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

**Award No. 44681**
**Docket No. MW- 45616**
**22-3-NRAB-00003-190541**

**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 Mr. R. Morris, by letter dated October 19,2018, for alleged violation of Code of Conduct Rule I, Knowledge of the Rules, Code of Conduct Rule 2, Courtesy and Professional Conduct, 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 7:00A.M. at Beacon Park Yard as the foreman of the Rail Job was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File BMWE 18/2018 18.371 KLS).**

**(2) As a consequence of the violation referred to in Part (I) above, Claimant R. Morris shall be exonerated of all charges, his 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, Mr. R. Morris, is a Foreman in the Track subdepartment of the Carrier's Maintenance and Way Department; and he works from 11:00 PM to 7:00 AM, which is an overtime shift He has been employed by Keolis CS has employed Claimant since July 1, 2014, when Keolis CS 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, 209, the Claimant was working as the Foreman on a rail gang at the Baily Park Yard, and also working on the New Hampshire moving equipment over to Beacon Hill. 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 and observed the crew "were clearing out the tracks but the track was out of service until 4:30 a.m." He confronted Foreman Morris to inquire where they were going; and told him they needed to keep laying rail. According to Road Master Britton, the Foreman said he**

**was "tired" and would instead "punch out and take the day off". (Britton Statement.) According to the Claimant, he responded by saying, "Gee, I'm pretty tired. I just moved that piece of equipment over here" "from the main, line, approximately eight miles away, from Beacon Park". At the on-property hearing, the Claimant admitted that he then "started to walk away" when Road Master Britton asked if he was refusing to follow the order. The Claimant said he walked away to keep lining up switches, to assist the crew coming in from laying rail; and then to check in with his crew, "to find out what's going on." The Claimant asserted repeatedly (and in what sounds from the transcript like a high level of agitation and disrespect), that the Road Master was "ranting and raving" when he arrived about having been sent to the job site in the middle of the night. Road Master denied behaving unprofessionally but hearsay witness statements submitted by the Organization corroborate the Claimant's that the Road Master was angry about the situation. (TR 33-35, 66, 68-70; Org. Exs. 2, 6.)**

**Morris then went to talk to Asst. Foreman S. Palombo, who was on the last piece of equipment coming in. (The Asst. Foreman was also disciplined over the incident, and her appeal was heard contemporaneous to the Claimant's.) Asst. Foreman Palombo called crew member Gerry Connors and told him "to bring the crew to her truck" and he "complied". (Org. Ex. 2.) Shortly thereafter, the crew converged upon where Claimant, Foreman, and Road Master Britton were having what crewmember J. Humes called a "spirited discussion".**

**During the ensuing discussion, Road Britton told the Claimant and the gathered crew to "put another string in or go home" - a "full string" of rail is approximately 1,600 feet of rail. (Org. Ex. 3, Humes statement; TR 62.) First the Claimant and others in the group objected to laying out rail at mile post 6 because the equipment ideally used to move rail (a "loader") did not have a current, valid inspection sticker. Then, when Road Master Britton directed the crew to use the speed swing instead, the Claimant and the WEO or speed swing Operator (R. Deprofio) said the swing was not adequate to move the rail before the track had to be returned to service at 4:30 a.m. (Org. Ex. 2, Connors statement.) The Road Master disagreed, informing the group that the speed swing had previously been used by the same Operator to safely perform similar work; and he maintained at the on-property hearing that safety and the avoidance of unnecessary train delay (NORAC Rule D) is ultimately his responsibility.**

**There was apparently disagreement between the Organization and the Claimant as to whether a safety issue was presented. The Organization emphasized the Claimant's good faith safety concerns and that it is the Operators who determine safety. (TR 42.). The Claimant, however, insisted that he "never mentioned safety" and that "[i]t had nothing to do with safety." (TR 80.) As such, it appears the Claimant was worried about timing and NORAC Rule D.**

**In any event, there is substantial, probative evidence that the speed swing could be used to safely perform the work as directed, within the time available. The Road Master testified that the swing had been used before and after that date to perform the same task under similar condition; and that it had taken only 43 minutes to perform the task on a subsequent day. Additionally, Asst. Engineer Ferraro testified how it would be safe if the speed swing was first threaded into the rail gauge. (TR 60.) In rebuttal, there was only a vague hearsay reference to the speed swing's capacity in Org. Ex. 2)[1], and the Foreman's generalized assertion that in his experience rail that has been laying by the track for years is often turned over on its side. (TR 64-65.)**

**There is also corroborating evidence from the authenticated hearsay statements (on which the Parties had the opportunity to question the witnesses by telephone) that the crew members understood that "Supervisor Britton gave them an Ultimatum" or "or else" type of directive. It is clear from the record that this was the cause of "spirited discussion". (Org. Ex. 2, emphasis of capitalization in original; see also Org. Ex. 3, 6.)**

**The Road Master described the Claimant's manner that day as argumentative, unprofessional, hostile, and disrespectful. Moreover, because the incident occurred in front of the whole crew, the Road Master considered it an attempt to undermine his authority. (TR 22-23.) Road Master Britton also felt threatened, as he relayed to multiple crew members through two group interactions later that day. (Britton testimony and Org. Exs. 2-4, 6.)**

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**[1] Crew member Gerry Connors asserted in an authenticated hearsay statement that the impossibility of using the speed swing as instructed "was proven correct when we tried to do it the next day and couldn't." (Org. Ex. 2.)**

