

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41523
Docket No. MW-41183
13-3-NRAB-00003-090452**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal 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 Agreement was violated when the Carrier failed and refused to grant Mr. T. Tranby the Alternative Handling pursuant to the December 1, 2005 ‘Safety Agreement’ in connection with charges of alleged failure to accurately report time while working as foreman on October 11, 2007 (System File T-D-3277-W/11-08-0187 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, any mention of the charges and the discipline must now be removed from Claimant T. Tranby’s personal record.”**

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.

This dispute arose in connection with the Claimant's responsibility as a Foreman to report time worked for payroll purposes. By letter dated October 22, 2007, the Claimant was advised to attend an Investigation on November 2, 2007, "... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure while working as Foreman, position 32034, to accurately report your time worked for October 11, 2007."

The Board notes that there is a paucity of evidence in the record concerning any alleged inaccuracy of the time reported but that the alleged inaccuracy is not a matter of dispute. Rather, the dispute in this case centers on the application of the December 1, 2005 Memorandum of Understanding between the parties hereto which, among other things, provided for a process of "Alternative Handling" for Rules infractions deemed non-serious, as defined therein. Such Alternative Handling was to focus on non-punitive responses to alleged Rule violations that included training and other non-disciplinary measures. Eligibility for alternative handling was provided for within Part 2 of the December 1, 2005 Memorandum of Understanding, which provided in pertinent part:

"Part 2 - ALTERNATIVE HANDLING PROGRAM

Alternative handling is a non-punitive response to rule violations that includes training and other non-disciplinary measures. An alternative handling event will be recorded in a separate alternative handling database and will not be entered on the employee's personal record. It will not be considered discipline and may only be used to determine eligibility for future alternative handling in the event of a subsequent violation and to document non-punitive counseling given to the employee. The availability of the Alternative Handling option, as applicable, will be included in the notice of investigation in the manner noted below. The parties agree that the Alternative Handling Program established by this agreement may

include coaching/counseling and other agreed-to alternative handling procedures.

* * *

Section 1 - Alternative Handling Eligibility

- A. Calculations for eligibility will consider only those offenses that occur after the signing of this Agreement. Offenses that have occurred prior to the signing of this Agreement will not be used to determine eligibility for alternative handling.**
- B. When a disciplinary ‘notice’ is issued to an employee, the charged employee, if eligible, will receive notice of alternative handling eligibility. If a disciplinary ‘notice’ to the employee is not required under the applicable CBA, an equivalent ‘notice’ to the employee will be used as notification.**
- C. Each employee subject to this Agreement is eligible for alternative handling provided he/she acknowledges accountability for the violation within five (5) days of receipt of the investigation notice. If an investigation notice is not required under the applicable CBA, employee must acknowledge accountability within five (5) days of the equivalent ‘notice’ of discipline.**
- D. Alternative handling, if requested, will be made available for rule violations except as defined in a) through f) below. Such rule violations to which alternative handling is applicable are referred to as ‘covered’ rule violations. The following rule violations are not covered:**
 - a) late reporting of a personal injury, not including muscular-skeletal injuries reported within 72 hours and under the guidelines of the BNSF Policy for Employee Performance Accountability**

- b) violation of the company drug and alcohol policy
- c) rule violation resulting in very serious personal injury to anyone (life threatening or career ending) or major property damage (\$100,000 or greater)
- d) Any violation involving actions directed at a specific employee(s) that results in discrimination because of race, color, religion, national origin, or sex.
- e) Rule violations involving intentional theft, intentional misuse of company property/resources, intentional infliction of personal injury, assault, intentional destruction of property, obvious inappropriate conduct of a sexual or violent nature.
- f) job abandonment for five or more consecutive work days and absent without authority (AWOL) for five or more consecutive work days

E. An employee is not eligible for alternative handling if he/she has:

- a) two prior alternative handling events in the previous 12 months,
- b) a violation of the same offense in the previous 18 months,
- c) three events (discipline or alternative handling) of any kind in the previous 12 months,
- d) three alternative handling events for Covered serious violations as defined in the governing discipline policy.

- e) failure to successfully complete an alternative handling plan during the previous 12 months.

F. Employees ineligible under Sections D and E may be granted alternative handling through mutual agreement and as part of the dispute resolution process. If an exception is not granted, the employee retains full contractual rights established under the applicable schedule agreement, consistent with Section 4 of this Agreement.

Section 2 - Alternative Handling Process

- A. Requests for alternative handling must be made in writing. If the employee is eligible for alternative handling, as defined in Section 1, training and corrective action will be appropriate to the type of offense and the employee's work history."

The terms under which a Rule violation is eligible for Alternative Handling are clear, unambiguous and mandatory: Section 1.D provides that Alternative Handling, if requested, will be made available for Rule violations except as defined in subsections (a) through (f).

The record clearly reveals that a request for Alternative Handling was timely filed in this case. The Carrier denied the request for Alternative Handling and instead proceeded to schedule a disciplinary Investigation. It is undisputed in the record of handling on the property that the Claimant accepted responsibility for inaccurate reporting of time for October 11, 2007 in a timely manner. The Carrier did not charge the Claimant with any of the violations listed within subsections (a) through (f). Moreover, the Carrier did not contend that any of the conditions listed within Section 1.E existed that would make the Claimant ineligible for Alternative Handling.

In view of the foregoing, we find that the Carrier violated the December 1, 2005 Memorandum of Understanding when it failed to include availability of the Alternative Handling option in the Notice of Investigation and when it denied Alternative Handling after it was requested by the Claimant. Had Alternative

Handling been offered, there would have been no opportunity or necessity to hold an Investigation or to offer a waiver of investigation concerning the matter. We therefore find that the discipline assessed the Claimant through the regular discipline process was improper and the Claimant's record must be cleared of all reference to the incident.

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 19th day of February 2013.