

The claim of the Organizations for full retroactivity is, in this case, a strong one. The period between the end of the last prior Agreement and the new Agreement is inordinately long – over eight years. While employees have received Harris COLA payments and did not have to begin making employee contributions towards health insurance, those facts do not make up for the loss of any pay increase during the eight year period in question. Employees at the Freights, employees at the Commuter carriers, and employees for the federal government and most private employers received substantial wage increases over this period. Even the TCU and ASWC and ARASA (OBS) represented employees at Amtrak received pay increases and some retroactivity. The cost of living continued to increase and the necessary living expenses of the employees in this dispute continued to increase over this period. In short, absent retroactivity, employees will have been paid much lower real wages throughout this eight year period than under the immediately preceding Agreement and the Agreement will depart significantly from the wages and benefits due under the Freight pattern.

Additionally, there was no credible evidence that the Organizations were principally responsible for the inordinately prolonged nature of these negotiations. The Board recognizes that, as early as 2002, Amtrak announced as one of its “principles” that it would not agree to retroactive pay as part of any agreement. That unilateral statement, however, does not mean that a recommendation that rewards the Carrier and punishes employees for the failure to have earlier reached a settlement is fair or equitable or appropriate in this case. While this is not a “refusal to bargain” proceeding, and the procedures applicable to presentation of evidence to PEBs are not fully analogous to adversarial proceedings attempting to gauge whether a particular pattern of behavior

constituted good faith bargaining, the evidence paints a fairly clear picture that places much greater responsibility on Amtrak for the failure to ink a deal over the prolonged period since December 31, 1999, than on the Organizations.

The evidence indicates that: 1) Amtrak resisted application of the obvious pay pattern without reasons given for that position; 2) Amtrak insisted throughout the limited negotiations that the Organizations agree to far-reaching Work Rules changes that are unprecedented in the industry and would seriously undermine their standing and the security of their members in continued employment; as will be discussed in the next section in greater detail, Amtrak never proceeded past general proposals to allow virtually unlimited contracting out, obliteration of craft or class lines, changes in work schedule, and the like, and when asked for justification for these positions and/or cost analysis, declined to provide that information; 3) the pattern over the years in the industry, including those Agreements that Amtrak did reach with the TCU, AWSC, and ARASA (OBS) in 2003 and 2004, has been to approach Work Rules changes in a measured, incremental fashion, based upon particular specific problems caused by the application of historical Work Rules, and to engage in appropriate discussions (including quid pro quo bargaining) for reaching agreements in these areas; it was inconceivable that the Organizations to this dispute could ever agree to the revisions of Work Rules demanded by Amtrak which Amtrak declined to discuss in detail in bargaining<sup>11</sup>; and

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<sup>11</sup> Amtrak apparently engaged in these focused, specific negotiations with the Organizations, as appropriate, and as needed, with respect to numerous projects. Differing positions were also taken regarding scope and contracting out in various arbitration proceedings. There was no evidence, however, that even a single detailed proposal in term bargaining was provided by Amtrak to the Organizations prior to the eve of the hearings in this matter and even those proposals were sweeping generalized attempts to eliminate all restrictions, rather than to focus upon particular proven problem areas. Further, as discussed below, the evidence introduced by Amtrak in support of its claimed need for these sweeping reforms was weak, at best, and with respect to many of the proposals bordered on non-existent.

4) the record revealed that the Organizations attempted on numerous occasions over the years to be released from mediation, despite the failure of the Parties to have narrowed the areas of their differences and, in each of those instances, Amtrak opposed release and opposed offers to arbitrate the matters in dispute.<sup>12</sup> When these and other facts are viewed together, there is a serious question as to whether Amtrak desired to obtain agreements from the Organizations in this proceeding other than under terms evidencing complete capitulation in several areas in which such capitulation could not reasonably be expected. Instead, it appeared content to continue to work its employees at 1999 wage levels (adjusted only by the Harris COLAs) and to reserve its arguments, after an agreement was ultimately reached, that: 1) retroactivity was inappropriate; and 2) even if appropriate, should not be awarded due to a lack of funding for that purpose.

Full retroactivity is not inconsistent with industry patterns over the years. It appears that full retroactivity has been granted in some cases and compromised in other cases by payment instead of signing bonuses. We are persuaded that, in this case, nothing short of full retroactivity is fair and equitable and appropriate to begin to restore to employees the lost wages that resulted from their inability to obtain a successor Agreement over the unprecedented eight year period that these employees have continued to work without a new Agreement. Even an award of full retroactivity will result in Amtrak having had the benefit of an interest-free “loan” of the pay that would have been granted on an ongoing basis if the Freight or other applicable pattern had been timely incorporated as part of an Agreement.

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<sup>12</sup> Amtrak’s implausible assertion that the Organizations deliberately avoided reaching agreement in the hopes of obtaining a more favorable political climate in which to obtain gains in Congress is inconsistent with the record evidence and is rejected.

Despite these conclusions, we do not wish to recommend terms that constitute an unreasonable risk of forcing Amtrak out of business or adversely affecting operations so significantly that safety will be imperiled or dependability affected.

Accordingly, some discussion of the financial ability of Amtrak to provide the retroactive pay recommended herein is appropriate.

