

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24847

Docket No. 44562

97-1-96-1-U-1906

The First Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company (former Missouri
(Pacific Upper Lines)

STATEMENT OF CLAIM:

"Claim of Engineer R. C. Lawrence for the clearing of his employment record of Level 2 discipline assessed under the Carrier's 'Upgrade' discipline policy as well as compensation for all expenses incurred by Claimant related to the discipline assessed including his attendance at the investigation held. The Organization further requests punitive damages in the amount of 7.5 million dollars for retaliatory discipline and outrageous conduct by the Carrier.

Claim of Engineer R. C. Lawrence for reinstatement, clearing of his employment record of Level 5 discipline assessed under the Carrier's 'Upgrade' discipline policy as well as compensation for all expenses incurred by Claimant related to the discipline assessed including his attendance at the investigation held. The Organization further requests punitive damages in the amount of 7.5 million dollars for retaliatory discipline and outrageous conduct by the Carrier."

FINDINGS:

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

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

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

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

In July 1994 Claimant sustained an on duty injury. On April 3 and 4, 1995, Carrier notified Claimant to report for a return to work exam and drug screen on April 10, 1995. On April 10, 1995, Claimant's Attorney in his FELA case against Carrier wrote Carrier advising it that he represented Claimant, that Claimant would not appear for the physical exam, and maintaining that the exam was not for any proper purpose but was "an effort to develop the railroad's defense for the lawsuit." The Attorney's letter further advised, "it is improper for you to directly communicate with my client, and I am hereby requesting that any further communication concerning Mr. Lawrence be directed to me."

On April 13, 1995, Carrier wrote Claimant that because Claimant had failed to appear for the physical exam on April 10, the exam had been rescheduled for April 24, 1995. On May 10, 1995, Carrier wrote Claimant advising him that because he had not appeared for the April 24 exam, the exam had been rescheduled for May 17, 1995. On May 22, 1995, Carrier notified Claimant to appear for an Investigation on May 31, 1995, concerning his failure to appear for a fitness for duty evaluation on May 17, 1995. The Hearing was postponed to and held on June 21, 1995. Claimant did not attend the Hearing. On June 28, 1995, Carrier notified Claimant that he had been assessed discipline at Level 2.

On June 29, 1995, Claimant was notified that the medical exam had been rescheduled for July 12, 1995. The notice further stated that failure to report would be considered insubordination. On July 14, 1995, Carrier notified Claimant to appear for an Investigation on July 20, 1995, into his alleged insubordination. Following two postponements, the Investigation was held on August 16, 1995. Claimant did not attend the Investigation. On August 23, 1995, Claimant was notified that he had been dismissed from service. It is undisputed that Claimant did not report for any of the medical exams that Carrier scheduled.

The Organization argues that the claim must be sustained because Carrier failed to initiate an Investigation within ten days of the infraction as required by the discipline rule. The Organization maintains that Carrier knew from Claimant's Attorney's April

10, 1995, letter that Claimant would not appear for any medical exams. Nevertheless, Carrier did not initiate disciplinary action until May 22, 1995. The Organization also contends that Carrier violated Claimant's due process rights in the Investigation that led to his discharge by refusing to call or make available as a witness the Superintendent who instructed the Claimant to report for the medical exams. Furthermore, the Organization contends, Carrier also breached the Agreement by not delivering the transcript within ten days following the Investigation.

On the merits, the Organization argues that Carrier had no basis for requiring Claimant to submit to a medical exam. The Organization contends that Claimant was on a Railroad Retirement Board disability annuity at the time and therefore could not be required to submit to a medical exam. The Organization maintains that Carrier's actions in the instant case were part of an overall Carrier policy to harass and retaliate against employees for filing FELA claims. The Organization urges that Carrier's actions were outrageous and against public policy and call for the imposition of punitive damages.

Carrier contends that it did not have to bring charges immediately after Claimant failed to report for the medical exam the first time it was scheduled. Carrier maintains that it acted reasonably in giving Claimant several opportunities to report for the exam before initiating disciplinary action. Accordingly, in Carrier's view, by acting within ten days of Claimant's failure to appear for the May 17 and July 12 exams, it acted in a timely manner.

