made whole. We also cannot rely upon that award. That was a case decided under FRSA. This is a case decided under the Agreement.

Organization's characterization of Claimants' activities changed from that of safety strikers to the status of sympathy strikers. See the Organization's letter of March 27, 1998 ("Claimants were sympathy strikers"). The Organization's initial portrayal of Claimants as safety strikers and its filing of a FRSA claim (which it later withdrew) prompted the Carrier to vigorously contest the asserted safety based reasons for Claimants' actions. As we held above at E, because of the Organization's switching of positions concerning Claimants' status, although we did not permit an evidentiary hearing to be held on the safety issues, we did permit the Carrier to introduce evidence going to the previously made safety assertions by the Organization.

It is obvious what the Organization was attempting to do. By initially portraying Claimants as safety strikers, the Organization sought to protect Claimants from being permanently replaced as threatened by the Carrier. Had there been a demonstrated safety concern which kept Claimants out of work, Claimants would have been entitled to their jobs back upon removal of that safety issue. But, as the Carrier argues, from what is in this record, we can assume that there was no safety concern from Claimants' perspective. From what we can tell from the evidence presented by the Carrier, we can assume that the picketing at the East Gate was peaceful and there was no real reason for Claimants to assert that they were afraid of crossing those picket lines. [16]

However, for our purposes, whether Claimants were safety strikers or sympathy strikers is, in the end, wholly irrelevant. The only factors we deem relevant are that Claimants withheld their services; they were disciplined for doing so: they did not quit: and they were not given a hearing as required by the Grievances Rule, which voided the discipline taken against them.

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[16] Our assumption concerning the safety issue is just that — an assumption for discussion purposes and one made to give the Carrier the benefit of the doubt. We recognize that in another award involving another group of employees involved in the strike that it was found that there was a safety concern. See Colorado and *Wyoming* Railway and United Transportation Union, *supra,* Org. Exh. D-7 which the Carrier advises us in its March 5. 2001 correspondence has been appealed to the Federal Court. Our assumption for discussion purposes should not be taken as a disagreement with the substantive findings made by that Board. We express no opinion on the merits of that dispute. Instead, we find that award distinguishable because it arose under FRSA and not under this Agreement. But in any event, to give the Carrier the benefit of the doubt, for purposes of *this case* involving *these* Claimants, we will assume that there was no safety concern.

Therefore, for purposes of this dispute, whether Claimants were safety strikers or sympathy strikers is, as a matter of contract, irrelevant for determining whether the Carrier violated the Agreement in this case. Claimants were disciplined without being given a hearing as required by the Agreement. That is all that matters. As discussed below at F(6)(b)(2), Claimants' status as strikers may have an effect on their backpay entitlement in terms of whether they were permanently replaced. However, because they were disciplined without being given a hearing, what kind of strikers they were is wholly irrelevant to the question of whether the Carrier violated the Agreement. [17]

[17] The Organization points out that in its initial letter to the Carrier of September 30, 1997, it also advised the Carrier that aside from being allegedly protected because they did not come to work because of safety issues, Claimants "... are protected by Supreme Court decisions [and] the Railway Labor Act ...." Org. Exh. A-3: Car. Exh. 11. While in the end we fmd that the characterization of Claimants' activities during the strike to be irrelevant because Claimants were disciplined without the contractually required hearing, we find that the Organization's vague references to "Supreme Court decisions" and "the Railway Labor Act", did not change what the Organization was attempting to do — portray Claimants as safety strikers in order to prevent their potential permanent replacement.

For the same reasons, we also find irrelevant the fact that, as the Organization argues, Claimants were given a physical examination but subsequently were not permitted to return to work. No employment related significance can come from some medical employee's giving a physical examination to Claimants. All that is relevant is that Claimants were disciplined without the required hearing.

(footnote continued1

6. Remedy

The next question is what remedy should be imposed?

