

REPORT  
to  
THE PRESIDENT

by  
EMERGENCY BOARD

NO. 218

APPOINTED BY EXECUTIVE ORDER 12664,  
DATED JANUARY 6, 1989  
PURSUANT TO SECTION 9A OF  
THE RAILWAY LABOR ACT, AS AMENDED

To investigate a dispute between the Port Authority Trans-  
Hudson Corporation and its employees represented by the  
Brotherhood of Locomotive Engineers

(National Mediation Board Case No. A-11895)

WASHINGTON, D.C.  
MARCH 8, 1989

LETTER OF TRANSMITTAL

Washington, D.C.  
March 8, 1989

The President  
The White House  
Washington, D.C.

Dear Mr. President:


On January 6, 1989, pursuant to Section 9A of the Railway Labor Act, as amended, and by Executive Order 12664, President Reagan created an Emergency Board to investigate a dispute between the Port Authority Trans-Hudson Corporation and its employees represented by the Brotherhood of Locomotive Engineers.

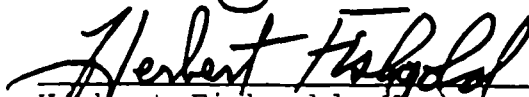
Following its investigation of the issues in dispute, including formal hearings on the record, the Board has prepared its Report and Recommendations for settlement of the dispute.

The Board now has the honor to submit to you, in accordance with the provisions of the Railway Labor Act, its selection of the most reasonable final offer for settlement of the dispute.

The Board acknowledges the assistance of Joseph E. Anderson and Mary L. Johnson of the National Mediation Board's staff, who rendered valuable aid to the Board during these proceedings and in preparation for this report.

Respectfully,

  
Robert J. Ables, Chairman

  
Herbert Fishgold, Member

  
Robert E. Peterson, Member

Enclosure

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## REPORT AND RECOMMENDATIONS

### I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 218 (Board) was established by President Ronald Reagan on January 6, 1989 by Executive Order 12664, pursuant to 45 U.S.C. Section 159(a) (Section 9A of the Railway Labor Act).

The Board was requested to investigate and report its findings and recommendations regarding a dispute between the Port Authority Trans-Hudson Corporation and its employees represented by the Brotherhood of Locomotive Engineers. A copy of the Executive Order is attached as Appendix "A".

The President appointed Robert J. Ables, an attorney and arbitrator from Washington, D.C., as Chairman of the Board. Herbert Fishgold, an attorney and arbitrator from Washington, D.C. and Robert E. Peterson, an arbitrator from Briarcliff Manor, New York, were appointed as Members. The National Mediation Board assigned Mary L. Johnson and Joseph E. Anderson as Special Assistants to the Emergency Board.

## II. PARTIES TO THE DISPUTE

### A. The Carrier

The Port Authority Trans-Hudson Corporation (PATH or Carrier) is a wholly owned subsidiary of the Port Authority of New York and New Jersey (Port Authority). It is a rapid rail transit system or rail commuter line which carries more than 200,000 passengers daily between Newark, Jersey City and Hoboken in New Jersey and the World Trade Center and Penn Station in New York City. PATH operates over 13.9 miles of track. It serves 13 stations -- seven in New Jersey and six in New York. PATH has approximately 400 passenger rail cars.

The Port Authority succeeded the bankrupt Hudson and Manhattan Railroad in 1962. The rail operation has incurred ever-deepening deficits. In 1963, with 29.2 million riders, it had an operating deficit of \$2.3 million. In 1987, with 51.3 million riders, PATH's operating deficit amounted to \$87.9 million. PATH has 1,115 employees, of whom 1,026 are represented by nine different labor organizations and 14 separate collective bargaining agreements.

### B. The Organization

The Brotherhood of Locomotive Engineers (BLE or Organization), one of nine organizations representing employees on this Carrier, represents 186 employees known on PATH as "Motormen" and otherwise known on most rail carriers as Road Passenger Engineers. The BLE also represents as a part of the bargaining unit, eight employees known as "Foremen."

The principal duties of incumbents of the motormen positions are to operate electrical power used in moving passenger trains in a commuter or rapid transit operation. The motormen operate the trains from the control compartment of a motor-unit passenger car rather than from the cab of a locomotive unit.

