

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45084
Docket No. MW-47051
24-3-NRAB-00003-220136**

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. A. Bossi, 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; Rule 17 - Attending to Duties and the Biometrics Policy 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 4, 2020 and February 12, 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 21.065 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. Bossi shall ‘* be placed back into service effective immediately, with all lost straight time, overtime, double-time wages, credits for vacation, credits for 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are applicable to him under our Collective Bargaining Agreement with all charges withdrawn.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 used his hand-held passport device to log in and/or out from a location other than his assigned work site, and accepted compensation for work that he did not perform. It found this to constitute dishonesty warranting discharge.

The Organization contests the reasonableness of this decision, and the claim has been processed to consideration by the instant Board.

Applicable provisions of the parties' Agreement state 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.

* * *

Position of Organization:

After an amended notice dated March 10, 2021, the Investigation in this case was ultimately held on March 17, 2021. As the Organization sees it, 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 Carrier then rescheduled the investigation for March 17, 2021, which is clearly more than 10 following the original March 4, 2021 withholding of Claimant from service. The

Organization maintains the Carrier simply traded one procedural violation for another.

The Carrier is required to approve payroll daily or weekly for the payroll cycle, and was or should have been aware of employees' punches and their locations at that time. Because the date of Claimant's first alleged violation was December 4, 2020, the Carrier would have been made aware of said violation when it approved Claimant's weekly payroll sometime before December 11, 2020. Rule 15 only allows a maximum of 30 days from the Carrier's first actual knowledge of a potential offense for the Carrier to bring charges against an employee, and the Carrier's failure to meet this timeline requires that the claim be sustained.

The Organization requested copies of all 2306 forms filled out by Claimant and all vehicle maintenance records for the Carrier vehicle he used. This simple request was denied by the Carrier on the grounds that the Carrier would not use it at the Investigation. The Organization argues that copies of the records in question were due as a matter of right to Claimant as the "originator" of them, and they would have shown where Claimant was working on the days in question. By denying the Organization access to 2306 forms, the Carrier has hampered the Organization's ability to disprove the Carrier's allegations in a blatant denial of a fair and impartial hearing.

Claimant's supervisor acknowledged he gave Claimant permission to punch from a different location on some of the contested days, though the particular days were not identified. Claimant has 24 years of service with no indication of any prior discipline.

In this instant dispute, the charges against Claimant were based on a serious allegation that he purposely attempted to steal time from the Carrier. Despite Carrier policies calling for progressive discipline, Claimant was denied any opportunity to learn from his mistakes. Furthermore, arbitration boards have routinely held that the Carrier must prove intent to defraud in order to establish a charge of dishonesty; the Organization insists they cannot meet their burden in this case.

Position of Carrier:

Claimant was warned by his supervisor of the requirement that he clock in and out only at his assigned work location. Claimant's supervisor reminded him of that obligation in connection with issuance of the January 2, 2019 L. Gros Memo as well. Despite this abundant notice, between December 1, 2020 and January 29, 2021, Claimant falsified a significant amount of time documents by intentionally clocking in or out away from his assigned work location on multiple occasions in locations closer to his Carver, Massachusetts home than his assigned job location which was in Weymouth. This allowed him to attain pay for time when he was not working. In the Carrier's assessment, this constituted theft of time and a fraudulent misuse of the Carrier's time entry system in clear violation of the Carrier's policies and rules. After learning that Claimant had clocked in or out at the incorrect location approximately 28 times, the Carrier removed him from service.

While the Carrier is required to provide the Organization with the documents it intends to use at least five days prior to the Investigation, there is no obligation of the Carrier in Rule 15, or otherwise to provide Claimants or the Organization with any other documentation. The Carrier concludes its actions were entirely appropriate and the discipline should be upheld.

Analysis:

Claimant's supervisor P. Hurley testified that Claimant's headquarters was at Reading, but he was supposed to clock in and out at the job site. (TR 14). He stated there were times when Claimant called and asked to punch in or out from another location and that permission was granted.

A. It's a decision that I have and if he gives me a good excuse I allow that.

Q. Did he do that on these 28 alleged times?

A. Well, not on all of them. (TR 17)

Claimant testified that there were exceptions to the practice of punching in and out at a job site:

Q. Did you punch in and punch out at your assigned 23 work locations?

A. I did and there are times I didn't.

Q. And the times that you didn't, why didn't you?

A. Because I needed to go get paperwork I needed for my job, I needed to clean up my truck, sanitize myself, and other times the truck had to be worked on so I had to drop it off at three to four different mechanic facilities. (TR 34-35)

Read together, this testimony is persuasive that Hurley gave Claimant permission to clock out from non-job site locations when there was a special reason to do so, but we are not persuaded that such special reasons existed to cover all 28 instances of non-job site punches. The evidence shows that on at least some occasions Claimant did not have permission to punch in/out where he did. As a result, though the dates have not been identified, the evidence establishes that he was guilty of violating the Carrier's policies and regulations regarding time keeping.

There are serious and persuasive mitigating circumstances in this case. Claimant's 24 years of service weighs heavily. He was given express supervisory permission for an unknown number of his off-job-site punches. He was not given any sort of warning or intermediary progressive discipline to allow him to correct his behavior. Further, the Carrier's failure to provide the Organization with the requested 2306 forms was prejudicial to Claimant in his ability to dispute the allegations against him. Our conclusion under these circumstances is that the missing 2306 forms should be construed against the Carrier, meaning that Claimant would have been able to explain at least some if not most of the contested discrepancies in his time keeping. In addition, the processing of the claim was not without procedural flaws.

Taken together these circumstances cannot reasonably be ignored to the point of dismissing a 24-year employee. Claimant's termination was clearly excessive under the circumstances.

Claim partly sustained in accordance with findings. Claimant shall be offered reinstatement subject to the Carrier's return to service policies. The Carrier shall replace the dismissal in Claimant's record with an actual suspension running from the date of his dismissal to one year prior to his reinstatement. Lost seniority is fully

restored to the date of his dismissal, and, vacation and all other compensable benefits are to be paid for the year prior to his reinstatement. The Carrier shall make him whole for one year of time lost as a result of this incident, less any interim earnings from replacement employment.

Claimant's medical insurance shall be restored retroactive to the date of his dismissal, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

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 31st day of October 2023.