

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5739
CASE NO. 47 (Waiting Time)

Before Public Law Board No. 5739

CSX TRANSPORTATION, INC.

and

UNITED TRANSPORTATION UNION

The United Transportation Union (hereinafter the "UTU" or the "Organization") and CSX Transportation, Inc. (hereinafter "CSX" or the "Carrier") are, respectively, an Organization and Carrier as defined in the applicable provisions of the Railway Labor Act. Pursuant to Public Law 89-456 Public Law Board No. 5739 (hereinafter the "Board") was established, and is constituted as follows:

Mr. Paul C. Thompson - Organization Member
Mr. Donald Noell - Carrier Member
Richard R. Kasher - Chairman and Neutral Member

The Board met at the Carrier's offices in Jacksonville, Florida and considered the parties' written submissions and oral arguments regarding the following claim:

Claim of Conductor C.D. Day, ID 148486, Trainman B. Jones, ID 166574 and Trainman D.C. Pleasant, ID 166703, dated February 16, 1989, claiming 108 miles account required to wait in excess of thirty (30) minutes for transportation from off duty point to the lodging facility.

Background Facts

The facts in the instant case are undisputed. On February 16, 1989 the Claimants were assigned to Train R-441 operating between Baldwin, Florida and Winston Yard, Lakeland, Florida. The crew was relieved at Winston Yard, the away-from-home terminal, at 7:15 a.m., and were not furnished transportation to the lodging facility until 8:20 a.m.

Article 32, Section 3(c) of the parties' agreement specifies that the Carrier will provide employees transportation from the off-duty point to the lodging facility within thirty (30) minutes after the crew goes off duty.

There is no factual dispute in the instant case that the Carrier's failure to provide transportation within thirty (30) minutes of the crew's being relieved from duty constitutes a violation of the subject rule. The dispute concerns the remedy.

The parties had held the instant case in abeyance pending the resolution of a similar claim for a basic day penalty payment which was pending before Public Law Board No. 3953. The parties subsequently agreed that the instant case was properly before this Board to be decided on its merits.

On May 3, 1995 Public Law Board No. 3953 sustained the claims of the Organization for a basic day's pay in circumstances where an engineer relieved from duty was not afforded transportation within the thirty (30) minute time specified in the applicable schedule agreement.

The issue before the Board in this case is what would be the appropriate remedy for the Carrier's violation of Article 32, Section 3(c) of the UTU/CSX Schedule Agreement.

Position of the Organization

The Organization submits that the rule is clear and unambiguous and that it is undisputed that the Carrier violated the rule.

The Organization asserts that Award No. 134 of Public Law Board No. 3953, chaired by Referee Don B. Hays, in which a virtually identical claim of the Organization was sustained, should be followed by this Board. The Organization points out that Neutral Referee Hays in previous cases has awarded a day's pay when the parties' contract was violated, and citing such awards the Organization submits that this Board should, likewise, sustain the claim by awarding a basic day's pay.

As, in the Organization's opinion, Award No. 134 of Public Law Board No. 3953 is not palpably erroneous, the Organization requests that the Board give that Award due consideration and sustain the claims as submitted.

Position of the Carrier

The Carrier points out that the Claimants waited thirty-five (35) minutes longer than they should have, and contends that such

violation does not justify the imposition for an eight (8) hour penalty.

The Carrier submits that CSX made every attempt to fulfill its obligations under the agreement, and to provide transportation within thirty (30) minutes of off-duty time.

The Carrier further points out that in most incidents CSX has no control as to when a taxi will arrive to transport crew members from the off-duty point to their lodging facility.

The Carrier contends that there is no provision in Article 32 for the imposition of any penalty, and that if any additional payment is due to the Claimants for the inconvenience of waiting thirty-five (35) additional minutes for a bus/taxi then continuous time payment would be an appropriate remedy.

The Carrier asserts that First Division Award No. 12855 held that "Penalties may not be awarded unless expressly provided by Agreement or by long established practice"; and argues that the Award by Neutral Referee Hays in Award No. 134 of Public Law Board No. 3953 has resulted in an unfair requirement that was neither negotiated by the parties nor intended by implication to be included in the agreement.

