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

Award No. 44680
Docket No. MW-45615
22-3-NRAB-00003-190540

The Third Division consisted of the regular members and in addition Referee Pilar Vaile 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 (suspension) imposed upon Ms. S. Palombo, by letter dated October 19, 2018, for alleged violation of Code of Conduct Rule 1, Knowledge of the Rules, Code of Conduct Rule 2, Courtesy and Professional Conduct, Code of Conduct Rule 4, Absence From Duty, Code of Conduct Rule 8, Behavioral Expectations for Keolis CS Employees and Prohibited Behaviors, Code of Conduct Rule 9, Safety, Code of Conduct Rule 15, Obeying Instructions, Directions and Orders, Code of Conduct Rule 17, Attending to Duties and NORAC Rule D, Employee Conduct in connection with an incident that occurred on October 4, 2018 while working 11:00 P.M. to 7:00 A.M. at Beacon Park Yard as the assistant foreman of the Rail Job was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File BMWE 19/2018 18.372 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. Palombo shall be exonerated of all charges, her record cleared and be fully compensated for all missed wages suffered, as well as any missed benefits and credits for vacation."

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 Board makes the following additional findings, upon consideration of the record as a whole and giving due deference to the original finder of fact:

The Claimant, Ms. Sarah Palombo, is an Assistant Foreman in the Track subdepartment of Keolis Commuter Service, LLC's (the Carrier's) Maintenance and Way Department; and she works from 11:00 PM to 7:00 AM, which is an overtime shift. She has been employed by the Carrier since July 1, 2014, when Keolis assumed the operation and maintenance of the commuter rail service under agreement with the Massachusetts Bay Transportation Authority ("MBTA"), and the responsibilities of the collective bargaining agreement then in effect between MBTA and the Organization.

On October 3-4, 2018, the Claimant was working on a rail gang at the Baily Park Yard. On October 3, 2018, Production Road Master Mark Britton was dispatched by his supervisor (Asst. Chief Engineer J. Ferraro) to check on this same crew of employees who were believed to have been performing overtime night work at a reduced capacity by leaving at approximately 2:00 AM on multiple nights, even though they were under pay, under the overtime rate, until 7:00 AM.

Road Master Britton arrived at approximately 2:00 AM on October 4, 2018 and observed the crew (including the Claimant) "were clearing out the tracks but the track was out of service until 4:30 a.m."

First, Road Master Britton met with Foreman Morris, and told the Foreman to have the crew go to work at mile 6. The Foreman said he was "tired" and would instead "punch out and take the day off". (Britton Statement.) Next, according to the unrebutted record, the Claimant and Morris engaged in conversation about Road Master Britton's instructions. Next, the Claimant called crewmember Gerry Connors and told him "to get whoever was near [him] and head to her truck." (Org. Ex. 1.) The group "complied" and converged upon where the Claimant, Foreman, and Road Master Britton were by then having what crewmember J. Humes called a "spirited discussion".

During the discussion, Road Master Britton told the Claimant and the others she had gathered to "put another string in or go home", and he may have screamed this and/or used an F-bomb. (Org. Exs. 1, 4; and Claimant testimony.) At first, the Claimant and others in the group objected to laying out rail at milepost 6 because the loader ideally used to move rail did not have a current, valid inspection sticker. Next, when Road Master Britton directed the crew to use the speed swing instead, the Foreman and the WEO or speed swing Operator (R. Deprofio) opined that the swing was not adequate to move the rail before the track had to be returned to service at 4:30 AM (TR 16.)

The Road Master informed the group that the speed swing had previously been used by the same Operator safely to perform similar work. As he would later testify, the swing had been used before and after that date to perform the same task under similar condition; and it had taken only 43 minutes to perform the task on a subsequent day. The only evidence to counter the Road Master's assertions was a vague hearsay statement from WEO Rob Deprofio that the impossibility of safely using the speed swing to lay the rail within the time available was thereafter "proven correct when we [he and unknown crewmembers] tried to do it the next day and couldn't." (Org. Ex. 1.)

