PUBLIC LAW BOARD NO. 5916

PARTIES TO DISPUTE) UNITED TRANSPORTATION UNION

CSX TRANSPORTATION, INC. (FORMER L&N RAILROAD)

STATEMENT OF CLAIM:

Claim of MSI Conductor W. S. Janes for one day on September 22, 1995 account transportation unavailable within thirty (30) minutes after off duty time. [UTU File: 376-R3059; CSXT File: 4(96-1686)]

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

On September 22, 1995 the Claimant submitted a claim for one day's pay in a contention that the Carrier was in violation of Article 32, Expenses Away From Home, in a failure to have provided transportation from the off-duty point to the lodging facility within 30 minutes after the time of relief from duty.

Article 32, paragraph 13, reads as follows in part here pertinent:

> In instances where the distance from the off-duty point to the lodging facility provided by the Carrier in accordance with the terms of this agreement, or from such lodging facility to the on-duty point, is one-mile or more, the Carrier will provide transportation without cost to the employees. Except as provided hereinafter, such transportation will be in automotive passenger vehicles and will be made available within 30 minutes after the time of relief from duty. When it becomes known that the vehicle normally used for transportation will not be available within the specified 30 minutes, the Carrier's representative will arrange for taxi service provided the taxi can be made available before the vehicle normally used.

The claim text as filed with the Carrier on September 22, 1995 reads in part here pertinent as follows:

> AT MILE 186 TIME 2314 HRS. COND TO KAYNE AVE. YARDMASTER, NEED TRANSPORTATION TO MOTEL, WILL GET RIDE ON WAY. MILE 187 TIME 2323 HRS. COND. AGAIN ASKED KAYNE AVE. YARD MASTER FOR TRANSPORTATION TO MOTEL. K.A.Y.M. VAN ORDERED AND ON WAY. TO EXPLAIN CLAIM; CREW CLAIM 8 HR. BASIC DAY AT NASHVILLE, TN. KAYNE AVE. YD. ACCT. VIOLATION OF AGREEMENT—ARTICLE 32, CARRIER NOT PROVIDING TRANSPORTATION WITHIN 30 MINUTES AFTER RELIEF FROM DUTY TIME.

In a November 20, 1995 appeal of a denial of the claim, the Organization said:

> R589-22 crew put off duty at Kayne Ave at 23:25 transportation was not provided until 23:59 – 34 min later then delivered another crew to oak street before taking R589 crew to motel some 40 mins later. Article #32 states transportation is to be provided within 30 mins after relief from duty.

On July 2, 1996, the General Manager denied the above appeal, stating, in part:

> Investigation failed to reveal any record of the time the Grey Van Service arrived at Kayne Ave. to pick up the crew on R58922. Even if the elapsed time was in excess of thirty minutes, the excess time would only serve to extend the off duty time four minutes, which would make the total on duty time 9' 34" instead of 9' 30". Since he was paid 187 miles for the trip, the additional four minutes would not add compensation to the trip in the respect to overtime.

In support of its position the Organization directs particular attention to Award No. 134 of PLB 3953, CSXT-UTU, Referee Don B. Hays, dated May 16, 1995, in sustaining the claims of an Engineer for a day's pay on each of two dates account being transported to a lodging facility more than 30 minutes after arrival at a terminal, i.e., 50 minutes in one instance and 71 minutes in the second. In its award, PLB No. 3953 cited the facts of record, the rules at issue, and in sustaining the claims stated:

> Based on the credible evidence of record we find no contractual basis that would mandate that these claims should be summarily denied.

The Carrier directs attention to Award No. 4 of PLB No. 4836, CSXT-UTU (Former B&O RR), Referee Marty E. Zusman, dated May 6, 1991, which award denied the claims of a Conductor and Brakeman for a day's pay because transportation to the lodging facility allegedly arrived one hour after they went off duty and called to be picked up. In part, PLB No. 4836 stated:

[The] claim was filed alleging that transportation finally arrived one hour after their first call and in violation of Item 3 of the Lodging Agreement. That language of Item 3 reads:

> "Where the lodging facility is not located within a reasonable walking distance from or to the relieving and/or on-duty point, transportation will be provided at the Carrier's expense. It is the intent that transportation is to be made available within 30 minutes from the time the last member of the crew is relieved. Where transportation is provided the crew may be transported as a unit."

The Board does not find in this record that the Carrier refuted the facts, . . .

The Board notes the language was clearly written to indicate "the intent" (not requirement) to provide transportation within thirty minutes. Not only is there no penalty clause, but Section 4 of the Lodging Agreement states in pertinent part that:

> "Complaints relative to cleanliness of rooms, waiting time and/or transportation, referred to in Paragraphs 1(a), 2 and 3 hereinabove, will be handled between the Local Chairman and the Superintendent having jurisdiction. If unresolved, they shall be referred to the General Chairman and the Director of Labor Relations."

