

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44238
Docket No. MW-44388
20-3-NRAB-00003-200458**

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

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier withheld Sectionman D. Rennick from his position as sectionman on Maintenance Gang TMGX1819 beginning December 15, 2015 and continuing (System File C-16-P018-4/10-16-0154 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Rennick shall now ' ... be paid (1) 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 by the Carrier and continuing until he is returned to work; (2) be paid for all of his travel time and personal vehicle mileage that he incurred for having to drive from his residence to Carrier required Doctor's appointments and testing; (3) be paid for all hours expended attending Carrier required Doctor's appointments and testing; (4) be given credit for all days for which qualifying days are required, such as vacation qualifying days, as well as, any additional benefits lost during this time frame; and (5) that the Carrier pay in full, any medical bills that the Claimant has already received or will receive that are associated with BNSF' s required testing, as settlement of this claim, and continuing until the violation ceases.”**

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 Carrier asserts the Claimant was observed by supervisors and coworkers staggering while walking on ballast, using tools as a walking aid, being short of breath after walking short distances, not able to keep up with coworkers, unable to carry the necessary tools for the essential functions of his job, and placing himself in harm's way by lacking situational awareness.

Following notification of his perceived inability to work, the Claimant followed instructions by timely contacting Eileen Warner. Warner sent the Claimant a follow up letter dated December 15, 2015, stating the BNSF Medical Department has recommended to the Nebraska Division that the Claimant not be allowed to return to work at this time. Warner also described the necessary steps to follow to ensure the Claimant could return to work as soon as possible.

The Claimant faxed in the necessary documentation on January 26, 2016. Upon receipt by the Carrier, both parties set a date for a field test: February 10, 2016. During the test, the Claimant was able to perform some of the basic functions, but had difficulty with others. He was sent a follow-up letter from the BNSF Medical Department on February 17, 2016 stating the field test was stopped due to concerns about his ability to safely perform the activities.

The BNSF Medical Department determined the Claimant was unfit to safely perform the duties of a gang trackman at the BNSF Railway. His notification letter included instructions if his condition improved or if he felt he could fill other positions. The Claimant was sent follow-up letters on January 16, 2016 and February 17, 2016. He was advised that BNSF had tried to call him multiple times and had left

messages. He was reminded that the BNSF Medical Department's services are free of charge and available anytime to discuss options. Lastly, the Claimant was supplied with a copy of yard master pool positions and an application.

The Organization asserts the Claimant complied with the Carrier's instructions and, in fact, was examined by at least two physicians who vouched for his immediate ability to return to full-service duty without restriction. Still, the Carrier persisted in withholding the Claimant from service, even forcing him onto a Medical Leave of Absence. The Carrier never provided any documentation from a medical professional which would serve to counter the professional medical opinions produced on behalf of the Claimant. No medical professionals were present for the field test. In the Organization's view, the field test did not simulate normal working conditions and was therefore arbitrary. The Organization maintains the Medical Director merely rubberstamped the observations described by supervision; it characterizes such a conclusion as arbitrary. In its view the Claimant did not request a medical leave of absence and was not unfit for service.

The following was reported to the Medical Department after the Field Test:

"Safety briefing was done and noted that we would re brief at each location where we would test. It was determined that the employee would get into and out of a section truck. Get into the back of the section truck to remove and replace tools on an even surface and carry them to a predetermined work location as phase one.

Phase two would be to get the proper tools out of the back of the truck, remove a spike and remove a rail anchor and replace it, returning the tools to the truck. Phase 3 was remove a shovel from the section truck and move 5 scoops of ballast.

Phase 4 would be to walk along ballast that represented his working conditions 1000 feet.

This was agreed to by the group as representative of types of work that he would potentially encounter during his normal work day, however exception was taken that the amount of time did not represent a full work day. It was agreed that if the employee felt unsafe he would stop the test, if any of the observers felt that the employee was unsafe that the

test should stop. Outdoor weather conditions were sunny, clear and about 50 degrees.

The group left for the Wagner building where a section truck was placed inside. The driver of the truck was removed from the testing area. An imaginary work area was set up approximately 30 feet from the truck inside the building. Mr. Rennick got into the truck without any issue other than a tremor noted in his legs. He then used good three point contact to get into the back of the section truck. He was required to step over a barrier in the back of the truck to access the hydraulic spike puller. He removed the tool using proper technique and was able to exit the back of the truck without exceptions. He was able to carry the puller to the "work site" and return it to the back of the truck and replace it. He performed the same task using a claw bar with no exception. Phase one took approximately 5 minutes.

We then drove to phase two. Mr. Rennick was able to get the claw bar out of the back of the truck and remove a spike with no issues. He was able to get a hammer and remove the rail anchor with no issue but did seem to have trouble bending over and maintaining balance to retrieve the anchor but no trouble re applying it to the rail. This took approximately 10 minutes.

We then drove to Phase 3. The weather conditions had allowed for lots of mud and snow and ice. Mr. Rennick had difficulty putting on his winter galoshes. He was short of breath after applying the galoshes. Mr. Rennick then walked to the truck, his limp becoming more pronounced as the test went on. He retrieved the shovel and walked to the ballast pile. To get to the pile he was required to climb up a 1.5 foot ballast mound as part of the rail bed, cross flag protected track and then about 10 feet to the ballast pile. Mr. Rennick nearly lost his balance climbing up the mound, flailing his arms. He recovered quickly and set about shoveling the 5 scoops of ballast. He had trouble with is balance and had to use the shovel to catch his balance during this process. He returned the shovel to the truck and staggered in the bed slightly. This portion of the test took approximately 10 minutes.

We then drove to phase 4. Mr. Rennick was to walk the ballast similar to the ballast that he would walk on as part of his normal duties as a

gang man. The incline was about 4 feet. He had some balance issues climbing up to the rail bed but was able to walk very quickly on the packed and tamped surface with a nearly fenestrating gait. He was then asked to walk on the shoulder of the rail bed when the surface was not tamped. Mr. Rennick had much difficulty walking on this surface and had to hold his arms up or out to the side to maintain balance. He nearly fell four times. The fourth time he lost his balance within 10 feet of the beginning of the shoulder walk. I stopped the test as I was afraid that he would fell and hurt himself.”

We are not persuaded by the Organization’s argument that the tasks involved in the field test were unrepresentative of the job. To the contrary, the tasks strike the Board as typical, such as removing and carrying work tools in a typical work area. Nor are we persuaded by the argument that personnel from the Medical Department needed to be present for the field test. The specifics of the test and of the Claimant’s difficulty were described in careful detail. The Medical Department did not abuse its discretion in relying on descriptions of the Claimant’s flailing arms and limping; such observations did not require a medical education. The observations were not conclusory in nature, but were factual and explicit: i.e. holding arms up or out to the side for balance. In sum, the Carrier has met its burden of showing that it had valid reasons for Claimant’s removal from service.

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 23rd day of October 2020.