No. 08-604

In The
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

On March 15, 2005, a panel of the First Division of the National Railroad Adjustment Board (NRAB) dismissed the cases of five locomotive engineers for "lack of jurisdiction" allegedly under the federal regulations known as Circular One, now codified in 29 C.F.R. Part 301.[1] Pet.App.65a-107a. With identical reasoning, the NRAB panel dismissed all five cases for failure to put evidence as to conferencing in the original submissions filed by the union pursuant to Circular One, which is codified in relevant part in 29 C.F.R. §301.5. *Id.* The NRAB panel based the dismissals on Circular One without interpreting or applying the parties' collective bargaining agreement ("CBA"). Pet.App.70a-71a, 78a-79a, 86a-87a, 94a-95a, 102a-103a. On April 22, 2005, the union, the respondent Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region (the "Organization"), filed a petition in United States District Court for the Northern District of Illinois to require the NRAB panel to hear and decide the cases according to the terms of the parties' CBA, as provided by the Railway Labor Act ("RLA"), 45 U.S.C. §153 First (i).

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[1] Congress authorized the full NRAB, i.e., the privately appointed members, to engage in a one-time rulemaking within forty days of June 21, 1934. 45 U.S.C. §153 First (v). Circular One was the result of this rule-making.

The Organization sought to set aside the NRAB panel's dismissal on both statutory and constitutional grounds. JA-20-21. On the statutory ground, the Organization alleged that the NRAB panel failed to "conform or confine itself to matters within the scope of the Division's jurisdiction," as required by 45 U.S.C. §153, First (q). JA-34-38. It alleged that the NRAB panel violated this statutory provision – and exceeded its jurisdiction – because it effectively created a new requirement that the Organization must always prove conferencing even when the Carrier had not disputed it, when there was no legal basis for such a rule in the RLA or Circular One. *Id.* Refusing to consider the Organization's evidence that conferences did in fact occur, the NRAB panel unlawfully dismissed these cases without any resolution of the contractual claims in the CBA. *Id.* On the constitutional due process ground, the Organization alleged that by acting without notice to apply such a requirement, which has no basis in the RLA or Circular One, the NRAB panel denied the Organization a fundamentally fair hearing in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. JA-25-34.

The defendant Union Pacific Railroad Company (the "Carrier") filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. JA-10; Pet.App.30a. It selectively attached various arbitration awards outside the record and which were not readily available to the Organization's

representatives at the time of the hearing before the NRAB. *See, e.g.,* Pet.App.71a. The Carrier did not rely on the parties' CBA, which was never interpreted or applied in these cases.[2] On May 15, 2006, the District Court granted Carrier's motion to dismiss. Pet.App.24a-42a.

On June 5, 2006, the Organization filed an appeal to the United States Court of Appeals for the Seventh Circuit. On April 9, 2008, the Seventh Circuit reversed the District Court. Pet.App.1a-23a. As stated by the Seventh Circuit, the controlling issue was whether "written documentation of the conference in the on-property record [is] a necessary prerequisite to arbitration before the NRAB." Pet.App.6a. The Seventh Circuit stated: "Although presented through both a statutory and constitutional framework, the essence of the conflict boils down to [this] single question." *Id.* It found that "no statute, regulation, or CBA required the evidence [of conferencing] to be presented in the on-property record" attached by the Organization in its original submission. Pet.App.23a.

The Seventh Circuit carefully reviewed the arbitration awards cited by the Carrier and found that they were neither on point nor were they binding

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[2] The relevant portion of the CBA, the "System Agreement – Discipline Rule," was attached by the Organization to its complaint in the District Court, was transmitted to the Seventh Circuit in the Record on Appeal, and is included in the addendum to this brief.

authority. Pet.App.13a-17a. The Seventh Circuit found the NRAB panel had acted without any legal basis in excluding the evidence of conferencing. It further found the Carrier would not have been prejudiced by the consideration of this evidence at the hearing stage. And it found the Organization itself had been prejudiced by the Carrier's failure to object to any issue relating to conferencing when the cases had been submitted years before. Based on this denial of due process, the Seventh Circuit reversed the decision of the District Court. Pet.App.23a. The Seventh Circuit noted the statutory claim but stated that the adjudication of the due process claim was "unavoidable." Pet.App.7a.

On April 23, 2008, the Carrier filed a petition for rehearing and rehearing *en banc* on the ground that the court of appeals had no jurisdiction to review the actions of the NRAB panel for violations of due process. On August 11, 2008, the three-judge panel of the Seventh Circuit denied the petition for rehearing, and no judge called for a vote for rehearing *en banc*. Pet.App.43a. In a separate concurrence, however, two judges not on the original panel offered their view that the NRAB panel had done nothing more than engage in "rule making by adjudication." Pet.App.45a. Furthermore, they stated it would not violate the Due Process Clause to impose the new rule retroactively. *Id.* Neither voted to grant the *en banc* petititon. On November 5, 2008, the Carrier filed a petition for certiorari seeking review of only two questions: (1) whether the federal courts have

jurisdiction to review decisions of an NRAB panel for violations of the United States Constitution, and (2) whether the Seventh Circuit erred in finding that the NRAB panel violated the Due Process Clause in dismissing these cases.

The Contractual Grievance Procedure Prior to the NRAB Filings

At various times in 2002 and 2003, the Carrier fired Engineer B.L. South, Engineer R.E. Whatley and Engineer C.C. Fosha. Pet.App.73a-80a, 81a-88a, 89a-96a. It also disciplined Engineer L.G. Glueck and Engineer M.L. Pope. Pet.App.65a-72a, 97a-104a. In all five cases, the Organization filed grievances and sought reinstatement and back pay for the fired engineers and the removal of discipline for the others. Prior to appearing before the NRAB panel the parties handled the grievances under their CBA, known as the "System Agreement – Discipline Rule, 1996." Pet.App.65a-107a.

As to each discharge or discipline, the Carrier and the Organization held the hearing required by the CBA before an "investigating officer." App. 5. This "investigating officer" is not an impartial decision maker, but one of the Carrier's own supervisors. This "investigating officer" conducts the hearing "on the property," i.e., he conducts an oral hearing at which contested facts are presented, and are tested by the adversarial process. App. 5. At such hearings, both the engineer (and the Organization as representative)

and Carrier can call and cross examine witnesses and introduce documents. App. 5. After the hearing, the record is transcribed, and under the CBA, another managerial employee, namely, the Carrier's superintendant, must read the transcript, sign and date it, and issue a decision after the date. App. 6.

As in these five cases, the Organization then can appeal the decision of the Carrier superintendant to the "highest ranking" officer at Carrier for labor relations. App. 6. If this appeal is unsuccessful, the Organization may then refer the matter to the appropriate NRAB Division after the parties hold a "conference" in a last attempt to settle the case. 45 U.S.C. §152 Second. The nature of this conference is not defined by statute and is often an informal meeting or even a phone call to see if the case can be resolved before either party files a notice of intent to file a submission with the appropriate NRAB Division. There is no requirement in the RLA that the conference be transcribed. There is no requirement in the RLA that it be documented in writing. There is no reference to proof of conferencing in Circular One, 29 C.F.R. Part 301.

The Organization and Carrier did conference the cases of the five engineers described above; and as the Seventh Circuit found, this fact was not disputed. *See, e.g.,* Pet.App.4a, 101a. Conferencing occurs after the evidentiary hearing has taken place, and all internal appeals have been exhausted. App. 6; 45 U.S.C. §152 Second. The evidentiary record relating

to the argumentative facts and the merits is closed by the time conferences occur. Thereafter, the Organization filed the respective "Notices of Intent to File Submission" with the First Division of the NRAB. Pet.App.29a. The Notice of Intent states that the Organization has the "intention" of filing an *ex parte* submission which sets out the "relevant, argumentative" facts as required by Circular One, 29 C.F.R. §301.5(d).

Normally, if conferencing had not occurred, the Carrier would raise an objection at the time of the filing of the Notice of Intent. The Carrier made no objection as to lack of conferencing in any of these five cases. Pet.App.4a. Furthermore, the Carrier made no objection later when it filed its own submission presenting its own statement of the "relevant, argumentative" facts as set out in Circular One which is codified by 29 C.F.R. §301.5. Pet.App.3a. It made no objection until the five cases were presented for oral argument several years after the filing of the Notice of Intent by the Organization. Pet.App.20a-21a.

