

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated November 2, 2010, S. D. Frazier, Mgr. Engineering Training, instructed C. E. Bush ("the Claimant") to attend a formal Investigation in Atlanta, Georgia, on November 16, 2010, of an allegation that on Monday, October 18, 2010, "while you were grading a set of test papers at the Tony Ingram REDI Center you altered another employee's answers, indicating he responded correctly to test questions when he did not." In connection with the alleged incident the letter charged the Claimant "with failing to properly perform your duties, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A, GR-2 and CSX Corporation Code of Ethics." The letter notified the Claimant that he was being withheld from service pending investigation.

On November 3, 2010, Mgr. Frazier sent an amended letter to the Claimant stating that the source of his information was Mr. L. J. Lindsey IV, Instructor Engineering at the Railroad Development and Educational Institute (REDI), and that the individual whose test answers were allegedly altered was Mr. J. Bey. The letter added the allegation, "During an interview that you had with Mr. Lindsey, you admitted to altering four (4) of Mr. Bey's test answers." The letter announced a change in the date of hearing to November 18, 2011, and of the location, to the Engineering Department conference room in Jacksonville, Florida.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant C. E. Bush has a service date with the Carrier of July 29, 2002. His service with the Carrier was interrupted in 2005, and he returned to work in around October, 2010. Because of the long period of time he was off work, he was required to receive retraining at the Carrier's REDI Center. The charging officer in this case, S. D. Frazier, Manager of Engineering Training at the REDI Center in Atlanta, Georgia, has been a manager with the Carrier for somewhat over 20 years.

On the morning of October 18, 2010, Instructor Engineering L. J. Lindsey came to Mgr. Frazier and reported that in reviewing one of the tests given to the employees at the Center it appeared that Mr. Bush had altered the test that he was grading that belonged to employee J. Bey. The employees had been instructed to exchange test papers with the employee sitting next to them and to grade each other's test. After the tests were exchanged Instructor Lindsey reviewed the questions and correct answers with the class, and each employee was supposed to mark on the test paper that he was grading any incorrect answers. Instructor Lindsey told Mgr. Frazier that after he reviewed the test

papers, he took Mr. Bush out into the hallway to question him about the altered test and that Mr. Bush, in front of Mr. Conklin, who Mr. Lindsey had taken with him as a witness, admitted to Lindsey that he altered the test.

He charged the Claimant with conduct unbecoming an employee, Mgr. Frazier stated, because he altered the grades on another employee's test. The Claimant failed to follow instructions, Mgr. Frazier testified, because he did not use a highlighter for the grading as instructed but instead used a pen or a pencil and altered the test. By altering the test score to benefit the other employee, Mgr. Frazier stated, the Claimant falsified the test results. The purpose of the highlighter, Mgr. Frazier explained, was to identify any incorrect answers without altering what was written on the test.

After receiving Instructor Lindsey's report, Mgr. Frazier brought Mr. Bush into his office and told him that he was going to remove him from the training center for the violations he had committed in altering another employee's test. Mr. Conklin was also present. Mr. Bush told Mgr. Frazier, in Mr. Conklin's presence, that he did not alter the test. At that time, Mgr. Frazier asked Mr. Conklin to step out of the room so that he could verify that what he had previously been told was accurate. Mr. Conklin assured Mr. Frazier that what he and Mr. Lindsey had previously told him was the truth and that Mr. Bush was not telling the truth. Mgr. Frazier testified that he therefore did not believe what Mr. Bush said to him. Mgr. Frazier had Mr. Bush taken back to the motel and instructed him to return to Jacksonville that day.

Mr. Frazier testified that up until the incident in question it was common for students to grade each other's tests. After the incident Mr. Frazier stopped that method of grading to ensure that a similar incident does not happen again. According to Mr. Frazier

the Center is slowly moving towards having all tests graded electronically. Mr. Bey, Mr. Frazier stated, was later dismissed from the program not because of the incident but because he failed academically.

