

PUBLIC LAW BOARD 6390

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

and

NMB Case No. 5  
Claims of V.E. Williams  
And F. J. Merando

THE UNITED TRANSPORTATION UNION

**STATEMENT OF CLAIM:** Claim on behalf of Conductor V.E. Williams and Brakeman F.J. Merando for Code HO-25 miles (2 hours) per Arbitration Board 419 account riding on the side of a car in excess of one mile without caboose. Claimants rode 1.6 miles on Tank Car 16156 from MP 45.8 to MP 47.4 without a caboose in the performance of their duties on road switcher R KAN 0051 12A on November 12, 1998.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) 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 14, 2001 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.

Prior to the 1982 National Handling, the Carrier and other carriers served notice on the Organization that it intended to eliminate cabooses and substitute, on an industry-wide basis, End of Train Devices ("ETD"). During the national negotiations which followed, representatives of the Organization and the Carrier were unable to reach voluntary agreement on a number of outstanding issues. These were then submitted to Presidential Emergency Board No. 195, which issued its recommendations regarding issues including the elimination of cabooses.

The Board's report led to a National Agreement dated October 15, 1982 between those parties ("National Agreement"), which, at Article X - Cabooses [Carrier Exhibit 2], provided:

Section 3. Conditions

Pursuant to the guidelines in Section 2, the following conditions shall be adhered to in an arbitration determination providing for operations without cabooses:

\* \* \*

(d) Crew members will not as a result of the elimination of cabooses be required to ride on the side or rear of cars except in normal switching or service movements or reverse movements that are not for extended distances.

\* \* \*

\* \* \*

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 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 provision 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.

Subsequent to the adoption of the 1982 National Agreement and pursuant to its terms, the Carrier notified the Organization of its intent to negotiate on-property rules as to the use of cabooses and

the consequences of not using cabooses. The Parties were unable to reach agreement on the issues; and arbitration was invoked.

In *The Atchison, Topeka and Santa Fe Railroad Company and UTU*, Arbitration Board 419 (Moore, Neutral, 1984) [Employees Exhibit 7] (the "Moore Award") the Board interpreted Section 3(d) of the National Agreement. After "fully considering the requirements of Section 2 and 3 of the National Agreement" (the terms of which were made applicable on the property) and the arguments of the Parties, the Moore Board held, in relevant part, that "extended distances" on the Property for purposes of Section 3 (d) meant "anything in excess of one mile".

On November 12, 1998, Claimants were assigned to Road Switcher R KAN0051. They departed Topeka, Kansas on R KAN0051 12A with 12 freight cars and no caboose. In the course of those duties, Claimants executed a reverse shove movement with a cut of cars from Mile Post 45.8 to 47.4, a distance of 1.6 miles. They made this movement by riding the point on the side of Tank Car UCLX 16156 because there was no caboose. The Parties stipulated that there was no caboose available.

There is no dispute that Claimants performed the reverse shove movement in connection with the performance of their duties and pursuant to lawful instructions, that their performance was consistent with the Carrier's rules and that to have done otherwise would have risked other rules violations by causing delay to the train.

Claimants submitted a claim for Code [Hang On ("HO")]-12 (two hours) for riding the side of a car in excess of one mile without a caboose. The HO claims were denied. The Organization protested the Carrier's rejection of the claims. The Parties were unable to adjust the claims on the property; and they were referred to this Board for resolution.

**POSITIONS OF THE PARTIES:** The positions of the Parties were set forth fully at the hearing and in their written pre-hearing and post-hearing submissions<sup>1</sup>. They are summarized as follows:

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1. As indicated, at the hearing, the Parties stipulated that no caboose was available for the train at issue. That stipulation obviates the need to address the arguments made in the written submissions whether the Carrier violated its obligations under Section 5 of Article X and, if it did, what the impact, if any, of such violation would be on the Carrier's obligations under Section 3.

