

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44697
Docket No. MW- 46192
22-3-NRAB-00003-200553**

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

**(Brotherhood of Maintenance of Way Employees 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 [fifteen (15) working day suspension, fifteen (15) deferred suspension and last and final warning for two (2) years] imposed upon Mr. M. Joseph, 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 10 and February 5, 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 BMW 19/2019 KLS).**
- (2) As a consequence of the violation referred to in Part (I) above, Claimant M. Joseph 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.

The Board makes the following additional findings, upon consideration of the record as a whole and giving due deference to the original finder of fact:

Claimant M. Joseph has been employed with Keolis as an EIC 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 eight (8) 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 headquartered in Boston, and 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 five (5) 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 seven (7) occurrences between January 10, 2019 and February 5, 2019 in which Claimant M. Joseph clocked in while off-property from various locations in the Boston area.

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 seven (7) 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 fifteen (15) day suspension, a fifteen (15) day deferred 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.

The Organization argues that the Carrier has violated Rule 15 by 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 it 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, because he and other employees frequently experience "glitches" with the devices; and the Signal employees were also investigated for similar issues over the biometric device use but were trained and "pardoned."

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 reasonably reject the Claimant's pleas of glitches or confusion, and to 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 employee is guilty of the offense").

The Claimant testified at length that glitches with the internet signal and GPS were frequent and alarming; and that he and other employees had observed "glitches" in the devices' recording of time and location information. He also testified that these issues caused him to wonder if he would be paid accurately for his time. However, it is very hard to imagine that, in such a case, the employee(s) and/or the Organization would not have complained about and/or grieved the issue before the time of investigation and discipline. *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").

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 they 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 both vague and exaggerated. Notably, he offered no corroborating evidence that he and his co-workers had been experiencing ongoing problems with the GPS devices. Given the implausibility of the Claimant's uncorroborated testimony there was a rational basis for the Hearing Officer to reject it. *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 Advocate, which 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. As such, 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 raised on-property regarding disparate treatment, the Board would have given this argument considerable attention since 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.