The National Railroad Adjustment Board

The National Railroad Adjustment Board is the 34 member board established by Congress in the 1934 amendments to the Railway Labor Act. That Act, 45 U.S.C. §153 First, states in relevant part: "There is established a Board, to be known as the 'National

Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934. . . ." The NRAB is comprised solely of persons appointed by private representatives of labor and management, i.e., the national railroad unions and rail carriers. 45 U.S.C. §153 First (a). The NRAB consists of four separate divisions, which cover various classes of railroad employees. 45 U.S.C. §153 First (h). The relevant division in this case, the First Division, has jurisdiction over disputes involving engineers, firemen, conductors and other yard service employees of train carriers, and has its principal office in Chicago, Illinois. *Id.*

The distinction between the Divisions and the Adjustment Board as a whole is significant. The NRAB panels which hear cases under the CBA are considered panels of the Division, and their awards are awards of the Division. 45 U.S.C. §153 First (k). The Adjustment Board as a whole consists of an equal number of management and labor representatives, for a total of 34 members. 45 U.S.C. §153 First (a). By contrast, the individual NRAB panels which hear cases in the First Division consist of only five persons: two "Carrier" Representatives, two "Organization" Representatives, and a Referee or Neutral Member to break a deadlock. 45 U.S.C. §153 First (h), (k), (l). While the individual panels are different from the Adjustment Board as a whole, they perform the day to day work of the NRAB, namely, to decide disputes "growing out of grievances or out of the interpretation

or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. §153 First (i). The RLA mandates that submission of a dispute to the NRAB is the exclusive remedy for these "minor disputes" regardless of the parties' preferences. *Id.*

The National Mediation Board is the federal agency which funds and staffs the operations of the National Railroad Adjustment Board. 45 U.S.C. §153 First (g). The operations of the NRAB are funded specifically by 45 U.S.C. §153 First (u). The federal government, through the NMB, oversees the expenditure of taxpayer funds by the NRAB and its divisions. The National Mediation Board also controls the selection, appointment and payment at government expense of the NRAB's referees. 45 U.S.C. §153 First (l). It sets the daily rates of referee's pay, and determines the propriety of referee's expenses, which also are paid from government funds. *Id.* The NRAB is administered by federal employees operated out of government offices in Chicago, Illinois and Washington, D.C., 45 U.S.C. §153 First (s), (u).

Section 3, First (i) of the RLA, 45 U.S.C. §153 First (i) sets out the functions of the NRAB as follows:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment

> in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> – 45 U.S.C. §153 First (i).

The procedural regulations as to the form and content of the submissions are set out in Circular One, referred to above and codified at 29 C.F.R. Part 301. Circular One is the result of a specific, one-time rule-making by the original members of the Adjustment Board. At the time the Adjustment Board was established, Congress required the entire Board "to meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section." 45 U.S.C. §153 First (v). Circular One is the complete set of rules resulting from this one-time rule-making. It sets out the form and content of the position statements filed by the "employees" and the "carrier" with the NRAB in 29 C.F.R. §301.5, which states in relevant part:

> **Form of submission.**
>
> . . .
>
> (d) Position of employees. Under the caption "position of employees" the employees 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 data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute (emphasis supplied).
>
> (e) Position of carrier. Under the caption "position of carrier" 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 data 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.

This provision of Circular One as to what must be in the original submission has no reference to conferencing. As the Seventh Circuit stated, "Section 301.5 of the regulations, therefore likewise fails to provide any rule that evidence of the conference must be presented in the on-property record." Pet.App.18a. Furthermore, the parties are directed by these regulations to provide evidence only as to the "pertinent" facts:

> §301.6 General.
>
> (a) To conserve time and expedite proceedings all parties within the scope of

> the Adjustment Board should prepare submissions in such manner that the *pertinent and related* facts and all supporting data bearing upon the dispute will be fully set forth, thus *obviating the need for lengthy briefs and unnecessary oral discussions* (emphasis supplied).

The Proceedings Before the NRAB Panel

The Carrier did not make any objection to the Organization's Notice of Intent in any of the five cases. Pet.App.3a. Nor did it make any claim of a failure to conference in its original position statements filed with the NRAB panel. Pet.App.21a. Nor did it make any objection about conferencing during the more than two years which elapsed from the filing of the position statements to the date of the hearing in these cases. *Id.* Finally, over two years after the filing of the position statements, the five cases were set for oral argument before a single NRAB panel led by Referee Elliott Goldstein.

On March 18, 2004, when the Organization advocate came to argue these five cases, he found that for the first time the Carrier was raising the objection that the cases had not been conferenced. *See, e.g.,* Pet.App.66a. The Organization advocate protested ("passionately" as the Referee later wrote in the awards) that the parties had held conferences in every one of the cases. Pet.App.4a. The Organization also protested that the Carrier had failed to raise a timely objection when the Organization had filed the

Notice of Intent and had waived the issue. Pet.App.67a. Though the objection had been raised in an untimely manner, the Organization offered to supply written evidence of the conferences here. *Id.*

The Referee then issued an order adjourning the hearing to July 27, 2004, to allow both parties to make additional submissions. *See, e.g.,* Pet.App.69a. At the July 2004 hearing, the Organization offered written evidence of conferencing in these cases, including phone logs and correspondence between the parties. *See, e.g.,* Pet.App.67a-68a. The Carrier was not claiming the parties had failed to conference, but rather that evidence of conferencing was not in the record attached to the Organization's initial submission and that evidence produced in response to the objection could not be considered at the hearing stage. *See, e.g.,* Pet.App.66a.

Based on this argument, the NRAB panel, over the strong dissent of the two Organization Representatives, refused to allow the consideration of the evidence. *See, e.g.,* Pet.App.69a. On March 15, 2005, by a three-to-two vote, the divided NRAB panel dismissed all five cases based on the contention that Circular One requires evidence of conferencing to be included in the original submission, even if there was no timely objection to lack of conferencing. *See, e.g.,* Pet.App.71a-72a. The panel majority did not dispute the Organization's evidence that conferencing had occurred, but stated that the evidence presented by the Organization, "no matter how convincing," could not be considered at this stage because of "Circular

1." *See, e.g.,* Pet.App.69a-71a. The panel majority stated that the Organization had "demonstrated that the conference actually occurred via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request." *See, e.g.,* Pet.App.67a. The panel further acknowledged that the Organization had "tendered a copy of a telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations." *See, e.g.,* Pet.App.67a-68a. It also noted that there was "subsequent correspondence *prepared by the Carrier* concerning those cases . . . " (emphasis supplied) after December 10, 2001. *See, e.g.,* Pet.App.68a. It acknowledged the BLET's evidence even included "settlement letters." *Id.*

As the panel indicated, the Carrier was not claiming that the parties had failed to conference. *See, e.g.,* Pet.App.66a. Rather, the Carrier argued that under Circular One, evidence of conferencing had to be in the Organization's original position statement, whether or not conferencing had been in dispute. *Id.* The NRAB panel stated in part:

> During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, *the record* before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by the Board. Second, the Carrier argued that

> pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that the conference indeed occurred rested with the moving party, the Organization. Third, based on the Carriers' assessment of the on property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held . . .
>
> – Pet.App.66a, 74a, 82a, 90a, 98a (emphasis supplied).

The panel dismissed the cases by reasoning that "NRAB Circular 1" prohibited the consideration of the Organization's evidence once the position statements had been filed:

> The Board emphasizes that all evidence of the statutorily required conference is *entirely* absent from the on property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's *belated* production of *supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal* . . .
>
> . . . Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after an appeal to the Board would have been *contrary to the procedural requirements contained in NRAB Circular 1.*
>
> – Pet.App.70a-71a, 78a-79a, 86a-87a, 94a-95a, 102a-103a (emphasis supplied).

The dissent filed by the Organization Representatives denied that Circular One required the exclusion of the evidence where the Carrier had not previously objected as to lack of conferencing. Pet.App.105a-107a. The dissent stated in part:

> The Majority has committed a grave injustice . . .
>
> Reduced to its essentials, the Majority has now concluded that the Division cannot consider any of the evidence showing that a conference was held if that evidence was not part of the property handling at the time the record of the case was closed with the service of a Notice of Intent . . .
>
> New evidence is disallowed by the Board [when] it represents an attempt to blindside one party or the other. It is a function of the Board's appellate nature, which limits it to deciding cases based on the record developed on the property. This situation is vastly different in these Dockets, however, because the conference issue was not raised until long after the records had been closed.
>
> This is the kind of gamesmanship that breeds contempt for the minor dispute process, and the Majority should be ashamed to use it to shield the Carrier from the merits of these cases.
>
> – Pet.App.105a-107a.

