Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44696
Docket No. MW-46191
22-3-NRAB-00003-200533

The Third Division consisted of the regular members and in addition Referee Pilar Vaile when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) working day suspension and last and final warning for two (2) years] imposed upon Mr. L. Ramos, by letter dated May 30, 2019, in connection with his alleged failure to properly attend to duties when he was absent from his assigned work location between January 18 and April 2, 2019 and alleged falsification of payroll documents for time paid that was not worked when he punched in away from jobsite was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier File BMWE 18/2019 KLS).

(2) As a consequence of the violation referred to in Part (I) above, Claimant L. Ramos shall now be exonerated of all charges brought against him, he be made whole for all lost wages as well as all missed benefits and credits for vacation, and he be returned to service immediately with no loss of seniority. Please advise the pay period in which this time will be paid and charges exonerated, or schedule to conference this appeal."

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.

Upon consideration of the whole record developed on-property, the Board finds and concludes as follows. Claimant L. Ramos has been employed with Keolis since July 1, 2014, when Keolis CS assumed the operation and maintenance of the commuter rail service under agreement with the Massachusetts Bay Transportation Authority ("MBTA"), and the responsibilities of the collective bargaining agreement then in effect between MBTA and the Organization. However, he had accumulated approximately ten (10) years of service with the Carrier, including its predecessor, at the time of the incidents in question.

At the time of this dispute, the Claimant was an assistant foreman headquartered in Boston; and he was assigned to work on the GLX project located at 56 Roland Street in the Charlestown neighborhood of Boston. His bulletined hours were 7:00 AM to 3:30 PM, Monday through Friday, but he and other GLX employees were asked as a matter of standard practice to come in at 6:00 AM for one hour of overtime.

In 2018, the Carrier instituted a new timekeeping system that involved a biometric GPS or "passport" device for clocking in remotely. At the time of this dispute, the Claimant was participating in a pilot program for the biometric devices. (Although there is a Biometric Policy in place, that evidence was properly excluded below because not provided to the Organization five (5) days prior to the on-property hearing.)

Upon learning of possible misconduct among a number of employees involving the biometric devices, the Carrier investigated the matter, and identified 25 occurrences between January 7, 2019 and April 2, 2019 in which Claimant L. Ramos clocked in while off-property from various locations in the Boston area, and in the vast majority of cases he was clocking in after 6:00 AM or 7:00 AM.

After a duly noticed on-property hearing that involved the testimony of only the Claimant and his Road Master, the Hearing Officer determined that the Claimant

had willfully abused the handheld biometric GPS device by clocking in while not on the job site on those 25 occasions; and had, as a result, been compensated for time not working. Thereafter, by letter dated May 30, 2019, the Carrier adopted the Hearing Officer's findings and imposed a thirty (30) day suspension and a last and final warning for two (2) years upon the Claimant, for falsifying payroll documents and willfully misusing the Carrier's handheld passport device.

The Organization timely filed a claim to challenge the discipline under the Railway Labor Act, 45 USC §§ 151, *et seq*., which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Carrier argues that although the timekeeping system was new, the basic expectations and obligations to clock in timely for a scheduled shift at the designated work site had not changed; and that there is substantial evidence in the record to support both the charges and the penalty selected because the Claimant's explanation(s) was not credible. Instead, the pattern and timing of the Claimant's clocking in show that he was trying to improperly increase his overtime in some cases and avoid clocking in late in others.

The Organization argues that the Carrier has violated Rule 15 by failing to provide the Claimant due notice of the hearing; failing to timely charge the Grievant; failing to prove that the Claimant intentionally and maliciously violated Carrier rules; and issuing excessive, unwarranted discipline. Regarding timeliness, the Organization's made two arguments. As an initial matter, it asserts that the charges were filed one (1) day late because it was 31 days after the admitted date of first knowledge, counting from that date. The Board rejects this frivolous argument, and strongly encourages the Representative below to retire it from use. The uniformly accepted and understood practice in legal and arbitration matters is that a statute of limitations or other time limit does not begin to run until the day following the triggering event. Next, the Organization asserts that at the on-property hearing the Carrier attempted to enter a letter from January 2, 2019, in which the Carrier admitted actual knowledge of the alleged offense more than three months prior to the Carrier's first purported date of knowledge on March 25, 2019. However, the Organization points to no evidence in the documentary record or transcript to support the fact of such letter or admission, and the Board finds no such evidence upon its independent review of the record. If the Organization raised any allegation or argument about that below, it did not adequately preserve the issue(s) for appeal since there is no record of it for this Board to now consider.

As to the merits, the Organization argues that the Carrier has failed to provide any evidence that the Claimant acted under an intent to defraud, as required in numerous Third Division awards. The Organization also asserts that the undisputed evidence is that employees were not trained in the use of the handheld devices; the Claimant had no confidence or assurance in the device's accuracy and no understanding of how they worked (he felt they provided vague and inaccurate location information); the Claimant was instructed or taught by past supervisors to clock in as soon as he was called to overtime, which happened frequently; and the Signal employees were also investigated for similar issues over improper biometric device use, but were trained and "pardoned." The Claimant testified generally to not understanding how the GPS system worked; and that he would often be on his way to work when he would get called to come into the GLX job site early to assist contractors for instance, and so would clock in then and go directly to the jobsite pursuant to supposed instructions.

