BEFORE

PUBLIC LAW BOARD NO. 4292

UNITED TRANSPORTATION UNION	Docket No. 19 Award No. 19
vs.	
CSX TRANSPORTATION, INC. (FORMER BALTIMORE & OHIO RR)	CSX File No. 4-(88-2459) UTU File No. 54412/1917

STATEMENT OF CLAIM

Claim for Conductor C. A. Jones, ID No. 097666, Brakeman R. E. Keys, ID No. 097624, and Brakeman D. L. Johnson, ID No. 097634 for May 12, 1988 as well as thirty four (34) additional train crews for various dates in May, June, July, August, and September 1988 for payment of two (2) hours account working on trains with mixed freight consist without a caboose.

BACKGROUND

The central issue in this case focuses on the interpretation of two sections of the 1982 (and 1985) National Agreement relating to the number of cabooses the Carrier is required to keep in service on through freight trains.

A brief history of negotiations on the issue of cabooses is necessary for an understanding of this matter. The 1982 National Agreement between the Parties, in its Article X, was the first to authorize the Carriers to operate certain freight trains without a caboose. The Agreement was preceded by the work of Emergency Board

No. 195 (established by Executive Order of the President, July 21, 1982) whose report on August 20, 1982 laid the groundwork for the October 15, 1982 National Agreement. This Agreement gave the Carrier the right to eliminate cabooses on certain types of trains, but provided a limit of twenty-five percent (25%) on the number of freight trains in through freight service that could be operated cabooseless. In the 1985 National Agreement, the Carrier was given the right to operate certain additional types of trains without a caboose, but the 25% limitation on trains in through freight service was not modified.

The 1982 National Agreement did not specify individually the trains in through freight service that the Carrier could now operate without a caboose. Rather, it set certain guidelines for the Parties to follow in reaching a more detailed agreement and called for arbitration if the Parties failed to resolve these questions. Eventually such arbitration was invoked, and in an award issued September 7, 1983, Arbitrator Leverett Edwards ruled on the previously unresolved issues and included with his award as Attachment A a list of trains in through freight service approved for cabooseless operation.

These claims were filed by members of a train crew alleging that on various dates in May through September 1988 they had been assigned to work trains in through freight service without a caboose which were not listed among those permitted to be operated in this manner. A substantial number of additional claims making the same allegation have also been filed and await disposition of this claim.

The particular aspects of Article X, 1982 National Agreement

bearing on this claim are reproduced below:

ARTICLE X - CABOOSES

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 4. Through Freight Service

(a) There shall be 25% limitation on the elimination of cabooses in through freight (including converted through freight) service, except by agreement. The 25% limitation shall be determined on the basis of the average monthly number of trains (conductor trips) operated in through freight service during the calendar year 1981. Trains on which cabooses are not presently required by local agreements or arrangements shall not be included in such count, shall not be counted in determining the 25% limitation, and any allowance paid under such agreements or arrangements shall not be affected by this Article. A carrier's proposal to eliminate cabooses may exceed the minimum number necessary to meet the 25% limitation. However, implementation of the arbitrator's decision shall be limited to such 25% and shall be instituted on the basis established below. In the event a carrier's proposal is submitted to arbitration, it shall be revised, if necessary, so that such proposal does not exceed 50% of the average monthly number of trains (conductor trips) operated in through freight service during the calendar year 1981.

.....

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.

It should be made clear at the outset that the facts of these claims are undisputed. The claimants were assigned to work caboose-less trains not among those permitted to be operated in such fashion by the Edwards' Arbitration award. The Carrier defends its action as justified under a new policy expressed in a June 10, 1988 letter to all UTU General Chairman. The letter called attention to Section 5 of Article X, 1982 National Agreement and proceeded as follows:

> Under this provision the Carrier is not required to purchase new caboose cars, or overhaul or perform major repairs to cabooses in the existing fleet. Since the effective date of this provision we have not purchased any new cabooses and have taken cabooses out of service when damaged or when their condition has deteriorated to the point that heavy repairs or major overhaul would be necessary. This has, of course, reduced our

