

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 384, (Case No. 384)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Jeffery L. Fry, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing September 2, 2021, when Claimant Al Hardy (0378729) was dismissed for being absent without proper authority for more than five consecutive work days beginning June 28, 2021, in violation of MWOR 1.15.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this dismissal with all rights unimpaired and pay for all wage loss including overtime commencing September 2, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0291) (Organization File No. 2418-SL13D3-2103)**

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 Claimant was placed on Medical Leave by his physician, beginning on October 21, 2019. Claimant’s physician continued to provide Medical Leave extension notes throughout 2020 and the beginning of 2021 which was extended through June 27, 2021. The record shows that Ms. C. O’Connell, Carrier Manager of Clinical Services stated that she attempted to contact Claimant to make sure Claimant was aware that his extension was about to expire on June 27, 2021, but couldn’t reach him as Claimant’s phone would not go through. Carrier asserted

it did not receive any extensions for the Claimant's leave prior to or on June 27, 2021. Therefore, June 28, 2021, was Claimant's return to service date. Claimant did not report for service on June 28th, or within five consecutive work days, thereafter. In accordance with Appendix 11 of the Agreement, Carrier sent a letter on July, 2021, notifying the Claimant that he was dismissed from service effective July 7, 2021, for **"being absent without proper authority for more than five consecutive work days beginning June 28, 2021 and continuing."**

After receiving the aforementioned letter from the Carrier, Claimant requested an Investigation under Rule 13, that was granted. Claimant was directed to attend a formal Investigation on August 12, 2021, concerning in pertinent part the following:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged absence without proper authority for more than five consecutive work days beginning June 28th, 2021 and continuing."

On September 2, 2021, Claimant was notified that he had been found guilty as charged and was advised this his previous dismissal would remain in effect.

It is the Organization's position that Claimant was unable to attend the Investigation due to illness and medication prescribed by his physician. It argued testimony from Carrier Witness Cindy O'Connell provided information that there are two departments that handle Medical Leaves. It stated Ms. O'Connell works in the return to work off duty and pre-employment department in corporate, Fort Worth, TX. It further stated there is also a Medical Leaves Department that also handles Medical Leaves. It asserted that Transcript Exhibits 4 and 5 explain that Claimant was still being medically monitored by Dr. Pouya Baharami at Essential Medical Clinic. Dr. Baharami stated that Claimant had been a patient for more than four years and Claimant asserted that the aforementioned documents had been sent to Medical Leaves Department. It stated that Ms. O'Connell had a phone conversation with Claimant and then turned the situation over to the Medical Leaves Department and subsequently the Carrier terminated Claimant without doing a thorough check of records. It closed the evidence shows Claimant had proper authority to be off work by his physician, therefore, it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier Claimant was well aware that he was required to report for duty on June 28, 2020, or in the alternative, that he was required to provide a physician's note to extend his leave, yet he never communicated his whereabouts or medical status to his immediate Supervisor or any other appropriate Carrier authority. It argued that the Organization attempted to suggest that there was evidence of miscommunication between Ms. O'Connell's department and Medical Leaves Department, however, testimony of Ms. O'Connell, on page 9 of the Transcript, shows there was no miscommunication between departments. Additionally, Ms. O'Connell testified that in the past Claimant always sent his extension request to multiple

departments such as Carrier Administration, Nurse, Engineering Support and the Organization, none of which was done for the alleged instant request. It asserted that no evidence was provided that Claimant requested an extension in a timely manner.

It further argued that faced with no rebuttal evidence, the Organization provided a physician's note dated July 23, 2021, ostensibly provided to the Claimant nearly one month after the expiration of his leave. In addition, the Organization provided a "Certificate to Return to School or Work" slip over one month after Claimant's Medical Leave expiration, stating that Claimant had been under the care of the physician, with a return-to-work date of August 23, 2021. It asserted that neither exhibit, provided by the Claimant's physician long after June 27th, or the five work days following June 28th, establish compliance with Agreement Rule 22(c) and Appendix 11, and consequently, are no defense to the Claimant's just dismissal for violation of MOW Rule 1.15. It concluded Carrier received no medical extension from Claimant and dismissal was appropriate. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and it is evident that Claimant understood how to request a Medical Leave. Claimant had worked for the Carrier approximately six years and during that time requested multiple Medical Leaves. Claimant's work record reveals that Claimant was almost always furloughed or on Medical Leave, with very little actual work time during his years of service. The evidence and testimony presented at the Investigation confirms that Claimant did not make a request for a Medical Leave in a timely fashion nor did Claimant offer any reason as to why he did not appear at the Investigation. As this Board has stated in past the Carrier did not violate the Claimant's right to a "fair and impartial" Hearing when it was held in "absentia" as the Claimant offered no proof that he was either ill or unable to attend the Hearing. The record indicates Claimant voluntarily exercised his right to not appear at the Investigation, however, in doing such Claimant chose to offer no rebuttal, therefore, Carrier's case stands un rebutted. The Board will follow property precedent (See: Public Law Board No. 7048, Awards 145, 354 and 382) in its determination that substantial evidence, that was not refuted was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The Board finds and holds that the discipline assessed was appropriate as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

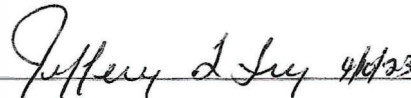
Claim denied.

A handwritten signature in black ink that reads "William R. Miller". The signature is written in a cursive style with a large, looped "W" and "M".

William R. Miller, Chairman & Neutral Member

A handwritten signature in blue ink that reads "Michelle D. McBride". The signature is written in a cursive style.

Michelle McBride, Carrier Member

A handwritten signature in blue ink that reads "Jeffery L. Fry". To the right of the signature, the date "4/10/23" is written in blue ink.

Jeffery L. Fry, Employee Member

Award Date: April 10, 2023