

PUBLIC LAW BOARD 6721

In the Matter of the Arbitration Between:  
**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

and

NMB Case No. 6  
**Claim of K. L. Hittle  
and A. R. Lyon  
Cabooses Not Furnished**

**UNITED TRANSPORTATION UNION**

**STATEMENT OF CLAIM:** Claim for two hours' pay each on behalf of Conductor K. L. Hittle and Brakeman A. R. Lyon account not furnished a caboose on a work train.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimants employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on July 2, 2004, at Washington, D.C. Claimants were not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

On April 15, 2002, Claimants were assigned, as Conductor and Brakeman, on Train No. W BARBAR1 15R, a work train, which was not furnished a caboose.

Article X (Cabooses) of the 1982 National Agreement states, in pertinent parts, as follows:

Pursuant to the recommendations of Emergency Board No. 195, the elimination of requirements for or affecting the utilization of cabooses, as proposed by the carriers in their notice served on or about February 2, 1981, will be handled on an individual railroad basis in accordance with the following agreed upon procedures and guidelines.

Cabooses may be eliminated from trains or assignments in any or all classes of service by agreement of the parties.

Cabooses in all classes of service other than through freight service are subject to elimination by agreement or, if necessary, by arbitration.

. . . .

#### Section 1. Procedures

(a) When a carrier desires to operate without cabooses in any service, it shall give written notice of such intent to the General Chairman or General Chairmen involved, specifying the trains, runs or assignments, territory, operations and service involved. A meeting will be held within fifteen (15) days from the date of such notice to commence consideration of the carrier's request subject to the guidelines outlined in Section 2 below.

. . . .

(c) In the event the carrier and the General Chairman or General Chairmen cannot reach an agreement within sixty (60) days from the date of the notice, either party may apply to the National Mediation Board to provide the first available neutral from the panel provided for below.

. . . .

#### Section 2. Guidelines

The parties to this Agreement adopt the recommendations of Emergency Board No. 195 that the elimination of cabooses should be an on-going national program and that this program can be most effectively implemented by agreements negotiated on the local properties by the representatives of the carriers and the organization most intimately acquainted with the complexities of individual situations.

. . . .

#### Section 5. Purchase and Maintenance of Cabooses

In addition to the foregoing, a carrier shall not be required to purchase or place into service any new cabooses. A carrier shall not be required to send cabooses in its existing fleet through existing major overhaul programs nor shall damaged cabooses be required to undergo major repairs. However, all cabooses that remain in use must be properly maintained and serviced.

. . .

#### Section 7. Penalty

If a train or yard ground crew has been furnished a caboose in accordance with existing agreement or practice on a train or assignment prior to the date of this Agreement and such train or assignment is operated without a caboose other than in accordance with the provisions of this Article or other local agreement or practice, the members of the train or yard ground crew will be allowed two hours' pay at the minimum basic rate of the assignment for which called in addition to all other earnings.

Article X (Cabooses) of the 1985 National Agreement states as follows:

#### Section 1 - Unit and Intermodal Trains

(a) Article X, Section 4, of the October 15, 1982 National Agreement provides for the elimination of cabooses in through freight (including converted through freight) service up to 25% of the base established thereby. The parties agree that in addition to a carrier's rights under such provision and other provisions of said Article X, cabooses may be discontinued on unit-type trains (e.g., coal, grain, phosphate) and intermodal-type trains (e.g., piggyback, auto rack, double stack) operated in through freight (including converted through freight) service based on Guidelines and Conditions (Sections 2 and 3 of Article X of the October 15, 1982 National Agreement).

(b) Except as provided in paragraph (a) above, Article X of the October 15, 1982 Agreement remains in effect.

#### Section 2. Run-through Service

In run-through service, a caboose which meets the basic minimum standards of the railroad on which it originated will be considered as meeting the basic minimum standards of the other railroad or railroads on which it is operated.

It is undisputed that Claimants were not furnished a caboose. It is stipulated that the former Santa Fe agreements apply to the instant case, that the former Santa Fe did not serve notice under the 1982 National Agreement to eliminate cabooses on work trains and that, up until the time of this dispute, Santa Fe (and later BNSF) allowed a two-hour penalty payment to work train crews which were required to work without a caboose.

Claimants filed a claim for two hours' pay each because they had not been furnished a caboose on a work train. The Carrier declined the claim as without basis; the Organization appealed the denial and, as the claim was not resolved on the property, it was presented to this Board for resolution.

**POSITIONS OF THE PARTIES:** The Organization argues that Claimants are entitled to two hours' pay each because they were not provided a caboose on their work train assignment. It concedes that, in accordance with Article X of the 1982 Agreement, the Carrier has the right to eliminate the use of cabooses, but contends that the Carrier may achieve that result only by negotiating or arbitrating their elimination. It asserts that, in implementing Article X, the Carrier has eliminated the use of cabooses from through freight service and from local freight, road switchers, and yard jobs, but has not done so with respect to work train service. It maintains, in addition, that Article X of the 1985 Agreement allowed the Carrier to eliminate the use of cabooses from unit and coal trains and from run-through trains, but not for work train service.

The Organization further argues that, through negotiations or arbitration, the Carrier has been granted the elimination of cabooses in every other class of service, but that the elimination of cabooses in work train service has never been requested or granted. Citing authority, it contends that, since the caboose has been eliminated from all other classes of service except work train service, the only resolution is to put a caboose on work trains or to pay the penalty for not providing a caboose as required by the 1982 Agreement, which has generally been a payment of two hours at the prevailing rate.

The Organization argues that the Carrier's action violated the Agreement and requires that the claim be sustained.

