

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39939
Docket No. MW-40642
09-3-NRAB-00003-080449

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Foreman C. E. Nuells, Sr. to displace junior Foreman A. Hernandez on Gang 3082 at Bloomington, Texas on April 18 and continuing until July 9, 2007 (System File MW-07-66/1474914 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. E. Nuells, Sr. shall now be compensated at his respective straight time rate of pay for eight (8) hours for each work day and at his respective time and one-half rate of pay for all lost hours of overtime beginning April 18 and continuing until July 9, 2007.”**

FINDINGS:

The Third 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.

The Claimant was on a medical leave of absence when this dispute arose. The Claimant presented a doctor's release dated April 12, 2007 which provided that he could return to work that date. However, the doctor stated in that release that the Claimant "... requested to be released against my medical advice due to financial situation."

The Carrier did not allow the Claimant to return to work based on that release. The record shows that the Claimant was cleared to return to work by the Carrier's physician on May 23, 2007 for an on-duty injury, but the Claimant also had off-duty medical conditions for which he was not released. The Claimant was advised that he needed further documentation for his off-duty condition. The Claimant subsequently provided the necessary documentation for his off-duty condition on June 28, 2007 (which the Carrier deemed acceptable) and the Claimant was cleared to return to work by the Carrier on July 2, 2007. The Claimant then exercised his bumping rights to an assignment on July 9, 2007.

It is the Carrier's managerial function to determine the fitness of its employees. The standard of review for such determinations is not for the Board to decide whether the Carrier was correct in its assessment of the Claimant's fitness. Instead, our role is limited to review whether the Carrier was arbitrary in its determination that the Claimant was unfit during the period in dispute. Third Division Award 25013. It was not arbitrary for the Carrier to determine that the doctor's release dated April 12, 2007, which cleared the Claimant to return to work, but stated that the Claimant "... requested to be released against my medical advice due to financial situation" [emphasis added] was not sufficient to allow the Claimant to return at that time. While the Claimant was subsequently cleared to return to work by the Carrier's physician on May 23, 2007, that clearance was only for the

Claimant's on-duty injury. The Claimant also needed to provide documentation for his off-duty condition. When the Claimant produced satisfactory documentation regarding his off-duty condition, he was allowed to return to work.

No arbitrary conduct by the Carrier has been shown. The claim must therefore be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 30th day of September 2009.