The Organizations, in their post-hearing brief, while challenging Amtrak's "ability to pay" defense, note that "In the interest of settlement, the Organizations are amenable to negotiations on the timing of retroactive payments due."

The Board is persuaded that, in light of the failure of Amtrak to have sought funding from Congress, and the resulting failure of Congress to specifically fund retroactive pay (or approve the creation of a special reserve for that purpose), it would be irresponsible to provide for payment of the entire retroactivity amount in FY 2008. The question is thus presented as to how much may prudently be paid in FY 2008 and how much should be recommended for payment on a deferred basis in FY 2009.

William H. Campbell, Amtrak's Chief Financial Officer, testified that:

1) monies appropriated and monies retained from other revenues cannot be "reserved" from year to year; thus, outside of the current year's funding and revenues, no monies are available for retroactive pay;

2) monies were available in the FY 2008 operating budget to fund the \$4,500 lump sum signing payment (which Mr. Campbell estimated had a cost, that includes the cost of Amtrak extending similar retroactive pay to other employee groups beyond the Organizations in this proceeding) of approximately \$83.2 million (including RRTA roll-

up); exclusive of those other employee groups, the projected cost (including RRTA roll-up) for the Organizations only was \$34.35 million; and

3) the \$4,500 bonus payment was “within the capability” of Amtrak to provide if necessary to obtain an agreement with the Organizations; and

4) the estimate of the full cost of retroactivity was approximately \$150 million (including RRTA roll-up and including extension of the full retroactivity to other employee groups, after discounting for employee groups who had agreed to Agreements that did not provide for retroactivity); while he did not testify to the number it would appear that the full retroactivity number solely for the Organizations in this dispute would thus be slightly less than \$62 million.

While the Board recommends that full retroactivity be awarded, albeit paid out in two components, one in FY 2008 and the remainder in FY 2009, the Board recommends that the pool of eligible employees who will receive retroactivity be limited to those individuals who were on the payroll as of December 1, 2007, the date on which the Board was created. This should reduce somewhat the cost of the retroactivity pay from the estimates provided by Mr. Campbell.

After consideration of all of the above, the Board recommends that, for eligible employees, 40% of the retroactivity be paid 60 days after the date of ratification and the remaining 60% of the retroactivity be paid on or before the one year anniversary date of the first 40% payment. This should result in payment of retroactivity that should be within Amtrak’s ability to pay and leave appropriate time for the remainder of the retroactivity pay to be adequately funded (from Congress and/or the fare box and/or other sources). The Board does not recommend any interest be added to these payments,

despite the recognition that the spacing will continue for modest additional periods of time the existing inequities.

**E. Moratorium**

Consistent with the Freight pattern and consistent with the remainder of the Board's recommendations, we recommend a moratorium date of December 31, 2009.

**F. Meal Allowance**

The Organizations have proposed a 20% increase in the daily meal allowance provided for work away from home from the present level of \$29.50 per day to \$35.40 per day. Adjustments to this allowance have historically been done on an ad hoc basis, both at the Freights and at Amtrak.

Based upon the length of time since the last adjustment (which took place in December 1997), increases in the cost of food and meals in the intervening period (which were greater than 20%), and the increases in the meal allowance negotiated as part of the 2000-05 Freight Agreement, we recommend adoption of the requested increase in daily meal allowance.

**G. Health and Welfare**

Until 1997, Amtrak participated in the Railroad Employees National Health and Welfare Plan ("National Plan"), the same health plan as the Freights.

In or about 1990, Amtrak and the Railway Labor Executives Association arbitrated the issue of the Amtrak's right to withdraw, mid-term, from the National Plan and to instead provide benefits through a plan administered by the Carrier. In Special Board of Adjustment Case No. 1029, issued on November 15, 1990, Arbitrator Nicholas H. Zumas, ruled that Amtrak could unilaterally change to a self-funded program,

provided that the level of benefits remained the same as those offered by the National Plan.

The principal reason for Amtrak's desire to split off from the National Plan was its belief that it could provide comparable benefits to its employees for significantly less money due to the lower average age of its employees compared with the Freights. Militating in favor of remaining in the National Plan after 1990 was the fact that substantial reserves had been accumulated in that Plan and those reserves were being used to subsidize what otherwise would have been larger current employer contributions necessary to provide the promised level of benefits.

In 1997, after those reserve levels were reduced somewhat as a consequence of being drawn down to pay out current benefits and as a result of some repayment to the participating carriers, Amtrak formed its own health plan – AmPlan. Like the National Plan as of the date of Amtrak's withdrawal, those benefits were provided to employees without employee contributions. AmPlan included a Joint Medical Administration Committee ("JMAC"), patterned after the Joint Committee system in place with respect to the National Plan. With some relatively minor differences due largely to differences in administration, and with the exception of benefits changes made to the National Plan as a result of the 2000 and 2005 Freight Agreements, the terms of the National Plan and AmPlan have remained identical. The record indicated that, for a number of the years after Amtrak's withdrawal from the National Plan, it provided the same package of benefits through AmPlan with significantly lower costs per employee. By 2007, however, the costs of the two plans were almost identical.