### III. HISTORY OF THE DISPUTE

This dispute arises from notice served by the BLE on the Carrier on July 8, 1985 for improvements in rates of pay, rules and working conditions. When negotiations failed to resolve the BLE demands, the parties, in May 1987, applied jointly for, and were extended benefit of, the mediation services of the NMB.

When it became evident that mediation would not bring the dispute to a resolution, the NMB, pursuant to the RLA, extended a proffer of arbitration to the parties. This proffer of arbitration was rejected by the BLE on August 2, 1988.

In a further effort to assist in resolving the dispute, the NMB conducted a public interest conference with both parties on September 7, 1988. These efforts were not successful.

PATH requested the President to establish an emergency board pursuant to Section 9A of the RLA. Thereafter, on September 9, 1988, President Ronald Reagan, by Executive Order No. 12650, established an emergency board to investigate the dispute.

Emergency Board No. 216 submitted its Report to the President on October 21, 1988. No settlement was reached by the parties following the release of the Report and Recommendations of Emergency Board No. 216.

On November 7, 1988, NMB Member Joshua M. Javits conducted a public hearing pursuant to Section 9A of the RLA to determine the reasons the parties, and in particular the BLE, had not accepted the recommendations of the emergency board to settle the dispute.

Thereafter, PATH requested that the President establish a second emergency board pursuant to Section 9A of the RLA, and President Ronald Reagan, by Executive Order No. 12664, dated January 6, 1989, established this emergency board to investigate and report on the dispute.

#### IV. FINAL OFFER SELECTION

Section 9A of the RLA, as amended, provides that it is the function of boards such as this, i.e., a second emergency board considering the same dispute between the parties, to submit a report "setting forth its selection of the most reasonable offer" of the parties for settlement of the dispute.

This section was added to the RLA, as an amendment, to provide a "Special Procedure for Commuter Service" in adoption of the Rail Passenger Service Act of 1981 (PL 97-35, Aug. 13, 1981). In this respect, Section 9A reads:

Except as provided in section 590(h) of this title, the provisions of this section shall apply to any dispute subject to this chapter between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

Section 9A is silent on the question whether a second emergency board is obliged to select a final offer of the parties on a "package" or "issue-by-issue" basis. Section 9A, in subsections (f) and (g) provides only that, within 30 days after creation of a second emergency board, the parties to the dispute shall submit to the board "final offers for settlement of the dispute" and that within 30 days after the submission of final offers, the emergency board shall submit a report to the President "setting forth its selection of the most reasonable offer."

The Board's efforts to determine whether there was any applicable legislative history to Section 9A have been to no avail. We have been advised by both the Department of Labor and the National Mediation Board that they are unaware of any legislative history which would shed light on the Congressional intent underlying Section 9A.

The first commuter emergency board under Section 9A was created on November 16, 1982 by Executive Order No. 12393. Since that time, to date, there have been eight additional first boards and, including this board, seven second boards, as well as one Advisory Board created by Congress, for the purpose of hearing and making recommendations to settle collective bargaining disputes on commuter rail lines. PATH and its represented employees have been involved in seven of these boards; the Long Island Rail Road and its represented employees have been involved in eight of these commuter emergency boards.

With but one exception, the parties settled their disputes peacefully and without resort to so-called self-help action following the release of an emergency board report and termination of the Section 9A procedures. It was only in connection with a dispute involving the LIRR and its employees represented by 14 separate labor organizations, and their differing demands, that a strike had ensued. It was in this single instance that the Congress intervened (H.J. Res. 93, P.L. 100-2) to create an Advisory Board.

In reviewing the way various second emergency boards have exercised their role in selecting the most reasonable final offer, this Board considered comments of the past emergency boards.

Five previous second emergency boards chose a package approach to selecting the final offer; one chose an item-by-item approach. The common theme in the reports of these boards on selecting final offers was to induce each side to introduce its most reasonable final offer for fear that the final offer of the other side would be selected.

As we intend to comment further in this report about the making of final offer proposals under Section 9A of the Railway Labor Act, we include in Appendix "B" a summary of pertinent comments by previous second emergency boards.

At hearings before this Board, we told the parties that, in determining which final offer is the most reasonable, we would make our selection on a package, not issue-by-issue basis.



