

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 214, (Case No. 214)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION – IBT RAIL CONFERENCE**

**vs**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Samantha Rogers, Carrier Member  
David R. Scoville, Employee Member

**STATEMENT OF CLAIM:**

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

- 1. The Carrier violated the Agreement commencing August 4, 2016, when Claimant, Erik Sandborn (0125070) was required to forfeit his seniority for accepting other employment while on leave of absence without securing written permission from BNSF and his General Chairman. The Carrier alleged violation of the ATSF/BMWED Agreement Rule 22(d) – Accepting Other Employment While on Leave of Absence.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate Claimant, remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing May 3, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-16-0372) (Organization File No. 493-SL13C4-161)**

**FINDINGS:**

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate that in the latter part of April of 2016, Claimant’s Supervisor, Manager Structures, Mr. Jeffrey Pyle, received a business card in his company mail box indicating that the Claimant was working as a massage therapist while on a Medical Leave of Absence from Carrier

due to an injury to his right shoulder and arm, therefore, the Carrier concluded that the Claimant was in violation of Rule 22(d) because the Claimant had not sought prior approval from the Carrier to accept other employment while on Leave of Absence and absent that approval the Claimant was subject to dismissal in accordance with Appendix 11 of the South Agreement that provides that an employee who is absent without authority for more than five consecutive days can be immediately dismissed from service without an Investigation.

Pursuant to a request for a formal Investigation from the Organization the Carrier directed the Claimant to attend a formal Investigation on June 8, 2016, which was mutually postponed until July 6, 2016, concerning in pertinent part the following charge:

**“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violation of Rule 22(d) – Accepting Other Employment While On Leave of Absence and Appendix No. 11 – Handling Certain Disciplinary Matters, of the South Agreement.”**

On August 4, 2016, Claimant was notified that the Carrier upheld Claimant’s Forfeiture of Seniority and he would remain dismissed.

It is the position of the Organization that the Carrier has erred in its interpretation of Rule 22(d). It argued that Rule 22(d) was not applicable to the Claimant’s situation because he did not seek or accept outside employment while on Leave of Absence. It stated the record shows that the Claimant and his wife established a small business approximately a year before going on a Medical Leave to supplement their family income. It further asserted that the Claimant never hid from the Carrier that he had a small business just like many other employees who operated logging operations, fishing boats, farms, property owners with tenants, professional Investment Brokers, etc. The Organization stated that there is a historical practice on the property that the Carrier has employed a diverse work force that includes many employees who have operated a variety of businesses with no requirement from the Carrier to have permission to run such businesses whether working or on Leave of Absence. The Organization also argued that the Claimant was not fit for a return to service as he had not totally healed from his injuries and was still under his doctor’s care. It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the Carrier’s position that Claimant was on a Medical Leave of Absence governed by Rule 22 of the South Agreement and according to it an employee who has other employment while on a Leave of Absence must obtain written permission from the ranking officer in the Department and if they do not, they are considered to be absent without authority. The Carrier

argued that even though Structures Manager Pyle testified it was possible that the Claimant might have told him he had a small business before obtaining a Leave of Absence Claimant was still in violation of Rule 22(d) because he was working elsewhere while on Leave of Absence. The Carrier further suggested that contrary to the Organization's argument that the Claimant had not fully healed from his injuries the Carrier had been willing to make accommodations for those injuries and return the Claimant on a transitional work program. Carrier stated it was very interesting that the Claimant had no problems using his right arm and shoulder to perform labor intensive physical massages yet was unable to perform the light duties that are part of a transitional work program that the Carrier offered the Claimant in March of 2016. It closed that the record is clear that the Claimant voluntarily forfeited his seniority and it was correct in not returning the Claimant to service and it asked that the Claimant not be returned to service and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and it is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

Rule 22(d) is the pertinent Rule in dispute and it states the following:

**"Accepting Other Employment While On Leave of Absence. Employees on leave of absence or absent under a doctor's recommendation who accept other employment without written permission from the ranking officer in the department in which employed shall be considered as absent without authority.**

**The General Chairman will be notified in writing by the General Manager when employees are granted leave of absence with permission to accept other employment. Leaves of absence to accept other employment will not exceed ninety (90) days, without approval of the General Chairman."** (Underlining Board's emphasis)

There is no dispute between the parties that the Claimant and his wife have owned a small business since April 13, 2015, wherein the Claimant is a Licensed Massage Therapist. The Claimant's business had operated approximately one year before the Claimant went on Medical Leave of Absence and over one year when the Carrier claimed that the Claimant was in violation of Rule 22(d) while on a Leave of Absence.

The key phrase to the resolution of this matter is **"...accept other employment..."**. That language makes it clear that before an employee can accept other employment he must first be offered employment which means there must be an employer who offers employment. In this instance no one offered the Claimant other employment as the Claimant was self-employed, and

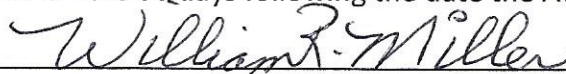
simply continued to do work that he had previously done while working for the Carrier, therefore, Rule 22(d) was not applicable in the instant case. Additionally, there was no showing that Claimant's work as a Massage Therapist had ever had a negative impact upon the fulfillment of the Claimant's job responsibilities and performance of his duties for the Carrier.