SUMMARY OF ARGUMENT

The Seventh Circuit properly recognized and exercised jurisdiction to review the decision of the NRAB panel for denial of procedural due process under the Fifth Amendment. Federal courts have exercised this jurisdiction for over fifty years – and before any provision for statutory review of NRAB actions under the RLA. In the 1966 amendments providing statutory review of NRAB actions, Congress sought to expand and not limit the pre-existing review by the federal courts under the Due Process Clause. Previously, the jurisdiction for due process review had been recognized by this Court itself in *Union Pacific R.R. Co. v. Price,* 360 U.S. 601, 606 (1959). In the 1966 amendments, there is neither express language nor any statement from a member of Congress showing "clear and convincing" intent, or *any* intent, to strip or preclude this Court's prior claim to jurisdiction. *See Webster v. Doe,* 486 U.S. 592, 603 (1988); *see also Califano v. Sanders,* 430 U.S. 99, 109 (1977). Later, in *Union Pacific v. Sheehan*, 439 U.S. 89 (1978), this Court restricted the use of procedural due process to override an NRAB panel's application of a specific CBA provision; but *Sheehan* never found that due process was unavailable as a ground of review. Significantly, under this Court's canons, which require a "clear and convincing" expression of Congressional intent to preclude constitutional claims, the majority of the Circuits have found no such intent.

Exercising such jurisdiction in this case, the Seventh Circuit properly found that the NRAB panel denied Organization's right to due process when the NRAB panel acted without legal or statutory authority to create a new rule or requirement that Organization had to submit evidence of conferencing in the original submission whether the fact of conferencing was in dispute or not. Pet.App.23a. The Seventh Circuit correctly held that the federal regulation ("Circular One") on which the NRAB panel purported to rely does not even apply to evidence of conferencing and the NRAB panel had no authority to create such a rule. Nonetheless, the NRAB panel unlawfully invoked its own "in-house" rule to dismiss the cases of the five engineers without any interpretation or decision of their claims under the CBA. Such denial of due process was especially egregious when the Organization had no notice that conferencing was in dispute or that such evidence was required when there had been no objection to the lack of conferencing. Nor would Carrier have been prejudiced by the consideration of the evidence at this stage when the Carrier itself had previously failed to object to the lack of conferencing in a timely manner.

Finally, Organization also challenged the dismissals for the failure of the NRAB panel to "confine or conform" itself to its proper jurisdiction, as set out in 45 U.S.C. §153, First (q). In violation of the RLA, NRAB panel unlawfully exceeded its jurisdiction here in applying a new procedural requirement which had no basis in the RLA or

Circular One. Since the Seventh Circuit found that the NRAB panel acted without legal authority in dismissing these cases without resolution of the contract claims, such a finding supports a violation of this statutory ground as well.

ARGUMENT

I. FEDERAL COURTS CONTINUE TO HAVE JURISDICTION TO REVIEW NRAB DECISIONS FOR VIOLATIONS OF PROCEDURAL DUE PROCESS.

A. While the Organization has also challenged these awards on statutory grounds, due process review is especially appropriate when an NRAB panel makes up a new procedural requirement to dismiss cases without a hearing under the CBA.

In the Seventh Circuit the Organization argued that the NRAB panel's dismissal of these cases, without any resolution of the contractual claims in the CBA, should be set aside *both* for a denial of procedural due process and violation of the RLA, namely, the "failure" of the panel to "confine or conform" itself to its proper jurisdiction. *See* 45 U.S.C. §153 First (q). The Seventh Circuit found the due process claim "unavoidable." Indeed, the facts of this case invite and even call for the use of procedural due process review, which federal courts have been using long before direct statutory review became available

in 1966. Such review continues to be especially well suited for procedural violations as in this case, where an NRAB panel created a new "jurisdictional" requirement with no basis in the RLA or Circular One. As the Seventh Circuit found, there was no authority in either the RLA or Circular One for this new requirement, namely, that the Organization had to "prove" conferencing in its original submission (and only there), even if the Carrier had not disputed it. The dismissals on this ground were all the more egregious because the Organization then produced convincing evidence of conferencing, which the NRAB panel also barred. The consideration of such evidence at this stage would not have prejudiced the Carrier, which itself had prejudiced the Organization by failing to raise the issue of conferencing in a timely manner. Furthermore, the Carrier did not deny in the hearing that the parties did conference. The Seventh Circuit was correct to find the whole proceeding as a denial of procedural due process.

This is not a case to review an arbitrator's interpretation of the CBA. The Organization's claims did not get to that point: there was never a resolution of the contractual claims in this case. There is a genuinely constitutional injury when the Organization's contractual claims in the CBA were extinguished without any application of the CBA under a procedural rule created by this NRAB panel without any legal authority to do so. The equity jurisdiction of the federal courts to hear claims of

procedural due process is properly invoked to ensure that NRAB panels do their intended job of interpreting the CBA and deciding the contractual claims.

B. Long before there was statutory review of NRAB actions, the federal courts recognized the right to review such actions for violations of due process.

For over sixty years, even before there was any statutory review of NRAB decisions, this Court and the lower courts claimed jurisdiction to review NRAB actions for violations of due process. *See, e.g., Price v. Union Pacific R.R. Co.*, 360 U.S. 601, 616 (1959); *see Ellerd v. Southern Pacific,* 241 F.2d 541 (7th Cir. 1957); *Barnett v. Pennsylvania-Reading Seashore Lines,* 245 F.2d 579 (3d Cir. 1957); *see also Edwards v. Capital Airlines Inc.,* 176 F.2d 755 (D.C. Cir. 1949); *Brotherhood of Railroad Trainmen v. Templeton,* 181 F.2d 527 (8th Cir. 1950). At the time Congress was developing the statutory provisions for direct review of NRAB awards, the federal courts were issuing decisions that recognized their jurisdiction to review such actions on due process grounds. *See D'Elia v. New York, New Haven and Hartford Railroad Co.,* 338 F.2d 701 (2d Cir. 1964).

While not disputed by any of the parties in this case, it is worth emphasizing that an NRAB panel's actions are a form of state action. The Organization is

unaware of any court that has ever questioned the existence of state action. This Court has stated that the "compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself." *Andrews v. Louisville & Nashville Railroad Company,* 406 U.S. 320, 323 (1972). As the Court pointed out, "in some situations the Act makes the federal administrative remedy exclusive." *Andrews,* 406 U.S. at 325; *see also Brotherhood of Railroad Trainmen v. Chicago R. I. R. Co.,* 353 U.S. 30 (1957); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966); *Elmore v. Chicago & Ill. Midland Ry.,* 782 F.2d 94, 96 (7th Cir. 1986).

Accordingly, as noted by this Court in *Andrews,* the NRAB is a "federal administrative" agency. The Carrier concedes that the NRAB awards represent state action. Pet.Br.31. The concession is well warranted. The National Mediation Board staffs and pays for the operations of the NRAB. The NMB determines which persons may serve as possible referees. It sets their rate of pay and determines the propriety of the Referee's expenses, which are also paid by government funds. 45 U.S.C. §153 First (l), (u). The NRAB is administered by federal employees operating out of government offices in Chicago and Washington D.C. The United States Attorneys represents NRAB panels in any federal or state courts in which they may be sued. *See Sheehan v. Union Pacific Railroad Co.,* 576 F.2d 854 (10th Cir.), *rev'd on other grounds,* 439 U.S. 89 (1978); *Mitchell v.*

Union Pacific R.R. Co., 408 F.3d 318 (7th Cir. 2005). The NRAB was set up to resolve minor disputes under a mandatory governmental procedure, and the rules set out in Circular One have the status of federal regulations. Indeed, the NRAB panel in this case claimed the authority to interpret Circular One as codified in 29 C.F.R. §301.5 to dismiss these claims without any review under the CBA.

With respect to NRAB actions, then, the federal courts can assert their equity jurisdiction to review or set aside governmental invasions of constitutional rights, including the right to procedural due process. *See Bell v. Hood,* 327 U.S. 678 (1946); *Marbury v. Madison,* 5 U.S. 137 (1803). As set out in the *Price* case of 1959, this Court specifically recognized such constitutional jurisdiction to review NRAB actions for violations of procedural due process. The Carrier in its brief omits a full statement of this important case. In *Price,* the Court held that when an employee "lost" an NRAB arbitration, the employee could not file the same claim anew in state court. In 1959, at a time when federal law did not provide for statutory review, the Court stated that at least procedural due process review was available:

> . . . . [T]he statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances . . . disposed of by the Board, *past* the action under Section 3, First (p) authorized against the non complying carriers . . . or the review

> sought of an award claimed to result from a denial of due process of law, see *Ellerd v. Southern Pacific R. Co.,* 241 F.2d 541; *Barnett v. Pennsylvania-Reading Seashore Lines,* 245 F.2d 579, 582.
>
> – *Price,* 360 U.S. at 616 (emphasis supplied).

Likewise, in *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548 (1959), a companion case to *Price,* the dissent took issue with the majority's reading of the RLA but noted the statements of other courts that due process review is available. *Day*, 360 U.S. at note 7.