L. J. Lindsey, Manager of Training Programs and Instructor at REDI Center, teaches FRA safety standards to new hires and management trainees. He has been in the position for two years. On October 18, 2010, he taught the track class for new hires where the incident in question occurred. The previous week one of the students, a new hire by the name of Mr. Bey, had struggled on an electronic test and had to take it over numerous times before passing it. Mr. Lindsey was worried about Mr. Bey's ability to maintain the 85% average required at the REDI Center. He therefore looked carefully at Mr. Bey's test paper that Mr. Bush had graded. The students were supposed to circle the correct answer on a multiple choice test, and Mr. Lindsey noticed that some of the circles looked different in color and shape. Some of the incorrect answers that were circled had a line drawn through the circle. For these reasons Mr. Lindsey was suspicious that answers had been altered on the test.

Mr. Conklin was teaching a class at the time, and Mr. Lindsey called him out of the class to look at Mr. Bey's test paper. After looking at the test paper, Mr. Conklin suggested that they call Mr. Bush out and ask him about the paper, which they did. Mr. Lindsey pointed to a group of questions on which the answers appeared to have been altered and said to Mr. Bush that if he had in fact altered the answers, he really wasn't doing justice to Mr. Bey, that they had to know if he was not comprehending the material. Mr. Lindsey then directly asked him if he had changed the answers, and, Mr. Lindsey testified, Mr. Bush said yes. Mr. Lindsey testified that he thanked Mr. Bush for being

honest and asked him to go back into his class. Mr. Lindsey then informed Mr. Frazier, who is his supervisor, what had happened.

On cross-examination Mr. Lindsey stated that the instructional method they used was for the students to exchange answer sheets, and the instructor would review the question and the correct answer with the students, who were told to mark the incorrect answers. Mr. Lindsey acknowledged that as an instructor, grading tests was his responsibility, and that he did not grade the tests in question. He did not see Mr. Bush change answers, Mr. Lindsey testified. Mr. Lindsey was asked on cross-examination what exactly Mr. Bush said to him in the hall. He answered, "When I asked him if he had changed those answers, he confirmed and said yes." Questioned if Mr. Bush gave an explanation, Mr. Lindsey stated, "I can't recall; I can't recall if he followed it up with a reason why or not." The next morning, Mr. Lindsey testified, he asked Mr. Bey if he knew that his answers were being altered, and he said no.

The Organization representative asked Mr. Lindsey whether he may not have misunderstood Mr. Bush, who was just stating that he marked the test wrong. Mr. Lindsey replied, "I asked him if he had in fact changed the answers and I pointed to him [sic] on the paper, he looked at them, he said, yes I changed those."

The hearing officer asked Mr. Lindsey if, as an instructor at the REDI Center, it was his job to personally grade every test paper of every student. He stated, no, that they assumed the integrity of the students. They try to help and not to trip up the students, Mr. Lindsey testified, and they felt that having them grade each other's exam and go over it in class would bring out certain points that were commonly missed. It was normal, Mr. Lindsey stated, to grade tests that way.

John F. Conklin testified that he is a training instructor at the REDI Center in Atlanta, Georgia. At the time of the incident he had been in the position for seven months. On October 18, 2010, he was a co-teacher with Mr. Lindsey of a new hire class. He described the incident as follows. That morning as soon as the students completed the week 2 summary test, he and Mr. Lindsey asked them to switch papers with the student sitting next to them, put down their pens, and pick up a highlighter marker to correct the test as a group. Mr. Bush said that he didn't have a highlighter and asked Mr. Conklin if he could use a pen. Mr. Conklin said yes. They then proceeded to review the test, and they discussed any wrong answers. Mr. Lindsey collected the tests and took them with him for grade entry.

Mr. Conklin [his account of the incident continued] continued to teach the class. About a half hour later Mr. Lindsey approached him and asked him to look at Mr. Bey's test. Mr. Conklin did so, and there appeared to be alterations on his test paper. They asked Mr. Bush to accompany them into the hallway. Mr. Lindsey asked him if he had made any alterations on the test. Mr. Bush said that he had and that he knew that it was wrong when he did it. Mr. Lindsey explained to him that it was really not a help for Mr. Bey to leave the REDI Center not knowing the material and that it would not be safe for him or the others in the field. He thanked Mr. Bush for his honesty, and Mr. Bush went back into the class. Mr. Conklin resumed teaching, and Mr. Lindsey went back to his administrative work.

