

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36001
Docket No. SG-36117
02-3-00-3-330**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

Claim on behalf of J. D. Jones for reinstatement to service with compensation for all lost time and benefits lost in connection with his dismissal on July 7, 1999 and to have all reference of this matter removed from his personal record. Account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when Carrier dismissed the Claimant without a fair and impartial investigation and imposed harsh and excessive discipline against him without meeting the burden of proving the charges against him. Carrier’s File No. 1190650. General Chairman’s File No. SWGC-1995. BRS File Case No. 11174-SP.”

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.

On June 14, 1999, S. R. Smith, Manager Signal Construction, received a fax from K. Shields, an employee who attended the Carrier's Signal School at Salt Lake City, Utah, during the period May 17 through 28, 1999. Shields' statement identified the Claimant as the individual who offered him the answers on the final exam in the class. The statement went on to state that the Claimant told Shields he planned to write the answers inside a styrofoam coffee cup and use them for his own benefit.

Smith questioned the remaining employees who attended the class. Two others, J. Burkalow and R. Moore, also provided statements confirming that the Claimant told them he had the answers to the test in his possession and planned to use them during the test.

The Claimant was removed from service and on June 25, 1999, an Investigation was held ". . . to develop the facts and determine your responsibility, if any, in connection with the allegation that you cheated on an examination at the Signal School in Salt Lake City, Utah, on or about May 27 and 28, 1999, in violation of Union Pacific Rule 1.6(4), effective April 10, 1994."

In a letter dated July 7, 1999, the Claimant was notified that there was a substantial degree of evidence to warrant the charges. He was assessed a Level 5 discipline and dismissed.

The Organization protests the discipline on two grounds. First, it argues that the Claimant was denied a fair and impartial Hearing when the Hearing Officer admitted hearsay testimony. In so doing, the Organization argues, the Claimant and his representative were denied the opportunity to confront and question those individuals who provided the statements. Second, the Organization contends that the Carrier failed to meet the test of substantial evidence in this case. The record consists of hearsay, supposition and testimony by witnesses who had no direct knowledge of the incident. In the face of the Claimant's emphatic denial of wrongdoing, the Carrier's evidence was not sufficiently probative to support the charges, the Organization asserts.

After careful examination of the record, the Board is not persuaded that the Organization's contentions have merit. The Organization objected during the course of the proceedings to the statements of Burkalow and Moore, and argued that the employees should have testified in person. The Carrier offered to have the employees testify via conference call, but the Organization did not avail itself of the offer. The

Board has previously had the opportunity to address the same issue. In Third Division Award 32569, the Board held:

“ . . . The Carrier did suggest what the Board believes to have been a reasonable alternative by offering to have had one of the employees answer questions by phone during the time frame of the Investigation. While such procedures may not have been ideal, it did reasonably fall within accepted protocol for collecting evidence to be used by forums such as the instant one, which frames awards on basis of substantial evidence. The Board cannot reasonably conclude, in this case, that the Claimant’s due process rights were violated by anything which occurred at the Investigation itself.”

The Organization’s second argument is equally unavailing. This is not a case where the charges were supported merely by hearsay evidence. The statements of Burkalow and Moore were properly received in evidence as corroborative of the direct testimony of K. Shields. His testimony established that the Claimant admitted he was in possession of the answers to the final exam and further admitted that he had developed a method to sneak those answers into the examination room. Shields’ testimony also established that the Claimant told him after the exam that he had in fact cheated.

No ill will or improper motive was ascribed to Shields at the Hearing. On the contrary, it was apparent that he was a reluctant witness. Under these circumstances, the Claimant’s admissions of guilt in his conversations with Shields weigh heavily against the Claimant’s self-serving protestations of innocence at the Investigation.

The Organization is correct when it points out that there is no eyewitness testimony in this case. There were no witnesses who came forward to testify that they personally observed the Claimant cheating on the exam. However, dishonest conduct of this nature is typically accomplished by stealth, not in plain view. An eyewitness account is not always possible, or necessary, in order for the Carrier to meet its burden of proof.

It is clear from the evidence adduced in this matter that the Claimant had both motive and opportunity to cheat on the exam. He needed a near perfect score to pass the course and he was permitted to bring a styrofoam coffee cup into the exam room, the record shows. Those facts, coupled with Shields’ testimony and the corroborating

statements of the two other employees, provide a compelling basis for substantiating the charges herein.

The Claimant's misconduct constituted a very serious breach of the employer-employee relationship. The purpose of the training class was to develop a level of proficiency in the maintenance, testing and inspection of safety sensitive circuits. By cheating on the exam, the Claimant misrepresented his capabilities, thereby creating potential danger to himself, his co-workers and the public. Discharge was fully justified under the circumstances.

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 16th day of April, 2002.