> serviceable caboose car fleet to the point that it is inadequate to furnish cabooses to operate on all trains not previously designated for such operation.
>
> Accordingly, this is to advise you that effective July 1, 1988, we are invoking the provisions of Section 5, Article X, of the October 15, 1982 National Agreement, and will operate trains not previously designated without cabooses to the extent that it is necessary to do so.
>
> Effective at the same time we will discontinue payments previously made under Section 7, Article X, of the 1982 agreement when such trains are operated cabooseless because such discontinuance is in accordance with the provisions of that article.

When the instant claims were handled on the property, the Local Superintendent's response was to allow claims occurring prior to July 1, 1988, but to deny all subsequent claims, citing the Carrier's decision to invoke Section 5 of Article X, as set forth in its letter of June 10, 1988. These claims have been subject to further discussions between the Parties without resolution and have now been referred to this Board.

The Union's basic contention is that the Carrier was given authority by Article X to end the use of cabooses on only 25% of all trains in through freight service. In its view, if the Carrier goes beyond this limit, it has violated the Article and becomes subject to the penalties of Section 7. Further, although Section 5 admittedly gives the Carrier the right to refuse to purchase new cabooses or make major repairs on existing ones, this authority must be read in light of the overall 25% limitation. By whatever means it may choose, and if

necessary by purchase or major repair, the Carrier must maintain a fleet of cabooses sufficient to meet the 25% limitation or pay the two hours' pay penalty set by Section 7.

The Carrier's basic contention is that Section 5 must be read without reservation and that it clearly contemplates a gradual reduction in the number of cabooses in operating condition. Under these circumstances, it asserts it has the right to carry through the implications of Section 5 without being forced to pay the two hours' penalty each time that a caboose is not available because the fleet of cabooses has been irrevocably reduced by attrition. The Carrier further contends that the history of negotiations over Article X supports its views regarding Section 5.

DISCUSSION AND OPINION

The issue presented by these claims is clearly a matter of some importance to both Parties. According to the Parties, this issue is being presented for the first time for adjudication on this property, and possibly for the first time on the property of any Carrier signatory to the 1982 National Agreement. This Board has made a special effort to review the quite detailed submissions of the Parties as well as the contentions and reasoning advanced at the hearing.

This opinion will address the following:

(1) History of negotiations on this issue;

(2) Wording utilized in Article X;

(3) Parties' interpretation of this wording; and

(4) Awards and opinions cited by the Parties.

1. History of Negotiations

From information submitted to the Board, it appears that in the course of discussions with members of the Presidential Emergency Board, the Parties exchanged a number of proposals relating to the purchase and repair of cabooses. According to the Carrier (and not contradicted by the Union), it was the Union that first proposed language somewhat similar to Section 5, suggesting thereby a method whereby the Carrier could achieve some cost-saving during the course of the Agreement by failing to purchase any new cabooses or to make major repairs on existing cabooses. The Carrier states that on August 12, 1982, the Union proposed the following:

> "(e) It is further agreed that pending completion of the procedures set forth in (a), (b), and (c) above, but not extending beyond the moratorium provisions of this agreement, the carrier shall not be required to purchase or construct new cabooses, or perform major overhauls, but must maintain a sufficient number of adequately serviceable cabooses to protect all runs and assignments that still require cabooses."

Later on the same day, the Carrier responded with the following:

> "The Board further recommends that the carriers should not be required to purchase or place into service any new cabooses, and cabooses in the existing fleet shall not be required to undergo major overhauls. However, to the extent cabooses are used, they shall be properly maintained.

The Emergency Board clearly considered this question for its

August 20, 1982 report included the following:

> The Board further recommends that the Carriers not be required to purchase or to place into service any new cabooses, and cabooses in the existing fleet shall not be required to undergo major overhaul. However, all cabooses that remain in use must be properly maintained and serviced.

