

rather than inquire further, the Superintendent rescheduled the examinations for a few days later and threatened Claimant with discipline if he did not attend. The Organization maintains that Claimant's justification for not attending the examinations is supported by his treating physician's report that Claimant remained disabled and was not expected to be released to duty unrestricted until December 31, 1995.

Carrier contends that the Organization's procedural claims lack merit. Carrier maintains that the Hearing Officer was not the charging official. Carrier urges that the Investigation notice was timely, in that it was issued within ten days of the dates on which Claimant failed to report for the examinations as instructed. Carrier maintains that there is no requirement that discipline not be issued until after the transcript has been prepared.

Carrier contends that it properly disciplined Claimant for his failure to comply with the Superintendent's instructions. Carrier urges that it had the right to require Claimant to take the physical exams, that it acted reasonably in light of the May 30, 1995, supplemental medical report and that the discipline imposed was in accord with Carrier's UPGRADE policy. Finally, Carrier contends that this Board lacks authority to award punitive damages.

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 instructions. Rather, Claimant replied that he was still recovering from surgery, remained under doctor's care, was still on medication and was physically unable to attend the scheduled back to work physical and functional capacity examinations. Carrier's Superintendent responded, "We understand that your doctor confirmed in May of this year that your condition has stabilized," and instructed Claimant to attend rescheduled exams or face possible disciplinary action.

The Superintendent's response was not accurate. Claimant's doctor's May 30 report did not state that Claimant's condition had stabilized. It reported that Claimant was instructed to increase his activity level as tolerated and to remain off work. It

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.