In accord with the 2000 Freight Agreements, effective as of July 1, 2001, the employees began to contribute a share of the total premium cost of the coverage.<sup>13</sup> The present rate of employee contribution under the Freight Agreements is \$166.25 per month.<sup>14</sup> Those Agreements further provide that the monthly employee contribution for 2010 cannot exceed the higher of the 2009 contribution or \$200.00. The 2000 and 2005 Freight Agreements also made a number of changes to the plan of benefits of the National Plan. Some increased benefits slightly. Others, in the nature of cost containment features, reduced benefits and/or improved administration.

The 2003 TCU Agreement contained provisions that differed from the 2000 Freight Agreement in the following respects: 1) the \$100 additional opt-out payment for employees who can demonstrate other health coverage and opt out of the National Plan was not included; 2) the employee contributions of \$50 per month beginning October 1, 2003, \$75 per month, beginning October 1, 2004 were significantly lower than under the Freight Agreement; and 3) the period in which medical benefits were provided following disability was changed from the two calendar year period following the year in which the disability took place, with vacation pay extension (the National Plan provision and which varied in individual cases from 24 months and one day to 35 months and 30 days) to a uniform 24 months following disability, with no extension for vacation pay.

The Organizations propose that the benefit changes negotiated with the Freight relative to the National Plan in the period between 2000 and the present be incorporated

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<sup>13</sup> This was to be done via Section 125 Cafeteria Plans so as to permit those contributions to be made on a pre-tax basis.

<sup>14</sup> Employee monthly contributions towards health benefits under the Freight agreements were \$33.39 (July 1, 2001-June 30, 2002); \$81.18 (July 1, 2002-June 30, 2003); \$79.74 (July 1, 2003-June 30, 2004); \$91.32 (July 1, 2004-June 30, 2005); \$97.43 (July 1, 2005-December 31, 2005); \$123.28 (January 1, 2006-December 31, 2006); and \$166.25 (January 1, 2007-December 31, 2007). It appears that the 2008 employee contributions under the Freight Agreements will be close, if not identical, to the 2007 rates.

into AmPlan in their totality and on an entire package basis. With one modest exception, the Board endorses that proposal as a fair and equitable basis for resolution in this case for several reasons. First, reasons of historical pattern bargaining support this proposal. Second, all Parties to this proceeding recognize the continued linkage between AmPlan and the National Plan. A central part of the proposed changes involves the introduction of employee cost-sharing in monthly contributions towards the provision of health insurance and a number of related welfare benefits. Amtrak recognized the linkage when it sought employee contributions from these Organizations and from other organizations in bargaining. The proposal that the employee contributions be a percentage of total annual costs and set at 15% - the same as is provided under the Freight Agreements – and that the 2010 contributions be further capped so as not to exceed the greater of the 2009 employee contribution or \$200.00, with the 2010 amounts to be continued thereafter without increase until varied by a successor Agreement, are elements of the Freight Agreements. It would be inappropriate to model the employee contribution change on the Freight Agreements, which is of enormous benefit to Amtrak at significant cost to employees, but then to divorce as irrelevant the other changes effected as part of the give and take of bargaining in the pattern Freight negotiations.

For these and other reasons, we cannot support Amtrak's request to institute a \$50.00 monthly premium contribution requirement for retirees that is not part of the Freight pattern. We recognize that a pattern is not inviolate. Deviations are made by the bargaining parties themselves, and by interest arbitrators and PEBs, where shown to be warranted. No such showing was made in this case. The sole basis posited by Amtrak at the hearing for the request was to receive some modest additional income from the retiree

participants, not to discourage them from participating in the plan. No cost data as to the amount of money involved, other than the estimate (as to which no calculational basis was provided) in the testimony of Thomas O.S. Rand, Kennedy & Rand Consulting, that this change was equivalent to \$2.50 per month per employee. Nor, apart from a claim of comity with the 2003 TCU Agreement, has Amtrak advanced persuasive reasons for any of the other proposed variations from the National Plan save one – the introduction of an additional \$100 per month payment to employees who opt out of the plan. The reason for recommending adoption of these additional payments is not obvious. Due to the delay in implementing the employee premium co-payments, the first required co-payments will be of sufficient size that it is unlikely any additional financial inducements are needed if an employee has qualifying other coverage and otherwise chooses to opt out. Since they are inapplicable to the vast majority of employees and would appear to reward individuals simply for giving up health coverage for which they would receive limited or no benefit, this limited variation would not seem to imperil principles of parity.<sup>15</sup> Given the serious competing claims upon Amtrak's limited revenue, the lack of any apparent benefit to these expenditures, and the changed circumstances existing now, as compared to the point in time when the Freight Agreements adopted that payment, we decline to recommend adoption as part of the packages a monetary item which has more than minimal cost and which has no apparent benefits.

There also are two minor items that merit deviation from the National Plan provisions due to differences in the administration of AmPlan. First, the change in

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<sup>15</sup> We limit the variation from the Freight pattern to the \$100 payment and recommend that employees who opt-out of health coverage retain the same eligibility as Freight employees for other welfare coverages with the same terms applicable to retention of those coverages.

benefits coverage appears appropriate due to differences in the AmPlan and National Plan networks. Second, the changes to the Emergency Room co-pays contained in Amtrak's proposal appear warranted. That merely extends to the existing ER co-pay under AmPlan the change in ER co-pay amounts adopted by the National Plan as part of the Freight pattern.