## V. FINAL OFFERS OF THE PARTIES

### A. The Carrier's Final Offer

The Carrier's final offer did not deviate from the position it took before Emergency Board No. 216, the first Section 9A board in this dispute. It effectively rested on the offer of the "pattern" followed in agreements then reached with six of the nine unions which represent employees of PATH.\* In this respect, the Carrier said in its final offer:

As was expressed before Presidential Emergency Board No. 216, it must be stated that the Carrier has signed agreements with six [of nine] organizations (eleven [of fourteen] agreements) representing almost 60% of its organized employees. Each signed agreement contains basically the same provisions: a three-year term granting a wage increase of 5% each year, the addition of Martin Luther King's Birthday as a paid holiday, increases in life insurance and major medical benefits.

There is no justification to offer the Engineer's Union a settlement which is in excess of the pattern already agreed to by large majority of the unions on the property, an opinion which was voiced by Emergency Board No. 216 as well as Emergency Board No. 217 which selected PATH's final offer in its dispute with the TCU/Carmen Division.

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\*/ Subsequent to the Carrier's final offer in this proceeding, PATH and the Brotherhood of Railroad Signalmen (BRS), on February 17, 1989 agreed on terms, including the wage patterns in the six other agreements. Also, as of March 2, 1989, PATH and the Brotherhood of Railway Carmen of the United States and Canada (BRC) reached a five year agreement, with wage increases said to be within the pattern set in predecessor agreements.

The Carrier listed its individual proposals which served to make up its final offer. The Carrier also noted that it has not and does not seek any work rule "givebacks" from the BLE.

The Carrier's final offer reads:

1. Term - September 8, 1985 to September 8, 1988

This is a proposed three-year agreement in keeping with the agreement reached before the Board.

2. Wages

September 8, 1985 - 5% increase in all rates.

September 8, 1986 - 5% increase in all rates.

September 8, 1987 - 5% increase in all rates.

The Carrier's offer is based on increases to a combination of salary and pension contribution so that, if the amount were applied solely to salary, the increases would be about 5.2% per annum.

3. Holidays

The addition, prospectively, of Martin Luther King's Birthday to the list of 11 holidays presently enjoyed by the organization.

4. Major Medical

An increase from \$100,000 to \$500,000 in the major medical maximum per employee and eligible dependent at no cost to the employee.

5. Life Insurance

An increase in the present paid up life insurance coverage effective at age 65 from \$5,000 to \$10,000 or the option of obtaining an additional \$10,000 life insurance at the prevailing group rate.

6. Meal Allowance

An increase in the meal allowance from \$2.25 after 10 hours worked to \$4.50 after working 12 hours.

B. The Organization's Final Offer

The BLE final offer was submitted in a written, narrative manner. It provided movement away from demands it had heretofore assumed during negotiations on the property and in its presentations before Emergency Board No. 216.

In regard to the wage issue, the BLE final offer proposed current rates of pay be increased 6.2% for 1985, 6.2% for 1986, and 5.6% for 1987. The BLE also proposed there be a ten cent (\$.10) per hour increase in the Carrier's contribution to the pension plan for 1987. This wage offer was in place of proposals which the BLE had made to Emergency Board No. 216 for wage increases in the amount of 7% for each of the three years, 1985, 1986 and 1987.

The BLE also included as part of its final offer the recommendations of Emergency Board No. 216 that an agreement between the parties include the Carrier's offers of 1) Martin Luther King's Birthday as an additional holiday, 2) increased life insurance, and 3) increased major medical benefits.

The BLE final offer also included a proposal that in lieu of the recommendation made by Emergency Board No. 216 that the meal allowance for time on duty beyond ten hours be raised from \$2.25 to \$7.50, that such meal allowance be increased instead to \$5.00 for employees required to be on duty ten hours.

The BLE final offer also included a proposal, in keeping with the recommendations of Emergency Board No. 216, that certain BLE officials be compensated for time lost in attending conferences at the direction of the Carrier. The BLE proposed adoption of the language contained in an agreement it has with the New Jersey Transit (NJT) system. Thus, the proposal of the BLE in this regard reads:

Conferences between PATH and duly accredited representatives will be held without cost to PATH. When duly accredited representatives are required to report for a conference at the direction of PATH, they will be compensated for the time engaged in the conference and if required to lay off an assignment by reason of the conference, will be made whole for the missed assignment. This provision will not apply to full-time paid BLE officials.