In the 1957 case of *Ellerd v. Southern Pacific R.R. Co.*, which is cited favorably in *Price,* the Seventh Circuit allowed a plaintiff to sue an NRAB panel for violation of due process. It held "we can conceive of no recourse except to reverse the judgment, so that the court may determine the essential question of whether plaintiff has been deprived of a constitutional hearing. . . ." *See Ellerd,* 241 F.2d at 545. The Seventh Circuit had noted the availability of due process review of NRAB decisions. *See Allain v. Tummon,* 212 F.2d 32 (7th Cir. 1954); *Hargis v. Wabash Railroad Co.,* 163 F.2d 608 (7th Cir. 1947) (citing *Dahlberg v. Pittsburg & L.E.R. Co*., 138 F.2d 121, 123 (3d Cir. 1943)). Other Circuits also recognized due process review before this Court's decision in *Price*. In *Barnett v. Pennsylvania-Reading Seashore,* also cited favorably in *Price*, the Third Circuit recognized due process jurisdiction and

proceeded to cite a host of cases which had reviewed NRAB actions on constitutional grounds. The citations in footnote 2 of *Barnett* include: "*Elgin, J&E Ry. Co. v. Burley*, 1945, 325 U.S. 711 (union before Board not authorized to bind absent employees); *Brotherhood of Railroad Trainmen v. Templeton*, 8 Cir. 181 F.2d 527 cert. denied 340 U.S. 823 (failure to give notice); *Edwards v. Capital Airlines*, 176 F.2d 755 cert denied, 1949, 338 US 885 (conflict of interest between Board members and employees)." *Barnett,* 245 F.2d at 582.

Furthermore, from the decision in *Price* up to the 1966 amendment of the RLA the federal courts continued to review NRAB actions for denial of procedural due process. *See, e.g., Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961); *D'Elia v. New York, New Haven & Hartford R.R. Co.,* 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 423 U.S. 1016 (1965).

C. In amending the RLA in 1966 to provide statutory review, Congress did not use any language or express any intent to strip the courts of their constitutional jurisdiction.

In providing statutory review in 45 U.S.C. §153 First (q), Congress sought to expand – not limit – the existing direct judicial review of NRAB awards. There is no express or implied preclusion of the jurisdiction which had been exercised by the federal courts up to 1966. Both the language of 45 U.S.C. §153 First (q)

and its legislative history fall far short of the "clear and convincing" evidence required by this Court to preclude jurisdiction to hear constitutional claims of governmental actions. *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *Califano v. Sanders*, 430 U.S. 99 (1977); *Utah v. Evans,* 536 U.S. 452 (2002); *Demore v. Kim*, 538 U.S. 510, 517 (2003); *Bowen v. Academy of Family Physicians*, 476 U.S. 667 (1986); *see also Johnson v. Robison*, 415 U.S. 361 (1974). In *Webster,* this Court stated:

> We emphasized in *Johnson v. Robison,* 415 U.S. 361 (1974) that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Weinberger v. Salfi,* 422 U.S. 749 we reaffirmed that view. We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 681 n. 12 (1986)." (internal citations omitted).
>
> – *Webster,* 486 U.S. at 603.

As this Court stated in *Utah v. Evans,* 536 U.S. at 463, "We read limitations on our jurisdiction to review narrowly. . . . We do not normally read an unexpressed intent to bar jurisdiction that we have previously exercised." This extra caution is important here in light of this Court's recognition of its jurisdiction for due process review in *Price.* It is also

significant that several appellate courts were exercising due process review at the very time these amendments were being considered. *See, e.g., D'Elia v. New York, New Haven & Hartford Railroad Co.*, 230 F. Supp. 912 (D. Conn. 1964).

The purpose of Congress in adding statutory review was remedial, i.e., to expand and not to limit direct judicial review. Congress was not concerned that such review had been too intrusive. Rather, Congress recognized that the limited procedural review as claimed in *Price* was insufficient. As noted by the dissent in *Day,* it was unfair to employees not to have some right to review of the substantive merits of these awards. As set out in 45 U.S.C. §153 First (q), Congress added three new grounds for review: (1) violations of the RLA itself, (2) the failure of an order of an NRAB panel "to conform or confine" itself to matters within its jurisdiction, namely, to render an interpretation of the CBA "without foundation in reason or fact," and (3) fraud. Senate Report No. 1201, Judicial review, p. 2287.

In adding the three new grounds, Congress does not say such review is "exclusive," or that "there is no other review," so as even to arguably reach "by implication" the constitutional review which already existed. There is not a word in subparagraph (q) that review under it is "exclusive." Congress did not use "exclusive," "only," or any similar word. Nor is there anything about withdrawing the "equity" jurisdiction previously claimed by the federal courts. In the first sentence of 45 U.S.C. §153 First (q), Congress adds

"jurisdiction" – simply adds it – where none had previously existed. "The court shall have *jurisdiction* to affirm the order of the division, to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as the court may direct." (emphasis supplied).

These are words without limitation. This case is not even close to the facial statutory bar of review which this Court found insufficient to preclude its jurisdiction over constitutional claims in *McNary v. Haitian Refugee Center,* 498 U.S. 479, 494 (1991). Here by contrast there is nothing that limits review. In effect the Carrier here falls back on the Latin maxim, "*expressio unius, est exclusio alterius.*" This is a completely inadequate basis under the leading cases to strip this Court of the jurisdiction recognized in cases like *Price.* The "clear and convincing standard" set out by a unanimous Court in cases like *Webster* and *Califano* rule out any use here of "implied" intent to strip this Court and the lower courts of the jurisdiction they had previously claimed or exercised. The Carrier essentially asks this Court to overrule *Webster, Califano,* and a host of other cases and replace it with an "implied" intent doctrine. But even if this Court were to overrule all these cases, there is no such intent that can be implied.

There is not a single remark, not one, by any legislator suggesting any desire to cut back review or roll back the very sparing use of due process. Reviewing this legislative history, no one could seriously claim that in 1966, Congress was somehow on a collision course with the federal courts over due

process review. This was no Congressional show-down with the judiciary: it was a peaceful, consensual expansion of review, utterly without controversy. Members of Congress cited and even relied on *Price*, which had also recognized due process review. They relied on *Price* and *Day* to support the view that as a constitutional matter, Congress did not have to extend the same full-fledged review as provided under the Administrative Procedure Act. The House Committee Report, for example, shows that Congress was well aware of *Price*, stating:

> . . . the constitutionality of permitting no review of the decisions of the Board has been upheld, at least as applied to employee claims that have been denied. It would therefore follow that the constitutionality of permitting only limited review should be upheld. For example, in *Union Pacific Railroad v. Price* (360 U.S. 601) and *Pennsylvania v. Day* (360 U.S. 548) the Supreme Court denied judicial relief to employees who had lost their case before the Adjustment Board, despite vigorous dissents pointing to the unfairness . . .
>
> – 89th Congress, 1st Session, Report No. 1114.

Of course in upholding the constitutionality of the RLA, *Price* had assumed the existence of due process review. Congress was acting not to eliminate this review but to fill in a gap. It was trying to provide for review of a panel's interpretation of a CBA – a kind of review that cannot be accommodated

under the due process clause. Referring to such review of a panel's interpretation of the CBA, the Senate Committee Report submitted by Senator Wayne Morse noted the current lack of such review:

> If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained . . . [T]his result is unfair to employees . . . [B]ecause the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be similar to those grounds commonly provided for review of arbitration awards.
>
> – Senate Report No. 1201, Judicial review, p. 2287.

Statutory review would fill that gap and allow very limited review of an interpretation of the CBA:

> The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award 'arbitrariness or capriciousness' on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly *without foundation in reason or fact*, and the

> committee intends that, under this bill, the courts will have that power.
>
> – Senate Report No. 1201, Judicial review, p. 2287 (emphasis supplied).

Accordingly, under the new statutory review, the courts may find that an NRAB panel has "exceeded [its] jurisdiction" when its award has no "foundation in reason or fact." *See Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 412 (5th Cir. 1969). The courts have interpreted the latter phrase to mean that the award has to "draw its essence from the collective bargaining agreement." *See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers,* 461 U.S. 757, 764 (quoting *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960)). However, such review applies to an actual interpretation of the CBA which in this case never occurred. The courts have continued to use the due process clause to review the NRAB panel's use or misuse of procedural rules not involving substantive interpretations of the CBA. *See, e.g., Chicago, Rock Island & Pacific Railroad Co. v. Wells,* 498 F.2d 913 (7th Cir. 1974). Congress logically would have taken for granted the continued existence of such review.