The Organization argues that Claimants are entitled to the penalty payment pursuant to Article X, Section 7 of the National Agreement. It contends that when a caboose is unavailable as a result of the attrition contemplated under Article X, Section 5, the prohibition in Article X, Section 3(d) against requiring crew members to ride on the side or rear of cars for movements over extended distances nonetheless remains in effect. Since it is not disputed that Claimants rode the side of the car during the move at issue it contends that the Carrier is obligated for the payment of penalties.

The Organization argues that Section 3 is absolute and does not sunset as a result of the unavailability and eventual elimination of cabooses. It asserts that no provision of the National Agreement and no awards interpreting or applying that Agreement renders Section 3 ineffective. It notes that the negotiators of the National Agreement knew that cabooses would be eliminated in the future and, had they intended for Section 3 to become inoperative when that would occur, they would have so provided.

The Organization points out that the Carrier obligation not to require crew members to ride on the side or rear of cars for extended distances as a result of the elimination of cabooses under Article X was only one of several obligations - all set forth in Section 3 - incurred by the Carrier in exchange for the elimination of cabooses. It argues that if allowed to be free of the obligation to keep crew members from being required to ride on the side or rear of cars, then the Carrier will seek to rid itself of other of its Section 3 obligations which were part of the same quid pro quo.

The Organization acknowledges that Section 3 allows the attrition of cabooses, but contends that it does not permit the elimination of the penalty under Section 7 simply because there is no available caboose for a particular train or even at the time the last caboose is eliminated. Citing *UTU and CSX*, PLB 4833, Award No. 28 (Seidenberg 1992) [Employees Exhibit 3], the Organization maintains that the National Agreement was not intended to require employees to hang on the side of equipment for more than one mile.

The Organization challenges the authorities cited by the Carrier, arguing that they are inapposite because those cases deal with other carriers and apply the many different standards imposed under the authority of Arbitration Board 419. The Organization

maintains by implication that the Moore Award, the on-property implementation of Article X made pursuant to PLB No. 419 (Employees Exhibit 7), controls the present situation such that once crew members ride for more than one mile on the sides of cars they are entitled to payment pursuant to Section 7. It points out that the Carrier has settled numerous claims on the property on that basis.

The Organization urges that the claims be sustained.

The Carrier argues that the National Agreement constitutes an agreement to eliminate cabooses through attrition and, in Article X, Section 7, for payment of penalties for Carrier violations of the attrition requirements. It maintains that the penalty provision is a function of the attrition process and that, once cabooses are eliminated, the penalty payment disappears. The Carrier points out that the penalty payment is due only when it operates a train without a caboose other than in accordance with the provisions of Article X. It argues that the evidence establishes that the caboose on the train at issue was eliminated pursuant to Section 5 of Article X which allowed for the attrition of cabooses and, because it was without a caboose as allowed by the National Agreement, the penalty under Section 7 no longer applies according to its own terms. The Carrier asserts that its position is supported by prior awards which held that once the cabooses were eliminated the penalty under Section 7 is no longer payable.

The Carrier points out that the Organization has not challenged the caboose attrition standards or their application in its presentation to the Board and asserts that it has waived this argument. It denies any intent not to maintain cabooses to the extent and for so long as it is required to do so and asserts that as long as they are available, it will make them available to crews.

The Carrier disclaims any intent to undo any other Section 3 requirements and rejects as groundless the Organization's arguments that an Award freeing it of any penalty from requiring employees toride the side or end of cars for extended distances would lead to the erosion of other Section 3 protections.

The Carrier urges that the claim be denied.

#### DISCUSSION AND ANALYSIS:

Facts Not In Dispute

It is not disputed that in the incident at issue here, the Carrier "required [Claimants] to ride on the side or rear of cars" for more than one mile - an "extended distance" on this property. The record establishes that the requirement that Claimants ride the sides or rear of the cars during the move was the "result of the elimination of cabooses": but for the attrition which had produced a dearth of cabooses, a caboose would have been assigned to the train. The record is less definitive that Claimants would have ridden in the caboose during the move, rather than on the side of the car, had a caboose been used on the train, but the Board concludes that would more likely than not have been the case.

