

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45076  
Docket No. MW-47032  
24-3-NRAB-00003-220069**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Keolis Commuter Services**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The discipline (dismissal) imposed upon Mr. J. McGee, by undated letter (following a ‘Decision Letter’ dated February 26, 2021), 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 and Prohibited Behaviors; Rule 15 - Obeying Instructions, Directions and Orders; and Rule 17 - Attending to Duties following review of the “supplemental work approval system which began on February 4, 2021 and in connection with his alleged falsification of payroll documentation when he knowingly and willfully abused the handheld passport devices to log in and/or out while he was not at his assigned work site and knowingly and willfully accepted payment for various shifts between December 1, 2020 and January 27, 2021 even though he was not performing any railroad related duties for parts of such shifts, was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier’s File BMW 11/2021 KLS).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant J. McGee shall “\*\*\* be placed back into service effective immediately, \*\*\* be fully compensated for any missed straight-time, overtime, double-time wages, credits for vacation and any other benefits under our Agreement with his seniority unimpaired and exonerated of all charges against him. \*\*\*”**

**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.

**Factual Background:**

The Carrier alleges Claimant falsified payroll documents when he used hand-held passport devices to log in and/or out from locations that were not his assigned work sites. It alleges he was compensated for work not performed.

On February 8, 2021, the Carrier sent out a Notice of Investigation for February 17. By letter dated February 10, 2021, the Carrier send out an amendment, changing the date of the Investigation to February 12, 2021. By letter dated February 11, 2021, the Carrier reset the investigation again, for February 17. Thereafter, the investigation was held on February 17, 2021. Following Investigation, the Carrier found Claimant guilty as charged and dismissed him from its employment.

The parties' Agreement provides as follows in pertinent part:

**Rule 15 - DISCIPLINE**

1. An employee who has been in service more than ninety (90) calendar days shall not be disciplined or dismissed without a fair and impartial investigation, unless such employee shall accept such dismissal or other discipline in writing and waive formal investigation. The employee may be held out of service pending such investigation only if his retention in service could be detrimental to himself, another person, or the Company.

**An employee held out of service pursuant to this rule shall remain under pay as though he were in actual service on his regular position unless medically disqualified. Compensation under this rule shall continue until the decision is rendered following the trial/investigation, except that if the employee or his duly accredited representative requests a postponement of the employee's trial/investigation, the employee will not be compensated for the period of such postponement.**

**In the event of such a postponement, the Company shall attempt to reschedule the trial/investigation to commence within fifteen (15) days of the postponement. If the trial/investigation cannot be rescheduled within that time, through no fault of the employee or his representative, compensation will again be paid after the fifteen (15) day period.**

- 2. An employee and his representative shall be given written notice in advance of the investigation, such notice to set forth the specific charge or charges against him. No charge shall be made that involves any offense of which the Company has had actual knowledge thirty (30) calendar days or more, except where a civil action or criminal proceeding results from the offense, in which event the charge may be made within thirty (30) days of the final judgement. The investigation shall be held at the city of employment within ten (10) calendar days of the date when notified of the offenses or held from service (A hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee or the employee's union representative.)**

**The Company must supply the Organization, five (5) days prior to the hearing, all documents to be used in any investigation.**

**At such investigation, the employee may be assisted by his duly accredited representative. A decision will be rendered by the investigating officer within ten (10) calendar days after completion of investigation.**

3. An employee dissatisfied with the decision shall have the right to appeal to the Director -Labor Relations, and a conference shall be granted, provided written request is made to such officer within thirty (30) calendar days of the date of receipt of the transcript. A decision will be rendered by the Director -Labor Relations within thirty (30) calendar days from the date the appeal is received or the day of conference, whichever is applicable. \* \* \*
8. The time limits set forth in this Rule may be extended by mutual agreement. When the U.S. Mail is used, the postmark will govern in determining compliance with the various time limits outlined in this Rule.

The Carrier's Biometric Policy states as follows in pertinent part:

**II. GENERAL** \* \* \*

- (5) Clocking into the system indicates that the employee is ready to begin his/her workday at that time.
- (6) Clocking out of the system indicates that the employee has concluded his/her workday at that time. \* \* \*

**IV. EMPLOYEE RESPONSIBILITIES** \* \* \*

2. Employees are required to accurately record his/her start and end time for each shift through the official timekeeping method as described in this policy. Each time an employee submits a time entry through the biometric device, he/she is certifying that the entry is accurate and in compliance with this policy. \* \* \*
4. To ensure accuracy, employees should view his/her entries daily, or at least weekly, prior to the close of the pay period. The employee may do so by going to the main screen at a Kronos time clock, choose the "more" key, then choose "view timecard online." If there is a discrepancy, the employee should address it with his/her Supervisor or Manager in accordance with Section VI, 3 of this policy. Account corrections may not be considered after the pay period is closed, so it is important that

employees review their time at the clock and make any necessary changes by the end of the day on Wednesday prior to the close of pay period.