If the intent to eliminate the jurisdiction of the courts must be "clear and convincing," it has not been "clear" to the majority of the Circuits. The appellate courts which have looked at the legislative history have found no Congressional intent to eliminate due

process review. *Shafii v. PLC British Airways,* 22 F.3d 59 (2d Cir. 1994); *see Edelman v. Western Airlines*, 892 F.2d 839 (9th Cir. 1989). Furthermore, the appropriate use of due process review makes functional sense. Review of procedure complements the statutory review of the merits of a particular CBA interpretation. Certainly the two forms of review can overlap. But they also serve different purposes. The Carrier concedes that the RLA does not provide a remedy for all violations of due process. Pet.Br. 37-38. Due process is especially suited in the narrow class of cases like the instant case where an NRAB panel is involved in misuse of federal regulations – and is avoiding any interpretation of the CBA. Surely Congress did not want to insulate NRAB panels from review in these circumstances.

Finally the claim that Congress wanted some "statutory" due process but not "constitutional" due process has no plausible basis. Certainly the evidence of Congressional intent to divide up the Due Process Clause or this Court's jurisdiction in such a nuanced way is not "clear and convincing." Furthermore, the principal elements of this "statutory due process" were enacted by Congress in 1934, not 1966. *See* 45 U.S.C. §153 First (j). This would seem to entail a showing that Congress actually intended to preclude constitutional claims not in 1966 but in 1934. Such an argument is just untenable.

D. *Union Pacific Railroad Co. v. Sheehan* did not rule out due process review.

After the 1966 amendment to the RLA, the courts, the carriers and the unions all continued to assume that due process review was available. *See, e.g., Rosen v. Eastern Air Lines,* 400 F.2d 462, 464 (5th Cir.), *cert. denied*, 394 U.S. 959 (1968) (*citing Southern Pacific Co. v. Wilson*, 378 F.2d 533 (5th Cir. 1967 and *Edwards v. St. Louis – San Francisco Railroad Co*., 361 F.2d 946, 953-954 (7th Cir. 1966)); *Kotakis v. Elgin, J. & E. Railway, Co.*, 520 F.2d 570, 574 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975) (*citing Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 616 (1959)). In the reported cases up to 1978, no party seems even to have made the argument that Congress eliminated due process review. *See, e.g., Wells*, 498 F.2d 913 (7th Cir. 1974). The uncertainty about such review only arose after this Court's decision in *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89 (1978).

In *Sheehan* this Court set aside a Tenth Circuit decision which misused due process to review an NRAB panel's interpretation of the CBA. The Tenth Circuit had invoked "procedural due process" to require an NRAB panel to "toll" or in effect waive a time-limit in the CBA. This was a highly improper use of due process to second-guess the application of an express CBA provision. In a terse *per curiam* opinion, this Court properly balked at this use of due process to toll a provision of the CBA, stating at 92-93:

> If the Court of Appeals' remand was based on its view that the Adjustment Board had failed to consider respondents' equitable tolling argument, the court was simply mistaken. The record shows that the respondent tendered the tolling claim to the Adjustment Board, which considered it and explicitly rejected it. If, on the other hand, the Court of Appeals *intended to reverse the Adjustment Board's rejection* of respondent's equitable tolling argument, the court exceeded the scope of its jurisdiction to review decisions of the Adjustment Board.
>
> – *Sheehan,* 439 U.S. at 92-93 (emphasis supplied).

In short, this Court found that Sheehan himself had received procedural due process, i.e., consideration of his tolling argument and a decision on the merits. But the Tenth Circuit could not use due process to review the NRAB panel's choice to apply the time limits of the CBA. *Sheehan* stands for the proposition that once an arbitrator applies the CBA, there is no due process review of that application. Thereafter, the interpretation of the CBA itself could be reviewed only on one of the three statutory grounds. *See Sheehan,* 439 U.S. at 93.

But *Sheehan* did not hold that due process review was unavailable in all circumstances. On the contrary, three times *Sheehan* cites the *Price* case, which specifically acknowledges procedural due process review. *See Sheehan,* 439 U.S. at 94. This particular use of due process was beyond the

jurisdiction of the Tenth Circuit, but in *Sheehan* the Court was not making any major statement that Congress had eliminated due process jurisdiction altogether. This Court's ruling in *Sheehan* was consistent with the limited use of due process jurisdiction before 1966. In the petition for *certiorari* in *Sheehan*, the petitioner – by coincidence, the Carrier in this case – did not even challenge the availability of due process review, and apparently no merits briefs were filed. The Court simply rendered a short *per curiam* opinion. It would not have handled the delicate issue of Congressional removal of jurisdiction in such a cursory manner and so completely inconsistent with cases like *Califano, supra,* decided the year before.

True, a minority of Circuits have interpreted *Sheehan* as precluding due process review. But the Circuits which have examined the question with the most care have held that due process jurisdiction is still available. *See Edelman v. Western Airlines, supra,* 892 F.2d 839, 846-848 (9th Cir. 1989); *see Shafii v. PLC British Airways*, 22 F.3d 59, 63-64 (2d Cir. 1994); *Hayes v. Western Weighing & Inspection Bureau*, 838 F.2d 1434, 1436 (5th Cir. 1988); *Armstrong Lodge No. 762 v. Union Pacific R.R.*, 783 F.2d 131, 135 (8th Cir. 1986); *Radin v. United States*, 699 F.2d 681, 684 (4th Cir. 1983) ("procedural deprivation by the arbitrators is ground for relief in the district court"). The Second, Fourth, Fifth, Eighth, Ninth and Seventh Circuits all agree. It is just implausible that the 89th Congress was seeking

to oust the courts of this very rare but important use of due process review. It is also implausible that in a short *per curiam* opinion, this Court had ruled out literally decades of procedural due process review without giving a significant discussion of this issue.

E. Due process fits the statutory scheme and federal labor policy.

Due process review of NRAB decisions has now been in effect for over half a century, and is still in effect in the majority of Circuits now. There has been no flood of litigation based on such review. Due process review has a limited role: to review procedural misconduct not involving the merits of an interpretation of the CBA. It is used primarily when an NRAB panel has avoided in some way the interpretation of the CBA or imposed some extraordinary procedural sanction. *See, e.g., International Ass'n of Machinists & Aerospace Workers v. Metro North Commuter R.R.,* 24 F.3d 369 (2d Cir. 1994); *System Federation, et al. v. Braidwood,* 284 F. Supp. 611, 616 (N.D. Ill. 1968) (also citing statutory grounds); *see also Wells,* 498 F.2d 913. While it can complement and overlap with statutory review, it has a special role.

Due process review ensures that NRAB panels conduct hearings under the RLA. There is no basis to believe that Congress wanted to preclude this rare but important use of procedural due process, which is now so established in the case law. The use of due

process in rare but important cases promotes federal labor policy by helping to ensure the integrity of this mandatory arbitration process. There is not the slightest reason in law or policy to justify abandoning it.

II. BY USING A RULE OR REQUIREMENT NEVER BEFORE APPLIED AND DISMISSING THE FIVE CASES WITHOUT ANY HEARING UNDER THE CBA, THE NRAB PANEL VIOLATED ORGANIZATION'S RIGHT TO DUE PROCESS.

The facts of this case present a classic violation of procedural due process. First, the Organization was denied any hearing or decision of its claims under the CBA. Second, the NRAB panel had no legal authority under the RLA or Circular One to bar the evidence of conferencing and thereby deny the Organization's right to a hearing. Third, the consideration of the evidence at this stage would have caused no particular prejudice to the Carrier when it had failed to raise a proper objection earlier. As the Seventh Circuit found, evidence of conferencing is not the type of evidence to which any evidentiary bar in Circular One might apply – evidence which Carrier should have received an opportunity to "rebut" in an investigative hearing. Furthermore, the Organization was prejudiced when it was denied reasonable notice that conferencing would be in dispute. Finally, a single NRAB panel has no institutional capacity to engage in rule-making by adjudication in a system

where individual arbitration decisions are not binding precedents.

A. The Organization had no hearing or decision of its contractual claims under the CBA.

The NRAB panel misused a federal regulation to dismiss these cases without any hearing or fair process to resolve these contractual claims. The Carrier implies that the investigative hearing was sufficient. Pet.Br.35-36. This investigative hearing may be "adversarial," but it is not before an impartial tribunal. It is conducted by the investigating officer, who is a managerial employee of the Carrier, appointed by the Carrier, and answerable to the Carrier, and who cannot even purport to be a neutral. The ultimate decision is actually made by the Carrier's superintendant, who is also a managerial employee of the Carrier. In none of these cases did the five engineers receive a decision based on the CBA as the Railway Labor Act requires. *See* 45 U.S.C. §153 First (f).