According to the Claimant, Road Master Britton conveyed his "ultimatum" (Org. Ex. 2) by saying "fucking do it or punch out". From the Claimant's own testimony this does not appear to be out of the ordinary language for the work site but none of the hearsay declarants confirmed the use of profanity. The hearsay declarants do, however, generally confirm those crew members' understanding that "Supervisor Britton gave them an Ultimatum" or "or else" type of directive, and

that the Road Master was angry. (Org. Ex. 1, emphasis of capitalization in original; see also Org. Ex. 2.)

After Road Master Britton issued his ultimatum to either use the speed swing to continue to lay rail at milepost 6 or clock out, the Claimant cursed and threw her flashlight some distance and towards a busy road, in anger (at the on-property hearing she said that it "slipped" and that Britton was also cursing). (TR 18, 36.) The Road Master described the Claimant's manner that day as confrontational, argumentative, swearing, hostile, and disrespectful. (TR 17-19.) Road Master Britton also felt that she was undermining his authority; and the Road Master felt threatened, as he relayed to multiple crew members through two group interactions later that day. (TR 19 and Org. Exs. 1-4)

After being told to either use the speed swing to move rail at mile 6 or to clock out, the Claimant clocked out at 2:45 AM along with the rest of the crew.

Later than morning, Claimant punched in at 6:51 AM but, instead of reporting to work, she requested and acted upon permission from R. Morris (the Foreman, who was also disciplined in relation to the same October 4 events) to take a Carrier truck to go to Human Resources (HR). while on the clock and during HR office hours, to file a complaint concerning the previous shift's incident, and Road Master Britton's conduct. As a result, she was absent from her work location while in service and under pay, without the permission of Road Master Britton or other Engineering Manager. While Britton originally believed the Claimant was on "personal business", her written complaint was filed with the Carrier representative (MaryAnn Lemon) who would later serve as the Charging Officer. (TR at 20-21, 31-33.)

On October 4, 2018, the Claimant was removed from service, pending an investigation into the matter; and the following day Road Master Britton provided a written statement. Thereafter, the Claimant was issued a notice of investigation and the foregoing charges based upon her alleged: refusal to use the speed swing to lay rail past milepost 6; throwing the flashlight in anger; and leaving her worksite in a company vehicle later that morning without permission or authority.

Thereafter, the Claimant was provided a duly noticed on-property hearing at which only she and Road Master Britton testified. The Hearing Officer found the

Claimant guilty of the alleged rules violations and the Carrier imposed a ten (10) working day suspension on the Claimant. The Organization timely filed a claim to challenge the discipline under the Railway Labor Act, 45 USC §§ 151, *et seq*., which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Carrier argues it has met its burden by proving through clear evidence that the Claimant engaged in the actions and violated Carrier rules as charged. As to any procedural challenges, it asserts they are without merit as the Claimant was provided a full and fair investigation, and she was given an opportunity to call any witnesses she felt could support her position and was apparently unable to do so. The Carrier further argues that it called the witnesses it believed were necessary (one, Britton); its witness was clear that the Claimant was insubordinate and in dereliction of her duties; and it is not the Carrier's obligation to call witnesses on behalf of the Organization or otherwise present its case for it.

As to the merits, the Carrier argues that it proved that the Claimant acted insubordinately and unprofessionally, yelling and swearing and refusing to perform tasks directly ordered by her supervisor. Although the Claimant could have performed the assigned task without any safety risk, she instead substituted her judgement on safety for that of her supervisor and chose not to do so. Moreover, even if Road Master Britton was also yelling or cursing, Keolis' rules are clear that provocation is not a justification for insubordination or unprofessionalism. The Carrier further proved that Claimant was away without leave the following day because she failed to ask permission of her actual supervisor, Road Master Britton, or another Manager.

