

# **REPORT**

**to**

**THE PRESIDENT**

**by**

**EMERGENCY BOARD**

**NO. 242**

SUBMITTED PURSUANT TO EXECUTIVE ORDER DATED DECEMBER 1, 2007  
ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE  
BETWEEN NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)  
AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES;  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
INTERNATIONAL ASSOCIATION OF MACHINISTS & 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; AND  
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION –  
AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION  
AND SECTION 10 OF  
THE RAILWAY LABOR ACT, AS AMENDED

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(National Mediation Board Case Nos. A-13080, A-13098, A-13125, A-13185, A-13330, A-13340,  
A-13370, A-13395, A-13435)

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**WASHINGTON, D.C.**  
**December 30, 2007**

Washington, D.C.  
December 30, 2007

The President  
The White House  
Washington, D.C. 20500

Dear Mr. President:

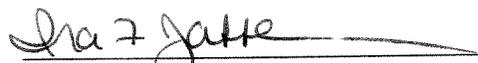
Pursuant to Section 10 of the Railway Labor Act, as amended, and by Executive Order effective December 1, 2007, you established an Emergency Board to investigate a dispute between National Railroad Passenger Corporation (Amtrak) and certain of its employees represented by the Brotherhood of Maintenance of Way Employees; the International Brotherhood of Electrical Workers; the International Association of Machinists and Aerospace Workers; the Brotherhood of Railroad Signalmen; the Joint Council of Carmen, comprised of the Transportation Communications International Union/Brotherhood Railway Carmen Division and the Transport Workers Union of America; the American Train Dispatchers Association; the National Conference of Firemen & Oilers/Service Employees International Union; and the Transportation Communications International Union – American Railway & Airway Supervisors Association.

Following its investigation of the issues in dispute, including both hearings and meetings with the parties, the Board now has the honor to submit its Report to you setting forth our recommendations for equitable resolution of the dispute between the parties.

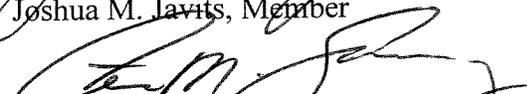
The Board acknowledges with thanks the assistance of Norman L. Graber, Esq. and Eileen M. Hennessey, Esq. of the National Mediation Board, who rendered invaluable counsel and aid to the Board throughout the proceedings.

Respectfully submitted,

  
Peter W. Tredick, Chairman

  
Ira F. Jaffe, Member

  
Joshua M. Javits, Member

  
Annette M. Sandberg, Member

  
Helen M. Witt, Member

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## **I. CREATION OF THE EMERGENCY BOARD**

Presidential Emergency Board No. 242 (“PEB” or “Board”) was established by the President pursuant to Section 10 of the Railway Labor Act (“RLA”), as amended, 45 U.S.C. § 151 *et seq.* including § 160, and by Executive Order dated November 28, 2007, effective December 1, 2007. The Board was created to investigate and report its findings and recommendations regarding a dispute between the National Railroad Passenger Service (“Amtrak” or “Carrier”) and certain of its employees represented by certain labor organizations. A copy of the Executive Order is attached as Appendix A.

The President appointed Peter W. Tredick, of Santa Barbara, California, as Chairman of the Board, and Ira F. Jaffe, of Potomac, Maryland, Joshua M. Javits, of Washington, District of Columbia, Annette M. Sandberg, of Alexandria, Virginia, and, Helen M. Witt, of Pittsburgh, Pennsylvania, as Members. The National Mediation Board (“NMB”) appointed Norman L. Graber, Esq. and Eileen M. Hennessey, Esq., as Special Counsel to the Board.

## **II. PARTIES TO THE DISPUTE**

### **A. Amtrak**

Amtrak provides passenger service to approximately 67,000 daily intercity passengers, in over 500 communities in 46 states on 21,000 miles of routes. Commuter services in the Northeast also operate on Amtrak facilities and in some cases Amtrak provides crew, dispatching, and/or maintenance of way and equipment to commuter operations. In addition, Amtrak provides commuter services outside of the Northeast Corridor. Overall, up to 600,000 intercity and commuter rail passengers utilize Amtrak services, and/or facilities on a daily basis.

