

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45395  
Docket No. MW-47598  
25-3-NRAB-00003-220876**

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña 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 [five (5) day suspension to be served November 15, 2021 to November 19, 2021; one (1) year final warning period, during which time any proven subsequent policy or rule violation will result in dismissal from service in all capacities] for alleged violation of Keolis Code of Conduct: Rule 1 – Knowledge of the Rules, Rule 2 – Courtesy and Professional Conduct, Rule 8 – Behavioral “Expectations and Prohibited Behaviors, Rule 15 – Obeying Instructions, Directions and Orders and Rule 17 – Attending to Duties, in connection with his alleged intimidation and actions being disrespectful, unprofessional, and disruptive to a safe, civil and efficient work environment on October 11, 2021, was arbitrary and capricious (Carrier’s file BMW 78/2021 KLS).**
- (2) As a consequence of the violation referred to Part (1) above, Claimant J. Mercado shall now “\*\*\*be fully compensated for with all straight time, overtime, double-time wages, his safety pay allotments, credits for vacation, credits for retirement, and all benefits allotted to him under our Collective Bargaining Agreement for his unjustified suspension, that all charges fully withdrawn and the one (1) year final warning be removed from his record.\*\*\*”**

**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**

Claimant, Mr. Jacob Mercado, began his employment with the Carrier on July 1, 2014. On October 11, 2021, while working at Lynn Station, Claimant saw employees of Olympic Services, a Carrier contractor, performing cleaning duties. The Olympic Services employees wore safety vests with the Carrier's name, Keolis, and were working on the track.

At 8:23 AM that morning, Claimant called Mr. Vincent Kennally, the Operations Manager for Olympic Services. The Claimant complained to Mr. Kennally that Olympic employees were working on the weekend, wearing Keolis vests, without any Keolis employees present. The Claimant told Mr. Kennally that it was not right for contractors to be working without Union employees, and that their presence amounted to "union busting." He concluded his call by telling Mr. Kennally that the Union President would be giving him a call. Mr. Kennally believed that the Claimant's purpose in calling was to intimidate.

Mr. Kennally immediately notified Mr. Peter Keenan, a quality control administrator for the Carrier. After speaking to Mr. Kennally, Mr. Keenan called the Claimant and asked if he had called Mr. Kennally. The Claimant confirmed making the call, saying he had received a complaint from a union member and that he was going to call the Union President.

On October 29, 2021, the Carrier notified the Claimant to appear for an investigation regarding the incident, citing a possible violation of the Carrier's Code of Conduct. The investigatory meeting was conducted on November 3, 2021.

On November 9, 2021, the Carrier notified the Claimant that his conduct on October 11, 2021 was considered intimidating and disruptive to a safe, civil and efficient work environment. Specifically, his actions violated the following Rules:

**Code of Conduct Rule, Knowledge of the Rules**

- **Keolis CS employees are required to be cognizant of and to comply with all rules, policies, procedures, and instructions issued by the Company.**

**Code of Conduct, Rule 2, Courtesy and Professional Conduct**

- **Keolis always expect each employee to conduct himself or herself in a professional and ethical manner and to represent the company positively, both in and away from the workplace. Projecting a professional image is an essential element of success in a customer service environment and will contribute to a safe and healthy work environment for employees. Each employee is expected to assist in maintaining this environment.**
- **Employee must refrain from all activities that compromise the safety, satisfaction and well-being of our customers, the public and other employees or other persons on the property. Employees must not make threatening gestures or engage in physical or verbal harassment or intimidation. Employees should not resort to loud, indecent, or vulgar language, even under the greatest provocation.**

**Code of Conduct Rule 15, Obeying Instructions, Directions and Orders**

- **An employee must willingly and respectfully obey all instructions, directions and orders from Keolis' supervisory personnel and officers except when doing so presents a clear and present danger to them, Keolis' 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 Keolis's supervisory personnel, officials or other employees, either by manner, speech, or other means will not be tolerated. Any act of insubordination will result in disciplinary action, up to and including termination.**

**Code of Conduct Rule 17, Attending to Duties**

- Every Keolis employee is obligated to perform his/her duties properly, in accordance with the established standards for the position. This always requires being alert to duties. Any activity or behavior that distracts or prevents an employee from attending to duties is unacceptable behavior. Employees will not disrupt or interfere with other employees in the performance of their duties.

The November 9, 2021 notice contained the following conclusion from the Hearing Officer:

Following a thorough evaluation of all the testimony and other evidence comprising the official record of this investigation, including the various arguments and objections, I find the Carrier has proven the following:

...

5. Evidence, including testimony by the Olympic Operations Manager, and his statement (Exhibit D), prove that you violated the Keolis Code of Conduct Policy when you acted in a disrespectful and unprofessional manner. Your actions were considered intimidating and disruptive to safe, civil and efficient work environment.

Based on the determination that the Claimant had violated the Carrier's rules, a five (5) day suspension was issued to be served November 15 -19, 2021. The Claimant was also notified that this was a Final Warning, and that any subsequent policy or rule violation occurring within one year could result in dismissal.

#### *Position of Organization*

The Organization contends that the Carrier failed to satisfy its burden of providing sufficient evidence to support the charges alleged and that the discipline imposed was arbitrary and capricious. The Organization also contends that the discipline imposed was unwarranted and excessive.

#### *Carrier's Position*

The Carrier maintains that the evidence fully substantiates and supports its conclusion that the Claimant engaged in the misconduct alleged and that he violated the rules and policies identified in the charging documents. The Carrier also contends that the penalty it imposed was appropriate and not arbitrary, capricious or excessive.

**Analysis**

The Board sits as an appellate review forum in discipline cases. As such, it does not weigh the evidence *de novo*. The Board's function is not to substitute its judgment for that of the Carrier, nor decide this matter in accord with what the Board believes should have been decided had it been the Board's decision to make. Rather, the Board's inquiry is to determine whether sufficient evidence exists to sustain the discipline imposed by the Carrier. If there is sufficient evidence supporting the Carrier's decision, then the Board cannot disturb the penalty unless the record reflects that the Carrier's decision was unjust, unreasonable or so arbitrary as to constitute an abuse of discretion.

Upon review of the entire record, the Board finds that sufficient evidence supports the Carrier's findings that the Claimant engaged in the conduct charged and that he violated the rules identified in the Carrier's November 9, 2021 Notice of Findings. Because the Board finds that sufficient evidence exists supporting the Carrier's decision, the Board is without authority, on this record, to disturb the penalty assessed.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 19<sup>th</sup> day of December 2024.