

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13613

Docket No. 13503

01-2-99-2-105

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

**(Brotherhood of Railway Carmen Division/
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Union Pacific Fruit Express Company**

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

- 1. Union Pacific Freight Express Company (hereinafter referred to as the Company or UFPE) was in violation of Rule 37 of the Agreement at Stockton, CA on August 7, 1998, when it removed Claimant Mr. Richard L. Curry from it service with out a hearing.**
- 2. Company violated the Union Pacific Fruit Express policy dealing with medical evaluations at the U.F.P.E. facility Stockton, CA on August 7, when they pulled the Claimant Mr. Richard L. Curry from service pending a Medical evaluation and held him out of service an unreasonable amount of time (75 days).**
- 3. Carrier shall compensate Mr. R.L. Curry the Claimant from August 7, 1998 to November 29, 1998 for every day Carrier withheld him from service for eight (8) hours at his current rate of pay excluding five (5) days vacation from November 19 thru November 25, 1998. 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.

On August 7, 1998, the Carrier removed the Claimant from service for a fitness for duty medical exam. Prior to his removal from service the Claimant was voicing and exhibiting aggression, rage, hostility and unsafe behavior. The Claimant was examined by a psychologist on August 27, 1998. Based on the psychologist's recommendation, the Claimant was scheduled for a physical examination on September 17, 1998. The Claimant did not attend that exam because he moved from Roseville, California, to Tucson, Arizona. The Carrier rescheduled the Claimant's physical exam for September 29, 1998, and scheduled a psychiatric exam for October 2, 1998. The Carrier received the psychiatrist's report on October 21, 1998. The Carrier's medical director cleared the Claimant to return to work on November 2, 1998. However, the psychologist had recommended that a mediator facilitate the Claimant's return to the workforce. This did not occur until November 30, 1998.

The Organization contends that the Claimant was removed from service without a Hearing. However, it is clear that the Claimant's removal from service was not a disciplinary action. Rather, the Carrier acted pursuant to its right and responsibility to protect the safety of the Claimant and of the other employees, as the Carrier had reason to suspect that the Claimant's unsafe behavior may have been associated with a physical or mental condition. No Hearing was required.

The Organization further contends that the Carrier excessively delayed the Claimant's evaluation and return to service. However, the record indicates that a significant portion of the delay was caused by the Claimant himself. The Claimant failed to keep the September 17 appointment because he had moved to Tucson. The Carrier acted with reasonable promptness in scheduling the Claimant's medical examinations and rescheduling them after learning of the Claimant's relocation. Furthermore, the Carrier's medical director cleared the Claimant to return to work within a reasonable time after receiving the reports of the examinations.

The Claimant was cleared to return to work on November 2, 1998, but was not returned to service until November 30, 1998. The Carrier maintains that the medical evaluations revealed that the Claimant had a good deal of anger toward his supervisor and, consequently, it was determined to have a neutral mediator present to facilitate the Claimant's return to work. We agree that the decision to have a neutral mediator present was reasonable.

However, the record contains no evidence supporting the delay of the Claimant's return to service from November 2, 1998, the date he was cleared by the Carrier's medical director, to November 30, 1998, the date he actually returned. The record contains the assertion that the neutral mediator was not available until November 30. However, there is no evidence explaining why the mediator was unavailable or why another mediator could not have been obtained. While the Carrier should be afforded a reasonable time to arrange for a neutral mediator to facilitate the Claimant's return to the workforce, any delay beyond a week requires an explanation backed by evidentiary support. A bald assertion of mediator unavailability does not suffice. Accordingly, we will sustain the claim but only with respect to the delay in returning the Claimant to service beyond November 9, 1998.

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 4th day of June, 2001.