Amtrak's Northeast Corridor, which runs between Washington, District of Columbia and Boston, Massachusetts, is the busiest railroad in North America, with more than 1,700 trains operating over some portion of the Washington-Boston route each day. The Washington-New York-Boston portion of the Northeast Corridor carried 9,431,279 passengers in FY 2006. The San Diego-Los Angeles-San Luis Obispo corridor carried 2,657,773 passengers during that time frame; and the San Jose-Oakland-Sacramento-Auburn corridor carried 1,263,504 passengers during that time. Additionally, the following corridors carried between 500,000 and 1,000,000 passengers in FY 2006: Manhattan-Albany-Buffalo; Philadelphia-Harrisburg; Oakland-Fresno-Bakersfield; Eugene-Portland-Seattle-Vancouver, BC; and Chicago-Milwaukee.

Amtrak provides contract commuter services/facilities to commuter agencies throughout the country. These include: Long Island Railroad (LIRR); New Jersey Transit (NJT); Metra (Chicago); Massachusetts Bay Transportation Authority (MBTA); Southeastern Pennsylvania Transit Authority (SEPTA); MARC (Maryland Area Regional Commuter); Peninsula Corridor Joint Powers Board (Caltrain); VRE (Virginia Railway Express); and Sound Transit (ST).

In FY 2006, Amtrak's earnings covered approximately 67 percent of its operating costs. The remainder is made up by Federal subsidies and State contributions.

#### **B. The Labor Organizations**

The Brotherhood of Maintenance of Way Employees ("BMWE") represents approximately 2,500 maintenance of way employees employed by Amtrak; the International Brotherhood of Electrical Workers ("IBEW") represents approximately 1,461 electrical workers employed by Amtrak; the International Association of

Machinists and Aerospace Workers (“IAM”) represents approximately 750 machinists employed by Amtrak; the Brotherhood of Railroad Signalmen (“BRS”) represents approximately 858 signalmen employed by Amtrak; the Joint Council of Carmen (“JCC”), comprised of the Transportation Communications International Union/Brotherhood Railway Carmen Division and the Transport Workers Union of America (“TWU”), represents approximately 2,000 carmen employed by Amtrak; the American Train Dispatchers Association (“ATDA”) represents approximately 2,100 train dispatchers employed by Amtrak; the National Conference of Firemen & Oilers/Service Employees International Union (“NCFO”) represents approximately 450 firemen and oilers employed by Amtrak; the Transportation Communications International Union – American Railway and Airway Supervisors Association (“ARASA”) represents approximately 490 maintenance of equipment supervisors employed by Amtrak; and ARASA represents approximately 210 maintenance of way supervisors employed by Amtrak.

The Passenger Rail Labor Bargaining Coalition (“PRLBC”) represents the following labor organizations in these proceedings: BMW, BRS, ATDA, and NCFO. These Organizations formed the PRLBC on August 23, 2007. Similarly, on May 22, 2006, the IAM, IBEW, and JCC advised the NMB that they had formed a coalition for the purpose of bargaining with Amtrak and were jointly represented before this Emergency Board.

### **III. HISTORY OF THE DISPUTE**

In late 1999, pursuant to Section 6 of the RLA, eight of the crafts or classes involved in this PEB served on Amtrak formal notices for changes in current rates of pay,

rules, and working conditions. ATDA served its Section 6 notice on Amtrak in December 2000.

The parties were unable to resolve the issues in dispute in direct negotiations, and applications were filed with the NMB by the separate crafts or classes between April 2000 and December 2006.

Following the applications for mediation, representatives of all parties worked with NMB mediators and with Board Members of the NMB in an effort to reach agreements. Various proposals for settlement were discussed, considered, and rejected. On October 18, 2007, after mediation sessions in the various cases ranging from approximately one year to seven years, the NMB, in accordance with Section 5, First, of the RLA, urged Amtrak and the Organizations to enter into agreements to submit their collective bargaining disputes to arbitration as provided in Section 8 of the RLA (“proffer of arbitration”). Between October 18 and 25, 2007, all of the Organizations declined the NMB proffer of arbitration. Amtrak also declined the NMB proffer of arbitration in five of the cases, and requested an extension of time in which to respond in the other four cases. As the RLA provides that both parties must agree to a proffer of arbitration to establish an arbitration board, no board was established.