Arbitrators have wide discretion in the formulation of remedies's The function of a remedy in a case

[continuation of footnote/

[18] *See Eastern Associated Coal Corp. v. United Mine Workers of America,* ___ *U.S.* ___, *No.* 99-1038 (November 28, 2000) slip opinion at 3, 9 [citations omitted]:

> [C]ourts will set aside the arbitrator's interpretation of what their agreement means only in rare instances.
>
> * *
>
> [B]oth employer *and union have agreed to entrust this remedial decision to an arbitrator.

See also. Steelworkers v. Enterprise Wheel. supra, 363 U.S. at 597:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide *variety* of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

Further, *see Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc.,* 514 F.2d 1235, 1237. *reh. denied. 520* F.2d 943 (5th Cir. 1975). cert. *denied,* 423 U.S. 1055 and cases cited therein:

> In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.

where a violation of a collective bargaming agreement is shown is to restore the *status quo ante* and to make whole those individuals who have been adversely affected by the demonstrated contract violation.

In accord with our remedial discretion and in an effort to restore the *status quo ante* and to make those who have been harmed whole, the remedy in this case shah be as follows:

a. Reinstatement

We have found that the Carrier violated the Grievances Rule when it disciplined Claimants but did not give them a hearing as required by that rule. That is not a technical violation. By not affording Claimants their right to a hearing as required by the Agreement, the Carrier precluded Claimants from defending their actions. By agreement, the parties have made an employee's right to a hearing a precondition to the imposition of valid discipline. Again, the Grievances Rule states ""*[n]o* employee shah be disciplined without a fair hearing by designated officer of the carrier" [emphasis added]. Under the Agreement, the Carrier simply cannot discipline employees without a hearing. Under the RLA, the discipline process is handled by the parties on the property and review of those matters by a division of the NRAB, special board of adjustment or public law board is only appellate in nature. By not giving Claimants a hearing as required by the Agreement, their ability to defend themselves was not just compromised, it was completely taken away. By not giving Claimants a hearing, the Carrier's action requires us to find that the discipline taken against Claimants was, as a matter of contract, void. [19] Because the discipline was void. Claimants' seniority shah therefore be restored

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[19] Discharge is often referred to as industrial capital punishment. Imposing such capital punishment without a hearing as required by a negotiated collective bargaining agreement is the antithesis of any notion of negotiated due process entitlements as the parties agreed when they provided for a hearing for disciplined employees in the Grievances Rule. *See* **Third** *Division Award* **2654:**

> We cannot regard the carrier's failure to advise the claimant of the nature of the charge and to accord him a hearing as technical. These pre-requisites are in the nature of guarantees of due process, and until they have been complied with any consideration of the merits would be premature. However conclusive the evidence in the possession of the carrier may appear to be, the claimant is entitled to the benefit of the presumption of innocence until his guilt is formally admitted or duly established in accordance with the rules.

and they shall be entitled to reinstatement."

b. Compensation

The next question as part of the remedy is whether Claimants should be compensated and, if so, to what extent? As a general principle, because the discipline against Claimants has been found to be void, aside from reinstatement, Claimants are also entitled to make whole relief. This relief shall include backpay and reimbursement to Claimants for any insurance or medical payments made by Claimants that would otherwise have been covered by their insurance coverage with the Carrier.

It is at this point, however, that we must consider if there are other factors which have an impact on Claimants' backpay entitlements — particularly, the fact that Claimants withheld their services during the strike.

1. The Commencement Of Claimants' Backuav And Benefits Entitlement

Claimants withheld their services commencing October 11, 1997 and did not offer to return to work until December 31. 1997. Claimants cannot expect compensation under this award for that period, and we shah require none.

