

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42363
Docket No. MW-42457
16-3-NRAB-00003-140083**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day actual suspension and a one (1) year review period commencing on October 30, 2012] imposed upon Mr. R. Sandness by letter dated November 2, 2012 for alleged violation of MOWOR 6.50 Movement of On-Track Equipment, MOWOR 6.50.1 Maximum Authorized Speed and MOWOR 6.51 Maintaining a Safe Braking Distance in connection with his alleged ‘. . . failure to move on-track equipment at a speed that will allow stopping within half the range of vision short of train, engine, railroad car, men or equipment fouling the track, stop signal, or derail, moveable point frog or switch lined improperly resulting in vehicle 21868 colliding with train RPWR883105I Newcastle Road Switcher at approximately 0930 on Friday October 5, 2012, at MP 520.3 Main Track 2 on the Black Hills Subdivision, while working as Track Inspector on gang TINS 1487, headquartered in Newcastle, WY. ***’ was arbitrary, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-13-D040-5/10-13-0035 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Sandness shall now receive the remedy prescribed by the parties in Rule 40G.”**

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 October 5, 2012, the Claimant was working as a Track Inspector on gang TINS1487. The weather conditions that day were wet and snowing, resulting in the rails being slick. While traveling east bound on Main Track 2 the Newcastle Road Switcher stopped in front of him on the track near MP 520.3. The Claimant assumed the train had cleared Main Track 2 and was not prepared to stop. Claimant struck the train while traveling approximately 13 mph. No one was harmed. He was found to have violated MOWOR 6.50 Movement of On-Track Equipment, 6.50.1 Maximum Authorized Speed and 6.51 Maintaining a Safe Braking Distance.

The Claimant admitted he was not able to stop within half the range of vision as required by MOWOR 6.50. He also understood he should have gone slower given the wet and snowy track conditions. He admitted he was in violation of MOWOR 6.51 because he did not ensure that his equipment was at least 300 feet behind a train. The Carrier argues where there is an admission of guilt, there is no need for further proof. The Carrier cannot establish that the case was prejudged since he admitted his violation.

It is the Organization's position that the Claimant was prejudged. Division Engineer Turnbull created a PowerPoint before the hearing saying the accident was caused by specific rules violations. His subordinate then served as the Hearing Officer and found the Claimant guilty. The Claimant is a 35-year employee with a spotless record.

A clearer case of prejudgment would be hard to find. A higher ranking official not only found specific rule violations prior to the investigation hearing, but

announced his findings publically. His subordinate served as Hearing Officer and went into the investigation under obvious pressure from his superior to find the same rules violation his boss had found. There can be no fair and impartial hearing when the rules violation has already been determined and announced prior to the investigation taking place.

The Carrier argues the rules violation was established by the Claimant's own admission. This argument misses the point. The prejudgment occurred prior to the investigation, prior to the Claimant's statement and prior to any formal gathering and consideration of the evidence. By definition, there could be no fair and impartial hearing when the result had already been announced. The breach of due process constituted a violation of Rule 40 and must result in an award favorable to the Organization.

The claim is sustained in full. The Carrier shall immediately remove the discipline from the Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate.

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 30th day of August 2016.