

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45396  
Docket No. MW-47613  
25-3-NRAB-00003-220881**

**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 [fifteen (15) day suspension to be served immediately; one (1) year final warning waiting period, during which time any proven subsequent policy or rule violation will result in dismissal from service in all capacities] imposed upon Mr. D. Nickerson, by undated letter (following a ‘Decision Letter’ dated October 20, 2021), for alleged violation of Keolis Code of Conduct: Rule 1 – Knowledge of the Rules, Rule 2 – Courtesy and Professional Conduct, Rule 6”Equal Employment Opportunity and Prevention of Discrimination and Harassment in the Workplace and Rule 8 – Behavioral Expectations and Prohibited Behaviors, in connection with his alleged actions that were unprofessional, inappropriate and disruptive to a safe, civil and efficient work environment on September 29, 2021, was arbitrary and excessive (Carrier’s file BMW 721.323 KLS).**
- (2) As a consequence of the violation referred to Part (1) above, Claimant D. Nickerson shall now “\*\*\*be made whole for all lost straight time, overtime, double-time wages, his safety pay allotment, credits for vacation, credits for retirement, and any other benefits that are applicable to him under our Collective Bargaining Agreement for the duration of his suspension with all charges withdrawn and the final warning removed from his record.\*\*\*”**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. Dale Nickerson, has been employed with the Carrier since approximately 1993 and has worked in the Keolis Engineering Department since July 1, 2014. Prior to the incident made the subject of this case, the Claimant had no prior history of discipline.

The Claimant has reviewed and acknowledged the Carrier's Code of Business Conduct, including the following: Keolis Code of Conduct: Rule 1 – Knowledge of the Rules, Rule 2 – Courtesy and Professional Conduct, Rule 6 – Equal Employment Opportunity and Prevention of Discrimination and Harassment in the Workplace and Rule 8 – Behavioral Expectations and Prohibited Behaviors.

On September 29, 2021, Mr. Joe Neves, Senior Engineer Track, was reviewing work performed on track in the vicinity of Meadowcroft Street in Lowell, Massachusetts. While speaking to other employees, Mr. Neves received a phone call from his manager, Mr. James Ferraro, and moved away from the employees he had been speaking to. According to Mr. Neves, he saw a truck more than one hundred feet away drive past him being operated by the Claimant. According to Mr. Neves, the Claimant rolled down the window yelling "Fuck you," and then gestured toward him with his middle finger extended. Mr. Neves also said that the Claimant drove his truck past the crossing, raising his arm out the window, again giving Mr. Neves the middle finger.

On September 30, 2021, the Carrier notified the Claimant that he was being removed from service for engaging in actions "detrimental to the service." On October

1, 2021, the Carrier directed the Claimant to appear for an investigation concerning Mr. Neves' claim. The investigation occurred on October 13, 2021.

At the investigation, no witness corroborated Mr. Neves' account. The Claimant admitted operating his personal vehicle at Meadowcroft Street where Mr. Neves was located, but he denied yelling any obscenities to Mr. Neves and denied giving him the middle finger. The Claimant testified that as his vehicle crossed over the track at Meadowcroft Street, he rolled down his window and pointed to the track and told Mr. Neves that he was following the mainline without any protection and to "get the heck out of the way." The Claimant denied ever giving Mr. Neves the finger a second time. The Claimant also testified that he saw other employees in the area on the date in question.

After reviewing all the evidence from the formal investigation, the Hearing Officer concluded that the Claimant had violated Keolis Code of Conduct: Rule 1 – Knowledge of the Rules, Rule 2 – Courtesy and Professional Conduct, Rule 6 – Equal Employment Opportunity and Prevention of Discrimination and Harassment in the Workplace and Rule 8 – Behavioral Expectations and Prohibited Behaviors when he yelled obscenities and used illicit hand gestures on the date in question. The Carrier issued a fifteen (15) day suspension and a Final Warning to be effective for a year effective October 20, 2021.

### *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 claims that there was no plausible reason for Mr. Neves to fabricate his statement. The Carrier also contends that the penalty it imposed was appropriate and not arbitrary, capricious or excessive.

### *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, capricious, unwarranted and 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 there is conflict in the testimony between the Carrier's primary witness, Mr. Neves, and the Claimant. No other witnesses corroborated either Mr. Neves' account or the Claimant's testimony. The burden of proof was on the Carrier. Because there was a direct factual conflict between the Carrier's primary witness and the Claimant's explanation and no independent corroboration supporting either witness' testimony, the result is an evidentiary wash. When this occurs, the party with the burden of proof—in this case the Carrier—has failed to produce sufficient evidence supporting its claim. *See Third Division Awards 40443 and 32890.*

The Carrier is ordered to make the Claimant whole in accordance with the parties' Collective Bargaining Agreement and past practice.

The Carrier is ordered to make the Claimant whole for all lost straight time, overtime, double-time wages, his safety pay allotment, credits for vacation, credits for retirement, and any other benefits that are applicable to him under the Collective Bargaining Agreement for the duration of his suspension with all charges withdrawn and the final warning removed from his record.

### **AWARD**

Claim sustained.

### **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 19<sup>th</sup> day of December 2024.