Furthermore, it is well settled that the due process clause does not apply to what the parties do in the contractual grievance procedure prior to consideration by the NRAB. *See Edwards v. St. Louis – San Francisco R.R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966); *D'Elia v. New York, New Haven & Hartford R.R. Co.*, 338 F.2d 701, 702 (2d Cir. 1964). It is the

NRAB's resolution of the dispute which must meet the standards of Due Process. *See Edwards*, 361 F.2d 953 (citing *D'Elia v. New York, New Haven & Hartford R.R. Co.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F.2d 701 (2d Cir. 1964); *Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961); *Ellerd v. Southern Pacific R.R. Co.,* 241 F.2d 541 (7th Cir. 1957); *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579 (3d Cir. 1957); *Brotherhood of Railroad Trainmen v. Templeton*, 181 F.2d 527 (8th Cir. 1950); *Edwards v. Capital Airlines, Inc.,* 176 F.2d 755 (1949)). By extinguishing the contractual claims without any interpretation or application of the CBA, the NRAB panel in this case effectively engaged in a taking of a contractual right without due process.

B. The NRAB panel acted without any legal authority in dismissing these cases without any hearing or decision of these claims under the CBA.

In this case, the Seventh Circuit found that the NRAB panel had no legal authority under the RLA or Circular One to bar the Organization's evidence of conferencing. Pet.App.23a. This evidence of conferencing which was offered by the Organization included correspondence from the Carrier. *See, e.g.,* Pet.App.68a. In fact the parties did conference. The NRAB panel even acknowledged the evidence might be "convincing" but stated that it was required to bar the evidence at the hearing stage by "Circular 1." Pet.App.70a-71a. The Seventh Circuit found that

Circular One did not even apply to this kind of evidence and that the NRAB panel had simply made up a new requirement. Pet.App.21a-23a.

The NRAB panel did not claim that the bar came directly from the RLA. Rather it stated that it was bound instead by "Circular 1." Pet.App.70a-71a. The Carrier's brief generally avoids discussing Circular One. Instead, the Carrier argues that the NRAB panel was applying a general statutory provision set out in 45 U.S.C. §153 First (j). The statutory language to which Carrier points this Court is that "disputes may be referred . . . with a full statement of facts. . . ." The Carrier contends that this use of the word "full" requires the Organization to provide evidence of conferencing in the original submission, whether conferencing is in dispute or not. But a "full statement of facts" could mean a wide range of things. Whatever it may be, this language is certainly not a clear requirement that specific evidence of conferencing must be in the Organization's initial brief.

Furthermore, the NRAB panel did not claim to be interpreting this language – it does not refer to or rely on the language "a full statement of facts" from 45 U.S.C. §153 First (j). Rather the NRAB panel stated that it was barring the Organization's evidence of conferencing because it was required by "Circular 1." But as the Seventh Circuit found, Circular One has nothing to do with evidence of conferencing. Pet.App.18a, 21a.

Circular One, or the relevant part codified as 29 C.F.R. §301.5(d), requires the Organization to present all "relevant, argumentative facts, including documentary evidence submitted in exhibit form. . . ." This same federal regulation also states as follows: " . . . all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made part of the particular question in dispute." As pointed out by the Seventh Circuit, this language makes no sense when applied to evidence of conferencing. A conference can be an informal meeting. It can be a phone call. There is no requirement that the conference has to be documented in writing. It does not have to be transcribed. There is no logical way that a phone call could "have been presented to the carrier and made part of the particular question in dispute." Furthermore, the conference is a last ditch attempt to settle the case after the parties have gone through the contractual grievance procedure. At the time a phone call occurs, the hearing record before the investigating officer has been transcribed and signed. It is problematic to see how a phone call or a meeting can be "made part of the particular question in dispute."

The purpose of Circular One is to provide an opportunity for the other side to "rebut" evidence when it is presented "on the property." Circular One has the purpose of barring "surprise" evidence from being presented for the first time to an NRAB panel. Pet.App.20a-21a. But, as the Seventh Circuit noted,

evidence of conferencing is not the kind of evidence which the other side has a right to see and rebut before it goes in the record. Pet.App.18a. The regulation set forth at 29 C.F.R. §301.5(d) was never intended to apply to the proof of an informal step that occurs after the contractual grievance procedure has been completed and well after the evidentiary record from the investigative hearing has been closed.

Accordingly, the Seventh Circuit found that the NRAB panel was simply creating a new requirement not in Circular One to justify the dismissal of these cases without a hearing under the CBA. It was not even a genuine "interpretation" when the regulation being "interpreted" could not logically apply to this class of evidence at all. Likewise, the Seventh Circuit ably distinguished the bar to evidence in this case from a routine evidentiary ruling such as the one at issue in *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29 (1987). In *Misco,* this Court upheld a challenge to an arbitrator's evidentiary ruling in a private arbitration. The court of appeals stated that if the NRAB panel had been applying an already existing rule of evidence as the arbitrator did in *Misco*, it would have deferred to the NRAB panel's decision. Pet.App.8a. But here, the Seventh Circuit noted, the NRAB panel was creating a new administrative rule solely for the purpose of keeping out the Organization's evidence. Pet.App.8a, 22a-23a.

Finally, the NRAB panel has no special competence to interpret either the RLA or any of its implementing regulations, as arguably the entire

Adjustment Board itself could do. The Adjustment Board itself, which has the delegated responsibility for rulemaking, can act only with consent of both the Carrier and Organization representatives: there are no neutrals to break ties for the 34 member Adjustment Board as a whole. A single NRAB panel with a neutral or referee is an entirely different entity and in no position to make the kind of binding interpretations of federal law or even Circular One to which a federal court might defer under *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984) or *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). Congress did delegate a one-time rulemaking authority to the Adjustment Board as a whole, but it did not delegate any such authority to a single Division panel. 45 U.S.C. §153 First (v). Nor does a single Division panel have any particular "agency expertise" since it can consist of five individuals who rarely if ever will serve on such panels. This panel acted without authority to create a new requirement to bar evidence of conferencing and had no legal basis or even a good reason for refusing to decide these contractual claims under the CBA.

C. Consideration of the evidence at the hearing stage would not have caused any particular prejudice to the Carrier, and Organization had no reasonable notice that it would have to submit evidence previously.

The consideration of the Organization's evidence of conferencing at the hearing stage would not have

caused any prejudice to the Carrier when the latter had failed to raise the issue properly. Indeed, the Carrier did not dispute that the conferences had occurred. Surely Circular One does not bar evidence of undisputed facts. More important, as the Seventh Circuit found, evidence of conferencing is not the type of evidence to which Circular One applies. This use of Circular One was just wrong, and the Organization had no reason to anticipate such a use of it. Seventh Circuit properly applied its own case law, specifically *Wells,* where it had found that even a published rule (as to the filing of a brief) should not be applied to keep out the brief when the late submission of the brief had not prejudiced the other side. *Wells,* 498 F.2d at 913.

If the Organization had not submitted the evidence at an earlier stage, it was only because Carrier had failed to object to lack of conferencing. If the NRAB panel allowed the Carrier to make an untimely objection, it should have allowed the Organization to submit the evidence to meet the objection. Indeed, if Circular One applied to evidence of conferencing, the NRAB panel should have barred the untimely objection, because the Carrier should have raised such a "relevant, argumentative" fact when it filed its original submission. *See* 29 C.F.R. §301.5(e). It is at least an element of due process that a party like the Organization should have timely, reasonable prior notice of the charges to which it would have to respond. If lack of conferencing was to be a claim in this case, the Organization was entitled

to some prior notice at the time it filed its original submission.

The Organization, not the Carrier, was the party that was unfairly prejudiced. The Seventh Circuit's decision made that clear:

> . . . any blindsiding came from the Carrier's actions. When the Organization filed its Notice of Intent to proceed to arbitration, it forwarded a copy of the on property record to the NRAB, and of course to the Carrier. It was clear from the face of the documents that the on property record to the NRAB lacked any written evidence that a conference had occurred. The Carrier, however, did not object to the lack of evidence of conferencing. Instead, it responded substantively to the merits of the claims and the parties proceeded to arbitration. Only on the eve of arbitration – when the Carrier claims the record was closed to all new submissions – did it raise its objection to the lack of evidence.
>
> – Pet.App.21a.

In an analogous situation at the National Labor Relations Board, federal courts have held that parties are entitled to either advance notice of the claim against it or the opportunity to fully litigate the issue when a new claim is made. *NLRB v. Complas Industries Inc.*, 714 F.2d 729, 734 (7th Cir. 1983); *Henry Bierce Co. v. NLRB,* 23 F.3d 1101 (6th Cir. 1994). Here the Organization did not have notice of

the conferencing issue or the opportunity to fully litigate it.