5. In addition to recording his/her start and end time, employees must use the biometric clock to make any changes to his/her job code, work schedules, or locations.

6. Employees must not falsify or incorrectly report time worked. \* \* \*

#### **VI. PAYROLL PROCESSING AND ADDITIONAL RESPONSIBILITIES**

Kronos is an automated electronic system that records the employee's time worked. It will also add miscellaneous payments such as Differentials, meals, or travel expenses to the employee's account, either automatically or by manual input.

##### **1. Overtime**

Regardless of location, employees who work a regular shift and an overtime shift in the same day must use the biometric clock to adjust their work location (if applicable) and to make a task or job change in the timekeeping system. Regardless of whether the overtime shift occurs before or after the regularly scheduled shift, employees must follow these steps during the time in between the two shifts. Employees who are required to perform duties from home or offsite will not be required to use the biometric clock, but will be expected to make these changes manually in a timely manner. Failure to adhere to these requirements will subject the employee to the disciplinary process outlined in this policy. \* \* \*

#### **IX. FALSIFICATION OR TAMPERING**

Any attempt to tamper with the biometric clock or any other timekeeping hardware will be considered a serious offense, subject to disciplinary action, up to and including termination. Any employee interfering with another's use of the timekeeping system may be subject to disciplinary action up to and including termination. Employees, Supervisors and Managers who falsely under-report or over-report the

hours worked by themselves or others for which they are approving time will be subject to disciplinary action, up to and including termination.

#### **X. WARNINGS AND DISCIPLINE**

Failure to comply with this policy will be considered a violation of this policy and the Code of Conduct (HRPP-038), Rule 17 Attending to Duties, which reads: It is essential for all employees to report to work on time and perform required duties during assigned hours. Employees must report to their supervisor in advance if they are unable to report for duty on time.

Formal progressive discipline for violations will be applied as follows:

First Step	Written reprimand completed by manager or supervisor and placed in the employee's personnel file
Second Step	1-day unpaid suspension consistent with any applicable CBA
Third Step	3-day unpaid suspension consistent with any applicable CBA
Fourth Step	Further disciplinary action up to and including termination.

Keolis reserves the right to bypass the progressive discipline process for violations of this policy including but not limited to the first, second or third steps.

The Company's Code of Conduct Policy states as follows in pertinent part:

#### **GENERAL \* \* \***

2. Failure to comply with the Code of Conduct may result in formal disciplinary action, up to and including termination. \* \* \*

#### **KCS RULES OF CONDUCT**

##### **1. Knowledge of the Rules**

- ☐ **Keolis CS employees are required to be cognizant of and to comply with all rules, policies, procedure and instructions issued by the Company. \***  
**\* \***
- ☐ **Ignorance of the rules will not be accepted as an excuse of negligence of omission of duty, and violations of the rules may subject an employee to the imposition of discipline \* \* \***

**8. Behavioral Expectations for Keolis CS employees \* \* \***

**c. Ethical standards. \* \* \*** This standard includes being honest in all statements, documents or investigations pertaining to company activities, and the proper use of company equipment, supplies and other materials.

**Prohibited Behaviors \* \* \***

- iv. Theft, misappropriation or other abuse of funds ... of KeolisCS and/or MBTA.**
- v. Falsification of time reporting or other official records ....**
- vi. Insubordination**

**15. Obeying Instructions, Directions, and Orders**

- An employee must willingly and respectfully obey all instructions, directions and orders from KeolisCS supervisory personnel and officers except when doing so presents a clear and present danger to them, KeolisCS or MBTA property or the public. Barring the presence of serious safety conditions, employees must comply with all instructions. An employee who disagrees with such instructions must comply and grieve later through the grievance procedure outlined in the collective bargaining agreement.**
- Insubordination or disrespect to KeolisCS supervisory personnel, officials or other employees, either by manner, speech, or any other means, will not be tolerated. Any act of insubordination will result in disciplinary action, up to and including termination.**

**Position of Organization:**

The Organization's arguments are both procedural and substantive. It notes the Carrier did not schedule Claimant's investigation within ten days of his removal from service. Rule 15 requires an investigation to be held within ten calendar days of the notification of offense(s) or the employee's being held from service. Claimant was removed from service on February 4, 2021. The Carrier's initial Notice dated February 8, 2021 scheduled the investigation on February 17, 2021, outside the acceptable time limits. The Carrier realized its mistake and tried to characterize it as a clerical error; it sent an amended Notice dated February 10, 2021 scheduling the investigation for February 12, 2021. A third Notice dated February 11, 2021 then rescheduled the investigation for the same exact date and time as the Carrier's initial February 8, 2021 Notice.