**After being told to either use the speed swing to move rail at mile 6 or to clock out, the Claimant "told everybody, 'We're going to punch out. This is going nowhere.'" (TR 72, Morris.) The Claimant clocked out at 2:33 AM along with the rest of the crew, well before the scheduled conclusion of the assigned overtime shift.**

**Immediately thereafter, another confrontation ensued. Road Master Britton had gone to the office and observed an additional mechanic and asked about his presence. Britton says he had previously instructed the Claimant to only bring on one mechanic for this overtime shift; the Claimant denies Britton told him this but says he would have objected if Britton had because they "always bring two mechanics". It is unrebutted that this altercation was severe enough that another employee intervened; and that the extra mechanic was suspended over the work. Additionally, the Claimant admits he called the Road Master a "lying cocksucker". He insists that he only said it once, not "multiple times" as Britton testified; and that he only said it because the Road Master referred to him as a "fucking liar" to the mechanic, which the Claimant says he "takes personal." (TR 79.)**

**On October 4, 2018, the Claimant was removed from service, pending an investigation into the matter. The following day Road Master Britton provided a written statement, and thereafter, the Claimant was issued a notice of investigation and the foregoing charges based upon his alleged: refusal to use the speed swing to lay rail past milepost 6; requesting two mechanics contrary to the Road Master's instructions; and becoming confrontational, and calling Britton a "lying cocksucker multiple times while approaching him in a hostile manner." (Britton stmt.)**

**Thereafter, the Claimant was provided a duly noticed on-property hearing at which he, Road Master Britton, and Asst. Chief Engineer J. Ferraro testified. The Hearing Officer found the Claimant guilty of the alleged rules violations and the Carrier imposed a twenty (20) 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 that it has met its burden by proving through clear evidence that 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 he was given an opportunity to call any witnesses he felt could support his position and was apparently unable to do so. The Carrier further argues that it called the witnesses it believed were necessary; its witnesses were clear that Claimant was insubordinate, confrontational and in dereliction of his 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 Claimant acted insubordinately and unprofessionally, refusing to perform tasks directly ordered by his supervisor, cursing out the Road Master, and disobeying instructions regarding the number of mechanics called in to work overtime. Although the Claimant could have performed the assigned task without any safety risk, he instead substituted her judgement on safety for that of his 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 Organization argues that the Carrier failed to prove just cause. First, the Claimant was denied his 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 more witnesses. Second, the Carrier failed to prove that the Claimant was guilty of the charges. The record shows that this was a mutually heated disagreement; and that the Claimant was provoked by Road Master Britton's cursing at him, and Road Master Britton clenched his fists. This impeached Road Master Britton's testimony that he remained "calm and cool about the whole situation"; and also demonstrates that the whole incident was in the nature of provoked "shop talk." Additionally, Road Master Britton admitted that he had given the Claimant and the rest of the crew "the option to either punch or lay out more rail" and they elected to clock out. Furthermore, the crew had legitimate safety concerns about putting the rail in with only the speed swing in the time allotted; and these concerns were tested and confirmed by the crew the following day. As to the charges related to the Claimant directing two mechanics to attend the crew, this was required by past practice and, in any event, Road Master Britton "voluntarily re-entered himself into the group of employees" after the Claimant had or was clocking out, thereby creating the so called 'hostile environment'" himself.**

**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 or that the discipline be mitigated at least.**

**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 obviously it bears the risk that it will not meet its burden of proof.**

**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; whether the Road Master had issued an order regarding the mechanics; and whether there was a past practice about that. The only fact not disputed was that the Claimant cursed at the Road Master one time.**

**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. *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"); and Third Div. Award No. 33432, *BMWE and CSX Transportation, Inc.* (Bierig 1999) ("In discipline cases, the Board sits as an appellate forum" and "do[es] not weigh the evidence de novo").**

**Since the Claimant admitted to calling his supervisor a lying cocksucker, it is obviously established. While the Claimant suggested he was provoked, being referred to as a "fucking liar" (assuming that's true) does not give on license to call their supervisor a "cocksucker". There was also 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.**

**Additionally, 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 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 of the events was still hostile, belligerent, disrespectful, and unapologetic days later. *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"); and 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 was hearsay claims, which the Hearing Officer – not unreasonably – largely did not credit. In any event, none of the hearsay statements corroborated a claim or inference of a "clear and present danger", as required to support an employee to refuse to obey a work directive. (Keolis Code of Conduct, Rule 15.) Indeed, there arguably was no such claim to corroborate since the Claimant denied at the on-property hearing that safety was an issue at all. There was also not substantial evidence of a past practice or safety issues regarding the number of mechanics required, since the Claimant only offered a vague statement about that.**

**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 and whether a second mechanic was needed or desired. 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).**

**Lastly, the Board addresses the Organization's allegations that Road Master Britton had acted against the Claimant in a biased and/or premeditated manner. The Hearing Officer did not make any findings related to this evidence but, as discussed, it is evident that she wholly credited Road Master Britton's testimony and that was not unreasonable given the entire record. As such, the Hearing Officer could easily have concluded under this record that the charges were proven notwithstanding any antipathy on the Road Master's part. Antipathy alone, while undesirable in a workplace, is not per se evidence of bad faith particularly where, as here, it appears to be in natural response to an employee's demonstrated poor attitude and work performance, and confrontational manner.**

## 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.**