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

Award No. 44698
Docket No. MW-46193
22-3-NRAB-00003-200554

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. C. Beaudet, 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 2 and March 28, 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's File BMWE-19/2019 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Beaudet 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 C. Beaudet has been employed as an EIC 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 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 he was an EIC at the GLX project located at Cobble Hill in Somerville. 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 it 6:00 AM for one hour of overtime.

In 2018, 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 using one of these 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. It is undisputed that the Claimant signed acknowledging receipt in understanding of Carrier policies five (5) years before the new time keeping system was implemented, but he did admit to seeing a memo about the Policy.

Upon learning of possible misconduct among a number of employees involving the biometric devices, the Carrier investigated the matter, and identified 44 occurrences between January 2, 2019 and March 28, 2019 in which Claimant C. Baudet was paid for time not worked. Investigation revealed that although the Claimant and the others were coming in an early on overtime, they were being released an hour early,

at 2:30 PM. Then, the Claimant would drive to a Carrier property closer to his residence, Wakefield, to clock out at 3:30; he also clocked in a handful of times away from his assigned work location. He did not have his supervisor's permission to travel to these locations on work time, or to log out or in there.

After a duly noticed on-property hearing, the Hearing Officer determined that the Claimant had willfully abused the handheld biometric GPS device by logging in and out location at locations other than his assigned headquarter on those 44 occasions; and had as a result been compensated for time not spent 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 your 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 using work time to commute to a property closer to his residence from which to clock out (and in some cases, clock in to, but still to obtain pay for all or part of his commute).

The Organization argues that the Carrier has violated Rule 15 by failing to provide the Claimant due notice of the hearing at his new address; failing to timely charge the Grievant; failing to prove that the Claimant intentionally and maliciously violated Carrier rules; and issuing excessive, unwarranted discipline. The Organization had also argued below that the Claimant was further denied his right to a fair and impartial investigation under Rule 15 when the Hearing Officer failed to exclude late raised witness testimony upon the Organization's objection.

Regarding the hearing notice, it was sent to the Claimant's last record of address in the Carrier's records and it was ultimately the Claimant's responsibility to make sure the Carrier received and updated his current contact information. While the cause of

the communication breakdown was not established in the record the issue is moot and it was harmless error, since it is undisputed that the Claimant received actual notice, attended the hearing, and did not identify any prejudice. Nor is the Board persuaded that the Claimant was denied a fair hearing by admission of testimony from Randy Metivier or rebuttal testimony from Mr. McCaul, since Rule 15 does not require the advance disclosure of witnesses as it does for documents, the Parties had not yet commenced closing arguments, and the was no claim or indication that the Organization was unable to properly cross-examine the witnesses.

Regarding timeliness, the Organization's made two arguments. As an initial matter, it asserted 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; and the Claimant was instructed or taught that it was acceptable to clock in anywhere, so long as it was on-property. The Organization also observes that the device's accuracy cannot be verified, and that the Claimant promptly discontinued the challenged practice once he was corrected.

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 it is true that Messrs. McCaul and Metivier at some point each seemed to confirm the Claimant's understanding regarding proper clock out locations, it became clear across the transcript that they were referring to PTC

employees, rather than employees like the Claimant who are permanently headquartered at a particular location and have set start and end times. Additionally, Roadmaster McCaul testified about the functioning of the biometric GPS' operation with sufficient layman's clarity as to support an inference that it works as intended. As he explained, the punch locations are recorded adjacent to the nearest GPS location when the device reads it, if there is a signal at the time. There was also no evidence in the record of this case suggesting regular and/or known inaccuracies and, in any event, the Claimant admits to logging out at the Wakefield and other non-Headquarter locations in all 44 incidents. Nor did he offer any corroborating evidence for his claim that this was authorized by a Supervisor.

As such, the record provides substantial, "direct, positive, material and relevant" evidence to support the Hearing Officer's findings regarding the Claimant's culpability, including any determinations on credibility. *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"); 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").

Lastly, as noted, the Organization argues that discipline was excessive. Here, as in several related companion cases, the Organization asserted in its *ex parte* submission to the NRAB that the Signal employees were also investigated for similar issues over improper biometric device use, but were trained and "pardoned." There was no evidence to that effect in the record below, but if there had been the Board would have given an argument of disparate treatment considerable attention under the just cause analysis. Absent such evidence, the Board is not persuaded that the discipline imposed here was too harsh.

It is axiomatic that truthfulness, and 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.