

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44001  
Docket No. MW-45478  
20-3-NRAB-00003-190050**

**The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(Keolis Commuter Services**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon M. Gorman, by letter dated October 6, 2017, for alleged falsification of payroll documents was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File Gorman-01/BMWE 17.200 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant Gorman shall be fully exonerated of all charges against him by the Carrier and be reinstated immediately with no loss of seniority and be compensated any missed wages, benefits, and vacation.”**

**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.**

**In a letter dated August 21, 2017, the Claimant was notified to attend an investigation in connection with an allegation that he falsified the signature of his supervisor and submitted a timecard for 47 hours pay that he did not work. Following postponement, the investigation was held on September 29, 2017.**

**The Claimant was advised in a letter dated October 6, 2017 that he was found guilty of the violations and was dismissed from service.**

**The Carrier maintains that there is substantial evidence in the record of the Rule violations. The evidence shows that submitted for work he did not do. Per GPS and the Claimant's admission, the Claimant's truck was not on the property at the times for which he sought pay. There was no exception for "work from home" or some other type of arrangement that would allow the Claimant to submit for time not doing Carrier work.**

**Further, the Claimant submitted timecards with a supervisor signature that was actually the Claimant's signature. The hearing officer heard the evidence and there is no showing that the conclusion that the Claimant violated the cited rules was in error. Although the Claimant contends a longstanding practice, the Claimant only has his testimony, which is unsupported by the record and the testimony.**

**The Carrier continues that the discipline was commensurate to the misconduct and not an abuse of Carrier discretion. Simply, the Claimant stole time and falsified time cards.**

**The Organization maintains that the Carrier failed to establish substantial evidence of the cited infractions. The Claimant freely admitted to signing the signature of his supervisor, but that there was no fraudulent intent. To the contrary, the Claimant was an employee with approximately 30 years of service and had been told by a prior supervisor to sign the timecard. The Organization continues that the supervisor witnesses could not testify that the practice did not exist. A supervisor acknowledged that he instructed the Claimant to get the timecards submitted. According to the**

Organization, this was a tacit acknowledgment that the Claimant would have to sign the time cards.

The Organization continues that signing for unavailable supervisors was a longstanding practice on the property and the Claimant was never told to cease the practice. If the Claimant was not warned, he could not be found guilty of violating a new policy that was unknown to him.

The Organization similarly argues that there was not falsification of time. The Claimant's crew worked pursuant to a longstanding practice where they would begin work early, work through breaks, and complete their work prior to their scheduled departure time. According to the Organization, the "paper schedule" was not the accurate schedule. The Carrier was well-aware of this longstanding practice. The Organization further argues that the Claimant was often working as a foreman in transit and from his home. The crew started early, finished prior to the "paper" time, worked through their breaks, and departed. The Claimant worked from home on his foremen duties. Carrier was aware of this practice and was also aware that the Claimant's crew was one of the most productive crews in Carrier employ. The Organization also points out that the Claimant drove his personal vehicle and not the Company vehicle on August 11, 2017. The Claimant worked that day.

There was no proof that the Claimant intended to defraud the Carrier. The Organization continues that, even if the cited rules were broken, there is no basis for terminating an employee who has no disciplinary background, thirty years of service, twenty five years of service as a foreman, and did not intend to defraud. The Carrier has deviated from the policy of progressive discipline and imposed discipline that is an abuse of discretion.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

**This Board has reviewed the evidence in the instant matter. The Claimant is charged with violations related to submitting a claim for time that he did not work and for falsifying supervisor signatures on timecards. There is an admission that the Claimant signed the signatures. There is also evidence that the Claimant submitted timecards for time he was not on Carrier property. There is substantial evidence in the record that the Claimant committed the cited infractions. However, there is also some evidence in the record that there had been past practices of allowing foremen to sign timecards when supervisors were unavailable to sign them. There is also some evidence in the record that the Claimant's crew had a known practice of working different times than their scheduled time and working through breaks. There is also some evidence that he performed foreman work off of Carrier property.**

**This Division notes that the Claimant is an approximately thirty year employee with a long history as a foreman. It is also obvious from the record that the Claimant has allowed his practices as a foreman to become sloppy in his twenty five years in that role. Although signing for a supervisor may have once been allowed, it is no longer allowed with the Carrier. Further, the practice of starting and finishing at non-scheduling times is also not allowed with the Carrier, as is working off-site.**