The Carrier failed to timely charge Claimant in accordance with and as required by Rule 15 of the Agreement. Rule 15 states that "\*\*\* No charge shall be made that involves any offense of which the Company has had actual knowledge thirty (30) calendar days or more \*\*\*" In the instant case, the Carrier improperly attempted to charge the Claimant almost sixty days after the Carrier's first knowledge of the incident. While the Carrier contends that its first knowledge was February 4, 2021, this is simply not true. The Carrier's log of Claimant's punch locations reveals that the Carrier had explicit first knowledge of Claimant's punch locations as early as December 1, 2020.

The Organization maintains the discipline taken was far in excess of what is contemplated in the Disciplinary Action Plan Policy. That policy describes its purpose as follows:

The purpose of this policy is to describe the progressive discipline program that is focused on modifying, in a constructive and collegial manner, the on the job behavior of employees when such behavior does not meet the standards of KeolisCS for the performance of duties. The first level of progressive discipline is counseling that is used to correct negative behavior through training and discussion between supervisor and employee, prior to the institution of formal disciplinary proceedings as stipulated in applicable collective bargaining agreements.

In addition, it points to the Biometrics Policy, which sets forth a four step process leading to possible termination. Significantly, Claimant received no prior steps under



this Policy prior to his termination. The Organization argues the Carrier consciously failed to adhere to its own Disciplinary Action Plan Policy as well its Biometric Devices Policy when it ignored the progressive discipline processes established for such cases. Because the Carrier bypassed any and all progressive discipline; Claimant never had a chance to correct his behavior.

The Carrier never identified the location(s) it thought Claimant should have been using, nor did it individualize each date and/or location. Claimant's position as an assistant flagging foreman required him to have various punch in and punch out locations due to the nature of his fluctuating assignments, as confirmed by his supervisor. He sought and obtained permission from his immediate supervisor to punch in and out at various locations because his work locations moved around. Hence, any allegation that those locations were improper is entirely unsupported and indefensible.

**Position of Carrier:**

The Carrier maintains that the amended Notice of Investigation cured any potential issue with the first notice. After that, there was a postponement of the hearing, to which the Organization did not object at the time. As a result, there was proper notice scheduling a timely investigation with no procedural violation. In any event, there was no prejudice to Claimant or the proceedings in any way.

The Carrier points out that Claimant was reminded by his supervisor of the requirement that he clock in and out only at his headquarters/assigned work location. One such reminder was in writing:

**MEMO TO: All Engineering Employees**  
**DATE: January 2, 2019**  
**FROM: Lionel Gros**  
**Chief Engineering Officer**  
**SUBJECT: Biometrics Devices - Clocking In/Out**

**Please be reminded that in accordance with the Keolis Biometrics Device Policy, all employees are required to correctly report their time worked by clocking in and out at their ASSIGNED location or headquarters.**

**Employees with Passport Devices are not permitted to clock in or out with the device when they are not at their ASSIGNED location or job**

site. It is mandatory that employees report to work on time, at their assigned location and clock in. It is further mandatory that employees perform their work assignment and clock out at their assigned location - not a random headquarters that may be closer to home or at home. Employees should be aware all Passport Devices and vehicles are GPS capable. Roadmasters have been instructed to perform daily random checks to monitor adherence to Keolis policies.

Failure to properly clock in or out via the KRONOS time clock or with a Passport device will be considered a violation of the Biometric Device Policy and the Keolis Code of Conduct.

False reporting of hours worked or failure to properly clock in or out at the proper location or job site may result in formal disciplinary action up to and including termination. Please ask your Roadmaster if you have any questions regarding this memo.

Despite abundant notice, between December 1, 2020 and January 29, 2021, he repeatedly falsified time documents by intentionally clocking in or out away from his headquarters/assigned work locations; the Carrier cites no less than 31 occasions. Roadmaster Patrick Hurley testified that he told Claimant to clock in and out at his assigned job location, and gave his flaggers a reminder memo about this. Yet Claimant's time records show him clocking in and out at other locations, including, inexplicably, 27 times at an address on Freeport Street in Dorchester, MA, where he had no reason to be during work hours.