At the hearing, the Parties stipulated that no caboose was available for the train on which Claimants rode the cars. The Board understands that stipulation to mean that the Parties are in agreement that the Carrier's failure to utilize a caboose on the train was consistent with the requirements of Article X.

#### Questions Presented

The stipulation that no caboose was available, which was contrary to the Organization's assertion made in its written submission, converts the dispute before the Board from one of whether the Carrier properly operated the train without a caboose in violation of the National Agreement to one of whether, in a train properly operated without a caboose as allowed by the National Agreement, requiring the crew to hang on a car for a distance in excess of a mile violated that National Agreement. In other words, the issue presented is whether a violation of Article X, Section 3 of the National Agreement is contingent on whether the operation of the train was in violation of Article X, Section 5 and, if so, whether the penalty provision of Article X, Section 7 or some other penalty provision is applicable.

#### The 1982 National Agreement

The evidence establishes that the negotiators of Article X of the 1982 National Agreement applicable to this dispute agreed to the elimination through attrition of cabooses (Section 5) and provided for the implementation of that Article on a railroad-by-railroad basis (Introduction). Article X provided for mandatory consideration of certain factors (Guidelines, Section 2) and that, in the railroad-specific arbitration proceedings, certain Conditions (Section 3) were required to be adhered to. See Carrier Exhibit 2.

Where caboosless operations were to be authorized in arbitration, the conditions to which Article X of the National Agreement required adherence included provision for continued caboose operation where necessary for suitable lodging [Section 3 (a)], where necessary for appropriate shelter [Section 3 (b)], for longer trains where the crew was normally required to provide rear-end flagging protection [Section 3 ( c )], and, by negative implication, required seating accommodations for crews in certain circumstances [Section 3 (e)]. The Conditions also prohibited riding on the side or rear of cars for extended distances as a result of the elimination of cabooses [Section 3 (d)]. The mandatory nature of the Conditions was confirmed in the negotiators' Questions and Answers interpreting the Agreement, Section 2, Q1/A1. See Employees Exhibit 5.

Section 7 of Article X provides for the two-hour penalty payments if a Carrier operates a train or crew which had operated with a caboose without a caboose "other than in accordance with the provision of this Article or other local agreement or practice . . .".

#### Underlying Purpose of Article X, Section 3 Conditions

The elimination of cabooses represents a significant change in working conditions for the trainman craft. Cabooses sometimes serve - in addition to places to perform work - as places to receive shelter and accommodation, places for lodging, rest and eating. Cabooses also serve as safe platforms on which to ride during the movement of trains. The elimination of cabooses required negotiators to consider how those functions would be accommodated in the absence of a caboose. Section 3 represents the list of prohibitions and restrictions which would be placed on the elimination of cabooses in order to accommodate those functions.

Clearly, the needs of crews for shelter and accommodation and the dangers of riding on the sides of cars would not be eliminated as a result of the total elimination of cabooses. Instead, the Section 3 Conditions appear to be a trade-off for the elimination of cabooses: at the end of the attrition process, all cabooses will be gone (except as necessary to satisfy stated Section 3 conditions and as otherwise agreed by the Parties), but the needs for shelter, lodging (etc.) would remain. And the reasons for the flat prohibition on requiring crews to ride the sides or rear of cars for extended distances would likewise remain.

The apparent result of the Carrier's position in this proceeding would be that, at the point when the elimination of a

caboose on a particular train or assignment would be proper in accordance with the terms of the National Agreement, it had no obligation to meet the conditions of Section 3. That, simply put, makes no sense. Indeed, as indicated, the Carrier disclaims any intent to back off from its obligations under the Section 3 conditions other than the "hanging off" prohibition as a result of the proper elimination of cabooses.

#### The Moore Award

As the record indicates, the Carrier initiated negotiations concerning the elimination of cabooses following the 1982 National Agreement, but without final success. The circumstances under which the Carrier would be permitted to remove cabooses pursuant to Article X were submitted to arbitration pursuant as part of SBA 419. The Moore Award which resolved certain disputes as to the scope of cabooseless operation on this property treated Section 2 factors as "guidelines", but not absolute requirements. However, that Board's interpretation of Section 3 (d) of Article X simply accepted its terms, without comment. There is no indication that the Carrier had challenged the mandatory nature of Section 3 (d). The Organization had simply made a request to have the Board define the term "extended distances"; and that Board defined the term to mean distances in excess of one mile.