However, Claimants stood ready to return to work effective December 31, 1997, but were not permitted to do so. The Carrier has not shown through sufficient evidence that Claimants were not immediately returned to work because of lack of work due to a phasing in of operations after the end of the strike. Rather, the Carrier has argued that Claimants quit and were not entitled to return to work. We have found that argument to be without merit. Claimants' backpay and

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20 *See e.g., PLB 4544, Award 38, supra,* where the carrier in that case had an apparently valid reason for discharging the employee because he was incarcerated, but failed to hold a hearing as required by the relevant agreement (id. at 2):

> This Board does not quarrel with Carrier's arguments that incarceration is an appropriate basis for termination. Further, the Board does not fault the awards which uphold this conclusion. However, the vast majority of the awards (if not all) dealing with termination of employment in situations where the employee has been incarcerated, involved cases where the matter was properly handled at a formal investigation as provided in the disciplinary rules applicable in the case. This ingredient is missing here. This missing ingredient fatally flaws the termination.
>
> Accordingly, it is the conclusion of the Board that the Agreement was violated when Claimant was terminated without a timely investigation. This termination must be reversed. Carrier shall restore Claimant to his former rank on the Belvidere Carman's seniority roster. . .

benefit entitlements shall therefore commence as of the date they offered to return to work — December 31, 1997.

2. Offsets Against Claimants' Backpay Entitlement

(a) Were Claimants Permanently Replaced?

But the fact that Claimants are entitled to backpay commencing December 31, 1997 does not end the inquiry concerning Claimants' backpay entitlements. Remember, Claimants withheld their services during the period of the strike, October 11, 1997 through December 31, 1997. In order to structure a remedy, for purposes of discussion we will again assume that Claimants' withholding of their services was not because of safety concerns. Therefore, because Claimants withheld their services during the strike, Claimants were, as the Carrier informed them, subject to being permanently replaced. So the question now is whether Claimants were permanently replaced?

For our purposes in structuring a remedy, the question of whether Claimants were permanently replaced serves as a potential offset to their backpay entitlements — i.e., if Claimants were permanently replaced *prior* to their offer to return to work *on* December 31, 1997 (as the Carrier could have done), Claimants would not be entitled to backpay for the period they were replaced. Claimants' entitlement to backpay would not begin to run again until they should have been recalled from their permanent replacement status — *i.e.*, when job openings existed or when there were vacancies created by departure of any demonstrated permanent replacements.[21]

We find that no offsets should be made as the result of Claimants being permanently replaced. We find that, although the Carrier *could* have permanently replaced

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[21] Prior to December 31, 1997, the Carrier took the position that it had the ability to permanently replace Claimants. We accept that. In the analogous situations under the NLRA, "...economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees: (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir., 1969). *cert.* denied 397 U.S. 920 (1970). However, whether the Carrier could have permanently replaced Claimants becomes an academic point. As now discussed, the evidence shows that the Carrier did not do so.

Claimants prior to their offer to return to work on December 31, 1997, the Carrier did *not* do so.

In the on-property handling, there are two seniority lists — one from January, 1997 (before the strike) and one from January, 1998 (after the strike). See Org. Exh. A-22; Car. Exh. 41. Those two seniority lists provide:

1997 Seniority Roster

Name	Helper	Advanced Helper	Carman	Entered Service
1. Larson, R			06/27/78	01./14/74
2. Kuhn. S.*			09/16/78	09./06/73
3. Harmes, C.			01/31/79	01./13/75
4. Pardee, J.*			08/20/79	04,/14/75
5. Straley, D.			04/27/80	01,/15/75
6. Gronbach, D.*			01/23/81	01/14/74
7. Olguin, D.*	07/05/77	06/01/78	06/01/81	07/05/77
8. Garbiso, T.	07/11/77	06/01/78	06/01/81	10/16/74
9. Burin, R.*	08/09/77	06/01/78	06/01/81	08/09/77
10. Arellano, A.	10/15/79	02/25/80	05/26/88	04/05/76
11. Poindexter, L.*	05/12/81	07/11/81	01/20/92	05/12/81
12. Mayo, G.	03/04/96	03/18/96		03/04/96
13. Walters, R.	10/07/96	10/28/96		10/07/96