Carrier contends that the Superintendent was not a material witness and, therefore, it did not violate the Claimant's due process rights in failing to call him. Carrier also maintains that the delay in sending the transcript did not prejudice Claimant's rights in any way. On the merits, Carrier contends that it had a right to examine the Claimant to determine his work status and that, when Claimant failed to appear for the required medical exams, he was subject to discipline. Finally, Carrier contends that this Board lacks authority to award punitive damages.

Usually, we would consider the Organization's procedural arguments first. In the instant case, we would have to reach the merits regardless of our disposition of the procedural arguments because the Organization's claim for punitive damages is based on the merits of the dispute. Therefore, we shall pass the procedural issues and consider the merits of the dispute first.

Carrier paints this dispute as a simple case of it needing to determine Claimant's status, directing Claimant to report for a medical exam and disciplining him for failure to report. The Board, however, does not agree that the dispute is that simple.

Generally, when faced with a directive, an employee must "obey now and grieve later." However, directives to report for medical exams and drug screens that are not consistent with Carrier's own rules are invalid and an employee who refuses to obey is not subject to discipline for insubordination. See, e.g., Third Division Awards 31954 and 31534. Thus, the question is whether Carrier's directives that Claimant report for medical exams were in keeping with Carrier's own rules.¹

The record, however, is devoid of the basis for Carrier's directives that Claimant report for return to duty medical exams. The only evidence that Carrier entered were the directives themselves and documentation that Claimant did not report. In its Submission, Carrier quotes from its Medical Policy that provides for requiring an employee to submit to a physical exam, "when the HSD becomes aware of a work site medical concern, and there is insufficient or poorly verified information available regarding . . . the alleged medical concern." This policy was not contained in the record developed on the property and there was no evidence presented that Carrier relied on this policy in directing Claimant to submit to a medical exam. Furthermore, there is no evidence in the record what the work site medical concern was or that there was insufficient or poorly verified information. Of course, as an appellate tribunal, we are confined to the record developed on the property and the record presented to us does not provide any evidence of a legitimate basis for Carrier's direction that Claimant report for a return to work medical exam and drug screen.

The only evidence bearing on Carrier's reason for directing Claimant to report for a medical exam came from the Organization. That evidence suggests that Carrier's reason had to do with Claimant's FELA claim. A letter dated August 2, 1994, from Carrier's Manager AA Systems and Reports stated that it was requiring employees who alleged that they were disabled by on duty injuries to report for medical exams because it had had prior instances where employees' Physicians testified to the employees' inability to perform the essential functions of their jobs, only to give the employees full

¹ There has been no citation to any specific rule in the Agreement that might govern medical exams.

releases to return to work after their cases were litigated or settled. The letter stated that Carrier needed outside verification of such employees' disabilities and acknowledged that this would inconvenience legitimately disabled employees.

Carrier asserts in its Submission that Claimant "laid off hurt," and then "dropped out of sight." However, there was no evidence in the record that Claimant dropped out of sight. On the contrary, Carrier knew Claimant's status because Claimant was pursuing an FELA claim based on his injuries. Moreover, Claimant did not ignore Carrier's initial directive to report for a medical exam. Rather, Claimant's Attorney responded questioning the legitimacy of the directive and requesting that all future communications be directed to him. Carrier made no effort to contact Claimant's Attorney or to explain why its directive was anything other than an effort to bolster its defense in the FELA case. Instead, it ignored the Attorney's letter, and mechanically issued subsequent directives to report for medical exams, then disciplined and ultimately discharged Claimant when he did not report as Carrier knew he would not. Carrier's actions were an arbitrary and inappropriate effort to create an artificial record for discipline and discharge. This Board cannot allow them to stand. We must sustain the claim.

The Organization concedes that because Claimant remains disabled, there can be no claim for lost wages. Instead of backpay, the Organization seeks punitive damages.

The Organization maintains that Carrier's actions were part of an overall pattern and practice of retaliating against employees who exercise their rights to file FELA claims. The Organization maintains that such outrageous conduct calls for extraordinary relief and justifies the award of punitive damages. In essence, the Organization seeks to transform this minor dispute into a claim for retaliatory discharge under state tort law. This Board, however, has no authority to consider state tort claims. Indeed, the Supreme Court has held that such state tort claims are not preempted by the Railway Labor Act precisely because they fall outside the scope of minor disputes that are entrusted to this Board's jurisdiction. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). Accordingly, we must deny the Organization's claim for punitive damages.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 24th day of September 1997.