The Parties before the Moore Board did not request, and the Board did not decide, the interrelationship between the unavailability of cabooses through attrition and the availability of penalty payments when the conditions of Section 3 were not met.

#### Prior Interpretations of Article X: Awards Contesting Failure to Utilize Caboose Or "Extended Distance"

A number of awards have interpreted Article X in the context whether a particular carrier had an obligation to make Section 7 penalty payments to compensate a crew for being required to ride the side or rear of cars for extended distances. Some involve whether the question whether it was proper under Article X and implementing arbitration awards for a caboose not to have been furnished. For example, in *UTU and Central Georgia Railroad Company*, PLB 5866 No. 20 (Criswell 1998) [Carrier Exhibit 13], the Board denied the claim of a trainman who rode the rear of a car more than one mile without a caboose. In declining to impose a penalty under Article X, Section 7, that Board focused its analysis on the absence of a proven violation of Article X, Section 5. Those



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Awards are not useful in the analysis of this dispute, where the Parties have agreed that no caboose was available and there is no claim that it was unavailable as a result of the Carrier's violation.

Other Awards contest whether the distance the crew rode was "extended", or whether an extended distance would be broken by the ability of the crew to stop and rest. These Awards are also inapplicable to this situation, where it is not disputed that the crew was required to ride the side of the cars for an extended distance as defined on this property. There is no assertion in this dispute of any right to stop and rest (a defense which appears, in any event, to have been rejected in other cases.

Prior Interpretations of Article X:  
Applicability of Section 7 Penalty  
To Situations where Caboose Properly Withheld

The issue of whether the Section 7 penalty would be applicable to a situation where a crew was required to hang off the side of a car for an extended period where the train was operating without a caboose in accordance with Article X of the National Agreement has been addressed in two Awards cited by the Parties. In *Award 19 of PLB No. 4292 (Henle, Neutral)* [Carrier Exhibit 17] that Board held, after extended discussion of the interrelationship of the various Sections of Article X that the penalty provided for in Section 7 of Article X was not applicable to situations where the carrier's failure to use a caboose was within the reasons contemplated in Section 5. The Board relied on the qualifying phrase making the penalty available for trains "operated without a caboose other than in accordance with the provisions of this Article". It held that requiring a crew to ride the side or rear of cars in a train which was operated without a caboose in accordance with Article X would not trigger the Section 7 penalty:

[T]his clause [Section 7] must be interpreted to refer to Section 5 and to mean that no penalty is due if the Carrier's failure to assign a caboose reflects a reduction in its inventory of cabooses available for service caused solely by the Carrier's exercise of its rights under Section 5.

*Award 7 of PLB 5471, CSX and UTU (Fischbach, Neutral)* followed the *Henle Board*, after an extended discussion of the logic of the earlier decision.

Prior Interpretations of Article X:  
Utilization of Penalty Other than Section 7  
Where Violation Found

In the *Seidenberg Award*, which involved questions whether the crew had been required to hang off for an "extended distance", where the Carrier asserted that the crew could have stopped the train, that there was a prior practice of such moves having been made without exceptions being taken and that there was no provision for a penalty for any violation, the Board held that the Carrier's requirement was in violation of Article X, Section 3 (d) of the National Agreement. The *Seidenberg Board*, whose Chair had served on *PEB No. 195*, whose report resulted in the 1982 National Agreement, found dispositive that "the negotiators of the October 1982 National agreement in agreeing to the elimination of cabooses did not envision that road crews in yarding their trains would be compelled to ride extended distances on the side of the cars", a conclusion which he stated "with some degree of assurance", based on his service on *PEB 195*.