The final item relative to AmPlan about which the Parties' proposals depart concerns the calculation of the amount of the employee contribution. All proposals support a formula based upon the National Plan formula – 15% of the employer's cost, paid by means of a pre-tax mechanism. All proposals support a cap on the 15% employee contribution in 2010, with the contribution in 2010 equal to the lesser of: a) the 15% of employer costs; or b) the greater of i) the 2009 employee contribution amount, or ii) \$200.00, with the 2010 amount to be continued thereafter until a successor Agreement is adopted that changes that amount. The difference between the proposals is whether to adopt the Freight Agreement dollar employee contribution figures (either as the contribution figure or as a cap) or to apply the Freight Agreement formula to the costs of AmPlan. The Board urges adoption of Amtrak's proposal in that regard. While AmPlan has a plan design that closely parallels that of the National Plan – a fact that will likely keep total costs per employee and employee contributions very close to one another – AmPlan is a separate plan. No reason was shown to have the share of cost-sharing for AmPlan employee participants differ from that of the National Plan by using National Plan dollar figures, an approach that could result in the cost sharing of the employee participants in AmPlan being slightly less or slightly more than 15%. Having transitioned to a separate parallel health plan, both Amtrak and the represented

employees now have a common stake in efficient benefit administration and cost controls within the existing plan of benefits and in having cost-sharing proceed on the basis of Amtrak's costs, rather than those of the National Plan participating employers (who presumably will determine contributions annually based not only on projected costs, but on the reserves contained in the National Plan).

Other than these items, the Board proposes that the changes negotiated to the National Plan since January 1, 2000, be extended to and incorporated as part of AmPlan, effective January 1, 2008. Those changes will continue the parity between the two programs contemplated by the Parties and avoid doing violence to the pattern that the Freight Agreements continue to constitute. The changes to be incorporated relate to both those that improve benefits in certain areas and those that limit benefits in certain areas. The changes cannot be dismissed as minimal; however, in the context of the overall design and costs of the program, they represent modest modifications around the edges, rather than major changes in design or benefits. According to Amtrak's expert in the PEB proceedings, the benefit reductions since January 1, 2000, that would be incorporated from the National Plan's cost containment measures that would apply under the new Agreement, represent 4% of current costs, even after one takes into account the benefits improvements that are also part of that parity approach. Based upon Amtrak's 2007 costs, this is equivalent to an additional \$48 per month per employee – a sum equal to almost 28% of the employee contribution amount, and brings the total savings to Amtrak in 2008 to \$214.25 per month, or \$2,571 per year.<sup>16</sup> Thus adoption of the aggregate changes from the National Plan – the employee contribution requirement and

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<sup>16</sup> If extended to all of Amtrak's employees, this is equivalent to approximately \$41.6 million in annual savings.

the various benefit and administrative changes, will result in close to a 20% reduction in health care costs for Amtrak in 2008 over what Amtrak's costs would have been under the 2007 plan provisions. Amtrak's proposed "cherry picking" of the Freight package to take the parts that benefit it while rejecting the rest has no legitimate basis and cannot be recommended by this Board.

## **H. Work Rules**

### **1. Amtrak's Proposed Changes to Work Rules**

Amtrak has proposed to the Organizations and to the Board a number of changes to Work Rules that have been in place for some years and which Amtrak states it seeks to improve the efficiency of the Carrier. Amtrak asserts that, in making these proposals, it is simply attempting to fulfill the desire of Congress to improve efficiency and to bring "19<sup>th</sup> century work rules" into the "21<sup>st</sup> century" so that it can efficiently operate a modern passenger railroad. In addition to proposed changes in Work Rules in other areas, Amtrak proposes an approach towards Work Rules that seeks to eliminate long-standing limitations on its ability to contract out work, seeks to eliminate restrictions on its ability to assign work out of craft or class, and seeks to eliminate restrictions on its ability to schedule work.<sup>17</sup>

Carriers have often sought changes to Work Rules in these areas, both in negotiations and before Presidential Emergency Boards. In negotiations in the industry, it is customary for agreements that amend or eliminate Work Rules to be fairly focused in

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<sup>17</sup> These Work Rules proposals are the primary focus of the Board's Report because the Parties indicated that they are the most significant of those proposed by Amtrak and because they were the subject of the most testimony and argument at the hearings. The Board has carefully reviewed and considered, however, all of the proposed Work Rules changes prior to making the recommendations in this matter. It should be noted that Amtrak has proposed major changes for scores of Work Rules.

nature, to be incremental, and to be negotiated with quid pro quos to in exchange for the agreement of the Organization to relax or repeal the particular restrictive Work Rules.

## 2. Contracting Out

On December 2, 1997, Congress passed the Amtrak Reform and Accountability Act of 1997, P.L. 105-134. Section 121 of that Act, Contracting Out, amended existing collective bargaining agreements between Amtrak and its organizations (including the Organizations parties to this dispute), to incorporate the pre-existing statutory language relative to contracting out. Those provisions, in essence, recognize Amtrak's right to contract out work that does not cause the furlough of any employee.

