Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43937
Docket No. MW-44658
20-3-NRAB-00003-180144

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to provide Mr. T. Kirksey with reimbursement for out-of-pocket CDL training expenses submitted by him on his May 27, 2016 expense report (System File H46406016/2016-207170 CSX).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Kirksey shall now be reimbursed for one thousand two hundred dollars ($1,200.00)."

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.

Prior to being furloughed, the Claimant was assigned to Gang 6NAB as a Vehicle Operator in Barr Yard near Riverdale, IL. During his furlough, the Claimant determined that all vacant positions on his seniority district required a CDL. The Claimant discussed the matter with his Roadmaster to determine if the Carrier would reimburse him for expenses related to the CDL training classes, and was told that the Carrier generally paid $700.00 but the difference would be paid. The Claimant submitted his expenditures for $1,200.00 and was denied reimbursement.

By letter dated June 8, 2016, the Organization submitted a claim on behalf of the Claimant alleging that the Carrier refused to reimburse the Claimant's for out-of-pocket Commercial Driver's License (CDL) training expenses in the sum of $1,200.00. By letter dated August 3, 2016, the Carrier denied the claim stating there was no violation of the agreement. The parties discussed the claim at conference on November 14, 2016. On January 30, 2017, the Carrier denied the Organization's appeal. On June 29, 2017, the Organization responded to the letter of declination. As the parties were unable to resolve this claim, the claim was advanced and this matter is before this Board for a final resolution of the claim.

The Organization contends that Rule 39 is clear and provides that employees shall be reimbursed for all fees necessary to obtain a CDL License for the first application. The Organization also submitted several statements which indicate a practice of the Carrier providing reimbursement for six (6) employees who have attended private CDL training. The Organization argues that with the clear language of Rule 39 and on property practice, the Carrier is required to reimburse employees for all fees inclusive of training. The Organization maintains that the Carrier violated the Agreement was violated when the Carrier failed to provide the Claimant with reimbursement for out-of-pocket CDL training expenses. The Organization also contends that the Agreement does not require approval of a supervisor prior to attending CDL training. Nonetheless, the Claimant's statement indicates that he did receive approval from the Roadmaster. The Organization argues that the Carrier's defenses are without merit. Lastly, it is the position of the Organization that the Claim should be sustained.

The Carrier contends that the Organization failed to show that the Carrier violated any rules or agreements. The Carrier asserts that Rule 39 does not require the Carrier to reimburse employees for anything more than license and test fees. The Carrier argues that the Claimant was furloughed at the time of the training, and asserts

that the Carrier should not be financially responsible for any training while an employee is not actively in the service of and employed by the Carrier. The language of Article 39 clearly states the Carrier shall reimburse for fees, not training. The Carrier asserts that it provides its own training and the same is available to the employees by request to their supervisor. Further, the Carrier contends that Rule 42 indicates that the Carrier retains control and oversight on training. The Carrier argues that no request was made of the Claimant, and the Claimant independently scheduled the training on his own accord. The Carrier argues that there was nothing in the record identifying a member of management team who is authorized to make such authorizations or interpret the agreement. The Carrier argues that although employees may have been reimbursed for training in the past, the Carrier is not required under Article 39. Moreover the Carrier argues that the statement alleging that the Carrier has paid for training in the past fail to address whether the employees were directed or authorized to attend the training. The Carrier maintains that the Organization has failed to meet its burden of proof. Lastly, it is the position of the Carrier that the grievance should be denied in its entirety.

Applicable Agreement Provisions

The pertinent provisions governing this dispute in the Agreement Between CSX Transportation, Inc. And It's Maintenance of Way Employes Represented by the Brotherhood of Maintenance of Way Employes (hereinafter, "Agreement"), effective June 1, 1999 are the Scope Rule, Rule 3, Rule 39 and Rule 42. The rules are incorporated herein as if fully rewritten. Specifically, Rule 39 and Rule 42 read:

"RULE 39 - COMMERCIAL DRIVERS LICENSE

Section 1 - CDL and FHWA testing, Licensing and Certification

(a) Upon presentation of proof of expenditures, CSXT shall reimburse employees for all fees necessary to obtain CDL License for the first application. Once the CDL is obtained, subsequent additional endorsements required to maintain the license requirements will also be reimbursed.

(b) Employees shall be permitted the use of an appropriate CSXT vehicle to take CDL test provided that written request for the use

of such vehicle is made to the Engineer of Maintenance of Track no less than five (5) working days prior to the CDL test.

(c) Failure of CSXT to provide a vehicle for CDL qualification upon proper written request shall result in the employee being considered CDL qualified for the purpose of job assignments until the next available CDL test for which CSXT provides a vehicle for testing purposes.

(d) No employee shall be denied assignment to a position based upon CSXT's failure to provide FHWA certification.

Section 2 - CDL and FHWA Rates

Other than the Vehicle Operator class an employee who may be assigned to operate a vehicle which requires CDL will receive $.30 per hour in addition to their regular rate for the entire work day.

Section 3

Vehicle operators will be the only job class required to obtain and maintain CDL qualifications. However, some positions may be required to obtain CDL and/or FHWA certification based on vehicle assigned. In this event, Sections 1 and 2 of this rule will apply."

