

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42374  
Docket No. MW-42554  
16-3-NRAB-00003-140222**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees Division -**  
**( IBT Rail Conference**  
**(BNSF Railway Company (former Burlington**  
**( Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier improperly removed and withheld Mr. D. Murphy from service beginning on October 18, 2012 and continuing (System File C-13-P018-8/10-13-0193 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant D. Murphy shall ‘. . . be paid for all straight time hours, overtime hours, and Holiday pay at the appropriate rate of pay for everyday that the Claimant has been improperly withheld from service beginning on October 18, 2012 and continuing until he is returned to work. I am also requesting that the Claimant be given credit for all days for which qualifying days are required, such as vacation qualifying days, as settlement of this claim.’”**

**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's foreman allegedly observed him having a slow reaction time while driving his truck, as well as tripping, stumbling and needing assistance while walking. Management was notified and he was removed from service, and placed on a medical leave of absence. His treating physician evaluated him and diagnosed him with osteoarthritis of the left hip. He was scheduled for surgery. In the interim his physician released him to work, although the doctor admitted that no non-surgical treatments had been effective. His surgery took place December 11, 2012. He was not restored to work until after the surgery.

The Carrier asserts it has the right to determine the physical fitness of its employees and to confirm their physical qualification to work. The Claimant was seen having difficulty reacting to signal lights and stopping; he tripped, stumbled and required assistance. These are true safety concerns, sufficient to remove someone from service. The doctor's assessment provided no basis for any conclusion that the Claimant's condition had changed or improved. It follows that he was not qualified to come back to work.

The Organization argues the Carrier had no medical basis for its decision to remove him from his job or for its failure to put him back when his physician returned him to work. Though the doctor found the Claimant had a limited range of motion in his hip and would need hip replacement surgery, he specifically assessed the Claimant as fully able to work prior to surgery. Once a physician determined the Claimant could work, he should have been returned to service.

The Claimant's position was truck driver, and his duties at times went beyond simply driving. It is un rebutted that the Carrier received substantiated reports that the Claimant was having trouble walking and needed assistance to do so. When an employee is seen by more than one person having difficulty with mobility, it does not require a physician for the Carrier to reach a reasonable

conclusion the Claimant was at risk of falling. This constitutes a reasonable basis for concern about an unsafe situation.

Nothing in the Claimant's medical record gave the Carrier reason to question this assessment. The Claimant's physician returned him to work without any evidence of improvement in his condition. The Carrier is under no obligation to follow medical recommendations that risk employee safety. To the contrary, the Carrier bears a heavy obligation to affirmatively be certain that it is not putting an employee on the job when there is good reason to fear that the employee might injure himself or others.

It is well established that the Carrier has the right to withhold an employee from service when that employee's ability to work is in question. It is, after all, the Carrier's ultimate responsibility to make every effort in support of a safe work environment. This obligation cannot be met if the Carrier puts people back to work when their ability to perform without injury is legitimately and reasonably questioned.

**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 August 2016.