

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44706
Docket No. MW-46378
22-3-NRAB-00003-210091**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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 (dismissal) imposed upon Mr. R. Bussey, by letter dated February 20, 2020, for alleged violation of Keolis Code of Conduct: Rule 1 - Knowledge of the Rules, Rule 2 - Courtesy and Professional Conduct, Rule 4 - Absence from Duty, Rule 8 Behavioral Expectations for KeolisCS Employees and Prohibited Behaviors, Rule 15 - Obeying Instructions, Directions and Orders and Rule 17 - Attending to Duties in connection with his alleged falsification of payroll documentation, failure to properly use the KRONOS time clock system and accepting payment for shifts not worked during the month of December 2019, not being present at his assigned location for the duration of his shifts during this time period and not being at his proper job location on January 24, 2020 during scheduled working hours was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier’s File BMW 20.054 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Bussey shall now be fully exonerated of all charges, placed back into service effective immediately with seniority unimpaired, fully compensated for any missed straight time, overtime, double time wages as well as per diems, credits for vacation and all other benefits.”**

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 Claimant, Machine Operator Richard Bussey, has been employed by the Carrier since July 1, 2014. He was dismissed on February 20, 2020, for violating the Carrier's Code of Conduct after a review of the "supplemental work approval system" indicated he falsified payroll documents when he logged in and/or out of the KRONOS Time Clock System while not at his assigned work site on 29 occasions between December 1, 2019 and January 22, 2020, resulting in his receipt of compensation for work not performed. A Notice of Formal Investigation was issued on January 31, 2020, for a hearing to be held on February 7, 2020. Following a postponement, the hearing was held on February 10, 2020.

Before reaching the merits of the dispute, the Board addresses the Organization's procedural objection alleging that the hearing officer failed to ensure the Claimant was afforded a fair and impartial hearing. A review of the record does not support the Organization's allegations. The assertion that the Claimant was not charged within 30 days of the Carrier's first knowledge of the offense, as provided by Rule 15, is unsupported by the record. Senior Engineer of Track Ronald Brousseau's testimony and supporting documentation conclusively establishes that the "supplemental work approval system" was conducted on January 23, 2020. The Notice of Formal Investigation was issued on January 31, 2020, and therefore, the charges were made within 30 days as required by Rule 15.

The Board does not find merit in the Organization's claim that the Carrier violated Rule 29 when it failed to notify the General Chairman of a change in headquarters on October 23, 2019. Failure to notify the General Chairman had no

effect on the Claimant's due process. The Organization's other procedural objections are also rejected.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence presented, the Board here finds that the Claimant violated the Carrier's Code of Conduct when he repeatedly logged in and out of the biometric timekeeping system in locations other than his assigned headquarters. The Claimant's actions resulted in his receiving a significant amount of additional compensation for time not worked.

Senior Engineer of Track Brousseau and Assistant Chief Engineer of Track James Ferraro provide credible and reliable testimony that proper notice was provided, and the Claimant knew he was to log in and out at his headquarters at Walpole as required by the Biometric Device Policy (hereinafter referred to as the "Policy") and the memorandum from the Chief Engineering Officer, issued on January 2, 2019. In addition to Mr. Brousseau's testimony, the posting of the January 2, 2019 memorandum next to the time clocks at the various locations constitutes sufficient notice. Arbitral precedent has consistently upheld that unless otherwise specified in the controlling agreement, the posting of bulletins and directives by the Carrier in customary and designated locations, constitutes proper notice.

The payroll records and the "FleetLocate" global positioning system provide a sufficient basis to conclude that the Claimant used the biometric device at locations other than his headquarters in Walpole for the sole purpose of increasing his compensation. The Claimant provides contradictory testimony regarding his use of time clocks in Franklin, Middleboro, and Braintree instead of Walpole. The record does not contain any verifiable justification for the Claimant not to use the timekeeping system in his headquarters. The documentation indicates this was not a one-time error. The record contains sufficient evidence that the Claimant engaged in a calculated effort to falsify time keeping records on numerous occasions, which cannot be interpreted as an honest mistake or misunderstanding. Such conduct constitutes theft and a violation of the basic tenet of trust required in the employment relationship.

The Organization's assertions that the biometric timekeeping system was defective is unsupported by the record. There is no evidence that the payroll system

contained a malfunction that sufficiently explained the Claimant's improper entries in the seven-week period reviewed by the Carrier.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Legions of arbitral awards have held that dismissal is appropriate discipline for theft of service violations such as time record falsification for receiving pay for time not worked, regardless of length of service or prior disciplinary record. The Carrier here correctly relies on a long-held standard in the industry that such factors do not provide protection to an employee who acts dishonestly.

The Board rejects the Organization's claim that the Carrier acted arbitrarily toward the Claimant by not documenting the verbal counseling given him by Mr. Brousseau as required by the Disciplinary Action Plan. The record confirms that the reminder of the Biometric Device Policy was not a disciplinary action that required documentation. It was a reminder of the Carrier's Policy, which the Claimant ignored. Further, theft and other acts of dishonesty do not require advance written notice that such conduct are grounds for termination even when a first offense.

The Board here finds that the Carrier has met its burden of proof with substantial evidence and, therefore, its decision to dismiss the Claimant is upheld.

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 4th day of March 2022.