On October 31, 2007, the NMB served notice that its services were terminated under the provisions of Section 5, First, of the RLA. Accordingly, “self-help” became available to both parties as of 12:01 a.m., EST, on Saturday, December 1, 2007.

Following the termination of mediation services, the NMB notified the President, in accordance with Section 10 of the RLA, that in its judgment the disputes threaten substantially to interrupt interstate commerce to a degree that would deprive sections of

the country of essential transportation service. The President, in his discretion, issued an Executive Order on November 28, 2007. Effective 12:01 EST on December 1, 2007, the Executive Order created this Board to investigate and report concerning the disputes.

#### **IV. ACTIVITIES OF THE EMERGENCY BOARD**

The Board held an organizational meeting by conference call on December 1, 2007. Following consultation with the parties, the Board issued an organizational letter on December 3, 2007, in which the ground rules for the Board's procedures were set forth. All parties were requested to provide the Board with pre-hearing submissions. Following the Board's approval of a joint request for a one-day filing extension, all of the parties submitted briefs to the Board on December 7, 2007. A hearing on the issues in dispute was held December 11, 12, and 13, 2007, in Washington, District of Columbia. All parties were represented by counsel, and had a full and fair opportunity to present oral and documentary evidence and argument.

On December 14, 2007, the Board met informally with the parties, in Washington, District of Columbia in an attempt to facilitate a settlement of the dispute. On December 20, 2007, the parties submitted post-hearing briefs to the Board. The Board thereafter met by conference call in a number of executive sessions to finalize this Report.

#### **V. OVERVIEW**

At the hearing and in their papers the Parties devoted substantial argument regarding the role of this PEB. Amtrak asserts that the Board should not recommend retroactive pay because it does not have the money for full retroactive payments and the Congress will not appropriate it. According to Amtrak's testimony and exhibits, the Carrier is neither profitable nor self-sufficient. The evidence showed that 2000-2007

were particularly challenging financial times for Amtrak. In fact, during 2000 and 2001, Congress zeroed out the operating subsidies for Amtrak and created self-sufficiency standards, which Amtrak still fails to meet. Additionally, because Amtrak is dependent upon the Congressional budgeting process for annual operating subsidies it has not been able to budget and save for the wage adjustments necessary to resolve these outstanding labor disputes. In fact, the Board acknowledges that, given the timing of this dispute, it is highly unlikely Amtrak will be able to modify its current 2008 budget pending before Congress to fund the wage adjustments necessary to fully settle this dispute.

The Organizations counter that retroactive payment is fair and equitable, and that predicting future Congressional action is beyond the scope of the Board's authority.

PEB 234 addressed this issue in a similar context in great detail. In that case the PEB analyzed a request by the Brotherhood of Maintenance of Way Employees for retroactive pay in light of Amtrak's position that Congress would not appropriate the necessary funds. The Board in that dispute concluded as follows:

Our obligation is to recommend a fair and equitable package of compensation for maintenance of way employees, and then leave to the funding authorities the issue of whether or not they wish to fund that package. We cannot, in good conscience, shirk that responsibility to the parties and to the collective bargaining process by surrendering to what might be characterized as political expediency.

Report to the President by Emergency Board 234, at 6 (1997).

Just as PEB 234 concluded, this Board cannot shrink from its responsibility to make recommendations based on the record in this case. Its role is to find a fair and reasonable basis for agreement. We must consider traditional factors relevant in the collective bargaining process but cannot tailor those recommendations to a prediction of Congressional action. We are cognizant of the political and financial constraints facing Amtrak, and have recommended adoption of contractual terms that are reflective, in part,

of those realities. But we agree with PEB 234 that Congress should be informed of the “true cost” of Amtrak’s service. It is then for Congress to determine whether to provide the funding necessary for passenger train service.