There is no evidence that the parties sought to apply the Agreement in the manner now under consideration. No record exists that the above process for resolving this complaint ever occurred. After a thorough review the Board does not find sufficient evidence that the Carrier has failed to abide by its negotiated provisions. If this circumstance, where one instance of a failure to provide transportation is presented, without a record of a failure on the Carrier's part to abide by Section 4, no penalty is supported.

As concerns argument to the Board that even assuming, *arguendo*, a penalty was determined to be appropriate that it be limited to the number of minutes in excess of 30 minutes at the straight time rate of pay, the Carrier directs attention to Award No. 21 of PLB No. 5907, CSXT-UTU, Referee Robert R. G. Richter, dated July 17, 1997. In part here pertinent PLB No. 5907 said the following in its Findings:

> This is one of 57 claims filed because transportation was not available within 30 minutes after Claimants registered off duty at Philadelphia, Pennsylvania. These claims cover a period from August 1989 through

August 1991 a period of 25 months. Both parties to the dispute agree the problem no longer exists.

* * * * * * *

The claim before this Board is for 46 minutes, however similar claims have been filed for a day's pay. In the case before this Board there is no dispute that the taxi hired by the Carrier was not made available within thirty minutes.

The question before this Board is whether the failure to provide transportation within 30 minutes requires the Carrier to pay a penalty.

The Carrier argues the dispute has been resolved by a previous Public Law Board. In Award No. 3 of Public Law Board 4836 held:

* * * * * * *

The Organization argues it handled the dispute in accordance with Section 4 without results. The record reveals the Local Chairman wrote the Carrier on July 5, 1989. Therefore, the filing of time claims was the only way to correct the situation. In the present dispute there are 57 claims over 25 months, about two per month, in which transportation allegedly was not available in 30 minutes. The most claims in any month are seven.

The Organization further argues that the above mentioned Award was only one instance and in this case it took two years to correct the problem.

The Carrier argues where no penalty is provided in the Agreement this Board cannot impose one. This argument has been refuted by numerous tribunals.

The position of the Organization is well taken, however, the Carrier has no control over the taxis when called. Traffic, weather, breakdowns are just some reasons for the transportation being late. While the dispute has been resolved this Board has not been informed just how it was done.

Based on the facts in this case the Carrier was dilatory in resolving the problem. However, a claim for a days pay is excessive, ergo the claim will be sustained for the number of minutes in excess of 30 minutes, to be paid at the straight time rate.

> The decision in this case is based on the facts and circumstances at Philadelphia, and does not mean a penalty payable in future cases, and clearly no penalty is payable when Section 4 is not complied with.

As concerns the merits of the case here at issue, the Board is not persuaded by Carrier argument that investigation failed to reveal any record of the time that the van service arrived to pick up the Claimant and his crew at Kayne Avenue. Nor does the Board find reason to believe argument that transportation services provided by a contract van or taxi are necessarily outside the control of the Carrier. It may be, as the Carrier urges, and is stated in Award No. 21 of PLB No. 5907, that such things as traffic, weather and vehicle breakdowns may cause a vehicle to arrive late for a pickup. However, none of those circumstances has been presented as the reason for the late arrival of the van service.

The Board also finds it difficult to comprehend that a contract van or taxi service of the nature involved in a dispute such as this would not be monitored as to when and at what time transportation services were requested and provided, if for no other purpose than to review billing statements. The Board likewise finds it difficult to believe that a van service would not maintain a log as to the time a call was received, at what time a pickup was made, and the time that the requested service was completed.

In the instant case, we have the unrefuted statement of the Claimant that he was in contact with the Yardmaster about transportation at 2314 hours and again at 2323 hours, and that the van did not arrive until 2359 hours, or 34 minutes after the time of relief of the Claimant from duty a 2325 hours. Actually, it arrived 45 minutes after the Claimant had first been in contact with the Yardmaster about such a matter. The record also contains the further statement that after picking up the Claimant that the van delivered another crew to Oak Street "before taking R589 crew to motel some 40 mins later."

The Claimant having provided the above information, the Board finds no merit in Carrier argument that the claim be denied in a failure "to prove this time allegation by the Claimant." If, in a case such as this, the Carrier wants to refute asserted times and statements as set forth in a claim or appeal it is obliged to obtain and present statements from its designated representatives as to what action they had taken and, in turn, what action the van service dispatcher or driver took upon being contacted for transportation so as to ensure a pick up within the time constraints of Article 32. Written statements might well relate times of contact, whether it was understood that a pickup could be accomplished within the prescribed 30 minutes, times of pickup and delivery, and what mitigating circumstance, if any, caused a delay in providing a timely service. Such a statement in the present case might, for instance, cast light on whether the delay was due to the van service having been directed to first pick up the crew that the Claimant says was in the van when he was picked up and was delivered to another location before taking him to the lodging facility.

