

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13530
Docket No. 13430
00-2-99-2-25**

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

**(Brotherhood of Railway Carmen Division
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (UPFE)

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

- 1. Company violated the Union Pacific Fruit Express policy dealing with medical evaluations at the North Platte Bailey yard, at the U.P.F.E. facility North Platte, NE on December 18, 1997, when they pulled the Claimant Mr. Ross Velasquez from service pending a Medical evaluation and held him out of service an unreasonable amount of time ‘(75 days)’.**
- 2. Company violated Rule 35 of the agreement when they waited ninety-five (95) days to notify the Claimant or his representative in writing, that they were disallowing the claim or grievance.**
- 3. Carrier shall compensate Mr. R. Velaquez [sic] the Claimant from December 19, 1997 to March 5, 1998 for every day Carrier withheld him from service for eight (8) hour at the current rate of pay. Also to include any lost overtime, holiday pay or any lost medical benefits or any other benefits that he had coming.”**

FINDINGS:

The Second 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.

From the outset, before resolving the merit issue, the Organization contends that the Carrier failed to timely respond to the instant claim that was filed on February 11, 1998.

When the Organization advised the Carrier that the claim had not been answered within 60 days of the date it was presented, the Carrier on May 11, 1998, responded contending that they did respond on March 17, 1998, and furnished a copy of that letter.

The Carrier has the burden to prove that the March 17 declination letter was put into the U.S. Mail system on either the 17th or the latest on the 18th. Simply furnishing a copy of the response and saying that was the date it was mailed does not satisfy the burden of proof.

The Claimant was withheld from service December 18, 1997, pending the results of a medical evaluation based upon a fellow employee's report that he had been making threats of physical violence toward several employees, plus several other of his peers reporting abnormal behavior and the appearance of being under the influence of something.

The Claimant was instructed to call the Employee's Assistance Hotline and follow the instructions received thereat within 24 hours. He did so but was not afforded an appointment until December 29, 1997. The Carrier then argues that after the appointment, the Claimant dropped out of sight and did not reappear until he received the Carrier's letter of January 23, 1998, advising that he would not be permitted to work until he complied with the recommendations of the EAP people.

The Claimant commenced working with the EAP program and was certified to return to work on March 2, 1998, but elected to stay out until March 5, 1998, which, apparently, was his first work day after his assigned rest days.

The argument has been advanced that even though the Time Limit Rule leaves no consideration for mitigating circumstances, the Claimant's availability for service during the period of the defaulted claim should be given consideration. Perhaps if the Claimant was incarcerated, deceased during the time being considered for payment, or suffered some disabling affliction that was known, the argument may be given some validity, but in this instance, all we know is that the Claimant dropped out of sight from December 29, 1997, to February 2, 1998, but for what reason it is unknown.

Rule 35 stipulates that, "If not so notified, the claim or grievance shall be allowed as presented. . . ." The aforementioned cannot, however, be a claim for something that is not within the Rules or some adverse action the Claimant, himself, undertook.

That portion of the initial claim that was presented in the first instance that reads, "or any lost medical benefits or any other benefits he may have coming" is not sustained, nor is any time the Claimant may have lost when he was certified to return to work on March 2 but opted to wait until March 5.

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 Second Division**

Dated at Chicago, Illinois, this 27th day of July, 2000.