The BLE further advised the Board that as a part of its final offer it was withdrawing its proposals as raised before Emergency Board No. 216 concerning 1) paid leave for annual physicals, 2) an increase in disability benefits, 3) a clothing maintenance allowance and, 4) the extension of the six hour tour of duty on the last shift to motor-switchmen.

## VI. DISCUSSION

### A. The Final Offers of The Parties

The Brotherhood of Locomotive Engineers in its final offer to PATH, in proceedings before this Board, reduced sharply its demands from previous positions taken, particularly on wages.

PATH held to positions taken previously, preferring to stand on the pattern set in agreements with other organizations on this property, particularly on wages.

In reducing wage demands essentially from a seven, seven, seven per cent a year basis to 6.2% each year, starting in 1985, the BLE clearly heard footsteps.

Wage agreements with six other organizations at that time, basically at 5% each year, plus recommendations by Emergency Board No. 216 that the BLE accept that wage pattern, could leave only the most adventuresome union not reducing its demands.

Properly we think, the BLE said that, in deciding to reduce its wage requirements, it regarded the purposes of Section 9A proceedings and our pressing each of the parties to submit its most reasonable offer.

The Carrier, not changing position on wages -- or any other proposal -- raised to the Board the question whether the spirit, intent and purpose of Section 9A would not be more fully served if the Organization's wage proposal were favored.

The inclination was resisted.

As the Carrier stood pat, seemingly not risking to say or do anything that might upset the pattern set with the other organizations, so, effectively, did the union not present to this Board new evidence supporting its last wage proposals.

Not making too fine a judicial point of the matter, the BLE had a burden to persuade us that any wage proposal over that of the pattern was the most "reasonable", as the statute mandates. It did not do that. It warmed over representations made to, but not accepted by, Emergency Board No. 216. With no more evidence effectively than that it believed it to be so, the Organization concluded that the Rail Safety Improvement Act of 1988 (Public Law No. 100-342) increased responsibilities of a motorman's job, implying, accordingly, that motormen should be paid wages at an increasingly higher differential than other Carrier employees.

The Organization supports such increase in pay differential on general representations that: regulations "well on the way" will ban use of controlled substances on or off duty; drug and alcohol testing will be frequent and pervasive of employee personal rights; and that certification of qualifications for the job and concomitant fines or loss of such certification for rules' infractions jeopardize job security.

In judging wage disputes in collective bargaining disputes, emergency boards usually struggle with dynamics in the market place. Consumer price index, interest rates, subsidy, profitability, length of agreement, public interest in the outcome and similar considerations typically move such boards in making their recommendations how the dispute ought to be settled.

In this case, if safety of operations would be compromised by increased requirements on qualifications to be or to act as a motorman, as compared to other Carrier employees, as the Organization represents in declarative statements, the differential in pay requested might be justified.

The Organization made no such case.

On findings by Emergency Board No. 216 that it was not persuaded by the safety and operational representations by the Organization and that rates of pay for motormen on PATH, as proposed to be increased by the Carrier, will not be out of line with those in the same classification in commuter rail operations in the New York City area, and with no reason to disturb those findings based on evidence in this proceeding, we select the Carrier's final offer on wages as most reasonable.

Wages being the most critical issue in dispute and our commitment to the parties to select a final offer on a package basis, we select the Carrier's overall proposal.

However, since this dispute does not necessarily end with this report, we add our thoughts on two collateral issues on which the parties have not agreed, and which may form the basis for additional negotiations between the parties: a small difference in the amount of increase for a meal allowance for work after 10 hours and the BLE request for a rule to pay for time lost by BLE officials when attending conferences at the direction of the Carrier.

The respective offers of the parties on meal allowance are not of great consequence. There are but few or infrequent occasions when a motorman is required to work beyond a regular

eight-hour day, much less more than ten hours on a work day. Therefore, this issue should be settled by adopting the Carrier's proposal.

The issue of paying for lost time for BLE officials attending conferences at the direction of PATH is also of little consequence. Even if the rule proposed by the BLE were to be adopted, it would have a limited effect and then on only a few members of the BLE local. It is our understanding that the Carrier, even though it did not mention this matter in its final offer package, would be willing to include as a part of agreement in resolution of the dispute, the NJT contract provisions as proposed to the Board by the BLE in its final offer.