**It appears to this Division that the Claimant became complacent in his foreman position and followed old, undocumented practices that were no longer allowable under the Carrier's application of the rules. There is substantial evidence in the record of the infractions. However, this Division cannot ignore the evidence of record.**

**The evidence shows that the Claimant committed the cited rule violations. The next inquiry is whether the discipline was an abuse of Carrier discretion. In this matter, this Board finds that the Carrier exceeded its discretion when imposed dismissal. This Board finds that the Carrier exceeded its discretion when it terminated the Claimant.**

**As stated above, the record establishes that the Claimant became complacent and sloppy about documentation as a long-time foreman. The Claimant should return to work. However, the specific facts do not warrant an award of backpay. Given the nature of the infractions, the Claimant should be reinstated with seniority unimpaired but with no award of backpay.**

**Given the nature of the infractions, the Claimant should be reinstated subject to a number of conditions to ensure a successful return to the Carrier: the Claimant**

**reinstated without retroactive payment of any kind but with seniority and benefits unimpaired. The Claimant is disqualified as a foreman for a one year period. The Claimant must successfully complete Carrier's return-to-work process.**

**Claim sustained in part and denied in part as detailed above.**

**AWARD**

**Claim sustained in accordance with the Findings.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 28th day of April 2020.**

## **CARRIER MEMBERS' DISSENT**

to

### **THIRD DIVISION AWARD 44001 – DOCKET MW-45478**

**(Referee Brian Clauss)**

**The Carrier hereby strenuously dissents from the award of majority.**

**The majority has found that “[t]he evidence shows that the Claimant committed the cited rule violations.” (emphasis added). Claimant was charged with a myriad of rule violations based upon his theft and falsification of time records. As the majority found, Claimant repeatedly stole time from the Carrier and even forged the signature of a supervisor to pay slips without his consent. Despite this, it somehow also decided that Claimant should be returned to work. As a mild consolation to the Carrier, this board found that Claimant was not entitled to back pay. In the face of its factual findings, an order to return the employee to work, even without back pay, is fundamentally wrong and an abuse of discretion.**

**As the Carrier illustrated, in its submission and argument, other employees, including employees with long-term employment relationships with the Carrier and its predecessors, have been justifiably dismissed for the same or lesser theft. For example, in upholding the dismissal of a 40-year employee who was engaged in a time theft scheme, the PLB held:**

**It is basic to the employment relationship that employees are only entitled to be paid for time worked and benefits to which they are entitled by agreement or law. Intentional claims for wages for time to which an employee is not entitled is theft. The same principle applies to employees who enter and certify time for such unearned wages, whether for themselves or others.**

***Keolis Commuter Services, LLC*, PLB 7781, Case No. 1 (M. David Vaughn, September 28, 2016); see also *Massachusetts Bay Commuter Railroad*, PLB 6801, Case No. 7 (Robert O’Brien, March 31, 2011) (finding that the carrier had the right to terminate an employee for deliberate theft of time).**

**Another on-property PLB, finding dismissal was an appropriate penalty for time theft, held:**

**Time record falsification is considered to be a most serious offense because it strikes at the heart of the employment**

relationship. Carrier must be able to ensure that its employees are trustworthy. It is fundamental that employees have an obligation not to enter or certify time to which they are not entitled. Carrier's Code of Conduct, which Claimant received, prohibits falsification of time reporting, but even in the absence of specific rules or provisions under the Code of Conduct, employees are expected to know that stealing time will not be tolerated.

*Keolis Commuter Services, LLC*, PLB 7777, Case No. 9 (Ann Kenis, December 26, 2017).

Rather than following this well-reasoned line of awards, this majority has issued its own brand of industrial justice and tacitly condoned this egregious misconduct.

The majority's award further raises the question of whether it even adequately reviewed the record in this matter. Among the 116 hours and 30 minutes of time the majority found Claimant stole, was an entire day where the Carrier proved through GPS records that Claimant never even came to work. How can an employer now employ and trust an employee who has so wantonly abused its good will by stealing time in such a significant way? How could the majority overcome such an overwhelming display of evidence and order an employee returned to work? These questions are never adequately addressed in the award.

The Carrier therefore dissents.

*John McLaughlin*

John McLaughlin

*Jeanie L. Arnold*

Jeanie L. Arnold

April 28, 2020