Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24909
Docket No. 44581
98-1-96-1-U-1910

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 L. R. Needham for reinstatement (vacation and seniority rights unimpaired), back pay, and punitive damages for outrageous conduct and retaliatory discharge in the amount of $7,500,000. The punitive damages claimed herein are in addition to any other claims made on behalf of Engineer Needham.

The Organization further claims all of its costs incurred in handling of this matter."

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.

On December 26, 1993, Claimant sustained an on duty injury. On August 14, 1995, Carrier's Superintendent wrote Claimant indicating that he had been advised that

Claimant had been cleared medically to return to duty with certain restrictions, and instructing Claimant to contact the Superintendent within ten days to arrange for a rules examination and for return to duty. Claimant's doctor responded to the Superintendent by letter dated August 17, 1995, explaining that he had advised Claimant that a return to work would be "highly unwise" because Claimant had a ruptured cervical disc that had been treated surgically. Claimant did not arrange for a rules exam or otherwise arrange to return to duty.

The August 1995 exchange was a repeat of similar prior exchanges whereby the Superintendent instructed Claimant to make arrangements to return to duty and Claimant or his attorney responded that Claimant's doctor had not released him. In the prior exchanges, Carrier took no further action. However, on August 30, 1995, Carrier directed Claimant to report for an Investigation on September 7, 1995, in connection with Claimant's failure to comply with the August 14, 1995, instructions. The Investigation was postponed to and held on September 28, 1995. Claimant did not appear for the Investigation, but was represented at the Investigation by the Organization. On October 5, 1995, Carrier advised Claimant that he had been dismissed from service.

The Organization contends that the claim must be sustained because Carrier failed to initiate an Investigation within ten days following the initial infraction as required by the Discipline Rule, Article 44(3). The Organization observes that Carrier first instructed Claimant to arrange to return to duty by letter dated November 1, 1994, again by letter dated November 14, 1994, and again by letter dated July 18, 1995. Each time Claimant responded directly or through his attorney that he was not medically released to return. The Organization contends that Carrier was required to act within ten days following the November letters and, certainly, within ten days following the July letter. The Organization urges that Carrier may not revive a stale discipline charge by reissuing the letter in August 1995. The Organization further contends that the claim must be sustained because Carrier failed to call two material witnesses and because the transcript Carrier furnished was incomplete.

On the merits, the Organization concedes that Claimant did not report to the Superintendent as instructed. The Organization maintains, however, that Claimant was justified in disobeying the Superintendent's instructions because compliance would have jeopardized his physical health and safety. The Organization urges that the only medical evidence in the record was Claimant's doctor's letter that it was medically unwise for Claimant to return to duty in light of his surgery.

The Organization contends that Carrier's actions were part of an outrageous attempt to retaliate against Claimant for filing an FELA lawsuit and, as such, are contrary to public policy. Consequently, the Organization urges that this Board award punitive damages and costs.

Carrier asserts that the Organization's procedural objections lack merit. Carrier contends that it properly discharged Claimant for insubordination when he failed to report to the Superintendent as instructed. Carrier urges that its Assistant Director - Occupational Medicine determined that Claimant could return to work with certain restrictions and that Carrier advised Claimant that it was prepared to meet those restrictions. Carrier maintains that Claimant's doctor never indicated that Claimant was incapable of returning to work, only that it was unwise for him to do so. Finally, Carrier contends that this Board lacks authority to award punitive damages or costs.

After careful consideration, the Board concludes that this matter is governed by our prior decision in First Division Award 24847. As in Award 24847, we find it appropriate to bypass the Organization's procedural arguments because the Organization's claim of bad faith in support of its argument for punitive damages requires that we reach the merits in any event.