• — designates named Claimant

1998 Seniority Roster

Name	Helper	Advanced Helper	Carman	Entered Service
1. Larson, R			06/27/78	01/14/74
2 Harmes, C.			01/31/79	01,/13/75
3. Straley, D.			04/27/80	01/15/75
4. Garbiso, T.	07/11/77	06/01/78	06/01/81	10/16/74
5. Arellano, A.	10/15/79	02/25/80	05/26/88	04/05/76
6. Mayo, G.	03/01/96	04/01/96		03/01/96
7. Walters, R	10/07/96	10/28/96		10/07/96
8. Siegla, S.	11/06/97	12/04/97		11/05/97
9. Stewart,, L.	11/07/97			11/07/97

Examination of the two seniority lists shows the following:

First, the six Claimants held Carmen positions.

Second, Claimants were removed from the 1998 seniority list.

Third, while the 1997 seniority list had 13 names, the 1998 seniority list only had nine, thereby showing that as of the time Claimants made their December 31, 1997 offer to return to work, there

were still at least four vacant positions.

Fourth, as shown by the 1998 seniority list, in November, 1997 (after Claimants withheld their services) only two employees (Siegla and Stewart) were hired. But, those two employees were hired into *Helper* positions, not *Carmen* positions. Therefore, although there were two hires into Helper positions, there were no hires into any Carmen positions held by Claimants before the strike.

Fifth, the 1997 roster shows 11 employees held Carmen positions and the 1998 roster shows only five employees held Carmen positions, thereby showing that after the strike, there were six Carmen vacancies.

Sixth, even after the strike ended and Claimants made an offer to return to work on December 31, 1997, the Carrier informed the Organization that, in effect, all Claimants had *not* been permanently replaced. See the Carrier's January 20, 1998 letter where it states that Claimants "... permanent replacements have been and *are being* hired." Org. Exh. A-8: Car. Exh. 28. If, as of January 20, 1998, the Carrier took the position that "... permanent replacements . . . . are being hired", then it is fair to conclude that as of the crucial date when Claimants made an offer to return to work — December 31, 1997 — all Claimants had not been permanently replaced.

Based on the above, we find that as of the time Claimants made their offer to return to work on December 31, 1997, there were six vacant Carmen positions. There are six Claimants. Therefore, Claimants were not permanently replaced. We find that there shah be no offsets against Claimants' backpay and benefit entitlements because of an asserted permanent replacement of Claimants."

(b) Interim Earnings

Because the function of this remedy is to make Claimants whole,

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22 The record reveals that two employees were hired during the summer of 1998 (Carmen Helpers B. Williams and C. Howell) who were upgraded to Carmen. Org. Exh. A-24. Any hiring the Carrier did after Claimants made their offer to return to work on December 31, 1997 is irrelevant. The critical date for determining whether Claimants were permanently replaced is the date they offered to return to work — December 31, 1997 when the strike ended. The Carrier cannot hire permanent replacements after the strike ended. *ALPA v.* United Airlines, *supra*, 614 F.Supp. at 1046:

> The same principle applies under the RLA. Since an employer's right to hire replacements is based only on its needs to 'continue in business," its right to fill positions permanently is limited to those actually occupied and used to continue in business during a strike.

and not to provide a windfall for Claimants, if Claimants had other employment during the period after they should have been reinstated on December 3 1, 1997, those earnings must be offset against their backpay entitlements until such time that the Carrier reinstates Claimants.

c. Claimants' Ability To Exercise Their Seniority Rights After December 31. 1997

A remedy serves to restore the *status quo ante.* In order to restore the *status quo ante,* Claimants' seniority rights must be restored as of December 3 1, 1997 when they should have been returned to work after they offered to do so. Therefore, as part of this remedy, Claimants shall have the ability to exercise their seniority rights retroactive to the date they should have been reinstated — December 31, 1997.

d. Conclusion On The Remedy

In sum, in the exercise of our remedial discretion and to restore the *status quo ante* and to make those adversely affected by the demonstrated contract violation whole: (1) Claimants shall be entitled to reinstatement effective December 31, 1997; (2) Claimants shall be made whole for lost wages and benefits commencing December 31, 1997, with offsets only for interim earnings earned by Claimants since that date until they are reinstated; (3) this relief shall include reimbursement to Claimants for any insurance or medical payments made by Claimants that would otherwise have been covered by their insurance coverage with the Carrier and: (4) Claimants shall be entitled to retroactively exercise their seniority to December 3 1, 1997.