"Rule 42 – Training

(a) When the Carrier requests employees to attend training for position to which currently assigned, they may be assigned to classroom or on-the-job training at such times and places as necessary.

(b) Training under this Rule will be offered to employees in seniority order as they appear on the seniority district rosters. When employees of the applicable class are exhausted, then the employees in lower classes of the rosters involved will be offered the training in order of their seniority. If there are no employees remaining in

the lower classes, the training will be offered in the same manner the positions are assigned under Section 1 of Rule 3."

After reviewing the record herein, the Board finds that Rule 42 is not applicable to these facts. Rule 42 addresses situations where the Carrier requests an employee to attend training for positions to which they are currently assigned. Here, it is not disputed that the Claimant was furloughed at the time of the incident and sought reimbursement for expenditures related to CDL training that he paid in order to bid on positions and remove himself from furlough status.

The Board further finds that the language of Rule 39 is clear and unambiguous and as written, only requires management approval for the use of the Carrier vehicle for purposes of testing. Similar language to "written request" found in provision B is not found in provision A of the rule.

The language of Rule 39 does not limit the fee to license and testing. Contrary to the Carrier's assertion, Rule 39 requires payment of all fees to obtain the CDL license and is not limited to just license fees and test fees. The employee statements are evidence that the Carrier has recognized CDL training as a necessary "fee" in obtaining a CDL license.

Notwithstanding, the Claimant was furloughed at the time the CDL license was obtained. The Organization as the moving party failed to establish that the Claimant was an "employee" within the meaning of Rule 39. However, the Board is persuaded that the Claimant's supervisor gave approval for the CDL training class while the Claimant was furloughed. The Board finds that the Organization has thus satisfied its burden of proof.

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 5th day of March 2020.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43937 – DOCKET 44658

(Referee Meeta Bass)

The Carrier strongly and respectfully dissents to this decision. Foremost, the Carrier disputes whether Claimant received proper and legitimate permission to attend outside training and receive reimbursement. Moreover, the Carrier strongly disputes that Rule 39 includes outside training costs in addition to license and test fees. To hold so impermissibly rewrites the Agreement. Awards too numerous to mention hold the established principle that the Board may not insert or delete language under when interpreting unambiguous provisions.

The Rule 39 clearly and unambiguously states the Carrier shall reimburse for fees, not training. Training is mentioned nowhere in the text of Rule 39. Nothing in the Rule mentions training, let alone outside, private training, and the Carrier is therefore not required to pay for or provide training under Rule 39. Consequently, approval or consent of the Carrier would be needed for reimbursement of any outside or private CDL training. The Organization alleges a past practice of payment for outside CDL training; however, it is well established that practice may not trump unambiguous Agreement language. Consequently, such allegations of practice are not relevant.

Notwithstanding, even in in the face of ambiguous language, this claim fails. If Rule 39 were ambiguous, the Organization bears the burden of proof to show a practice of reimbursement, without approval or permission, for outside training. It did not do so in the instant matter. The statements provided by the Organization allege the Carrier has paid for training in the past. These statements were disputed throughout the on-property record and are not sufficient to establish a practice. Moreover, these statements fail to adequately address whether the employees were directed to attend the training or sought authorization prior to attending the training. Assertions of an established past practice also fail in consideration that the Carrier provides its own training at the REDI Center, which teaches the same information and is available to the employees by request to their supervisor.

The Carrier may or may not have reimbursed for private class training in the past, but such reimbursements would have been the exception rather than the rule. A statement from Division Engineer Joshua Brass confirms the Carrier's practice of not paying for private training. Moreover, if there were occasions that private training was paid for by the Carrier, these reimbursements cannot establish a practice:

> ***"The Board will first address the issue of an alleged historical practice or policy and the single incident as cited by the Organization. The Board has consistently held that an erroneous allowance made without the knowledge or approval of the officer of Carrier authorized to make and interpret agreements has no effect on the rules of the agreement. The record in this case does not establish that the Shop Director is the officer of the Carrier authorized to make or interpret agreements."*** **NRAB Second Division, Award 12827 (Mason). (Emphasis added).**

Further, Rule 42 is not applicable to the facts of the instant matter as the Rule concerns training for positions to which an employee is currently assigned, and the Claimant in this matter was furloughed at the time. However, Rule 42, unlike Rule 39, very specifically addresses training. The language *"requests employees to attend"* of Rule 42 indicates the Carrier intended to retain control and oversight when it comes to training. Rule 42 further shows the Carrier would not be obligated to pay for private training where it did not instruct Claimant to attend and did not authorize the expenditure prior to attendance. In the matter at issue, Claimant of his own accord chose to attend an outside training course. Staff Engineer Zach Wright unequivocally stated that Claimant was not instructed to go to training. Claimant was neither authorized nor instructed to attend this outside training, and this was the Organization's burden to prove. Rule 42 additionally serves as evidence that had the parties intended for Rule 39 to include language regarding expenses for CDL training they would have done so. Regardless, even if Rule 39 did require reimbursement for training, which it does not, it is wholly unreasonable to expect the Carrier to be financially responsible for expenditures it did not approve or consent.

Michael Skipper
Senior Director Labor Relations

Jeanie L. Arnold

Jeanie L. Arnold

March 5, 2020