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

Award No. 44000
Docket No. MW-44676
20-3-NRAB-00003-180150

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. N. Hull with reimbursement for out-of-pocket CDL training expenses submitted by him on his April 14, 2016 expense report (System File H46405116/2016-205571 CSX).

(2) As a consequence of the violation referred to in Part (1) above, Claimant N. Hull shall now be reimbursed two thousand three hundred ten dollars ($2,310.00)." "

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.

The Organization contends that the Carrier violated the Agreement when the company failed to provide the Claimant with reimbursement for out of pocket CDL training expenses in the sum of $2,310.00. The Organization asserts that the Carrier has not offered any CDL training classes for its own employees in nearly two years. The Claimant was furloughed and determined that all vacant position on his seniority district required a CDL and attended CDL training in order to obtain a position. The Organization contends that Rule 39 of the Agreement provides that employees shall be reimbursed for all fees necessary to obtain a CDL License for the first application. The Organization argues that the Carrier has established a practice of providing reimbursement for employees who have attended private CDL trainings. The Organization maintains that Carrier is obligated to reimburse employees for all costs related to obtaining a CDL, including CDL training costs. Lastly, it is the position of the Organization that the clear language of the Agreement and the on-property practice, the claim should be sustained.

The Carrier contends that the Organization failed to show a violation of any rules or agreements. The Carrier asserts that Rule 39 does not require the Carrier to reimburse employees for anything more than license fees and test fees. Per Rule 42, the Carrier is not obligated to pay for private training where it did not authorize the same. The Claimant was furloughed at the time, and the Carrier should not be financially responsible for any training while the employee is not actively employed. The Carrier contends that a practice does not exist on property to reimburse for private training courses. The Carrier contends that Rule 42 retains control and oversight when it comes to training. The Claimant of his own accord chose to attend an outside training course. The Claimant was neither authorized nor instructed to attend this outside trying course. The Carrier also contends that the Organization did not meet its burden of proof to show a violation. The Carrier argues that the written statements submitted by the Organization does not establish a practice nor do they address whether those employees were directed to attend the training or sought authorization prior to attending the training

The Carrier argues that the statement provided by the Organization fail to address whether the employees were directed to attend the training or sought authorization prior to attending the train.

<u>Applicable Agreement Provisions</u>

The Agreement Between CSX Transportation, Inc. and Its Maintenance of Way Employes Represented by the Brotherhood of Maintenance of Way Employes

(hereinafter, "Agreement"), effective June 1, 1999, Rule 39 Commercial Driver's License and Rule 42- Training, and Rule 24 are hereby incorporated herein as if fully rewritten. Rule 39 reads:

"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 trains will be offered in the same manner 02090positions 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.

AWARD

Claim denied.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of April 2020.

CARRIER MEMBER
CONCURRING in part AND DISSENTING in part
to
THIRD DIVISION
AWARD 44000 – DOCKET 44676

(Referee Meeta Bass)

The referee is clearly correct in holding that this case should be denied. Where the referee and the Carrier part ways is that Rule 39 has now been rewritten to include outside training in addition to license and test fees. 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 three (3) 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 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. Claimant was neither authorized nor instructed to attend this outside training. 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
Carrier Member

Jeanie L. Arnold

Jeanie L. Arnold
Carrier Member

LABOR MEMBER'S CONCURRENCE AND DISSENT TO
AWARD 44000, DOCKET MW-44676
(Referee Meeta Bass)

The Majority's decision was well reasoned as it applies to the reimbursement for CDL expenses. However, the majority erred when it held:

> **"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."**

Very clearly a person on furlough remains an employee under the Agreement. The Agreement refers to "furloughed employees" approximately ten (10) times. One example of this is Rule 3, Section 4(a), which states:

> "(a) A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award. When **furloughed employees** are to be used to fill positions under this Section, the senior qualified **furloughed employees** in the seniority district shall be offered the opportunity to return to service. **Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status.**"

In light of the language cited above and numerous other examples listed within the Agreement, there can be no question that the Agreement contemplates a person in furloughed status will remain as an employe. Accordingly, the Majority erred when it ignored the terms of the Agreement and found otherwise.

Respectfully submitted,

Zachary C. Voegel
Labor Member