**The Carrier** argues that the claim is without merit because the 1982 National Agreement permitted it to assign Claimants to a train which did not contain a caboose. It contends that the premise of Article X is that cabooses would be eliminated and that it was not obligated to provide cabooses to any class of road or yard service.

It maintains that it did not eliminate cabooses for work trains pursuant to Section 1(a) but, rather, cabooses were eliminated pursuant to Section 5, which states:

. . . [A] carrier shall not be required to purchase or place into service any new cabooses. A carrier shall not be required to send cabooses in its existing fleet through existing major overhaul programs nor shall damaged cabooses be required to undergo major repairs.

It argues that this language, read together with the preamble to Article X, requires a conclusion that the framers of the agreement intended that, at some time in the future, there would be no more cabooses and that, over the last 22 years, cabooses have, indeed, attrited. Citing authority, it contends that there has never been a serious challenge to the Carrier's position that cabooses have been eliminated as they have been attrited.

The Carrier further argues that the claim deals exclusively with Section 7 (Penalty) and the Carrier's decision to operate work trains without cabooses, not whether a "penalty" payment under Section 3 (Conditions) is due because a trainman was required to perform impermissible work while performing service in cabooseless operation. Citing authority, it contends that the provisions of Section 3 are designed to accommodate the impact on employees of the absence of cabooses rather than to protect against cabooseless operations that are not in accordance with Article X.

Finally, the Carrier argues that the Organization has failed to carry the requisite burden of proof and has failed to identify any rule or provision specifically supporting its position.

The Carrier urges that the claim be denied as without merit.

**DISCUSSION AND ANALYSIS:** Upon the whole of the record and in consideration of the arguments, the Board is persuaded that the Carrier violated Article X of the National Agreement. The Award so reflects.

It is undisputed that Article X of the 1982 National Agreement provided to the Carrier the right to eliminate the use of cabooses in any class of service. The preamble states that cabooses can be eliminated from "any or all classes of service" by agreement between the Parties; it states that cabooses can be eliminated from "all classes of service other than through freight service" by agreement or arbitration.

The exact procedure which must be used when the Carrier desires to operate without cabooses in any service is contained in Article X, Section 1. Paragraph (a) requires that the Carrier (1) give written notice of such intent to the Organization ("General Chairman or General Chairmen"), "specifying the trains, runs or assignments, territory, operations and service involved," and (2) hold a meeting within 15 days of the notice date "to commence consideration of the carrier's request." If the Parties reach agreement concerning the elimination of cabooses, paragraph (b) permits the Carrier to implement their elimination at its convenience. If the Parties cannot reach agreement within 60 days concerning the elimination of cabooses, paragraph (c) permits either Party to apply to the National Mediation Board to provide a neutral to arbitrate the issue.

The remaining paragraphs of Section 1 set out the procedure by which neutrals are to be selected and the arbitrations conducted. The subsequent sections of Article X - Section 2 (Guidelines) and Section 3 (Conditions) - do not eliminate or modify the procedures contained in Section 1. Section 2 lists those factors that the Parties should consider in attempting to reach agreement to eliminate cabooses and Section 3 lists those conditions that an arbitrator should consider when determining operations without cabooses.

It is undisputed that the Carrier followed the procedure outlined in Section 1, when it sought to operate through freight service and local freight, road switchers and yard jobs without cabooses and negotiations allowed the Carrier to eliminate the use of cabooses from unit and coal trains and from run-through trains (1985 National Agreement, Article X). It is also undisputed, however, that the Carrier never requested and was never granted, in accordance with the procedures of Section 1, the right to eliminate cabooses in work train service. Its failure to follow the procedures outlined in Section 1 compels this Board to sustain the Claimant's claim and remedy.

The Carrier's contention that it did not violate the 1982 National Agreement is without merit. Although it may be true that Article X presumes that cabooses will be eliminated, through attrition or otherwise, its introductory paragraph nonetheless requires that their elimination be handled "in accordance with the following agreed upon procedures . . ." The "agreed upon procedures" - enumerated in Section 1 and very clearly requiring notice, agreement or arbitration - were not followed by the Carrier in the instant case. While the Carrier contends that it eliminated cabooses for work trains pursuant to Section 5 and not Section 1,

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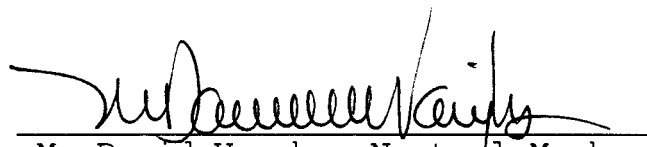
Section 5 simply permits the Carrier to choose not to replace cabooses. It does not, however, supersede the procedure contained in Section 1 to provide notice, reach agreement or arbitrate.


The Board has carefully reviewed the authorities cited by the Carrier (Car. Exs. 3-5) and finds that they are distinguishable from the instant case. In each of the cited cases, the Carrier had previously followed the required procedure as outlined in Section 1 to eliminate cabooses from service. The remaining disputes concerned whether, in a situation where the caboose had been properly eliminated, the result violated one of the conditions set forth in Section 3 (e.g., hanging on to the side or rear of cars for extended distances, using a "platform car," etc.).

This Board cannot require the Carrier to follow the procedures set forth in Section 1; it can, and hereby does, however, require that the Carrier pay the penalty provided for in Section 7 for not doing so.

**AWARD:** The Organization met its burden that Carrier's action violated Article X of the Agreement. The is claim sustained. The Carrier is ordered to pay Conductor K. L. Hittle and Brakeman A. R. Lyon two hours' pay each for violating the Agreement.

Dated this 14<sup>th</sup> day of September, 2004.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
R. L. Marceau, Employee Member