The 30-minute time period prescribed in Article 32, as the Board views it, should provide ample time for a pick up to be affected since the Carrier has knowledge as to the time that a crew will be arriving at an away from home terminal, if not from contact made by a crew member in advance of such time, as in the instant case. Thus, it would seem to the Board that Article 32 was intended that employees be picked up as promptly as possible after marking off duty for transportation to the lodging facility, and that the parties were of a belief that this could reasonably be accomplished in less than 30 minutes. The Board therefore believes that except for established mitigating or emergency circumstances, that the Carrier should be held accountable and penalized if it fails to provide transportation within the prescribed 30-minute period.

Turning, therefore, to the penalty to be attached to the claim before us. The Board does not agree that no penalty should be awarded because PLB No. 4836 found that it was the "intent" and not the "requirement" of the rule that transportation would be provided within 30 minutes. Article 32, the rule at issue in the instant dispute, does not read the same as the rule before PLB No. 4836. Here, it is specifically stated in Article 32 that transportation "will" be made available within 30 minutes. As indicated above, the rule before PLB No. 4836 read: "It is the intent that transportation is to be made available within 30 minutes from the time the last member of the crew is relieved." Article 32, unlike the rule before PLB No. 4836, also does not contain a provision that complaints related to transportation to a lodging facility be handled between the Local Chairman and the Superintendent, etc. Further, whereas the rule before PLB No. 4836 prescribes that transportation be provided where the lodging facility is not located "within a reasonable distance" from or to the relieving and/or on-duty point, Article 32 states transportation is to be provided if such distance is "one-mile or more."

The Board also does not agree, as held by PLB 5907, that the penalty be limited to the number of minutes that transportation is late in excess of 30 minutes. The rule before PLB No. 5907 appears to be the same as that involved in the dispute heard by PLB 4836, i.e., containing an intent clause, a reasonable distance clause, and a complaints procedure. That rule, and the fact that the lead case was for 46 minutes, may well have been the reason why PLB 5907 awarded a limited penalty. In any event, it concerns the Board that limiting the penalty in such a manner only fosters a rather cavalier attitude in those responsibility for ensuring that transportation is provided within the prescribed 30-minute time period in a belief that either a rather limited penalty, or no penalty at all, will attach to such a violation. In the case at issue, for example, it is offered by the General Manager in his letter of July 2, 1996, supra, that: "Even if the elapsed time was in excess of 30 minutes that the additional time would not add compensation to the trip in the respect to overtime." Furthermore, the Carrier argues that the Claimant was only "inconvenienced" for four minutes, disregarding the fact that the Claimant had already been off duty for 30 minutes and transportation had basically been requested some 49 minutes earlier, and that the Claimant had to sustain a further delay in getting to the lodging facility while the van driver delivered another crew to a different location.

Lastly, in the light of this being at least the fourth PLB to hear cases on this subject matter, and other cases reportedly being held in abeyance pending a decision on this case, the Board is not convinced, as the Carrier also argues, that there is no evidence of a continuing pattern where transportation to lodging facilities is routinely late or that it continues to make every possible effort to make transportation available within 30 minutes to inbound crews for transport to lodging facilities.

Accordingly, based on the facts of record as found to exist in the instant case, the Board will sustain the claim for one day's pay at the straight time rate of pay.

AWARD:

Claim sustained.

Robert E. Peterson
Chair & Neutral Member

Patricia A. Madden
Carrier Member

Paul C. Thompson
Organization Member

Jacksonville, FL
Dated: October 5, 1999

CARRIER'S DISSENT

TO

AWARD NO. 24 OF PUBLIC LAW BOARD NO. 5916

The Board, in its decision resulting in Award 24, overlooked two basic tenets of industrial arbitration. First, it found the Carrier negligent because it was unable to furnish taxi company records which would substantiate, or refute, the Organization's allegations. The Carrier informed the Organization during its on-property handling that its claim could not be verified because the Organization failed to furnish such documents. As the moving party, it was the Organization's burden to prove the facts involved in its allegations. The Carrier never established an affirmative defense and, as such, was not required to disprove the Organization's case. Apparently, this Board feels the Carrier should bear the responsibility of proving the movant's case.

Second, the Board overstepped its authority by establishing a penalty when there is none contemplated by the Parties. On this point, the Carrier agrees with the Organization, where, within their submission **(p. 9)**, they advise that "*….this Board is respectfully cautioned that its purpose and duty is to serve in an appellate capacity and not as a Rule(s) making forum.*"

Nonetheless, this Board amended the Parties' Agreement by awarding the claim as presented. The Board has overlooked numerous precedential awards declining monetary awards where none is provided for; instead, it awards an arbitrary amount as a penalty for an unsubstantiated violation of an Agreement provision.

The Carrier asserts the only penalty which could conceivably be awarded would be for the extra time expended by the Claimant in waiting on his ride -- four minutes. In the face of the facts of record, any payment in excess of four minutes is patently excessive and without contractual support.

For the reasons stated above, the Carrier hereby dissents.

Patricia A. Madden
Carrier Member