

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 24912
Docket No. 44588
98-1-96-1-U-1917

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 C. Hardin for the clearing of his employment record 'Upgrade' Level 2 and punitive damages in the amount of 7.5 million dollars for retaliatory discipline and outrageous conduct by the Carrier toward an injured employee and tort punitive damages of \$10,000.00 (ten-thousand dollars) for the Carrier's flagrant and continued disregard for contractual time limits provisions of Article 44, B.L.E. Schedule Rules. The Organization further claims on behalf of Engineer C. Hardin one basic day punitive contract damages for each day Engineer Hardin suffers this disciplinary action until this matter is fully resolved."

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 July 1, 1994, Claimant sustained an on duty injury. He returned to work on October 24, 1994, and worked sporadically thereafter. On April 25, 1995, Carrier's Superintendent wrote Claimant instructing him to report for service within ten days and to protect his assignment on a full time basis. Claimant reported for service and worked on May 6 and 7, 1995. On May 8, 1995, Claimant worked part of the day and then laid off due to his prior injury. On June 2, 1995, Carrier directed Claimant to report for an investigation on June 7, 1995, in connection with his alleged failure to comply with the instructions in the April 25 letter. Following a postponement, the investigation was held on June 15, 1995. On June 20, 1995, Carrier notified Claimant that he had been found in violation of Rule 1.13 and had been assessed discipline at Level 2. Level 2 discipline is one day off with pay to develop a corrective action plan to modify behavior.

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). In the Organization's view, Carrier was required to act within ten days of May 8, when Claimant laid off due to prior injury. The Organization further argues that the claim should be sustained because Carrier refused to allow the Organization to call the Hearing Officer as a material witness and because the Hearing Officer refused to recuse himself so that he could testify. Furthermore, the Organization maintains that the claim should be sustained because the discipline was rendered before the transcript was prepared.

On the merits, the Organization contends that Claimant complied with the April 25 instructions to the extent that he was medically able. The Organization argues that Claimant was on medication for pain and that the side effects of such medication precluded him from working everyday. The Organization maintains that Claimant should not be held to comply completely where such compliance would endanger his health or safety.

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

Carrier argues that the claim should be dismissed because the appeal was filed by the Vice General Chairman instead of the General Chairman. Carrier asserts that the Organization's procedural objections lack merit.

Carrier contends that it properly disciplined Claimant for his failure to comply with the April 25 instructions. Carrier urges that its Assistant Director - Occupational Medicine had cleared Claimant to return to work unrestricted and that Claimant was obligated to report for duty each day other than his assigned rest days. Finally, Carrier contends that this Board lacks authority to award punitive damages.

Carrier's contention that the claim must be dismissed due to improper handling lacks merit. By letter dated June 9, 1995, the General Chairman confirmed a conference held on May 25, 1995, with Carrier's General Director - Labor Relations, wherein he delegated authority to the Vice General Chairman to handle disputes at the General Chairman's level. There is no record that Carrier took exception to this delegation. The appeal was processed properly.

The Organization has raised a number of procedural arguments. However, regardless of how we might rule on the procedural claims, we would have to reach the merits because of the Organization's claim for punitive damages. Therefore, we find it appropriate that we resolve this case on its merits without deciding the procedural issues. See First Division Award 24847.

The record reveals that Claimant did not ignore the Superintendent's April 25 letter. Rather, Claimant returned to work on May 6. He worked May 6 and 7, and part of May 8 before laying off due to his prior injury. Claimant also wrote to the Superintendent, advising that he had seen his doctor on April 28, 1995, that his neck had been bothering him, that the doctor had prescribed pain medication and that he was working as much as he could but wanted to avoid hurting himself or others. The Superintendent responded requesting that Claimant furnish a list of his prescription medications. Claimant responded by furnishing a list that included Wygesic.¹ Claimant's doctor also provided a note, dated May 15, 1995, excusing Claimant from work for two weeks.

The Superintendent testified that, in bringing charges, he relied on the opinion of Carrier's Assistant Director - Occupational Medicine that Claimant was released to work without restrictions. This could not be the case, however, because the Assistant

¹ Claimant's doctor also furnished a supplemental medical report, dated April 28, 1995, that indicated he had prescribed Wygesic to Claimant.

Director - Occupational Medicine's evaluation of Claimant's medication was not issued until after the notice of charges was issued and, indeed, after the date for which the Hearing was originally scheduled. Furthermore, the Assistant Director - Occupational Medicine's communication did not specifically address Wygesic. The Superintendent was unable to confirm in his testimony that he had forwarded the list containing Wygesic to the Assistant Director - Occupational Medicine. On the other hand, the Organization introduced deposition testimony from the Assistant Director - Occupational Medicine that a common side effect of Wygesic is sedation which can impair an employee's ability to work safely. Moreover, as noted above, Claimant's physician issued a note excusing Claimant from work during the relevant time period.

Based on the record presented, we cannot say that there is substantial evidence that Claimant could work safely while taking his medication. Although generally, an employee who believes that instructions directed to him are inappropriate must obey now and grieve later, it is well-established that an employee may decline to comply with a superior's instructions where compliance would be unsafe. In the instant case, Claimant communicated his concern that complying with the April 25, 1995 instructions would jeopardize his safety and that of others, and the evidence supports that concern. Therefore, the Level 2 discipline must be removed from Claimant's record.

We now turn to the Organization's claim for punitive damages. 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 or retaliatory discipline. 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 discipline. 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.

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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.