#### B. The Section 9A Process

It can be argued that Section 9A is accomplishing its purpose of keeping rail operations running. Indeed, although the status quo period after impasse can stretch to 240 days, and often the real collective bargaining by the parties only takes place following the issuance of the second board's report, the proponents of the Section 9A process point to the fact that there has been only one strike in the six prior impasses reaching the second emergency boards. This, it is argued, shows that the process, and thus collective bargaining, is working.

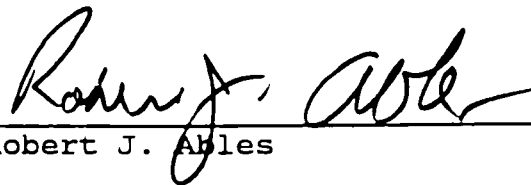
Its critics, including some members of past second emergency boards, claim that the second emergency board appears not to have attained the influence that Congress seemingly intended, in that the parties have incorporated the two emergency board procedures as part of their bargaining process. While the bottom line of eventual agreement between the parties is the desired result, some proponents of change in Section 9A, based upon the experience of prior boards, argue that, even up to and including the second boards, the parties do not take advantage of the reasoned recommendations of the first boards and the subsequent public hearings conducted by the NMB, to engage in true collective bargaining. Rather, they continue to posture themselves for any negotiations which take place following the issuance of reports of the second board.

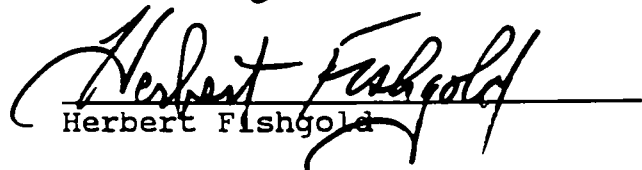
As noted in our discussion of the parties' final offers, it can be argued that the parties herein have not effectively utilized the 9A procedures to achieve the hoped for accord, to-date. It is noted that almost four years have elapsed since the onset of bargaining, and this Board's report only covers final offers for a three-year contractual period ending in September 1988. Based on this experience, the Board would urge the

parties, present and future, who fall within the coverage of Section 9A, to assure a more timely resolution of disputes by engaging in serious impasse bargaining, including full justification of their respective positions, at each and every step of the Section 9A timetable.

VII. SELECTION OF THE MOST REASONABLE OFFER

On the basis of the foregoing considerations, and in keeping with the Board's announced intent to the parties to select a "package" final offer, the Board selects as the most reasonable offer that which has been presented to the Board by the Carrier.

  
Robert J. Ables

  
Herbert Fishgold

  
Robert E. Peterson



12664

ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE  
BETWEEN THE PORT AUTHORITY TRANS-HUDSON CORPORATION  
AND CERTAIN OF ITS EMPLOYEES REPRESENTED BY  
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

A dispute exists between the Port Authority Trans-Hudson Corporation and certain of its employees represented by the Brotherhood of Locomotive Engineers.

The dispute has not heretofore been completely adjusted under the provisions of the Railway Labor Act, as amended (the "Act").

A party empowered by the Act has requested that the President establish an emergency board pursuant to Section 9A of the Act (45 U.S.C. section 159a).

Section 9A(e) of the Act provides that the President, upon such a request, shall appoint a second emergency board to investigate and report on the dispute.

NOW, THEREFORE, by the authority vested in me by Section 9A of the Act, it is hereby ordered as follows:

Section 1. Establishment of Board. There is established, effective January 7, 1989, a board of three members to be appointed by the President to investigate this dispute. 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. Within 30 days after creation of the board, the parties to the dispute shall submit to the board final offers for settlement of the dispute. Within 30 days after submission of final offers for settlement of the dispute, the board shall submit a report to the President setting forth its selection of the most reasonable offer.

Sec. 3. Maintaining Conditions. As provided by Section 9A(h) of the Act, from the time a request to establish a board is made until 60 days after the board makes its report, no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.

Sec. 4. Expiration. The board shall terminate upon the submission of the report provided for in Section 2 of this Order.

RONALD REAGAN

THE WHITE HOUSE.