7. Other Concerns

a. The Concern Of The Tenth Circuit,

In its opinion in this case, the Tenth Circuit stated "[a]n adjustment board also must assess the merit of C&W's assertion that the absence of a specific provision addressing 'safety-based refusals to return to work precludes the TCU . . . from relying on the collective bargaining agreements." *Colorado & Wyoming Railway Company, supra,* slip opinion at 15. We have done so. We find the Carrier's argument has no merit.

We have found that Claimants did not quit and the Carrier violated the Agreement when it disciplined Claimants but did not give them a hearing as required by the Grievances Rule in the Agreement,

thereby requiring that the discipline be voided. We have also found that in the context of this case, because the Carrier violated the Agreement by not giving Claimants a hearing as required by the Agreement, Claimants' once-asserted status as safety strikers (which the Organization withdrew) is irrelevant to our contractual determination in this matter that the Carrier violated the Agreement. Claimants were employees and were entitled to protection of the Grievances Rule. We have further found that although the Carrier could have permanently replaced Claimants, it did not do so. The safety issue is simply irrelevant to our finding a violation of the Agreement.

Under the circumstances, as a matter of contract, the Carrier's assertion that the Organization is precluded from relying on the Agreement in this case does not, in our opinion, change the result.

b. The Carrier's Other Arguments

The Carrier's other arguments not previously addressed do not change the result.

First, the Carrier argues that the claims were untimely. Car. Submission at 2 l-22.

The Agreement provides (Car. Exh. 53):

> **Time Limit on Claims**
>
> (1) All claims or grievances arising on or after January 1. 1955, shall be handled as follows:
>
> (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based.

Pointing to the September and October, 1997 correspondence, the Carrier argues that "... by the end of October, 1997, the Individual Claimants knew that they were no longer employed by C&W and that C&W was hiring new employees." Car. Submission at 22. Thus, according to the Carrier, "[t]o be timely, any grievance or claim asserted must have been filed within 60 days of October 20, 1997, or within 60 days of October 30, 1997, at the latest, i.e., by December 29, 1997." *Id*. Therefore, the Carrier argues that the claims in this matter which were not filed until January 10 and 16, 1998 were filed beyond the 60 day time period. See Org. Exhs. A-10, A-19; Car. Exhs. *55, 56.* We disagree.

Disputes under grievance procedures in collective bargaining agreements are presumptively arbi-

trable.[23] With that presumption in mind, it is fair to conclude that under the Time Limit on Claims provision, the "occurrence" did not arise until December 31, 1997 when the Carrier did not permit Claimants to return to work after Claimants offered to do so. The claims which were filed on January 10 and 16, 1998 protesting the Carrier's action were well within the 60 day filing requirement. Therefore, the claims were timely filed.[24]

Second, based on the evidence we received into this record proffered by the Carrier (see discussion above at E), the Carrier asserts that Claimants engaged in misconduct during the strike. Car. Submission at 7. Had the Carrier given Claimants a hearing as required by the Grievances Rule, those kinds of allegations could have been addressed and, if the Carrier showed that Claimants engaged in such misconduct, they could have been disciplined or discharged depending upon the severity of any proven misconduct. Because Claimants were not given a hearing, these kinds of allegations cannot now be raised before this Board.[25]

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[23] Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 377 (1974) ("In the Steelworkers trilogy, this Court enunciated the now well-known presumption of arbitrability of labor disputes"): *Wright v. Universal Maritime Service Corp., supra, 525 U.S. 70* (1998), slip opinion at 6 (referring to "the presumption of arbitrability this Court has found . . .." and (id. at 7):

> In collective bargaining agreements, we have said, "there is a presumption of arbitrability in the sense that '[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.'" AT&T Technologies Inc. v. Communications Workers, 475 Il. *S. 643, 650* (1986) (quoting *Warrior & Gulf, supra* [363 U. S. 574 (1960)] at 582-583).