Amtrak's Section 6 notices to the Organizations, in a section entitled "Rules to Support Amtrak Business Plan Objectives," each contained the following identical language as its proposal relative to contracting out: "Permit greater flexibility in contracting out work, as needed." No greater detail concerning Amtrak's needs or desires was provided during the formal bargaining in this case. No additional written proposal regarding contracting out was provided by Amtrak prior to the cooling off period and the PEB proceeding in this case. Amtrak indicated that it did not tender specific written proposals for two reasons. First, it concluded that to do so when the Organizations had indicated their unwillingness to modify Work Rules to permit Amtrak greater contracting out would be "negotiating with itself." Second, it argued that this objection by the Organizations was disingenuous since details concerning its contracting out desires were communicated in private "off the record" meetings. Further testimony, however, revealed that those discussions related to the handling of specific projects or

situations where work was to be contracted out, rather than to general proposals for new contract language or reform of Work Rules.

On November 20, 2007, Amtrak provided proposed Terms of Agreement to each of the Organizations. Those proposed Terms of Agreement included the following language relative to contracting out:

Contracting Out – Eliminate any existing contracting out restrictions. Provide that employees furloughed as a result of contracting will have an option for up to and including 1 year severance pay, or transfer with relocation, or remaining on furlough. A labor protection event as set forth in the Mittenal Award will supersede this provision.

The Carrier's December 6, 2007 proposal contained yet a different formulation of its contracting out request. It stated as follows:

Replace the current provisions of Rule ... - Contracting Out, placed in the [organization] Agreement pursuant to Public Law No. 105-134, with the following:

In response to Public Law No. 105-134, in exercising its rights to contract out work, Amtrak will provide the following options for employees who may be furloughed as a result of such contracting:

1. Severance for up to twelve (12) months with each month of service counting as one (1) month of pay (21 eight hour days for each month), up to a maximum of twelve (12) months, or
2. transfer to another vacant position for which qualified, with relocation under the terms of Appendix C-2/Mittenal (regardless of service), or
3. remain furloughed.

A labor protection event as set forth in the Mittenal Award will supersede this provision.

In the case of the BMW represented employees, the existing Scope Rule precludes contracting out of work to a greater degree than the Scope Rules and/or Agreements of the other Organizations. Amtrak proposed in its December 6, 2007 Proposal to amend the BMW Scope Rule so as to permit the contracting out of non-core functions (which Amtrak defined to include tree removal, brush and grass cutting, snow removal outside the right of way, clean up of non-railroad materials on the right of way,

asphalt paving, bridge netting and fall protection, underwater inspections, demolition, fencing, large scale catenary pole foundations, large scale steel painting projects, and facility projects) and work for which special certification was needed (which Amtrak stated included lead abatement, asbestos removal, and building system maintenance, such as HVAC, cleaning, etc.).

The BMWE did not agree that the listed duties were “non-core” in nature and asserted that they were substantial, regular duties of its members. Safety considerations related to clearing trees in the vicinity of high voltage power lines were also cited as a basis not to contract out those functions. No aggregate information was introduced as to how much work in these categories is presently being performed by BMWE employees, whether furloughs would result if Amtrak contracted out much or all of that work, whether there were any cost savings associated with any planned contracting out of that work and, if so, how much money would realistically be saved by such contracting out. While Amtrak asserted that it desired to reassign BMWE employees performing those enumerated duties to core work and that it did not expect furloughs to result, there was no evidence introduced as to the volume of that claimed core work backlog or its location. Nor was there proof that these claimed problems have increased in recent years.

The Carrier confirmed in its economic presentation that, if these proposed Terms of Agreement are agreed to, then it intended to contract out the entire Car Cleaner function, resulting in the furlough of approximately 800 employees represented by the JCC.

### 3. Assignment of Work Out of Craft or Class

Amtrak's Section 6 notices to the Organizations, in a section entitled "Rules to Support Amtrak Business Plan Objectives," each contained the following identical language as its proposal relative to out of craft or class work: "Provide that all employees work in a team environment, capable of performing all work for which capable, without claim or penalty, in the most efficient manner possible." No greater detail concerning Amtrak's needs or desires was provided during the formal bargaining in this case. No additional written proposal regarding assignment of work out of craft or class was provided by Amtrak prior to the cooling off period and the PEB proceeding in this case.

The Carrier included in its November 20, 2007 proposed Terms of Agreement identical language to each of the Organizations which provided in pertinent part as follows:

Scope – Modify all work assignment and jurisdiction rules and agreements to provide:

- a. Employees can do any work in/out of craft they are capable of doing; other crafts can do any [organization] work they are capable of performing; training may be given as needed.
- b. A craft to craft ratio amongst shop craft unions will be established as of the date of the last signed shop craft settlement. Ratio will be reviewed around October 1 of each year or when a major event occurs. Amtrak will provide adjustments and [organization] may review the adjustment as it involves them.
- c. Any scope claims which may exist are considered withdrawn. No scope or jurisdiction claims may be submitted in the future.

Amtrak asserted that this proposal was necessary particularly in turnaround situations to eliminate delays in effecting repairs to trains which contribute to on-time performance problems. The areas cited specifically were repairs of toilets and heating, ventilation, and air conditioning ("HVAC") systems. Depending upon the problem, a problem with the HVAC system or the toilets might be within the traditional work for an

Electrician (IBEW), Plumber (Sheet Metal Workers), or Air System-Cleaner (JCC). In response to an inquiry as to why the matter would not be covered by existing Incidental or Simple Work Rules<sup>18</sup>, the Carrier replied that the major reason was that its foremen (who are also unionized) are reluctant to make out of craft or class assignments due to fear of being criticized if penalty pay is ultimately awarded. No specifics, however, were provided to establish either the frequency in which these situations were operational problems or the frequency of any operational delays due to the craft based system of work assignments. Nor was there any evidence suggesting that any problems which might exist have become more severe in recent years.