Following issuance of this Report, the Parties resumed negotiations that were to lead to the October National Agreement. On September 1, 1982, the Carriers proposed the following:

> "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."

In response, the Unions on the following day suggested the following:

> "A carrier shall not be required to purchase, construct or place into service any new cabooses or to perform major overhauls except where necessary to provide suitable cabooses on all trains or assignments where required. All cabooses that remain in service must be properly maintained and serviced in accordance with existing rules and standards."

The final wording, incorporated into the October 15,, 1982 National Agreement, was identical to the Carriers' September 1, 1982 proposal and specifically did not include the limitation language embodied in the Unions' proposal of September 2 which would have added the clause "except where necessary to provide suitable cabooses on all trains or assignments where required."

Thus the history of negotiations leading up to the adoption of Section 5 suggests that the final agreed-to wording specifically rejected any limitation on a Carrier's right to avoid purchasing new cabooses or making major repairs on existing cabooses.

2. Wording Utilized in Article X

The origin of much of the language of Article X can be found in the report of Emergency Board No. 195. After reviewing various aspects of the caboose issue, the Board concluded as follows:

> While the Board finds merit in the position of both parties, we conclude that, subject to the conditions and limitations hereinafter set forth, cabooses may be eliminated in each class of service without undermining safety and operational considerations. Moreover, we do not find any justification for excluding the elimination of cabooses in through freight service from arbitration procedures where disputes arise in specific cases.
>
> The Board believes that the elimination of cabooses should be an on-going national program.

This thought was carried over to Article X in the opening to Section 2. This language suggests that the Parties foresaw a gradual attrition of the Carriers' inventory of cabooses, ending at some point in the future with the "elimination of cabooses." The wording, "the elimination of cabooses should be an on-going national program" leaves little room for any alternative explanation although it does not set any timetable or deadline for achieving the "elimination of cabooses."

More directly pertinent to the merits of these claims is the wording of Sections 5 and 7. Section 5 directly authorizes the

Carrier to forego purchasing any new cabooses or performing "major overhaul" or "major repairs" on existing cabooses. As previously noted, no restriction or limitation is placed on this authority.

Section 7 is the penalty section, providing a two-hour payment to crew members whenever the provisions of Article X have not been observed. Specifically the penalty would apply whenever a train or assignment, furnished with a caboose prior to the 1982 National Agreement, was now, following the 1982 National Agreement, "operated without a caboose other than in accordance with the provisions of this Article....."

It is the Union's contention that the merits of the present claims are fully supported by the language of Section 7. Since the test of Section 7 (crew furnished a caboose prior to the 1982 Agreement but not following the Agreement) has admittedly been met, in its view, the penalty provisions of Section 7 clearly must apply. The Carrier responds by emphasizing the conditional clause in Section 7 modifying or limiting the application of penalty, "other than in accordance with the provisions of the Article." In its view, this clause refers to section 5 (among others) and thus if the reason for the Carrier's failure to assign a caboose is its decision to invoke the authority granted it by Section 5, then no penalty is applicable.

3. Parties' Interpretation of This Wording

It is important to inquire whether the Parties recognized the potential conflict inherent in the wording of Sections 5 and 7 and whether they took steps to resolve this inconsistency.

Apparently, such conflict was recognized. The Union's submission includes a letter from UTU President Fred Hardin addressed to all UTU General Chairmen and dated July 21, 1988 following the Carrier's June 10 notice that it was invoking Section 5. Mr. Hardin set forth the Union's dissent from the Carrier's action. He also enclosed the texts of two proposed "Questions and Answers" which were designed to provide supplementary information regarding Section 5, both proposed at the time of the 1982 National Agreement, one by the Union and one by the Carriers.

The Union proposal reads as follows:

"(UTU) Q. May the carrier eliminate a caboose from a train or assignment as being unfit for service on the pretext that they are not required to purchase or place into service any new cabooses or to overhaul or perform major repairs on cabooses in its existing fleet?

