

PUBLIC LAW BOARD 6394

AWARD NO. 29

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(MW-DEAR-05-23-LM-151)

Statement of Claim:

Claim on behalf of D. E. Pomeroy, "unjustly being withheld from service and we request he be returned to service on his Track Foreman position immediately and compensated for all wages he could have earned commencing February 28, 2005 and to continue until his return to duty, all compensation should include any overtime worked by employee filling his position, and all days compensated should be paid as time worked to apply to all applicable benefits such as vacation qualification, R. R. B. benefits, etc."

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

The Carrier withheld Employee D. E. Pomeroy, the Claimant herein, (holding the position of Track Foreman, Chicago Seniority District, Dearborn Division), from service from February 28, 2005 through August 19, 2005, maintaining that the Claimant's medical condition was inconsistent with the Carrier's medical guidelines, thereby rendering him medically unfit for duty. The Claimant was

diagnosed with Ischemia, a medical condition that precludes the Claimant from holding a Commercial Driver's License ("CDL"), a requirement for the Track Foreman position.

Following the Claimant's successful open-heart surgery in September 2004, the record reflects a series of correspondence between the Carrier's Medical Department and the Carrier's personal physician beginning December 28, 2004 and continuing through February 16, 2005. This last correspondence from the Carrier's Associate Medical Director concluded that given the Claimant's Ischemia condition, he continued to be medically restricted from active service until such time as his medical condition improved. On April 1, 2005, the Claimant's personal physician sent the following release to "whom it may concern":

Mr. Pomeroy is released to work. He has no restrictions at all regarding lifting or strenuous activity.

The next contact with the Claimant occurred on July 5, 2005 following receipt by the Medical Department of a letter from the Claimant dated June 15, 2005 in which the Claimant requested clarification of the Medical Department's February 16th medical disqualification letter, specifically the identification of the medical condition as well as relevant medical guidelines that prevented his return to work as a Track Gang Foreman. The Claimant was withheld from service starting February 28, 2005. The Organization took exception to the fact that the Claimant was withheld from service by filing a claim on April 12, 2005. This claim was withdrawn and resubmitted on April 22, 2005. The Organization seeks the Claimant's immediate return to service in his Track Foreman position together with "and compensated for all wages he could have earned commencing February 28, 2005 and to continue until his return to duty. . . ."

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

Following a careful review of the record and for reasons set forth below, the Board must respectfully deny the Organization's claim.

On July 6, 2005, the Medical Department confirmed by telephone conversation with the Claimant's personal physician that Ischemia existed around the edges of the Claimant's heart. The Medical Department explained to the Claimant's physician that employees such as the Claimant holding heavy physically demanding jobs are medically disqualified from their job position should their stress test demonstrate evidence of Ischemia. On July 7, 2005, the Medical Department confirmed the Job Demand Form with the Claimant's supervisor. There was no further action on Claimant's case occurred until August 9, 2005 when the Medical Department consulted with an outside cardiologist regarding the Claimant's medical condition. This cardiologist advised that in his opinion, the Claimant would not be a significant risk of a serious cardiac event should he return to work as a Laborer. On August 12, 2005, in response to the Claimant's June 15th letter, the Carrier's Medical Director identified Cardiac Ischemia as the medical condition that precluded the Claim from returning to a Track Gang Foreman position. However, the Claimant was approved to return to work to positions that would not require him to hold a CDL. In this regard, the Medical Department advised field supervision that the Claimant was medically qualified to return to the positions of Assistant Foremen, Track Foreman, Trackman or Machine Operator, none of which required a CDL as an essential qualification of the position. On August 19, 2005, the Claimant returned to work as a Trackman.

Given the foregoing, the Organization failed to show that the Carrier, whose decision to withhold the Claimant from service as a Track Foreman was based on competent medical advice, acted in an arbitrary, capricious or discriminatory manner. In order to succeed in its claim, the Organization would have been required to show that the holding of a CDL was not an essential requirement of the job as a Track Foreman, and/or that the Claimant's diagnosed medical condition would not preclude him from attaining a CDL license. The Organization demonstrated neither.

Even had the Organization succeeded in its claim, the Claimant would not, under the facts of this case, be entitled to a make whole remedy. In this regard, it is well-accepted arbitration precedent that an aggrieved employee is obligated to mitigate his losses. There is noting in the record that

demonstrates that the Claimant even attempted to do so. The Carrier's letter to the Claimant dated February 16, 2005 noted that while he was not medically qualified to assume the duties of the Track Foreman position, he was "[n]ot being dismissed from service." The Carrier further advised the Claimant that"

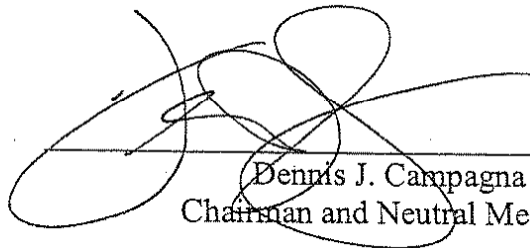
You may wish to be considered for employment in another position in which there is a vacancy for which you qualify and in which you can work safely.

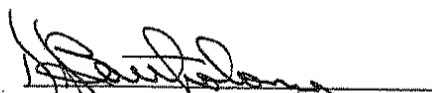
Other than the Claimant's demand that he be permitted to assume his duties as a Track Foreman, the record does not show that the Claimant sought to take advantage of any interim opportunity while his exception was being processed. Accordingly, he would not have been entitled to the make whole remedy the Organization sought on his behalf.

Notwithstanding the foregoing conclusion, the Board notes that it took the Carrier an unreasonable amount of time, beginning July 5, 2005 and until August 9, 2005 in which to respond to the Claimant's request for clarification. Accordingly, the Board directs that the Claimant receive payment for this time period.

CONCLUSION

The Claim is partially sustained in accordance with the findings and conclusions noted and discussed above.


Dennis J. Campagna
Chairman and Neutral Member


D.D. Bartholomay 6-12-07
Organization Member


D.L. Kerby
Carrier Member

Dated May 31, 2007, Buffalo, New York