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

Award No. 44707
Docket No. MW-46379
22-3-NRAB-00003-210092

The Third Division consisted of the regular members and in addition Referee Michael Capone 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 (dismissal) imposed upon Mr. J. Proude, by letter dated February 21, 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 months of December 2019 and January 2020 and not being present at his assigned location for the duration of his shifts during this time period was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File BMWE 20.053 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Proude 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 John Proude, has been employed by the Carrier since July 1, 2014. He was dismissed on February 21, 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 headquarters in Walpole on seven occasions between December 1, 2019 and January 22, 2020, resulting in his receipt of compensation for time he was not performing work related duties. 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 11, 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 logged in and out of the biometric timekeeping system in locations other than his assigned headquarters. However, the Board finds that while the Claimant violated the Carrier's Biometric Device Policy (hereinafter referred to as the "Policy") and the memorandum from the Chief Engineering Officer, issued on January 2, 2019, the record does not contain substantial evidence that his actions were an attempt to receive pay for time not worked and therefore, we do not find his conduct dishonest as defined by Rule 8 of the Code of Conduct.

Senior Engineer of Track Brousseau provides reliable testimony and documentary evidence that the Claimant had proper notice that he was to log in and out at his headquarters at Walpole. In addition to Mr. Brousseau's testimony, the posting of the January 2, 2019 memorandum near 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.

However, we find that the evidence presented to be inconclusive as to whether the Claimant's conduct constitutes theft of service and dishonesty. A careful review of the record reveals that the Claimant used the timeclock in Braintree instead of Walpole on numerous occasions. The Board concludes that the documentary evidence and testimony provide a sufficient basis to conclude that the Claimant's work activities on those days led him to use the Braintree location not as an attempt to obtain pay for work not performed, but as part of his understanding that he could use another location for timekeeping purposes if his assignment brought him closer to a location other than Walpole. While his actions were misguided and in

violation of the Carrier's rules, his misconduct did not constitute theft or falsification of timekeeping records.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Here, we find the Carrier acted arbitrarily in imposing the discipline of dismissal. Our review of its "Decision Letter", dated February 21, 2020, assessing the dismissal, indicates that the Hearing Officer did not cite theft of service or dishonesty in its "Findings and Conclusion". Instead, the letter states, ". . . a review of the supplemental work conducted on January 23, 2020, revealed that you failed to properly use the Kronos Time Clocks System when you logged in or out away from your assigned work location and/or headquarters on December 4th, 6th, 13th and January 3rd, 9th, 10th, and 17th." The Decision Letter does not reference acts of dishonesty but instead correctly focuses on the Claimant having proper notice of the rules, his failure to follow them and his improper use of the time keeping system.

The Board finds that the Claimant's failure to comply with the Carrier's Policy and directives is a violation of Rules 1 and 15 of the Code of Conduct but does not constitute theft and dishonesty. We find that the Claimant operated under his own misguided conclusion that he could perform his job without regard to specific directives from the Carrier. We find his actions to be serious misconduct and insubordinate. As such, the Claimant is reinstated with seniority unimpaired, but without compensation for lost earnings while not in service. No other requested remedy is awarded.

The Board here finds that the Carrier has not met its burden of proof with substantial evidence that the Claimant was dishonest, and therefore, its decision to dismiss the Claimant is not upheld.

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 4th day of March 2022.