The Carrier asserts that the instant claim is nothing less than an attempt to exact windfall payments for a minor, insignificant violation of the agreement. The Carrier points out that there were 257 similar claims held in abeyance in May, 1995 when the Hays Award was rendered, that that these claims had

accumulated over a period of nine years. The Carrier submits that, considering the hundreds of thousands of times crews have been transported in those nine years, 257 incidents is not an indication that the Carrier has established a pattern of violating the agreement; and thus, without such evidence, the Carrier contends that there is no justification for the payment of any penalty.

The Carrier cites several awards of Public Law Boards in which it was found that a basic day penalty was not the proper remedy for the violation of a rule by a carrier.

In conclusion, the Carrier submits that Award No. 134 of Public Law Board No. 3953 is an anomaly, and is in error as Neutral Referee Hays ignored the fact that there is no provision in the Agreement for payment of a penalty when transportation is late picking up a crew at the away-from-home terminal. Accordingly, the Carrier contends that if the Claimants are entitled to any additional payment for their inconvenience, such payment should be restricted to payment of continuous time on a minute basis until transportation to the lodging facility arrives.

Findings of the Board

In this Board's opinion, the facts in this case and similar cases represent the type of situation in which the parties should meet and negotiate in good faith and determine what is the

appropriate remedy for the Carrier's violation of the thirty (30) minute waiting time rule. Just as the rule does not provide for a penalty of a basic day for violation of the rule it does not provide that continuous time is the appropriate remedy; and it is more than arguable, if for instance a crew or a member of a crew was required to wait for four or five hours for transportation, that that crew or crew member would be entitled to some substantial remedy for the extreme inconvenience caused by the Carrier's failure to have the crew or crew member transported from an away-from-home terminal to the designated lodging facility.

In the instant case, a wait of an additional thirty-five (35) minutes does not appear to be a particularly onerous inconvenience. However, this Board is not in the position to judge what period of additional waiting time in what climate conditions and/or at what hours of the day or night would constitute a significant inconvenience justifying a remedy in excess of continuous time. Clearly, continuous time, at the least, is a minimal remedy for a crew or crew member who may have just been relieved from duty after a long and arduous road trip.

This Board does not have before it all of the facts considered by Neutral Referee Hays in Award No. 134 of Public Law Board No. 3953. Thus, we feel somewhat unfettered in determining what is the appropriate remedy in this case.

Our belief that we are free to fashion an appropriate remedy is supported, in part, by the Award of Referee John C. Fletcher in First Division Award No. 24177 in which he observes as follows:

For more than half a century, this Division, as well as Special Boards of Adjustment and Public Law Boards, have wrestled with the fact that the parties, for whatever reason, have never agreed upon the appropriate remedy for Agreement violations, except in a few cases. Obviously, the parties appear content to have this Board resolve such disputes on a case by case basis.

Referee Fletcher then went on to observe and "stress" that "such decisions [regarding remedies where none are specified] are ad hoc"; and that in finding "an appropriate remedy in each case, the Board must balance a number of factors."

In balancing the factors in the instant case, this Board has considered that (1) the Carrier has control through its contractual arrangements with taxi/bus companies to require those companies to timely provide transportation service to the Carrier's crews or to incur penalties for failure to do so, (2) 257 incidents of late "pick ups" in the context of "hundreds of thousands of times" crews have been transported over the nine year period is not a great number, but does represent minimal, some or extreme inconvenience to those crews who are not transported within the time prescribed and (3) the decision of Referee Hays on this property in Award No. 134 of Public Law

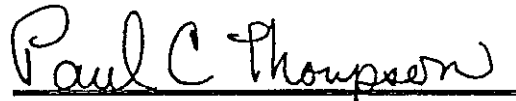
Board No. 3953 deserves some deference as he considered a virtually identical claim(s).

Based upon the foregoing considerations, this Board concludes that the claim should be sustained.

Award: The claim is sustained in accordance with the above findings. This Award was signed this 26th day of April, 1997.



Donald A. Noell
Carrier Member



Paul C. Thompson
Organization Member



Richard R. Kasher
Chairman and Neutral Member