

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41781  
Docket No. SG-42004  
13-3-NRAB-00003-120356**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Railroad Signalmen  
(National Railroad Passenger Corporation (Amtrak))

**STATEMENT OF CLAIM:**

**“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:**

**Claim on behalf of K. J. Martin, for immediate reinstatement and compensation for lost wages, including overtime he would have worked, and any mention of this incident removed from his record, account Carrier violated Agreement Rule 57 when it imposed the excessive discipline of dismissal against the Claimant in connection with an Investigation held on April 14, 2011. Carrier’s File No. BRS-SD-1146D. General Chairman’s File No. AEGC-18-1103. BRS File Case No. 14641-NRPC(N).”**

**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 April 28, 2010, the Claimant and employee Pilla, both of whom were Signal Helpers at that time, failed the Electronics Technician (ET) exam. During the exam, the Claimant used his cell phone to take photos of the questions to use as a study guide for a future exam, if necessary. In May 2010, the Claimant sent Pilla copies of the photos for his use.

On September 20, 2010, the Claimant and Pilla took and passed the ET exam. Due to the Claimant's superior seniority, he was awarded the next available ET position, which became available shortly after the exam; there was no similar position for Pilla, who remained working as a Signal Helper.

On March 7, 2011, Pilla contacted his supervisor and informed him that the Claimant had photographed the questions during the April ET exam and used them to cheat on the September exam. Pilla forwarded a written statement by email and attached copies of the photos of the questions.

By letter dated March 11, 2011, the Division Engineer notified the Claimant that (1) the ET exam had been compromised on April 28, 2010, (2) all subsequent tests were deemed invalid, and (3) his ET status was revoked. The Claimant was directed to return to his former position or exercise his seniority to another position. In addition, the Claimant was issued a Notice of Investigation on March 21, 2011, charging him with dishonesty and conduct unbecoming an employee.

Following the Hearing which was conducted on April 14, and in a Decision Letter dated April 26, 2011, the Hearing Officer found the Claimant guilty of the charges in violation of the Carrier's Standards of Excellence. As a result, the Claimant was dismissed effective April 27, 2011.

The Organization initially argues that the Carrier violated Rule 57 by failing to afford the Claimant a fair and impartial Hearing prior to assessing discipline by reducing his rank and pay prior to a Hearing Notice or Investigation. According to the Organization, the Carrier thereby denied him Agreement due process and showed prejudgment of his guilt of the eventual charges, citing Third Division Award 31547 and Second Division Award 11916. The Organization asserts that the Carrier failed to meet its burden of establishing, by substantial evidence, that the Claimant was guilty of dishonesty, noting that he was permitted to use his cell phone as a calculator during the exam and could have used its Wi-Fi capacity to obtain the answers to the questions if he wanted to cheat. It maintains that the Claimant did

not understand that photographing the exam questions for future use as a study guide constituted dishonesty, because he had no idea how many different exams the Carrier used. The Organization further contends that the Carrier's treatment of the Claimant was disparate, because Pilla had equal culpability and was not disciplined for his dishonesty. It asserts that it was improper to single the Claimant out for punishment, relying on Third Division Awards 8431, 21240 and 23855. Finally, the Organization maintains that not only was the penalty assessed excessive and arbitrary, the Carrier failed to consider mitigating factors, including that the Claimant was honest when questioned, explained the reasons for his actions and accepted responsibility for them, and had a discipline-free record during his two years of prior service, citing Third Division Award 19037 and Second Division Award 8157.

Conversely, the Carrier contends that it committed no procedural violation, because invalidating ET test results across the board for all exams subsequent to April 28, 2010 after discovering the Claimant's dishonesty did not constitute discipline, and the Claimant received a fair and impartial Hearing on April 14, 2011. It contends that it proved the charges of dishonesty and conduct unbecoming by the Claimant's own admission that he electronically duplicated the exam to perfect his responses on a subsequent exam, which amounts to cheating, citing Third Division Award 8310. The Carrier argues that the discipline assessed was commensurate with the seriousness of the offense of dishonesty, and was neither excessive nor arbitrary, relying on Special Board of Adjustment No. 986, Case Nos. 118, 140, 183, 216, 226, 229, 242 and 251; Public Law Board No. 2406, Awards 46, 53 and 56; as well as Public Law Board No. 4568, Case 10.

A careful review of the record convinces the Board that no procedural violation requires the overturning of the discipline imposed. Invalidating all test results from exams given after discovering that they had been compromised does not amount to discipline imposed on the Claimant prior to a Hearing. This is so because he admitted photographing the April 28, 2010 exam questions when asked, and such admission constituted the basis for the Carrier's determination that subsequent exams had been compromised. The Claimant was not singled out for treatment - all exams results were invalidated, not just his.

With respect to the merits, there is no dispute that the Claimant photographed all exam questions on April 28, 2010, in order to use them to study for future exams and forwarded them to Pilla for his use as well. Even if he was given

permission to use his cell phone as a calculator during the April 28, 2010 exam, he unquestionably he exceeded such authorized use. The Board has no doubt that the Carrier may reasonably have considered the Claimant's action as cheating and that it sustained its burden of establishing the Claimant's dishonesty. However, that finding does not dispose of this claim, as it might have justified dismissal in other cases. See, e.g. Special Board of Adjustment No. 986, Case Nos. 216, 229, 242 and 251.

The Claimant testified that he and Pilla studied together. While Pilla denied asking for the photos, he did not deny using them to study for the September 20, 2010 ET exam. He did not come forward to report the Claimant's "cheating" until such time as he realized that the Claimant's superior seniority had robbed him of obtaining an ET position, more than six months after they had passed the September 20, 2010 ET exam. The record is devoid of any dishonesty charges initiated against Pilla, or any discipline assessed him for his culpability in "cheating" by using copies of the prior exam questions to study for the subsequent exam.

The Carrier argues that the revocation of the Claimant's ET status upon invalidating the September 2010 test results did not constitute discipline. Therefore, no discipline was assessed Pilla for his dishonesty. While Pilla's dishonest conduct was not the same as the Claimant's, it still amounted to dishonesty, for which the Carrier determined that no disciplinary penalty was appropriate. It is the view of the Board that such action constitutes disparate treatment, and undermined the Carrier's contention that dismissal is the only appropriate penalty for a first offense of dishonesty. See, Third Division Awards 21240 and 23855. It is on that basis alone that the Carrier's dismissal of the Claimant is found to be excessive and arbitrary. Therefore, the Claimant shall be returned to service as a Signal Helper without loss of benefits, but he shall not receive any compensation for time lost as a result of his dismissal.

**AWARD**

Claim sustained in accordance with the Findings.

**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 25th day of November 2013.**