The Organizations maintained that this proposal was merely a renamed attempt to obtain a “composite mechanic,” a concept which had been rejected in prior negotiations and had been rejected by a number of prior Presidential Emergency Boards.

#### 4. Work Schedules/Overtime

Amtrak’s Section 6 notices to the Organizations, in a section entitled “Rules to Support Amtrak Business Plan Objectives,” each contained the following identical language as its proposal relative to scheduling of work and overtime:

Provide that overtime will be payable after an employee has worked forty (40) hours during the workweek.

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<sup>18</sup> The Incidental Work Rule in effect provides that “incidental work” covered by the classification of work or scope rules of another craft or crafts may be performed when completing a work assignment. Incidental work includes the removal or replacement or the connection or disconnection of parts and appliances, such as wires, piping, covers, shielding and other appurtenances from or near the main work assignment, and includes other simple tasks that require neither special training nor special tools. There are also time limits on the amount of incidental work that may be performed – it may not comprise a preponderant part of the assignment exceeding the main work assignment. Simple tasks can be performed up to two hours per shift and such hours are not considered when determining what constitutes a preponderant part of the assignment. Thus, if an assignment is expected to take a full eight hours to accomplish, including the incidental work and simple tasks, up to two hours may be spent performing simple tasks and an additional two hours and fifty-nine minutes (one-half of the remaining time less one minute) may be spent performing other incidental work duties.

In order to enhance flexibility in meeting customer needs and service requirements, provide that work schedules, rest days, blanking and/or combining jobs, starting times, meal periods, hours of assignment, and any existing necessities for filling vacancies may be adjusted. This includes the setback of assignments at running repair locations on a day to day basis.

No greater detail concerning Amtrak's needs or desires was provided during the formal bargaining in this case. No additional written proposal regarding work scheduling or overtime was provided by Amtrak prior to the cooling off period and the PEB proceeding in this case.

The Carrier included in its November 20, 2007 proposed Terms of Agreement identical language to each of the Organizations which provided in pertinent part as follows:

Eliminate Bank Time<sup>19</sup>.

Amend existing rules to provide that overtime shall only be paid for hours worked in excess of 40 straight time hours in the work week, excluding where such work is performed by an employee due to moving from one assignment to another. Paid vacation, holidays, jury duty, bereavement, training, paid personal leave and paid military leave will be credited towards the 40 hours when substituted for regular work hours. Work week will not be reduced and the existing double time rule will remain.

The December 6, 2007 Proposals provided by the Carrier mirror, in substance, the excerpts from the November 20, 2007 proposed Terms of Agreement noted above.

Increased flexibility in work scheduling was addressed via different language in Amtrak's proposals, depending upon the Organization. Illustrative is the Carrier's Proposal to the BMW, dated December 6, 2007, which provides in pertinent part that:

#### VII. Starting Times

Paragraphs a, b, c, d, f, and h of Rule 42 – Starting Times, of the BMW Northeast Corridor Agreement and Rule 10 – Shifts, Starting Time and Meal Periods, of the BMW Corporate Agreement are replaced with the following (meal period provision under the BMW Corporate agreement shall remain):

One two or three shifts may be established where necessary to meet service requirements. The starting time of any shift or position may be changed on thirty-six (36) hours notice to the employee affected. The starting time for employees assigned to one

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<sup>19</sup> Bank time is compensatory time provided in lieu of payment of overtime.

or two shift operations shall be scheduled according to service requirements and need not be consecutive. For three shift operations, starting times for second and third shift shall generally be immediately following the preceding shift, but shifts may overlap consistent with operating requirements.

Amtrak asserted that it needed greater flexibility in scheduling so as to take better advantage of periods of lessened track use to perform maintenance and upgrades of the right of way and to accomplish repairs and maintenance of coaches and locomotives during periods that will minimize the effect on on-time performance. At the hearings, a handful of examples were cited of particular work schedules that Amtrak desired to implement to achieve those goals. The Organizations responded that, contrary to Amtrak's position, it could implement a number of those schedules under the existing Work Rules. The Organizations also noted that, in emergency situations, even greater scheduling flexibility exists.

Amtrak estimates that it will save over \$10 million annually by being able to schedule weekend and evening and night work and adjust starting times without the need to pay overtime or penalty for such work.

##### 5. Findings and Recommendations

There are a variety of reasons why the Board cannot recommend adoption of any of Amtrak's Work Rules proposals.

Some of the reasons we cannot recommend adoption of these proposals are common to all of the requested Work Rules changes. In that regard, we note the following.

First, none of the proposals were shown to be consistent with the Freight pattern. In fact, some of these Work Rules proposals were also made by the Freights and abandoned in bargaining. Amtrak's reliance upon the provisions of the failed BLET TA

is misplaced. For reasons discussed earlier in connection with the discussion of pattern considerations, the BLET TA, which was overwhelmingly rejected, cannot provide an appropriate pattern or basis for the contracting out language sought by the Carrier. Moreover, the jobs performed by the BLET represented employees are very difficult to contract out and its scope rules protect its work in any event. The change, even if agreed to, would thus have limited practical effect with respect to its members. No other rail agreement, including the 2003 TCU Agreement and the Freight Agreements or the agreements with the Commuter Railroads, contains language similar to that sought herein by Amtrak.