About 3:00 p.m. that afternoon, Mr. Conklin was asked to bring Mr. Bush into Mr. Frazier's office. Mr. Frazier informed Mr. Bush that he would be dismissed from the REDI Center training program for altering Mr. Bey's test. Mr. Bush said that he did not

alter the test but just failed to mark an answer correctly. Mr. Conklin collected his books and his ID card and escorted him to where they waited for a cab to take him to the hotel. Mr. Conklin testified that two other instructors happened by and spoke to Mr. Bush. According to Mr. Conklin Mr. Bush vacillated back and forth in admitting to altering the test and changing answers and not doing it. The van then arrived to take him back to the hotel. Mr. Conklin made sure the driver knew which hotel to go to, shook Mr. Bush's hand, and the van left.

A couple of days later, Mr. Conklin testified, some other students in the class approached him during their spiking competency and mentioned that they had told Mr. Bush that it probably wasn't a good idea to be altering test exams like that, that it would get him dismissed from the program if he got caught. On cross-examination Mr. Conklin testified that he did not see Mr. Bush change any answers. He did not speak to Mr. Bey about the matter until the end of the program, Mr. Conklin stated, and Mr. Bey said that he did not have any knowledge that anybody was changing answers on his test.

Mr. Conklin testified that the test involved was a summary test to review everything covered in the second week of the program. The student's grade in the test counted toward his average in the course.

Claimant Bush testified as follows. His position with the Carrier was a track worker. The incident in question occurred two weeks after he came to the REDI Center upon his return to work following vocational rehabilitation. He had been off work since 2005 for almost five years. The morning in question he was taken out of class by Mr. Lindsey, who brought him into the hall. John Conklin was there. Mr. Lindsey asked him if he was helping Jeremiah Bey. He said no. Mr. Lindsey pointed to one of the answers

and asked, "What about this question?" He (Bush) said, "I did miss that one." Mr. Lindsey said, "Well, Jeremiah needs to know this stuff for the REDI Center for his own good." He patted the Claimant on the back and said, "Thanks for being honest" and walked away.

At the end of the day, Claimant Bush testified, John Conklin got him and told him to get his books. They went to Mr. Frazier's office, he stated, and Mr. Frazier told him that he was putting him out of the REDI Center for falsifying the test. The Claimant denied falsifying the test. Mr. Frazier, Mr. Bush testified, said, "We have two officers that witnessed that you admitted doing it," and he walked out of the office. Mr. Bush stated that he was shocked and devastated by what Mr. Frazier said to him.

The hearing officer asked Mr. Bush whether he told Mr. Lindsey and Mr. Conklin that he had altered answers on Mr. Bey's test sheet. He answered, "No, I didn't." Asked how he would account for the testimony he heard that day at the hearing, he stated, "It's false." In reply to questions from his Organization representative, Mr. Bush testified that he did not change any answers on the test. He stated that he missed one answer; he failed to mark one of the answers.

The Organization introduced into evidence an email communication from Jeremiah M. Bey which stated, "I Jeremiah Bey Submit this letter to explain that to my knowledge I am not aware that Mr. Bush changed any of my test answers on the date in question. If I can be anymore assistant to help with this situation please feel free to reach out to me at [telephone number given in letter but omitted from award for privacy reasons]." Mr. Bush testified that he sat at the same table with Mr. Bey, probably less than a foot away. If he had changed answers, Mr. Bush stated, he feels that Mr. Bey would have seen him

do it. Mr. Bush reiterated that he did not change any answers on the test.

Mr. Lindsey was recalled to testify by the hearing officer and repeated his testimony that Mr. Bush admitted to him that he altered the answers on the answer sheet and that Mr. Conklin was also present when he made the admission. The Organization representative then recalled for Mr. Lindsey his prior testimony that Mr. Bush had made some comments when he questioned him but that he did not remember what they were. He asked Mr. Lindsey why he did not listen to what Mr. Bush was saying. He stated, "I listened to him, I just can't recall the exact phrases that he used." Mr. Lindsey testified that once he confirmed that the questions had been altered, the reason that they were altered was not his concern at that point.

Mr. Conklin was recalled to testify by the hearing officer and repeated his earlier testimony. The Organization representative then asked him if Mr. Bush was given a chance to explain if he had changed any answers. Mr. Conklin stated that "[i]t was sort of an open discussion in the hallway." Asked by the Organization representative what Mr. Bush's reply was, Mr. Conklin testified, "He replied that yes he had changed some of the answers, he knew it was wrong but he did it and that's all I recall." He did not hear him say that he may have missed marking an answer wrong, Mr. Conklin stated. Asked whether Mr. Bush would gain any benefit out of changing Mr. Bey's answers, Mr. Conklin stated, "Not that I'm aware of."