In this connection, the Senate Committee on Appropriations recently noted that “most of” Amtrak’s employees have gone more than seven (now eight) years without a general wage increase, and that consequently many craftsmen have fallen “further and further” behind craftsmen “conducting identical work for freight and commuter railroads.” S. Rep. No. 110-131, at 92-93 (2007). This Report went on to state that “Amtrak’s failure to reach a labor settlement is not a result of inadequate Federal funding.”

The House Committee on Appropriations also noted that “. . . Amtrak’s wages, in many cases, are well below market and many of Amtrak’s skilled workforce are compensated as much as 29 percent below the levels paid for comparable jobs on the freight railroads.” H. R. Rep. No. 110-238, at 86-87 (2007).

“Ability to pay” is one criterion traditionally considered in collective bargaining and interest arbitrations when attempting to determine appropriate compensation and working conditions; we have given that criterion its appropriate weight. We can neither assume that Congress will decline to appropriate the funds needed to adequately fund a settlement that may result based upon the recommendations set forth in this Report, nor may we ignore Amtrak’s present economic situation based upon a contrary assumption that whatever is recommended or may be agreed to will be fully funded. Our task, as noted in prior PEB Reports, must be to recommend an appropriate solution to the issues in dispute, based upon the record developed in this matter, and in light of all of the

relevant factors. Appropriate consideration must be given to historical patterns and relationships, both within the Carrier and within the industry, to the fiscal realities facing Amtrak, to Amtrak's dependence upon Congressional operating and capital subsidies, to the labor market generally and competitive pressures on Amtrak, to the increases in productivity by the employees in this proceeding, and to the equities surrounding the lengthy period of time that has elapsed since the last Agreements and last general wage increases (during which time real wages have fallen for the employees in this case, both compared to traditional comparator groups and in inflation-adjusted dollars).

## **VI. DISCUSSION AND RECOMMENDATIONS**

### **A. Summary of the Parties' Proposals**

The Organizations urge that the new Agreement begin, effective January 1, 2000 – the day after the moratorium date of the prior Agreement – and remain in effect through December 31, 2009. The Organizations' wage proposals track – both in nominal percentage amounts and dates – the wage adjustments negotiated in the 2000-04 and the current (2005-09) Agreements between the organizations and the Class I Freight Carriers.<sup>1</sup> Amtrak agrees that the new Agreement should begin, effective January 1, 2000, but proposes that it remain in effect through September 30, 2010.

The Organizations and Amtrak each propose significant wage increases, reflective of the fact that there have been no general wage increases since 1999. The proposals of both the Organizations and Amtrak would end the "Harris" COLA once a new

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<sup>1</sup> The Class I Freight Carriers consist at the present time of the Burlington Northern and Santa Fe, CSX, Kansas City Southern, Norfolk Southern, and Union Pacific Railroads. Together, they employ approximately 155,000 employees, own more than 75,000 miles of road, have annual operating revenues in excess of \$43.4 billion, and net annual railway operating income in excess of \$5.5 billion. For ease of reference, hereinafter they will be collectively referred to simply as the "Freights" and the Agreements between the Organizations and the Freights will be referred to simply as the "Freight Agreements." There are also over a hundred Class II and Class III (much smaller) railroads which sign on to the Freight Agreement.

Agreement is ratified. The Organizations, however, would have the Harris COLA pop up after the amendable date. Amtrak urges that the Harris COLA be eliminated permanently without pop up.

The single most significant area of dispute between the Parties relates to retroactivity. The Organizations seek retroactivity in an amount equal to the full difference in pay between what employees actually received and what their rates of pay would have been under a successor Agreement, with adjustment for the cost-sharing contributions that would also have been paid if the employee contributions towards health insurance required by the 2000-04 and 2005-09 Freight Agreements had been in effect. No claim is raised herein for any interest or similar adjustments. Full nominal back pay is claimed, however, a claim estimated to be equivalent, on a composite basis and “net” of the retroactive cost-sharing contributions, to a payment as of January 1, 2008, of \$12,848 per employee. Amtrak, by contrast, has offered no retroactivity. It proposes a lump sum bonus of \$4,500 to each employee represented by the Organizations, regardless of craft or class or job title, who has 2000 or more straight time hours paid for time worked, holidays, personal leave, compensatory/bank time, and/or vacation, during FY 2007.

