

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 193

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The removal of claimant J. Pollard's seniority by letter dated March 5, 2009 for alleged failure to respond to Carrier letter dated February 12, 2009 was arbitrary and capricious and in violation of the Agreement [Carrier's File CW-MW-1-58-2(Pollard)].
2. As a consequence of the violation referred to Part 1 above, Mr. Pollard shall have his seniority rights reinstated."

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

AWARD

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

The Claimant maintained seniority in the Track Sub-department as a Rule 2 Group 1 Thermit Welder Helper before the events leading to this grievance occurred. This case involves the decision of the Carrier to remove the Claimant's seniority in response to his failure to respond to a letter asking for medical information.

In December 2008, the Claimant was on medical leave. On December 8, 2008, the Carrier sent a letter to the Claimant stating that once he was released by his physician to return to work he would need to provide the Carrier medical information within ten days to determine his fitness for service. On January 2, 2009, the Carrier again sent the Claimant a letter stating that he was under a medical hold and could not return to work until he provided the Carrier with information about his medical condition. The Claimant

sent the Carrier the requested information. The Carrier acknowledged receipt of the information requested in its January 2, 2009 letter in another letter dated February 5, 2009, where it requested additional information to be sent within 30 days from receipt of the letter. On February 12, 2009 the carrier sent another letter asking the Claimant to report to the Carrier's offices within 10 days to pick up papers for a return to work exam. Finally, on March 5, 2009 the carrier sent a letter to the Claimant notifying him of a forfeiture of all seniority rights because he failed to respond to the February 12 letter within 10 days of its delivery.

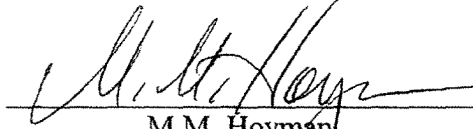
The Claimant acknowledges receipt of the February 5, 2009 letter (delivered February 10, 2009) with its 30 day deadline for provision of further medical information. However, the Claimant denies receiving the February 12, 2009 letter that requested a response within 10 days. The Carrier provided evidence from the post office that both the February 5 and February 12 (delivered February 20, 2009) letters were signed for. In a written appeal of the Carrier's decision on April 20, 2009 the Claimant stated that his fiancé signed for the second letter and failed to give it to him for two weeks because they were separated at the time and she was the only person with the key to the mail box.


The Organization argues that the Claimant did nothing to give the Carrier any impression that he was resigning or had quit. On the contrary, the Claimant provided the requested medical information from the January 2, 2009 letter, so it seems strange that he would suddenly decide to terminate the employment relationship. In addition, the Organization states the level of offense is not sufficient for removal of seniority and because the Claimant failed to report for a company physical, which is different from doing something like failing to report for a job assignment. Finally, the Organization also claims that Carrier failed to cite a specific agreement provision which allowed it to remove the Claimant in this case.

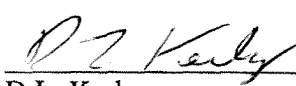
The Board has carefully considered the record in coming to its conclusion about this case. The key point of this case is that the Claimant failed to respond in any way to the February 12, 2009 letter. According to that letter, the Claimant had to respond by March 2, 2009, or forfeit all seniority rights. The Claimant's failure to respond to the February 12, 2009 letter is justified by the Organization as having mitigating circumstances. The mitigating circumstances seem to be that the Claimant claims his fiancé signed for the letter and did not give it to him until after the 10 day deadline. The Board does not consider this to be a mitigating circumstance. Regardless of personal circumstances, the Claimant has a responsibility to ensure he maintains an address with the Carrier at which he can be reached. If the Claimant's personal circumstances resulted in him not having access to the address he gave the Carrier, it is his responsibility to notify the Carrier and update his address. The removal of the Claimant was within the Carrier's management rights and did not violate the collective bargaining agreement.

The claim is denied.

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M.M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member


D.L. Kerby
Carrier Member

Award Date: June 30, 2011