

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45083
Docket No. MW-47050
24-3-NRAB-00003-220135**

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. G. Walsh, by undated letter (following a ‘Decision Letter’ dated March 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 10, 2020 and February 8, 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 21.066 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Walsh shall “* be placed back into service effective immediately, with all lost straight time, overtime, double-time wages, credits for vacation, retirement, and any other benefits that are applicable to him under our Collective Bargaining Agreement with all charges withdrawn. ***”**

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 has alleged that Claimant falsified payroll documents when he knowingly and willfully abused the hand-held passport devices to log in and/or out when he was not at his assigned work site. It maintains he accepted compensation for work that he did not perform, and is guilty of dishonesty. As a result, it terminated Claimant's employment.

The Organization contests the allegations as unfounded and the discharge as unreasonable; the claim has been duly processed to consideration by the instant Board.

Applicable provisions of the Parties' Agreement provide 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. * * * 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.

Position of Organization:

The Organization contends that the Carrier violated Rule 15 when it originally scheduled the investigation for March 12, 2021, yet did not provide its evidence to the Organization until March 10, 2021. The Agreement requires that the Carrier provide evidence to the Organization at least five days prior to the investigation.

The Carrier rescheduled the investigation for March 17, 2021, which is clearly more than ten days after the original March 5, 2021 charges. These actions show that the Carrier had no intention of supplying the evidence or holding the investigation in a timely manner as required by Rule 15. The Carrier failed to timely charge Claimant in accordance with and as required by Rule 15 of the Agreement. Rule 15 is clear and unambiguous and 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."

The Carrier's March 5, 2021 Notice of Investigation stated that review of the supplemental work approval system began on February 4, 2021. However, the Organization contends this date was simply manufactured; the Carrier knew of the

punching issues well in advance of this date. As explained by the Organization during the on-property handling of this dispute, the Carrier is required to approve payroll daily or weekly for their payroll cycle. Because the date of Claimant's first alleged violation was December 10, 2020, the Carrier would have known of said violation when it approved Claimant's weekly payroll prior to December 17, 2020. It concludes the Carrier violated Rule 15 when it failed to bring forth its charges against the Claimant until well over the thirty (30) days,

Arbitration boards have routinely held that the Carrier must prove intent to defraud. Representative of the numerous awards holding to said effect are Third Division Awards 33981, 39510, 40261, 40301, 42961 and Awards 32 and 33 of PLB No. 7660. Typical decisions are Third Division Awards 33981, 42961 and Award 32 of PLB No. 7660. AWARD 33981 states in pertinent part:

The Carrier asserts that the Claimant admitted the violation and therefore he was not prejudiced even if he was denied his procedural rights. The Organization submitted Third Division Awards 16064, 16154 and 21122 to the effect that falsifying time cards involves the element of intent to defraud. We are inclined to agree, particularly where, as here the Claimant was found guilty of acting 'knowingly and willfully.'

Accordingly, although Claimant admitted submitting a claim for time not worked, the element of intent had yet to be proved. It is a well-established principle that a carrier must base a decision of guilt on substantive evidence and may not rely on mere speculation, assumption or conjecture as a basis upon which to impose discipline.

The Organization further argues that the discipline assessed against Claimant was excessive; the Carrier failed to adhere to its own Disciplinary Action Plan Policy when it ignored the "Progressive Discipline Process" provided for.

Position of Carrier:

The Carrier's review concluded on or after February 26, 2021 and noted the alleged violations. Following established protocol, Claimant was removed from service on March 4, 2021, and issued a Notice of Investigation on March 5, 2021. There is no question that the charges were within 30 days from discovery of Claimant's misconduct, and therefore timely.

The January 2, 2019 memo to all staff was clear that “[f]alse 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.”

As an Assistant Foreman working as an EIC, Claimant was provided with hand-held biometric passport time entry devices and instructed to clock in and out only at his assigned job location. Clocking in or out at unassigned locations is prohibited. Claimant admitted to all of the essential facts of this matter during the Investigation. He admitted that he understood he was to sign out only at Readville or his assigned work location, and that he violated the Carrier’s policies by his actions. The evidence demonstrates 14 different occasions where Claimant committed time clock falsification.

Between December 1, 2020 and February 26, 2021, Claimant falsified a significant amount of time documents by intentionally clocking out away from his assigned work location. Those clock outs were at or near Claimant’s Taunton home, thereby converting his entire trip home into paid time. Claimant’s actions therefore allowed him to obtain additional pay that he was not due. In the Carrier’s view, this constitutes theft, an act of dishonesty that damages the employment relationship beyond repair.

Analysis:

We do not find a procedural violation in this case. The Carrier is not held accountable for knowledge of the alleged violations until completion of its investigation into the situation. To hold otherwise would require the Carrier to make uninformed, snap judgments, a way of dealing that would be disadvantageous to the Organization, the Carrier and employees alike. Accordingly, we hold the Carrier was entitled to look into the facts, and as a result, there was no timeliness problem in the instant case.

The record in this case demonstrates that Claimant knew his actions were in violation of Carrier requirements and could have serious consequences, including termination. Yet he knowingly persisted in gaining pay for time not worked. Under these circumstances, the Carrier has established proper cause for the discipline taken.

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 31st day of October 2023.