January 6, 1989.

Section 9A, Second Emergency Boards - Summary of Comments on Final Offer Process

Board No. 201 concluded it was required to select a final offer on a package approach, rather than issue-by-issue. The Board noted: "The uncertainty as to which offer the Board might choose served as an important catalytic agent in achieving eight agreements."

Board Nos. 205 and 206 involved a first contract for one Carrier and two separate unions. With regard to selection of a final offer, the Board wrote, in each of its two reports:

In certain situations it would be necessary to treat the package as a whole and in others to treat items on an individual basis. As the language of the statute provides no direction on this, the Board is persuaded that it has the option to select either.

Board No. 207 took the following position:

The Board has decided to make the prescribed selection on the basis of the entire package of items offered by one of the parties. This Board must select what is reasonable and objective in light of the goals to be accomplished. It considers that method of selection to be in the public interest as well as the interest of the parties in the case.

Board No. 212 examined the question of selection of final offers in some detail. It said:

The Board, in its organizational meeting with the parties, determined that it would make its selection from amongst the parties' final offers on a package basis. That is, the Board would select either the complete final offer of the Carrier or that of the Organizations. There would be no issue-by-issue determination.

Our motivation for this procedure was to induce each side to introduce its most reasonable final offer for fear that the other side's final package would be selected. We hoped that the parties would review their respective positions seriously and then submit and support their "bottom line", proposals. The time for posturing would have passed.

Our hopes were not realized. Neither side has viewed the Section 9A process as an opportunity to put forward its true bottom line proposals in the hope that we would select those proposals over those of the other side.

Instead, the parties have used this Board as yet another stage in the ever-increasing process of negotiation. Both have submitted offers designed for the negotiations that they expect to follow this report.

We view this strategy as unfortunate. A valuable opportunity for truly narrowing the parties' differences has been lost. The posturing herein guarantees further delay, and the frustration that accompanies delay, in the inevitable "real" bargaining that must ensue if an acceptable accord is to be reached.

Moreover, we do not believe that Congress intended the parties to take this approach. It is clear that Congress, in enacting Section 9A, expected that the final offer selection process would further narrow the parties' differences. The process was not to be pro forma. The language of Section 9A evidences an intent that this Board's selection of final offer would either resolve the dispute in toto or would, at the very least, bring the parties sufficiently close so as to make settlement imminent.

The parties have not followed that Congressional intention.

While the different Organization's final offers differ in many ways, we conclude that our selection in favor of the Carrier would be the same if each of the Organization's proposals were individually compared with the final offer of the Carrier.

The dispute considered by Board No. 212 continued to have ramifications. Very substantive bargaining took place after Board No. 212's report was fully prepared, but before its release. To provide an impetus for talks, the Board gave the parties an outline of its views on the respective issues. Subsequent bargaining sessions led to resolution of some outstanding issues with most of the involved unions and the LIRR.

Congress then passed HJR 93, Public Law 100-2, establishing an Advisory Board and directing the submission of a comprehensive report containing findings as to (1) the progress, if any, of negotiations between the LIRR and certain employees represented by several labor organizations, (2) findings of fact regarding circumstances related to the dispute, and (3) recommendations for a proposed solution of the dispute described in the joint resolution, including, but not limited to the issues covered by Board No. 212.

The Advisory Board mediated between the parties and agreement was reached with another labor organization. The Board eventually made recommendations on the remaining issues between the International Association of Machinists and the Carrier.

The parties subsequently reached agreement on these remaining issues.

Board No. 217 in a pending dispute between PATH and employees represented by the Transportation Communications Union - Carmen Division reported on January 6, 1989. It selected a package approach to selecting a final offer. It noted:

In examining the circumstances of this particular case, this Board found that Emergency Board No. 214 was presented with a

large number of issues including numerous work rule changes. Since the issuance of Emergency Board No. 214's Report, no progress had been made to narrow the issues or reduce the dispute. This Board believed that to inform the parties it would select final offers on only a package basis would impel the parties to prioritize their concerns and to present the Board with only those issues which were of most compelling interest to them. Whether or not the Railway Labor Act prescribes that final offers may be considered only on a package basis, we elected to do so under the circumstances of this case. The parties were so informed on December 1, 1988, prior to their submission of final offers.