Further, see Fairweather's Practice *and* Procedure in *Labor* Arbitration (BNA, 3rd ed.), 105 ("... [T]here is no dispute that there is a presumption of arbitrability in disputes between a union and an employer "); Hill and Sinicropi, Evidence In Arbitration (BNA, 2nd ed.), 27 ("Since well-established federal labor policy favors arbitration as the means of resolving disagreements under a collective bargaining agreement, arbitrators, when confronted with challenges to their jurisdiction, have adopted the stance that disputes are presumptively arbitrable . ..."). *How* Arbitration *Works, supra* at 277 ("... [D]oubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance.").

[24] During argument, the Carrier pointed out that in *PLB 6161,* Award 2, *supra, the* Firemen and Oilers filed a claim prior to the end of the strike. That action by a different organization under a different agreement cannot change our conclusion that, under this Agreement, the claims were timely filed. In any event, as discussed at note 15. we have found *PLB 6161,* Award 2 unpersuasive and not binding upon us.

[25] Percolating in the background in these kinds of cases where employees are reinstated who allegedly engaged in misconduct is the question of whether such reinstatements violate public policy. In the public policy context, the Supreme Court has recently affirmed that in the arbitral setting " only in rare instances . . .." will a court

[footnote *continued*]

[continuation of footnote]
set aside an arbitrator's award. Eastern Associated Coal *Corp. v. Mine Workers, supra,* slip opinion at 3. Aside from it being a "rare instance" for a court to set aside an arbitral determination to reinstate an employee, the evidence of alleged misconduct in this case is nowhere near any level which could cause any concern over Claimants' reinstatement. A review of the affidavits and videotapes supplied by the Carrier shows that, at most, the typical name calling and gesturing which occur during strikes occurred in this case. See Car. Exhs. l-10, 15-22, 25, 80-84. More serious type alleged threats are not directly shown to be committed by Claimants. Indeed, a reading of the affidavits and the position taken by the Carrier in this case that there was never a safety concern shows that, in fact, the type of misconduct alleged by the Carrier was a non-factor. The Carrier's own evidence shows that employees readily crossed the picket lines and came to work without fear for their safety. The affidavits supplied show that there was no concern by the employees and the picketing was peaceful. The videotapes show the same. Car. Exhs. 80-84. Indeed. one affidavit states that the witness observed the videotapes and "... all of the tapes are fairly representative of picket line activity at the East Gate during the entire period that gate was being picketed." Car. Exh. 15 at ¶5. It is inconsistent for the Carrier to assert that Claimants engaged in picket line misconduct or other misconduct and at the same time argue that the picketing was peaceful and employees came to work without fear. The Carrier's task in this regard is further made more difficult because it was the Carrier who disciplined Claimants without holding the contractually called for hearing. The Carrier cannot argue that misconduct occurred when it took away Claimants only forum for defending alleged instances of misconduct — the hearing under the Agreement. Further, as shown by Claimants' seniority dates set forth in the seniority list at F(6)(b)(2)(a), these are very long term employees having between 16 and *24* years of service. That length of service indicates to us that Claimants were good employees, else the Carrier would not have kept them that long leading to the conclusion that there is no reason to believe that Claimants could not be reinstated and func-
[footnote continued/

c. The Organization's Other Arguments

The claims also assert that the Carrier violated other rules of the Agreement aside from the Grievances Rule, specifically, Rules 12, 20, 22, 38, Upgrading Carmen Helpers and Apprentices, and the publication of seniority rosters. The Carrier argues that those rules were not violated. Car. Submission at 24-29, 31-32. However, in light of our findings and the remedy fashioned, there would be no further relief we would impose for those asserted violations beyond what we have required in this case for the Carrier's failure to give Claimants a hearing as required by the Grievances Rule. The Organization's arguments concerning further rule violations are therefore moot.