Second, none of the proposals were shown to have been the subject of intensive bargaining with the affected Organizations and were not even the subject of specific, detailed proposals until the cooling off period – almost eight years after the expiration of the last Agreement and the provision of Section 6 notices. The subject matter of these Work Rules is far too complex for major changes to be implemented without first being subject to the crucible of good faith bargaining which often yields a workable, balanced framework for addressing proven problems in a proportionate, measured fashion, taking into account appropriate tradeoffs and quid pro quos that often times accompany agreements to modify work rules.

Third, many of the work rules proposals go to core craft and class job security concerns. A significant showing of propriety and need would have to be made prior to our recommending that these longstanding principles be eliminated. Moreover, the result of any abrupt abandonment of these work assignment and job security principles would

likely include significant instability and, at least in the short run, would create far more productivity problems than would be solved.

Fourth, no proof of compelling operational need for any of these proposed work rules changes was demonstrated. There was no showing that any problems have changed in frequency or severity in recent years or that the proper use of the existing work rules cannot achieve most of the results that the Carrier claims to seek by the proposed work rules changes. The need to meet and discuss matters with the Organizations prior to contracting out their work is not an undue burden or grounds to eliminate the existing limitations on contracting out. Rather, that represents a process that seems to work reasonably well in balancing the legitimate and often complex interests of all parties in those decisions and their effects.

Fifth, to the extent that any recommendation ought to reflect a mutually acceptable basis for agreement, since the recommendations of this Board should mirror results that would be achieved through good faith, arms length, collective bargaining, there is virtually no chance that the comprehensive changes to existing work rules and assignment and pay practices sought by Amtrak would be agreed to by the Organizations, particularly in the absence of countervailing substantial concessions by Amtrak. None of these proposed changes standing alone and in their present form appears to be something that would likely be agreed to or could be ratified. Together, there is virtually no chance of such agreement or ratification.

Any one of these concerns may well have led us to recommend against adoption of Amtrak's proposed Work Rules changes. Together, they require that we recommend against adoption of these proposed Work Rules changes.

There are additional reasons that militate against acceptance of the individual work rules discussed above.

With respect to Amtrak's contracting out proposal, the Carrier's right to contract out work that does not lead to furloughs is broad with respect to most of the Organizations. No showing was made of any need by Amtrak to obtain the unrestricted right to engage in contracting out that would lead to employee furloughs. Nor did the Carrier establish that the BMW contracting out and scope rules needed to be modified in the fashion that it sought. The record contains listings and brief descriptions of hundreds of contracts in recent years in which Amtrak did contract out craft work, some involving relatively small projects, and others involving major projects. In many of these situations, Amtrak met with the affected Organizations and reached agreements as to how they would be handled under the existing Work Rules. The record did not include evidence of even a single instance in which Amtrak sought to contract out work, the Organization refused, and the work then could not be accomplished satisfactorily and efficiently. Nor was proof provided as to any situation in which the application of the existing Work Rules caused significant operating inefficiencies, on-time performance problems, or featherbedding type situations. In fact, although Amtrak's claimed motivation is to improve the efficiency of its operations and improve on-time performance – a laudable goal – there is no dispute that on-time performance has improved significantly in recent years despite the existence of the existing contracting out Work Rules and there was no evidence of any situation in which the ability to more broadly contract out work would have made trains more timely in their performance.

No need was shown in these hearings to support the contracting out of the Car Cleaner job classification.

No evidence was introduced supportive of Amtrak's assertion that Congress favors contracting out even when it may result in furloughs of Amtrak's own employees. Although the 1997 Act suggests that Congress expected there to be bargaining on the issue of contracting out and protective provisions where it might result in employee furloughs, there was no showing that Congress expected or desired wholesale changes to scope and other work rules to contract out work that Amtrak's own employees have been doing. Congress appeared concerned with improving operating efficiencies, but did not express any preference for having work performed by outside contractors instead of with Amtrak's own employees and did not indicate that it supported furloughing Amtrak employees to have work performed by outside contract personnel. To the contrary, Amtrak's plans to contract out its reservations work to India met with express Congressional disapproval.

With respect to the proposal to allow the Carrier to assign work without regard to craft or class, there was no showing that the Carrier was fully utilizing the already significant flexibility it enjoys pursuant to the Incidental and Simple Work Rules. If there are problems with foremen more fully utilizing those rules, the solution is to better instruct the foremen, not to discard long-standing rules relative to craft or class. The Carrier's proposal goes beyond the "composite mechanic" concept – a proposal that has been rejected by every Presidential Emergency Board to consider it. The toilet and HVAC examples, stressed by several of Amtrak's witnesses at the hearings, were simply not proven to be major problems. No details whatsoever of their frequency was provided.

No evidence, either cumulatively or even anecdotally, was provided as to specific situations in which it was determined, even in hind sight, that the inability to assign work across craft or class lines led to operating delays.

With regard to work scheduling and overtime, Amtrak again failed to establish that, after accommodations made with the various Organizations and its current flexibility in scheduling are considered, there remains a problem that should be solved in the fashion advocated by the Carrier.

