

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39940
Docket No. MW-40648
09-3-NRAB-00003-080501

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 withheld Mr. J. Garcia from service, after removing him from service on March 23, 2007, until October 18, 2007 (System File MW-07-78/1476448 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Garcia shall now be compensated for all lost wages from March 23, 2007 and continuing until October 18, 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 held a Truck Driver's position on Tie Gang 9164. On March 22, 2007 and during working hours, the Claimant fell asleep during a health van examination and was removed from service. A subsequent medical examination conducted by the Claimant's physician showed that the Claimant was diagnosed with obstructive sleep apnea. A Continuous Positive Airway Pressure ("CPAP") machine was prescribed for the Claimant. On June 10, 2007, the Carrier's Health Services Department advised the Claimant that he would need to provide a wakefulness study, compliancy report and other documentation before he could be allowed to return to work.

Thereafter, communications between the Carrier and the Claimant's physician and further examination and testing of the Claimant did not immediately result in a release by the Claimant's physician showing that the Claimant could return to work as a Truck Driver without restrictions and that the Claimant's obstructive sleep apnea was under control. A number of medical progress reports from the Claimant's physician specifically state that the Claimant could not perform driving duties. See e.g., reports of July 23, 2007 ("needs to be in non-driving position . . . can return if not driving or operating heavy machinery . . .") and September 3, 2007 (same). A medical progress report dated October 15, 2007 finally cleared the Claimant to return to driving duties ("may return to driving . . . as long as he remains compliant. . .") On October 17, 2007, the Carrier cleared the Claimant to return to work.

The Claimant held a Truck Driver's position. The medical reports provided to the Carrier during the time in dispute show that due to the Claimant's obstructive sleep apnea, he could not safely perform driving duties. The Claimant's condition was not under control until October 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. See Third Division Award 25013. Given that (1) the Claimant fell asleep while on duty on March 22, 2007 (2) medical reports showed that the Claimant had obstructive sleep apnea (3) the Claimant did not have his sleep

problems under control until October 2007 through use of the CPAP machine and (4) the Claimant's job was to drive trucks, we cannot find that the Carrier was arbitrary when it withheld the Claimant from service until he was able to get his sleep problems under control.

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.