

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44250  
Docket No. MW-45576  
20-3-NRAB-00003-190453**

**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 Northern  
(Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. P. Henneman, by letter dated December 14, 2017, for violation of MWOR 1.1.4 Condition of Equipment and Tools, MWOR 1.6 Conduct, MWOR 11.2 Requirements for Operating Roadway Machines and MWOR 14.3 Operating With Track Warrants in connection with his alleged' ... failure to safely maintain BNSF regulator X0600490 and negligence affecting the interest of the company and the safety of it's (sic) employees while working on gang TSCX0002 leading to the accident that occurred on Friday, November 10, 2017 on the Big Horn Subdivision.' was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-5458-M/11-18-0194 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Henneman shall now '... be immediately paid for his lost time while withheld from service and for the day to attend investigation, including any and all overtime paid to people junior to him, any expenses lost, and we also request that Mr. Henneman be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter**

received by the Organization on December 18, 2017 letter from Phil Heusler.’”

**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 the evening of November 9, 2017, the Claimant and two mechanics performed walk around inspections on all machines associated with TSCX0002. When the Claimant inspected machine #0600490, he noticed the brake pads needed to be changed. However, he did not have the brake pads replaced or take the machine out of service. The next day, Machine Operator Shaffer was assigned to operate machine #0600490. When he arrived, the machine was already running, he walked around the machine then began operating it. He was not advised that the Claimant had found bad brake pads. Shortly after noon, Machine Operator Borah was assigned to the machine. While parking it, the machine began to roll backwards. Borah attempted to stop the machine without success. The machine rolled approximately 6 to 6.5 miles before colliding with a drone tamper parked on a spur track.

The recommended guidelines for wheel to brake shoe clearance are 1/16 to 1/8 inch. After impact, Machine #0600490 was measured as follows: right rear wheel: front pad – 1/4 inch, rear pad – 3/4 inch; left rear wheel: front pad – 1/4 inch, rear pad – 3/4 inch; right front wheel: front pad – 1/4 inch, rear pad – 3/4 inch; left front wheel: front pad – 1/4 inch, rear pad – 3/4 inch.

The Carrier concluded the Claimant had failed to properly maintain the machine. Following investigation, the Claimant was issued a 30-day Level S actual

suspension with a three-year probationary period for violation of Maintenance of Way Operating Rules 1.1.4, 1.6, 11.2, and 14.3. The Claimant admitted at hearing that as foreman of the gang, he was responsible for the machines. He also admitted that he walked the machine the day before and noted the brake pads needed to be changed, though this was not recorded. (TR 158).

The Organization argues that a fair and impartial hearing was denied in this case. Conducting Officer R. Stauffer, Carrier witness T. Kjelstrup and Roadmaster C. Jennings met on November 21, 2017 before the investigation, for approximately thirty minutes to discuss matters related to the upcoming investigation. The hearing officer refused to accept into evidence a photograph of himself meeting with Carrier witnesses before the hearing. In addition, the Organization alleges the Carrier prejudged this case. It references the PowerPoint presentation published on November 13, 2017. The PowerPoint concludes that "... the root cause of the incident was caused by a failure to maintain the proper brake adjustment on all the wheels." The Organization also protests the fact that the Claimant was pulled from service prior to investigation, fully five days after the incident of November 10, 2017. The Organization asserts that if the Carrier viewed the Claimant's actions of November 10, 2017 to be a serious rule violation as outlined in Rule 40B, the Carrier would have immediately pulled the Claimant from service.

The Organization has provided substantial, consistent precedent in support of the conclusion that a meeting of a hearing officer with witnesses prior to investigation is a *per se* violation of the Carrier's Rule 40 obligations. The rationale is that even if there is no influence on the hearing evidence actually presented, the appearance of impropriety is so definitive that any appearance of impartiality is utterly destroyed.

The procedural violation in this case is unequivocal. The fact that the witnesses were seen meeting with the hearing officer prior to the hearing derails any possible perception that the process was "fair and impartial" as required by Rule 40. The situation is exacerbated by the refusal of the hearing officer to admit the photograph of the group as an exhibit. This constituted an effort to impair the Organization's effectiveness in arguing denial of procedural process, and in effect was a second instance of just that. The precedent is clear on this point; the Board finds a denial of procedural due process which is fatal to the Carrier's case.

Claim sustained. The Claimant's 30-day record suspension with a three-year review period shall be removed from his record and he shall be paid for any time, overtime or benefits lost while withheld from service.

**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 23rd day of October 2020.