The Organization argues that the Carrier failed to prove just cause. First, the Claimant was denied her contractual right to a fair and impartial investigation as required under Rule 15 by the Carrier's failure to investigate the matter fully or call any witnesses other than the Road Master. Second, the Carrier failed to prove that the Claimant was guilty of the charges. The flashlight charge is simply not true and is disputed by the Claimant. As to the charge related to clocking out, the crew had legitimate safety concerns about putting the rail in with only the speed swing, in the time allotted. However, instead of assigning another task, Road Master Britton gave the option to "just fucking do it, or punch out", which is exactly what the Claimant and the rest of the crew did. As to the charge related to leaving the job

site, the Claimant had permission of her Foreman, she was clearly on Carrier business, and the on-property Hearing Officer was aware of this. However, the Road Master had a premeditated bias against the Claimant, who he referred to as a "cancer" to be gotten rid of.

The Organization also argues that the Hearing Officer's credibility determinations "are not in line with the reality of the facts presented" and as such "must be considered arbitrary, capricious and, resultantly, lacking any evidentiary support for the Carrier's position." Accordingly, the Organization urges that the instant claim be sustained and the requested make whole be ordered. Alternatively, discipline should be mitigated because discipline was clearly excessive, and not progressive, corrective or rehabilitative' and/or because the Carrier failed to prove all of the charges levied against the Claimant.

Upon consideration of the whole record developed on-property, the Board finds and concludes as follows. As an initial matter, the Board rejects the Organization's arguments related to denial of a fair hearing. An employer is not required to interview every eyewitness to an incident, although it obviously bears the risk that it will not meet its burden of proof. However, here most of the disputed facts related to the Organization's affirmative defenses or statements in mitigation.

As to the merits, the Board first observes that the on-property Hearing Officer's word choice in describing the evidence as "undisputed" was obviously not a wise, thoughtful or accurate one, since the "he said/she said" testimony was disputed as to the statements, demeanor, actions of Road Master Britton and the Claimant on October 4, 2019; whether a directive was issued, to be violated; and whether the Claimant had adequate authorization to leave the worksite later that morning to report the earlier incident and the Road Master's conduct therein.

Nonetheless, the record provides substantial, "direct, positive, material and relevant" evidence to support the Hearing Officers findings regarding the Claimant's culpability on all charges except the one for AWOL as discussed below. ***See*** **Third Div. Award 24412,** ***BMWE and Consol. Rail Corp. (formerly The NY, New Haven and Hartford Rail Co.)*** **(Cables 1983);** ***see also*** **Third Div. Award 21372,** ***BMWE and The Texas and Pacific Railway Co.*** **(Cables 1977) (the Carrier must "demonstrate convincingly that an employe is guilty of the offense"); Third Div. Award No. 33432,** ***BMWE and CSX Transportation, Inc.*** **(Bierig 1999) ("[i]n**

discipline cases, the Board sits as an appellate forum" and "do[es] not weigh the evidence de novo").

As described above, there was substantial evidence that the Claimant and crew understood the Road Master to be making an ultimatum – that was why everyone was so agitated. The employees did not want to perform the work directed but they also did not want to lose out on their overtime pay. The issue then becomes whether they had a valid safety defense. The witnesses disagreed about that.

However, it clear under the on-property record that the Hearing Officer had reasonable grounds to credit the testimony of Road Master Britton over that of the Claimant. While it would have been far preferable for the Hearing Officer to be clearer and more express in making credibility determinations, the on-property record provides ample basis to signal where credibility determinations were required; what they were; and the record evidence relied upon in crediting Road Master Britton's testimony. At a minimum, Road Master Britton' testimony reads as more consistent, straightforward and genuine than that of the Claimant, whose testimony reads as evasive, defensive, and argumentative; and reflects a general disinclination to accept the impact of her own actions on October 4, 2018. *See* Third Div. Award No. 42713, *BMWED - IBT Rail Conference and BNSF Railway Co. (Former Burlington Northern Railway Co.)* (Helburn 2017) ("in this industry, the credibility determinations of Conducting Officers are to be accepted" unless they "ignore[] reality"); PLB No. 7564, Award No. 15, *BMWED – IBT Railway Conference and BNSF Railway Co.* (Helburn 2013) ("with rare exception, the Conducting Officer's credibility determinations are to be accepted because the Conducting Officer had the opportunity to question and observe the demeanor of the various witnesses").