The Carrier has argued that based on prior arbitration awards the Organization should have assumed it had to prove conferencing whether or not the Carrier raised an objection. Yet the arbitration awards cited by the Carrier do not make any such point. The Seventh Circuit goes into detail as to why the cited awards are not precedents. The Organization cannot improve on the Seventh Circuit's analysis of these purported precedents. Yes, these awards dismiss cases for lack of conferencing "in the record." JA-40-59. But in these cited awards there is no question that the parties did in fact fail to conference. None of these cases bar a party from presenting any evidence of conferencing. None of them apply Circular One to keep out evidence after an objection is made. None dismiss for lack of conferencing when a party like the Carrier technically avoided claiming that the conferences had failed to occur and where the NRAB panel even acknowledged that such evidence might be persuasive or convincing.

Furthermore, even if the awards cited by the Carrier were on point (and they are not), the arbitration awards of NRAB panels – certainly at this time – were not collected or indexed or even being published in a systematic way. The publication of the awards in bound volumes had stopped in 1972. Only in July 2005 – after these claims had been dismissed – did the National Mediation Board begin partial

"online" publication of the awards. Even this new online service has no index or digest. Furthermore, with the exception of one award, the awards cited by the Carrier are not even from the First Division. They come from the Second, Third, and Fourth Divisions outside the jurisdiction of this First Division NRAB panel. These are Divisions to which the particular Organization advocates in this case (who practice only in the First Division) do not have access. Even the single First Division award cited by the Carrier is not at the present moment available online. In short, these awards attached by the Carrier in the Joint Appendix are not only off the point, but would not have been seen by the Organization advocates for these five engineers. The Organization had no fair or reasonable prior notice from these awards or any other legal source that it had to submit evidence of conferencing; the Carrier had not even raised the issue prior to the hearing.

D. Individual NRAB panels cannot engage in "rule making by adjudication."

In voting against *en banc* review, two members of the Seventh Circuit incorrectly stated that even if the NRAB panel had no authority under Circular One, it could have imposed a new rule "by adjudication" and applied it without notice retroactively. A single NRAB panel has no authority to make rules, either by rule-making or adjudication. The RLA gives rule-making authority to the Adjustment Board as a whole – the body which consists of 34 labor and management

representatives. The Chairman and Vice Chairman of the Adjustment Board represent management and labor respectively. This is the only body to which Congress entrusted any rule-making authority. *See* 45 U.S.C. §153 First (v). It necessarily operates by consent of both management and labor: there are no "neutrals" or "referees" to create rules in case of a tie. Even in this case, Congress allowed such rule-making authority on a one time only basis, to be completed within 45 days after June 21, 1934. The result of that rule-making, i.e., Circular One, are the only rules that are now part of the Code of Federal Regulations.

A single NRAB panel is a far cry from the Adjustment Board itself. It is only one of several panels operating in the four Divisions of the NRAB. The Organization knows of no "rule" that has ever been created by a single NRAB panel. The individual NRAB panels are not supposed to interpret the RLA as the NLRB or the SEC does with respect to their organic statutes. The panels are not commissioned by Congress to render such interpretations. *Cf. Chevron,* 467 U.S. 837. Rather, they are supposed to interpret and apply the CBA. *See Sheehan,* 439 U.S. at 94 ("The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions."), citing *Price,* 360 U.S. at 611 and *Elgin, J. & E. Railway Co. v. Burley*, 327 U.S. 661, 664 (1946).

Even in the case of the NLRB or SEC, this Court does not favor rule-making by adjudication. *See SEC v. Chenery,* 318 U.S. 80 (1943)*; NLRB v. Wyman Gordon,* 394 U.S. 759 (1969). However, at least those agencies operate by some limited use of precedent. In this case "rulemaking by adjudication," by a single NRAB panel, is a conceptual impossibility, because the RLA arbitration process does not operate by strict adherence to *stare decisis*. *See* Jacob A. Seidenberg, *The Railway Labor Act at Fifty, Grievance Adjustment in the Railroad Industry*, 209, 220-221 (National Mediation Board, 1977). The Referee who wrote these decisions may claim he is "bound" by "precedent" (which included one of his own cases) but in fact he is not. Arbitration awards do not have the weight of judicial precedent, and arbitrators are not bound by the rationale of earlier decisions. *See, e.g., Butler Armco Independent Union v. Armco Inc.* 701 F.2d 253, 254 (3d Cir. 1983); *El Dorado Technical Services, Inc. v. Union General De Trabajadores De Puerto Rico,* 961 F.2d 317, 321 (1st Cir. 1992). Indeed, a federal court once held that the very referee in this case, Elliott Goldstein, was not bound by prior arbitration awards. *Wyman-Gordon Co. v. United Steelworkers of America,* 613 F. Supp. 626, 629 (N.D. Ill. 1985). Even NRAB awards state there is no strict adherence to "stare decisis." *See, e.g.,* NRAB Award No. 15719.[3] Even if there were strong *stare decisis*,

[3] Available online at the "NMB Knowledge Store," http://kas.cuadra.com/starweb1/nmbks/servlet.starweb1?path=nmbks/nmb.web.

there is no system or mechanism to allow any single NRAB panel to know what any other panel has decided. That problem is compounded by the existence of four Divisions.

There cannot be rule-making if there cannot be "rules" with any binding or even strong *stare decisis* effect. If no NRAB panel has any authority to bind another panel, it is impossible to engage in rulemaking by adjudication. No single panel has the legal authority to issue "rules" for the entire Adjustment Board.

In a system like the NRAB with very weak *stare decisis*, there is no particular logic for applying an unfair or surprising "interpretation" retroactively – certainly not for the sake of any consistency. Indeed, even in a system with strict *stare decisis*, this Court has cautioned against applying new procedural rules retroactively. *See Landgraf v. USI Film Products,* 511 U.S. 244 (1994). On matters of substantive law, this Court has required retroactive application only to ensure the uniformity appropriate in a judicial system based on precedent. *See, e.g., James Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991) ("These rationales do not apply analogously to agency adjudications."); *Laborers' Int'l Union of North America, AFL-CIO v. Foster Wheeler Energy Corp.,* 26 F.3d 375, 386, fn. 8 (3d Cir. 1994), *District Lodge 64 Int'l Ass'n of Aerospace Workers v. NLRB,* 949 F.2d 441, 447 (D.C. Cir. 1991). Administrative agencies are different because they mix legislative and judicial functions, and such agencies as the NLRB and SEC

have weaker principles of *stare decisis*. And if *stare decisis* is weaker even for such agencies as these, it is even weaker for the individual NRAB panels acting independently of each other.

Despite the unfairness in particular cases, *Beam* allows retroactive application of new interpretations in order to serve the goal of consistency in our judicial system. But all the principled considerations that justify the outcome in cases like *Beam* are absent here. Maybe the new interpretation will be applied by another panel. Or maybe it will not. "Retroactivity" in this system can be a one-time *ad hoc* event which only aggravates the unfairness. In short an individual NRAB panel should not be rule-making at all by adjudication at all, and it certainly should not do so retroactively. This Court has made clear its distaste for this practice. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208-09 (1988).

Aside from the singular unfairness of retroactivity, the Organization notes that some NRAB panels do *not* dismiss cases "with prejudice" for lack of conferencing. There is no consistent practice. Some panels simply stay the cases and allow the parties to conference and then return. *See, e.g.,* NRAB Awards 23867, 5074.[4] Dismissal with prejudice is too draconian a penalty even when the parties fail to

[4] Available online at the "NMB Knowledge Store," http://kas.cuadra.com/starweb1/nmbks/servlet.starweb1?path=nmbks/nmb.web.

conference. What is unique about this case is to dismiss for lack of conferencing when conferences occurred. It is no wonder that on the record here, the Seventh Circuit found the due process issue "unavoidable."

III. THE COURT MAY VACATE THESE AWARDS ON THE STATUTORY GROUND THAT THE NRAB PANEL HAD NO AUTHORITY TO DISMISS THESE CASES AND THEREBY FAILED TO "CONFINE OR CONFORM" ITSELF TO ITS PROPER AND LIMITED JURISDICTION UNDER THE RLA.

The Seventh Circuit's finding of a due process violation made it unnecessary for it to decide the statutory claim which Organization argued with equal measure. The case law in the Seventh Circuit and other Circuits is arguably as well developed for due process review as it is for statutory claims. *See Wells,* 498 F.2d 913. While courts should avoid novel constitutional claims, there is nothing "novel" about this form of review. In rare and limited instances, this form of review goes back decades.

Nonetheless, the Organization contends that if due process review is not available for any reason, the Seventh Circuit should be allowed to consider the statutory ground, namely, that the NRAB panel exceeded its jurisdiction – or failed to "confine or conform" to its proper jurisdiction, to use the language of 45 U.S.C. §153 First (q). Since the

Seventh Circuit found that the NRAB panel acted without legal authority under Circular One, such a finding establishes a violation on this statutory ground as well. Specifically, by barring evidence of conferencing without any legal basis, this individual NRAB panel went far beyond its limited role of deciding these contractual claims in the CBA.