G. **Conclusion**

When all the smoke clears and all of the arguments are considered, this is a straight forward and simple case. The facts show that Claimants did not cross picket fines established by another union: Claimants did not quit: when the

[continuation of footnote]
Uon as productive employees. In any event, as far a public policy issues are concerned, this is simply not a case where public policy could preclude Claimants' reinstatement.

picket lines were taken down the Carrier did not permit Claimants to return to work and therefore disciplined Claimants: the discipline was imposed without holding a hearing as required by the Agreement; by failing to give Claimants a hearing as required by the Agreement, the disciplinary actions against Claimants were void: and although the Carrier had the right to permanently replace Claimants when they refused to cross the picket lines, the Carrier did not do so. Claimants' jobs therefore remained vacant after the strike ended and Claimants offered to return to work. In order to make Claimants whole, Claimants shall be entitled to reinstatement to their former positions with backpay, benefits (including make whole insurance compensation) and seniority entitlements retroactive to the day Claimants offered to return to work (December 31, 1997). Claimants' backpay entitlements shall be offset by earnings received by Claimants at other employment during the period December 31, 1997 until Claimants are reinstated.[26]

26 Given the litigation spawned by the 1997 strike as well as the court proceedings and related matters before the Second Division which preceded the proceedings before this Board, we suspect that this award may well be challenged. Indeed, we are informed that in addition to the pro- *[footnote continued]*

[continuation of footnote]
ceedings discussed in this matter, CF&I has appealed an NLRB administrative law judge's ruling which found that the USWA strikers were unfair labor practice strikers. *See New CF&I, Inc.,* 27-CA-15562. et al.. (May 17. 2000). Org. Exh. C-13. Further, as indicated in its March 5, 2001 correspondence to this Board, the Carrier has now filed a dissent to *Colorado and* Wyoming *Railway and United Transportation Union.* supra. which found the UTU employees who did not cross the USWA lines were safety strikers and has advised us that on February 6. 2001. the Carrier filed a petition for review of that award in the United States District Court for the District of Colorado.

While we have found it necessary to look to common labor law doctrines in order to put this case in context. our findings of fact are based on the record presented to us: our ultimate conclusion that the Carrier violated the Agreement is based upon our interpretation of the language of the Agreement: and our remedy has been fashioned within the discretion afforded to us. Those who may be called upon to review this award must accordingly defer. See the Tenth Circuit's decision in this case, slip opinion at 11-12:

> . (... the RLA provides a "mandatory, exclusive, and comprehensive system for resolving grievance disputes"), in part because "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Buell,* 480 U.S. at 562 n. 9 (quoting, among other cases, *Trainmen v. Chicago, R. &I. R. Co., 353* U.S. 30, 40 (1957)). As a corollary, "[j]udicial review of these Boards' determinations has been characterized as 'among the narrowest known to the law.'" *Id.* (quoting Union *Pacific* R.R. Co. *v.* Sheehan, 439 U.S. 89, 91 (1978)).

See also, Paper-workers v. Misco, supra, 484 U.S. at 37-38. 108 S.Ct. at 370 ("... [b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept"): *Eastern Associated Coal* Corp. *v. Mine Workers, supra,* slip opinion *[footnote continued]*

AWARD

Claims sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member - Dissenting

Organization Member

Chicago, Illinois

Dated: March 30, 2001

[continuation of footnote]
at 3 ("... courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances"): *Steelworkers v. Enterprise Wheel, supra, 363* US. at 599 ("... the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for: and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his").