"(UTU) A. No. The carrier must provide, properly maintain and service sufficient cabooses for all trains and assignments on which they are required, regardless of whether this would necessitate placing new cabooses into service or to overhaul or perform major repairs on cabooses in its existing fleet.

The Carriers' proposal reads as follows:

"(NRLC) Q. May a carrier eliminate a caboose from a train or assignment by reducing the number of cabooses in its existing fleet for reasons other than specifically provided for in this Section?

"(NRLC) A. No. Elimination under this Section is limited to cabooses which would require replacement by purchase or major repairs."

It is clear from these proposed "Questions and Answers" that

the two Parties did recognize the issue inherent in the instant claims. The Union Q and A would have made clear the Carriers' obligation, despite the wording of Section 5, to provide cabooses for all required trains even if this entailed purchases of new cabooses or major repairs to existing cabooses. On the other hand, the Carriers' Q and A would have made clear that for any Carrier, Section 5 permits "reducing the number of cabooses in its existing fleet." It is unfortunate that the Parties were unable to resolve these differing interpretations of Section 5.

4. Awards and Opinions Cited by the Parties

Since the issue presented by these claims is arising for the first time, awards in other cases have only limited relevance. The Union's citations for the most part are concerned with the traditional warning that arbitrators and neutrals should look essentially to the language of the Agreement and not venture forth to, as one award states, "change an agreement by removing or making inoperative any provision or rule which the parties have obligated themselves to carry out." (First Division Award No. 15971, Referee William M. Leiserson). In the Union's view, the Carrier in the present proceeding is attempting to secure a new rule which the Carriers as a group were unable to obtain in the 1982 national bargaining negotiations.

The Carrier's many citations cover several aspects of the case. Most pertinent perhaps are those citations of awards which make clear that one section of a rule or article must not be interpreted without at the same time recognizing the application of

other sections of the rule, article or agreement. One such citation is the following:

> "A basic rule commonly observed by the courts and industrial arbitrators in the interpretation and application of a provision of a labor agreement which may arguably be construed in different ways...is, as far as feasible, to ascertain and give effect to the apparent intent of the parties, determining such intention not only from the language employed in the agreement but also from the aim and purpose to be attained under it, irrespective of any inaccuracy or ambiguity of expression." (First Division Award No. 20514, Arbitrator Charles Anrod)

In the board's view, this review of the major aspects of the claims presented leads to two major conclusions:

1. With respect to the Parties' intent in formulating Section 5 of Article X, the history of negotiations on this issue makes clear that the Union sought a restriction or limitation on the Carrier's right to forego purchasing new cabooses or performing "major overhaul" or "major repair" on existing cabooses. In this effort, the Union was not successful. A similar effort was made in the course of developing supplementary "Questions and Answers" concerning Section 5, but this effort also was unsuccessful.

2. With respect to the meaning of the wording of Article X, it is true that a certain inconsistency exists between the language of Section 5 and Section 7. The critical question is, to what extent, if any, does the Carrier's freedom to forego purchases and major repairs allow it to operate without penalty a caboosless train in through freight service which would otherwise require a caboose? On this

question, the Board gives greater weight than the Union to the conditional clause in Section 7, "other than in accordance with the provisions of this Article." In the Board's view, this clause 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.

Thus this Board must conclude, based on all the facts and circumstances of these claims, that the claims cannot be sustained since the absence of a caboose on the claimants' train resulted directly from the Carrier's action under Section 5, Article X.

This Board is mindful of its obligation to avoid rewriting agreements between the Parties or injecting new rules which the Parties specifically declined to adopt in negotiations. Nonetheless, in this proceeding, the Board is convinced that its conclusions constitute a reasonable interpretation of the intent of the Parties and the meaning of the language utilized in the writing of Article X of the 1982 National Agreement.

AWARD

The claims are dismissed.

Peter Henle, Neutral Member

L.F. Kell, Jr., Carrier Member

R.W. Earley, Employee Member Dissenting

8/18/89
Date