Upon consideration of the whole record developed on-property, the Board finds and concludes that the Claimant's arguments and testimony were not sufficient to refute that offered by the Carrier. While the Hearing Officer failed to make many specific factual findings, or to articulate specific credibility determinations and their basis, there was nonetheless "direct, positive, material and relevant evidence" from which she could conclude that the Claimant was guilty of the charges. *See* Third Div. Award 24412, *BMWE and Consol. Rail Corp. (formerly The NY, New Haven and Hartford Rail Co.)* (Cables 1983); *see also* Third Div. Award 21372, *BMWE and The Texas and Pacific Railway Co.* (Cables 1977) (the Carrier must "demonstrate convincingly that an employe is guilty of the offense"). There was also substantial evidence in the record for her to reasonably reject the Claimant's pleas of ignorance, confusion and innocence; and to conclude that he knew and understood (or should have) the obligation to clock in on time, at his designated work site; and to not clock in while commuting, even (or especially) if running late. *See, e.g.,* Third Div. Award No. 33432, *BMWE and CSX Transportation, Inc.* (Bierig 1999) ("In discipline cases, the Board sits as an appellate forum" and "do[es] not weigh the evidence de novo"); and Third Div. Award No. 42713, *BMWED - IBT Rail Conference and BNSF Railway Co. (Former Burlington Northern Railway Co.)* (Helburn 2017) ("in this industry, the credibility determinations of Conducting Officers are to be accepted" unless they "ignore[] reality").

Here, Roadmaster McCaul admitted that there are times when employees are called to go to the job site earlier than scheduled. However, as he credibly described it, when employees have regular bulletined and scheduled overtime, they should be clocking in at the GLX site at that scheduled time. Additionally, although Roadmaster

McCaul could not attest to the accuracy of the biometric GPS devices, there was no objective, specific, or coherent suggestion in the record that the devices were not accurate, and the Organization had the burden on that issue as an affirmative defense.

In contrast to McCaul's testimony, the Claimant's testimony appears from the transcript to be vague, evasive, unlikely, and often non-response. Notably, he offered no corroborating evidence (such as testimony from co-workers or supervisors, or phone records for the relevant dates) to corroborate his apparent insinuation that all 25 incidents must have involved his being called in to the job site early. Additionally, most of the incidents involved late clock-ins, for which there was no adequate explanation. While it is true that "no number of possibilities makes a probability" (*see* Third Div. Award 30849), many numbers of actual occurrences of a thing – *e.g.*, clocking in at erratic times from off the property – do reasonably give rise to a strong inference of intentionality. *Disting*. PLB No. 7564, Award No. 15, *BMWED – IBT Railway Conference and BNSF Railway Co.* (Helburn 2013) (noting that "the long-standing practice in the industry" is "that with rare exception, the Conducting Officer's credibility determinations are to be accepted because the Conducting Officer had the opportunity to question and observe the demeanor of the various witnesses; and determining that was such a rare case, because the Hearing Officer "credited equivocal, hesitant testimony from the supervisor over that of multiple employees' clear, and unhesitant testimony").

Moreover, while the allegation of different treatment for Signal workers was not specifically denied and gives great pause, the Organization again offered nothing more than bare and general assertions from its unsworn representative about that and Advocate argument is not evidence. Specifically, the Organization offered no credible, corroborating evidence as to the nature of the timekeeping problems among Signal workers or what measure the Carrier took in response. Nor does the record reflect that it sought such information from the Carrier. Accordingly, there is no factual record from which the Board could determine whether or not they were treated dissimilarly although similarly situated under the circumstances. *See* SBA No. 934, Award No. 581, *IBEW and Metro-North Commuter Railroad* (Capone 2015) ("mere assertions do not suffice to sustain an affirmative defense" and "[r]eliable and sufficient evidence must be contained in the record for such a plea to succeed) (emphasis added).

Lastly, as noted, the Organization argues that discipline was excessive. Had the Organization proven its assertions regarding disparate treatment, the Board would have given this argument considerable attention since – contrary to the Carrier's relevance arguments – evenhanded application is one of the basic elements of just cause.

However, without such proof, the Board is not persuaded that the discipline imposed was too harsh. It is axiomatic that truthfulness, particularly in regard to time keeping, strikes at the heart of the employment relationship; and that such offenses may reasonably be grounds for immediate termination. Employers must entrust each employee to accurately and honestly track their time. Given the gravity and repetition of the offense, and lack of proven mitigating factors, there is no basis for the Board to substitute its judgement for that of the Carrier, regarding penalty selection in this case. ***See*** **Third Div. Award 19488,** ***Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express & Station Employees and The Baltimore and Ohio Railroad Co.*** **(Brent 1972) ("the severity of punishment must be reasonably related to the gravity of the offense"); and Third Div. Award No. 33432,** ***BMWE and CSX Transportation, Inc.*** **(Bierig 1999) (if the charges are sustained, the Board is "not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion").**

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of January 2022.