In light of these findings and recommendations, it is not necessary to discuss the Organizations' assertions that Amtrak proposed these changes in bad faith to effectively preclude a successor agreement from being reached. Nor need we discuss the claim that adoption of these changes, singly or together, would drastically shift the relative bargaining strength of the Parties and permit Amtrak to threaten to contract out work or change work times or assign work to other crafts not for operational needs, but to force concessions from the Organizations on other matters.

#### 6. ARASA (MofW and MofE Supervisors)

A situation arose in the summer of 2007 in which seven vacant supervisor jobs and one supervisory position in which there was an incumbent were eliminated by Amtrak. Shortly after that elimination, Amtrak announced vacancies in eight management level General Foreman and Safety Officer positions, whose duties included the duties of the eliminated supervisor positions. ARASA proposed that the existing Scope Rules be strengthened to make clear that this behavior is contractually inappropriate. Few specifics surrounding Amtrak's actions were presented at the hearings in this matter.

ARASA conceded that its objection to the actions of Amtrak may well be something that could be addressed on the basis of the existing scope rule and contractual language through the grievance procedure.

The Board declines to recommend a change in Scope Rule or contractual provision that has not been the subject of prior extensive bargaining, that may be properly resolvable on the basis of the existing provisions, and as to which we lack sufficient detailed facts to determine the fair and appropriate solution.

For these reasons, we recommend against adoption of ARASA's proposed Work Rules change.

#### 7. All Remaining Proposed Work Rules Changes

For the reasons previously noted, the Board does not recommend adoption of any of the remaining Work Rules changes proposed in this matter. The record simply failed to establish the need for such Work Rules in their proposed form. We remain persuaded that such complex and often thorny issues should, at least initially, be accomplished through careful and focused collective bargaining.<sup>20</sup>


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<sup>20</sup> The BMWWE proposed that certain changes to certain work rules made to comply with the Consent Decree in James Thornton et al. v. National Railroad Passenger Corporation (Docket No. 98CV0890) (EGS), pending before the Hon. Emmet G. Sullivan, and reflected in an Interim Agreement, be included in the new Agreement. No testimony was developed regarding those work rules. The record provides no basis for the Board to make any affirmative findings as to the fairness and equity in incorporating those work rules in the new Agreement. If, however, all Parties so agree, we have no objection to such incorporation either.

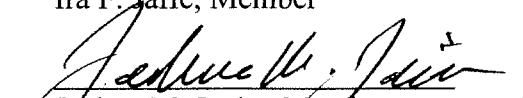
## VII. CONCLUSION


In closing, the Board gratefully acknowledges the counsel and professional assistance rendered by Norman L. Graber, Esq., and Eileen M. Hennessey, Esq. of the National Mediation Board throughout this process.

Respectfully submitted,

  
Peter W. Tredick, Chairman

  
Ira F. Jaffe, Member

  
Joshua M. Javits, Member

  
Annette M. Sandberg, Member

  
Helen M. Witt, Member

APPENDIX A

EXECUTIVE ORDER

- 13452 -

ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE DISPUTES  
BETWEEN THE NATIONAL RAILROAD PASSENGER CORPORATION  
AND CERTAIN OF ITS EMPLOYEES REPRESENTED  
BY CERTAIN LABOR ORGANIZATIONS

Disputes exist between National Railroad Passenger Corporation (Amtrak) and certain of its employees represented by certain labor organizations. The labor organizations involved in these disputes are designated on the attached list, which is made a part of this order.

The disputes have not heretofore been adjusted under the provisions of the Railway Labor Act, as amended (45 U.S.C. 151 et seq.) (RLA).

In the judgment of the National Mediation Board, these disputes threaten substantially to interrupt interstate commerce to a degree that would deprive sections of the country of essential transportation service.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States, including section 10 of the RLA (45 U.S.C. 160), it is hereby ordered as follows:

Section 1. Establishment of Emergency Board (Board). There is established, effective 12:01 a.m. eastern standard time on December 1, 2007, a Board of five members to be appointed by the President to investigate and report on these disputes. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier. The Board shall perform its functions subject to the availability of funds.

Sec. 2. Report. The Board shall report to the President with respect to the disputes within 30 days of its creation.

Sec. 3. Maintaining Conditions. As provided by section 10 of the RLA, from the date of the creation of the Board and for 30 days after the Board has submitted its report to the President, no change in the conditions out of which the disputes arose shall be made by the parties to the controversy, except by agreement of the parties.

Sec. 4. Records Maintenance. The records and files of the Board are records of the Office of the President and upon the Board's termination shall be maintained in the physical custody of the National Mediation Board.

Sec. 5. Expiration. The Board shall terminate upon the submission of the report provided for in section 2 of this order.

A large, stylized handwritten signature in black ink, appearing to read 'Guz'.

THE WHITE HOUSE,

November 28, 2007.

## LABOR ORGANIZATIONS

Brotherhood of Maintenance of Way Employes  
International Brotherhood of Electrical Workers  
International Association of Machinists and Aerospace Workers  
Brotherhood of Railroad Signalmen  
Joint Council of Carmen, comprised of the Transportation Communications International  
Union/Brotherhood Railway Carmen Division and the Transport Workers Union of America  
American Train Dispatchers Association  
National Conference of Firemen & Oilers/Service Employees International Union  
Transportation Communications International Union – American Railway and Airline  
Supervisors Association