When confronted about clocking from the Freeport Street location, Claimant did not have a satisfactory answer as to why he was clocking in or out there, other than the assertion that it was somewhere in between other work locations. His improper actions allowed him to attain pay for time when he was commuting and not working. This constituted theft of time and a misuse of the Carrier's time entry system. Given the fraudulent and repeated nature of Claimant's behavior, the Carrier removal of Claimant from service must be upheld.

**Analysis:**

The Carrier was entitled to make sure it had all the facts prior to removing an employee. As a result, it did not breach the 30-day limit for charging an employee in this case. The Organization did not object to the postponement of the Investigation

from February 12 to 17, hence its silence will be interpreted as assent. We find no prejudice in the timing of the Investigation.

Roadmaster Hurley testified at the Investigation that he told Claimant to clock in and out at his assigned job location. TR 15. Indeed, Rule 26 of the parties' Agreement establishes that employee's work days start and end at their designated assembling point. Claimant denies receiving a copy of the Biometric Policy, and the Carrier document indicating Claimant acknowledged receipt of Company policies does not include the Biometric Policy in its list of policies received. (Carrier Exhibit F). The Carrier has not established that Claimant received a copy of the Biometric Policy.

That said, we find he was fully on notice of the prospect of discipline including discharge should he not clock in and out from his assigned work locations. Roadmaster Hurley testified without rebuttal that he specifically advised Claimant of the necessity of clocking in and out at his assigned work location. This evidence establishes that he was told of the requirement.

Claimant did not deny receiving the January 2, 2019 memo warning that he could be terminated for failure to clock in and out at his assigned location. He attempted to imply non-receipt by stating that the memo was not hand delivered to him. TR 31. This does not constitute a denial of receipt. There would be no point in issuing a memo to put employees on notice of expectations if it were not distributed. As a result, we find a rebuttable presumption that Claimant in fact received the January 2, 2019 memo. There was no credible indication of non-receipt. As a result, we find Claimant was fully on notice of the requirement that he clock in and out from his assigned work location, and that failure to do so would result in disciplinary action up to and including termination.

Though the Organization makes much of the Biometric Policy's description of a progressive approach to discipline for improper time keeping, the policy expressly reserves to the Carrier the discretion to bypass such a progressive approach. Hence, the Carrier is not required to follow a progressive approach so long as it exercises its managerial discretion in a manner that is not arbitrary, capricious or discriminatory. In our view, the Carrier can reasonably bypass progressive discipline only in cases where it is evident that the employee in question volitionally undertook to claim unearned compensation by falsifying his or her time records.

Claimant flatly denied being compensated when he was not performing work. TR 41. However, when asked why he clocked in and out from Dorchester he stated: "It's a

very central location to all the tracks that I work on.” TR 41. This constitutes an admission that he was not clocking in and out from an assigned work location when he used Dorchester. As to the Freeport Street location, he said “And that is directly in the middle of those two places.” [parcel 12 on Boylston and Readville] These statements constitute admissions that Claimant was falsifying his time reports; it is not possible to clock in and out between locations without charging the Carrier for the time spent going to/from Dorchester to his assigned work location. It is noteworthy that Claimant punched in or out from Dorchester approximately 12 times prior to the January 2, 2019 memo, and roughly 7 times after the memo issued. This indicates that Claimant ignored the memo. We find the Carrier did not abuse its discretion in concluding that Claimant’s repeated conduct was volitional in nature and therefore dishonest.

Claimant was reminded, both orally and in writing that he had to clock in and out from assigned work locations. He knew or should have known that charging the Company for his time driving away or towards a work location was fraud; his pay was for time worked yet he charged for his time commuting. This was repeated over and over despite warnings from supervision.

The Carrier characterizes Claimant’s repeated failure to follow applicable directives as insubordination. We are not so persuaded. Insubordination as an offense requires that certain elements of proof be established: a direct order was given, the order was refused, and the refusal was made with knowledge of the consequences. The memo in this case did not constitute a direct order, Claimant did not articulate refusal to follow the order, and he received no specific, personal warning that such an articulated refusal would result in his termination. It follows that Claimant’s non-responsiveness to supervision in this regard might be characterized as failure to follow instructions, but not as insubordination.

Though the Carrier has failed to establish its allegation of insubordination, Claimant’s offense of falsifying Company timekeeping records, standing alone, is serious enough to warrant termination. Falsification of Company timekeeping records is an act of dishonesty, which by its very nature breaches the trust inherently necessary in an employment relationship. The Carrier cannot be expected to keep on its payroll an employee who is known to have attempted to defraud the Company. It acted within its discretion in deeming Claimant’s conduct a dischargeable offense.

**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 31<sup>st</sup> day of October 2023.