Although Carrier paints this case as a simple matter of insubordination, the record is clear that the issue is more involved. Specifically, if compliance with the Superintendent's directive would have jeopardized Claimant's health or safety, Claimant was justified in refusing to obey and may not be disciplined for insubordination. The Organization introduced a letter from Claimant's treating physician stating just that. Carrier's argument that Claimant's doctor merely stated that it was unwise for Claimant to return to duty is ludicrous. Claimant's doctor did not have to use any magic words in his letter. It is clear that any reasonable reading of the doctor's letter would lead to the conclusion that the doctor has advised Claimant that returning to duty would jeopardize his recovery from back surgery.

Moreover, the letter from Claimant's doctor is unrefuted in this record. During the Hearing, a letter from Carrier's Assistant Director - Occupational Medicine to the Superintendent which purported to state that Claimant could return to work under certain restrictions was identified. However, when the Organization objected that neither the Superintendent nor the Assistant Director - Occupation Medicine was made available as a witness, the Hearing Officer withdrew the letter as an exhibit. Thus, the only medical evidence in the record supports the Organization's position that compliance

with the Superintendent's directive would jeopardize the Claimant's health and safety. Accordingly, the dismissal cannot stand.

As in Award 24847, Claimant must be reinstated with seniority and benefits unimpaired. As in Award 24847, backpay is not appropriate because Claimant remains disabled.

In Award 24847, we denied the Organization's claim for punitive damages because it was, in essence, a claim for retaliatory discharge under state tort law. We observed that the Supreme Court had held in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), that such retaliatory discharge tort claims are not minor disputes and therefore are not preempted by the Railway Labor Act. We concluded that we lacked authority to consider state tort law and lacked authority to award punitive damages.

Since issuance of Award 24847, the Missouri Supreme Court has decided *State ex. rel. Union Pac. RR Co. v. Dierker*, 961 S.W.2d 816, 157 L.R.R.M. 2385 (Mo. Jan. 27, 1998). The Organization contends that the Court ruled that the claim that Carrier was retaliating against employees for filing FELA claims was a minor dispute and, therefore, this Board has jurisdiction to award punitive damages. We do not agree.

At issue before the Missouri Supreme Court was an order by the Circuit Court of the City of St. Louis prohibiting Carrier from: 1. directly communicating with FELA plaintiffs regarding their health or employment status; 2. requiring FELA plaintiffs to attend physical ability tests or other medical examinations; 3. disciplining FELA plaintiffs for failing to comply with such requirements; or 4. changing the employment status of FELA plaintiffs while their suits were pending, except for affirmative misconduct. The Missouri Supreme Court held that the blanket protective order was preempted by the Railway Labor Act because it involved interpretation of the collective bargaining agreement and, accordingly was a minor dispute subject to the exclusive jurisdiction of this Board.

The Missouri Supreme Court's ruling was quite narrow. It held only that a blanket protective order was preempted. Judge White wrote a separate concurring opinion in which he emphasized that a trial court had authority to enter a protective order upon a finding of bad faith in an individual case. 157 L.R.R.M. at 2392 (White, J. concurring). Moreover, the Missouri Supreme Court was not presented with a state tort claim for retaliatory discharge. Indeed, the Court implicitly recognized that such a tort claim would not be preempted by the RLA and would not involve a minor dispute

subject to this Board's jurisdiction. The Court cited *Norris* extensively and relied heavily on the U.S. Supreme Court's opinion in that case. Therefore, we see no reason to deviate from our conclusion in Award 24847.

This Board's authority is limited to minor disputes, i.e., to determining whether Carrier violated the Agreement between it and the Organization. We have found that Carrier violated the Agreement and that the appropriate remedy is to set aside Claimant's dismissal. If Claimant wishes to assert a state tort law right to be free from retaliation for filing an FELA lawsuit and wishes to vindicate such a right through punitive damages, Claimant must take his case to state court. Of course, we have no way of knowing whether the Missouri courts will recognize such a tort claim, but it is clear under *Norris* that they have authority to do so and that this Board does not have such authority.

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 15th day of June 1998.