The Carrier also argued that the Claimant was medically fit to have returned to service for light duties and should have done so when that opportunity was offered. However, on page 23 of the transcript, Medical Field Manager, Lisa Gladney, explained that offers of transitional work are of a voluntary nature. Therefore, Claimant's decision not to enter the voluntary program and accept light duties so that he could continue with his doctor's therapy program was within the Claimant's right. On page 27 of the transcript, the Claimant explained that his doctor had him on a work hardening program in an effort to strengthen his right shoulder and bicep and because that shoulder and bicep had not fully healed he was not fit to return to service and fulfill the duties of his position. Claimant further explained that he only used his left arm and hand for deep massages and reiterated he was not medically fit for his Carrier craft position. Claimant's explanation of his medical fitness and his doctor's physical therapy program still being necessary was not refuted nor even challenged.

The Board has determined that the Carrier did not meet its burden of proof that the Claimant accepted other employment while on a Medical Leave of Absence in violation of Rule 22(d), therefore, the Board finds and hold that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from the Seniority Roster. The Carrier's liability period begins upon the date the Claimant's doctor found him fit for full service until the date Claimant is reinstated in accordance with Rule 13(f) of the Discipline Rule.

**AWARD**

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.

  
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William R. Miller, Chairman and Neutral Member

  
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Samantha Rogers, Carrier Member

  
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David R. Scoville, Employee Member

Award Date: 1/5/18

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 290, (Case No. 290)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

**vs**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Michelle McBride, Carrier Member  
Louis R. Below, Employee Member

**REQUEST FOR INTERPRETATION of P.L.B. No. 7048, Award No. 214:**

On March 3, 2020, the Organization advised the Neutral Member of the Board that a dispute had arisen over the implementation of Award No. 214 because the Carrier had refused to make the Claimant whole for all losses of earnings and benefits suffered during the period he was improperly withheld from service (dismissed) by the Carrier on the basis that the Claimant had resigned.

The instant dispute was a dismissal case wherein it was determined that the Carrier did not meet its burden of proof that the Claimant accepted other employment while on Medical Leave in violation of Rule 22(d). Award No. 214 was adopted on January 5, 2018, and it concluded as follows:

**“...the Board finds and holds that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from the Seniority Roster. The Carrier’s liability period begins upon the date the Claimant’s doctor found him fit for full service until the date Claimant is reinstated in accordance with Rule 13(f) of the Discipline Rule.”**

The Question at issue: **“Did the Carrier fulfill the determination of Award No. 214?”**

**FINDINGS:**

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act,

as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

It is the position of the Organization in its Interpretation Request of March 3, 2020, that the Carrier has asserted that Claimant resigned from its service, and it has complied with Award No. 214. The Organization argued that the Carrier has offered no proof of resignation from the Claimant and without proof of such and an examination of that resignation it is clear that the Carrier has not fulfilled the continuing requirements of Award No. 214. In the Organization's Submission of August 13, 2020, it has narrowed its request to being that the Carrier be required to reimburse the Claimant for out-of-pocket medical expenses that Claimant incurred while out of service. It asked that its request be sustained.

It is the Carrier's position that the record substantiated that Claimant resigned from its service effective July 4, 2018 (See Carrier Exhibit 10). It argued that the record substantiates that Claimant's release to full duty was only on a provisional basis. Nevertheless, based upon this full release, Claimant was able to displace a junior employee effective June 11, 2018. According to the Carrier Claimant's pay records shows that Claimant only worked that assignment one day on June 11<sup>th</sup>. Following that Claimant took floating vacation days from June 12 to June 25, unapproved absences from June 26 to July 3 (five consecutive work days that could have resulted in termination per Appendix 11 of the South Agreement and then resigned effective July 5, 2018.

The Carrier further stated that Claimant's seniority rights were fully restored and, it argued, that in error, calculations to the good of the Claimant's "net wage loss" resulted in a payment of \$81,583.33 on July 26, 2018. It concluded that it had complied with Award No. 214 and it asked that the Organization's Interpretation Request be denied.

The Board has been requested to issue an Interpretation of Award No. 214 which is the fourth of five Interpretation Requests to this Board during its ten plus years of existence. The central issue in the instant case is whether or not the Carrier adhered to the aforementioned Award.

Award No. 214 was adopted by the parties on January 5, 2018, and the Carrier was directed by the Board to make the Award effective on or before 30 days following the date the Award was signed by the parties. Claimant was medically released to service on June 7, 2018, and returned to service on June 11, 2018. Claimant worked one day, then took floating vacation days followed by an unapproved absence after which Claimant resigned effective July 4, 2018. It was not rebutted that Claimant was paid \$81,583.33 on July 26, 2018, which was 20 days after the Claimant had resigned.

The Board finds and holds that the Organization's argument set forth in its Request for Interpretation of Award No. 214 to compensate Claimant for out-of-pocket medical expenses Claimant might have incurred while in a dismissed status have become moot because of the Claimant's resignation, therefore, the Organization's Request for additional monies is denied. The Board would be remiss not to mention that the Organization's good work in behalf of the Claimant appears to have not been appreciated as Claimant resigned shortly after being returned to service.

**AWARD**

Interpretation Request denied.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: 10-14-20