Yet there is a good reason why the Seventh Circuit chose to find a violation of due process. First, the wrong here is entirely procedural in nature, and due process is a more effective way of conceptualizing and redressing a wrong that is procedural only. Second, due process allowed the Seventh Circuit to consider whether an action by the NRAB in excess of its jurisdiction also results in a denial of a fundamentally fair hearing. To the extent that the NRAB's action went beyond the law *and* resulted in a denial of a process for fair resolution of the contractual claims, the finding of a due process violation strengthens the case for judicial intervention, which should always be extremely rare. Pet.App.21a-22a. Both on statutory and due process grounds, these orders of dismissal should be vacated. The five engineers deserve resolution of their contractual claims.

CONCLUSION

The Organization respectfully submits the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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AGREEMENT BETWEEN UNION PACIFIC RAILROAD (UP) AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS (BLE)

Whereas the BLE and various Carriers represented by the National Railway Labor Conference (NRLC) (including UP) have entered into a tentative agreement;

Whereas the aforementioned tentative agreement is presently subject to ratification by the BLE before it can become effective;

Whereas the BLE and UP have also reached certain other tentative agreements, listed below and attached hereto;

Whereas it is the intention of the parties that such other agreements, listed below and attached hereto, only become effective if and when the agreement between the BLE and those Carriers represented by the NRLC is ratified and becomes effective;

It is agreed:

1. The BLE and UP have reached tentative agreement on the following agreements, copies of which are attached hereto:

   (a) System Agreement – Discipline Rule

   (b) System Agreement – Claim Handling Process

   (c) System Agreement – Instructor Engineers

   (d) System Agreement – Peer Training

(e) System Agreement – Weight on Drivers

(f) System Agreement – Extra (Undisturbed) Rest

(g) System Agreement – Without Fireman Payment

(h) System Agreement – Compensation Delivery

2. The above-listed agreements will become effective only if and when the agreement between the BLE and the various Carriers represented by the NRLC is ratified and becomes effective. In that event, the above listed agreements will become effective on the same date as the BLE/NRLC Agreement.

Signed this 21 day of March, 1996

/s/ B. D. MacArthur
B. D. MacArthur – BLE

/s/ [Illegible]
L. A. Lambert – UP

/s/ D. E. Penning
D. E. Penning – BLE

/s/ A. Terry Olin
A. T. Olin – UP

/s/ M. L. Royal Jr.
M. L. Royal, Jr. – BLE

/s/ Jan Raaz
J. M. Raaz – UP

/s/ D. L. Stewart
D. L. Stewart – BLE

Approved:

/s/ [Illegible] Young
M. A. Young – BLE

/s/ [Illegible]
J. J. Marchant – Sr. AVP – UPRR

Approved:

/s/ R. E. Dean
R. Dean – VP – BLE

Attachment (a)

SYSTEM AGREEMENT – DISCIPLINE RULE

1. All existing agreements pertaining to the handling of discipline are eliminated and replaced by this agreement.

GENERAL

2. Locomotive engineers will not be disciplined without first being given a fair and impartial investigation except as provided below. They may, however, be held out of service pending investigation, but it is not intended that an engineer be held out of service for minor offenses.

NOTICE

3. Within 10 days of the time the appropriate company officer knew or should have known of an alleged offense, the engineer will be given written notice of the specific charges against him or her. The notice will state the time and place of the investigation and will be furnished sufficiently in advance to allow the engineer the opportunity to arrange for representation by a BLE representative(s) (the BLE Local Chairman or other elected BLE Officers) and witnesses. The

notice will propose discipline to be assessed if investigation is waived and designate a carrier officer who may be contacted for the purpose of arranging for an informal conference on the matter. A copy of the notice will be furnished to the BLE Local Chairman.

WAIVER

4. Prior to the investigation, the engineer (and the BLE representative if desired by the engineer) may contact the designated carrier officer and arrange for an informal conference to discuss the alleged offense and proposed discipline. Such informal conference may be either in person or by telephone.

   (a) If such informal conference results in the proposed discipline being dropped, no further action will be taken.

   (b) If such informal conference results in proposed discipline being accepted by the engineer and the investigation being waived, the engineer's record will be updated accordingly.

   (c) If such informal conference does not result in either (a) or (b) above or no informal conference takes place, the discipline imposed as a result of a hearing may not exceed that proposed in the notice of charges.

INVESTIGATION

5. Unless postponed for good cause, the investigation will be held no later than 10 days after the date of the notice.

6. When practicable, the investigation will be held at the engineer's home terminal. When that is not practicable, the investigation will be held at a location which will minimize the travel, inconvenience and loss of time for all employees, involved. When an engineer is required to travel to an investigation at other than his or her home terminal, the engineer will be reimbursed for actual, reasonable and necessary expenses incurred.

7. Where request is made sufficiently in advance and it is practicable, the engineer and/or the BLE representative will be allowed to examine material or exhibits to be presented in evidence prior to the investigation. At the investigation, the engineer and/or the BLE representative will be afforded the opportunity to examine or cross examine all witnesses. Such examination will extend to all matters under investigation.

8. The investigation will be recorded and transcribed. Copies of transcript will be furnished to the engineer and the BLE Local Chairman no later than the date discipline is issued. If the accuracy of the transcript is questioned and the investigation was electronically recorded, the tapes shall be examined and, if necessary, the transcript will be corrected.

DECISION

9. A written decision will be issued no later than 10 days after completion of the hearing. The notice will be sent by US Mail to the last known address of the engineer and to the BLE Local Chairman.

10. If the Superintendent fails to issue a decision within such 10 day time limit or if the engineer is found not at fault, the engineer will be paid for any time lost and the engineer's record will be cleared of the discipline at issue.

APPEALS

11. If the engineer is not satisfied with the decision, the BLE General Chairman, may appeal to the designated Labor Relations officer within 60 days from the date of the Superintendent's decision.

12. The Labor Relations officer will respond to the appeal within 60 days from the date of the BLE General Chairman's appeal. If the Labor Relations officer fails to respond within 60 days, the engineer will be paid for any time lost and the engineer's record will be cleared of the discipline at issue.

13. If the engineer is dissatisfied with the decision of Labor Relations, proceedings for final disposition of the case under the Railway Labor Act must be instituted by the engineer or his other duly authorized representative within one year of the date of that decision or the case will be considered closed and the discipline will stand as issued, unless the time limit is extended by mutual agreement.

MISCELLANEOUS

14. If a dispute arises concerning the timeliness of a notice or decision, the postmark on the envelope containing such document shall be deemed to be the date of such notice or decision.

15. Engineers attending an investigation as witnesses at the direction of the carrier will be compensated for all time lost and, in addition, will be reimbursed for actual, reasonable and necessary expenses incurred. When no time is lost, witnesses will be paid for actual time attending the investigation with a minimum of two hours, to be paid at the rate of the last service performed.

16. The engineer being investigated or the BLE representative may request the Carrier to direct a witness to attend an investigation, provided sufficient advance notice is given as well as a description of the testimony the witness would be expected to provide. If the Carrier declines to call the witness and the witness attends at the request of the engineer or BLE and provides relevant testimony which would not otherwise have been in the record, the carrier will compensate the witness as if it had directed the witness to attend.

17. If, by operation of this agreement or as the result of an arbitration decision, the Carrier is required to pay an engineer who has been disciplined for "time lost", the amount due shall be based on the average daily earnings of the engineer for the 12 month period (beginning with the first full month) prior to removal from service. The sum of

the claimant's earnings during such period shall be divided by 365 to arrive at the average daily earnings to be applied in determining the amount of lost wages, based on the number of days of discipline.

NOTE, Section 1: This agreement is not intended to modify or replace "By-Pass" or "Companion" Agreements.

This agreement is not intended to modify or replace Carrier policies pertaining to discipline; except that to the extent this agreement may conflict with a Carrier policy, this agreement shall govern.

NOTE, Section 17: The twelve (12) month period utilized in determining the employee's average daily earnings will not include any month(s) in which the employee experienced unusually low earnings due to circumstances beyond his/her control, such as personal injury, documented major illness, of the employee or a family member, etc. It is not the intent of this NOTE, however, to exclude those months in which the employee lays off on his/her own accord. It is intended the twelve (12) month period utilized will reflect the engineer's normal work habits and history.

Example: An engineer was dismissed in October for an alleged rules

violation. Pursuant to an arbitration award, the engineer is reinstated and awarded time lost (back pay). Six months prior to his/her dismissal, said engineer was off-duty (medical leave) for two (2) months (March and April) due to a documented major illness, such as a heart attack.

Calculation of the employee's average daily earnings for the preceding twelve (12) months will commence with September and will incorporate the prior fourteen (14) months, including September (March and April are excluded due to the employee having no earnings in those months due to the medical condition).

* * *