The *Seidenberg Board* sustained the claims and awarded as a penalty "one day's pay to be divided between both claimants. Significantly, for our purposes, the *Seidenberg Award* did not discuss the applicability of Section 7 in determining the penalty, but appears to have awarded it on the traditional basis of a day's pay in compensation for a rules violation.

Application of the Analysis  
To the Facts of the Incident at Issue:  
The Carrier Violated Section 3 (d)

As stated above, the Board finds 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. Thus, the Board believes that the prohibition on employees hanging off the side or end of cars for extended distances as a result of the lack of a caboose is absolute, rather than being dependent on whether the caboose has been properly withheld. The Board concludes that the Carrier's requirement in the incident giving rise to the claims at issue that the crew ride the side of cars for an extended distance was in violation of Section 3.

### Penalty

The language of Section 7 provides an exception to the availability of that penalty when caboosless operation takes place in accordance with the provisions of Article X. The *Henle and Fischbach Awards* which interpret that Section clearly so provide. This Board will follow those Awards: the Board concludes that the Section 7 penalty is not available in situations where the Carrier's is in compliance with Article X and cannot serve as a basis to enforce Section 3 (d) in this incident.

Implicit in the Carrier's argument that a Section 3 violation can only occur when there is a violation of Section 5 is the premise that the basis for the sole penalty for any violation of Article X is set forth in Section 7. That appears to be the import of the Carrier's larger argument that Article X must be construed as a whole. In essence the Carrier argues that operation without cabooses which is the result of the attrition contemplated and allowed in Article X is an operation "in accordance with the provisions of [Article X]" and so, no operation stemming therefrom can be violative of Section 7.

Section 7 does not, by its terms, refer to Section 3 violations. Instead, it refers to "[operation of a train or assignment] without a caboose". Section 3 does not address itself to caboose operations, but instead, to "conditions" for caboosless operations. These several conditions are accommodations to employees for the impact of working without a caboose. In other words, the protections of the employees' working conditions that are set forth in Section 3 appear to be a quid pro quo for the elimination of the caboose; and the need for the protections listed would appear to exist whenever a caboose is eliminated, not simply when a caboose is improperly eliminated.

In finding that operation with trainmen riding extended distances on the side of cars without incident was "more providential than a safety-wise operation" the *Seidenberg Board* noted that:

The railroad industry, under the most propitious circumstances, is a hazardous industry replete with danger and the Carrier should be restrained rather than encouraged to carry on activities that have inherent risks to the affected employees.

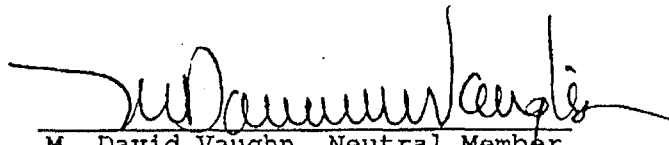
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Based on that statement, the Board concludes that the *Seidenberg Board* was associating the penalty for violation of Section 3(d) not just with a benefit to the trainmen riding the side of the car, but as an active constraint on the Carrier so as to prevent its ordering the performance of an already-dangerous operation by a means that increased the risk to the employees. This further establishes that Section 3(d) can be violated independent of a violation of Section 5.

The Board's analysis that Section 3 can be and was violated without the occurrence of a Section 5 violation, leaves Section 3 protections without a specific penalty for their violation (as contrasted to improper operation without a caboose, for which Section 7 provides a specific remedy). The Board finds, however, that circumstance is not fatal to the enforcement of Section 3. A penalty distinct from the remedy set forth in Section 7 - which addresses a different type of violation than is at issue here - may be structured based on the settled principle that, in the absence of a contrary practice on a specific property, the penalty for rules violations is a day's pay, 100 miles.

**AWARD:** The Carrier violated Article X, Section 3 (d) of the 1982 National Agreement by requiring Claimants to ride on the side or end of cars for a distance in excess of one mile in circumstances in which, but for the consequences of the 1982 National Agreement, they would have ridden in a caboose. The Organization's claims are sustained. Claimants shall be paid two hour's pay,

Dated this 14<sup>th</sup> day of December 2001.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
Rick Marceau, Employee Member