In a closing statement after the conclusion of the presentation of evidence, Claimant Bush stated that he takes his job very seriously and that he would not jeopardize his job under any circumstances. "Everything I said today is true," he declared, "and I'm ready to move on forward and go to work." He asked for the Board's consideration and

stated, "I wouldn't gain anything out of this by changing the test."

In his closing statement on the Claimant's behalf the Organization representative noted that "there was no test shown where Mr. Bush changed any answers; just testimony from the Carrier's witnesses." He further pointed out that Mr. Lindsey and Mr. Conklin "admitted that they did not see Mr. Bush change any answers." In addition, he called attention to Mr. Bey's written statement that he had no knowledge of any answers being changed by Mr. Bush. With those facts, the Organization contends, together with Mr. Bush's testimony that he did not change any answers, the charges against him should be dismissed.

Following the close of the hearing, by letter dated December 8, 2010, the Division Engineer notified the Claimant of the Carrier's finding that the evidence presented at the hearing supported and confirmed "a finding of guilt, in that you, as demonstrated by carrier witnesses, admitted to altering the test answers on the answer sheet submitted by Mr. Bey. Your adamant denial of those reported comments during your testimony," the letter continued, "are inconsistent with the facts presented during the hearing." The discipline assessed, the letter stated, was the Claimant's "immediate dismissal in all capacities from CSX Transportation."

This case turns on a credibility resolution. Mr. Lindsey and Mr. Conklin both testified that the Claimant, Mr. Bush, admitted that he altered Mr. Bey's test paper. Mr. Bush denied that he made such an admission. Even in a situation where three witnesses are all testifying in good faith, it is not likely that the two who agree will both be mistaken and the third witness right. In the present situation Mr. Lindsey and Mr. Conklin are both disinterested witnesses. They had nothing to gain from testifying falsely about Mr. Bush

or in his losing his job. The testimony they gave at the hearing is the same thing that they told Mr. Frazier on the date of the incident.

Mr. Bush, on the other hand, was not a disinterested witness. His job was at stake, and he therefore had a strong motive not to testify in good faith. According to his testimony he was not questioned about altering a test but whether he had graded the test wrong. He stated that he admitted to missing one of the questions and that he was patted on the back and thanked by Lindsey for his honesty in admitting to his mistake.

Mr. Bush's version of the facts, however, does not fit in with his admission, testified to by Mr. Conklin, that he knew that what he did was wrong. Admitting that one was wrong is a moral judgment. However, there is no moral element in mistakenly marking an answer wrong. In addition, the fact that Mr. Bush graded Mr. Bey's paper with a pen, instead of a highlighter, as the students were instructed to do, raises the suspicion that he planned to make changes from the beginning.

It is true that it is not apparent what Mr. Bush could possibly gain from altering a fellow student's incorrect answers. Nevertheless, for the reasons discussed above, the Board believes that there is substantial evidence that he did, in fact, alter the test answers of a fellow student. Although the Carrier did not produce the test paper in question at the hearing, it is not disputed that there was a test paper belonging to Mr. Bey that Mr. Bush graded. In addition two witnesses credibly testified that the test appeared to them to be altered and that Mr. Bush admitted altering the test.

Where the existence of the test is not in question and two disinterested witnesses, who were physically situated so that they would have no difficulty hearing what the Claimant said, testified that the test appeared to them to be altered and that the Claimant

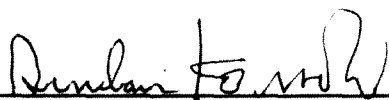
admitted altering the test, in the Board's opinion that constitutes substantial evidence that the Claimant altered the test. That was a dishonest act that could have serious consequences. It could result in an incompetent employee passing the course because of falsified test results and being assigned to track work, thereby exposing the public, himself, and his fellow employees to danger and the Carrier to serious liability. The Carrier was within its rights in deciding not to retain in its employ an individual who had demonstrated such dishonesty and poor judgment as the Claimant.

A W A R D

Claim denied.

O R D E R

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



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
March 28, 2011