Moreover, the only other evidence corroborating the claim that the Claimant and other crew members were responding appropriately to legitimate safety concerns were hearsay claims, which the Hearing Officer – reasonably – did not credit except perhaps to corroborate disputed testimony were possible. In any event, the hearsay statements were as likely to support one side as the other as to various points, and none of them corroborated a claim or inference of a "clear and present danger", as required to support an employee's refusal to obey a clear work directive. (Keolis Code of Conduct, Rule 15.)

Accordingly, the substantial weight of admissible evidence was that it was the Road Master's call in this case – not that of the Claimant or the Operators – as to whether the crew should lay the rail. Had the Organization offered any objective, corroborating, sworn eyewitness testimony as to its affirmative defense, there could have been a basis for review of such a conclusion. The lack of such evidence, however, leaves little or no basis in the record for the Board to conclude the Hearing Officer acted capriciously in crediting Road Master Britton's testimony over that of the Claimant as to the disputed facts about the early morning dispute. *Disting.* PLB No. 7564, Award No. 15, *supra* (varying from the general rule of deference to the Hearing Officer where s/he credited equivocal, hesitant testimony of one witness over that of multiple employees' clear, and unhesitant testimony).

In contrast to the issue of insubordination, however, the on-property record lacks substantial, probative evidence that the Claimant violated a Carrier rule in obtaining permission from a Foreman to use a Carrier vehicle to go to HR and file a complaint against the Road Master for what had occurred earlier that morning. It is unrebutted that the Claimant requested and obtained permission from Foreman Morris to do this. Additionally, the Carrier was aware when it issued the notice of investigation that this was not personal business. However, it offered no argument or evidence suggesting the Claimant could not (and should have known that she could not) rely on her Foreman's permission to go to HR and to use a Carrier truck; and was instead required to obtain permission from an Engineering Manager under these circumstances. As such, the claim against that charge is sustained and that charge is hereby dismissed.

In this case, however, that dismissal does not affect the Board's ultimate decision to sustain the penalty. While it is true that failure to prove one of multiple charges may often result in penalty mitigation, it is not an automatic right. Here, the most significant allegations were supported by substantial evidence, and are quite egregious: insubordination/disobeying a direct order, throwing a blunt, weighted object in anger, and seeking to undermine the Road Master's authority before the crew. Moreover, other traditional factors of mitigation were missing as the Claimant was not shown to have stellar work performance, ethic or attitude; denied culpability throughout the proceedings; and failed to show any remorse. Indeed, according to the transcript, she doubled down during the hearing to provide considerable gratuitous opinion testimony about what a bad supervisor the Road Master was, apparently believing that justified her conduct and attitude. The

surrounding circumstances were also quite appalling, as she appears by all accounts to have called the crew to assist her in angrily confronting the Road Master about his order, causing him to feel threatened. Given the entire record and surrounding circumstances, the Board cannot say with any conviction that the selected penalty is now suddenly excessive, because a less significant allegation was not established by substantial evidence. The remaining proven charges are still adequate to support the 10-day suspension, and that penalty still does not "shock the conscience" under the facts and circumstances established in the on-property record.[1]

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 28th day of January 2022.

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[1] For similar reasons, the Board also concludes there is not substantial evidence of improper bias against the Claimant, or premeditation. While antipathy between supervisors and crewmembers is not a positive or desirable thing, it is largely the employee's obligation to accommodate to reasonable requests of their superiors, and any antipathy against the Claimant here would appear to be warranted under the facts and circumstances, at least as a transient matter.