Both Parties seek to apply employee contributions towards health insurance in the amount (15%) negotiated as part of the Freight Agreements, although they calculate the 15% employee contribution towards premiums going forward differently. The Parties also differ concerning whether all, or only some, of the changes in health and welfare benefits under the Freight Agreements should be imposed on AmPlan (the health insurance plan that provides benefits to Amtrak employees).

The major area of dispute between the Parties after retroactivity relates to proposed work rules changes. The Carrier proposed a number of potentially sweeping work rules changes in a number of significant areas, including contracting out, assignment of work out of class or craft, and work scheduling. Several of the Organizations also have made work rules proposals specific to the crafts or classes that they represent.

## **B. Pattern Considerations**

### **1. The Historical Pattern – The Class I Freights**

Amtrak was chartered in May 1971 as a result of the Rail Passenger Service Act. The Carrier was created after the Freights left the unprofitable passenger rail business. The initial complement of employees came from Conrail. Amtrak has been unprofitable for its entire existence, relying upon a federal operating subsidy to continue operations. It is the only federally owned or controlled entity subject to the Railway Labor Act.

There is no dispute that, despite the differences between Amtrak's unprofitable passenger rail operations and the Freights, the Freight Agreements have served over the years as the historical pattern referenced for establishment of wages, benefits, and working conditions, at Amtrak. For over 30 years, the Parties have used the Freight Agreements as the pattern for purposes of negotiating new Amtrak Agreements with the Organizations. Presidential Emergency Boards which have issued reports in connection with Amtrak and one or more organizations have treated the Freight Agreements as the pattern against which fair and reasonable agreements may be measured.

The importance of pattern bargaining in the railroad industry has been the subject of commentary by a number of PEBs over the years. In each of these reports, the PEB

has noted that pattern bargaining principles serve a number of functions. First, absent changed circumstances sufficient to break the pattern, they provide an objective indicator of the terms that should result from arms length, good faith bargaining between parties in the same industry, attempting to set wages and working conditions in similar jobs, at the same points in time. Second, pattern bargaining promotes stability, both internally within a carrier and externally in the industry, by utilizing referents that the Parties themselves used in prior rounds of bargaining and, depending upon the proposals, perhaps even in the current round of bargaining. Third, these principles provide benchmarks in bargaining, enhancing the likelihood of voluntary agreements. Fourth, the absence of a pattern would be much more uncertain and chaotic, encouraging groups at one carrier to attempt to outdo others, creating an undesirable and disruptive cycle. Given the critical nature of the services provided and the economic repercussions of labor disruptions, stability as a goal is even more important than in other industries. Avoiding strife and work stoppages, while ensuring that wages, benefits, and working conditions are fairly and appropriately determined, are among the principal goals underlying the RLA generally and the PEB process in particular. Fifth, patterns assist in the maintenance of well recognized parity relationships among the wages paid to employees in different classes or crafts or working at different carriers.

The Carrier and the Organizations embrace these general concepts. It is in their application where their positions diverge. The Organizations seek an Agreement that mirrors closely the Freight Agreements and seeks retroactivity for the entire period since December 31, 1999. The Carrier points, instead, to certain differences in its operations from the Freights – differences that have existed for virtually the entire life of the Carrier

– and asks, instead, that the Organizations and the Board focus principally upon a claimed “internal pattern,” consisting of several Agreements reached in 2003 and 2004 and extend that “internal pattern” forward based upon a variation of the Freight pattern after 2004, and that retroactivity not be applied, except for the offered lump sum.

## 2. The Claim of Internal Pattern

Amtrak maintained in bargaining with the Organizations represented before this Board and in its presentation to the PEB that the most appropriate pattern for an agreement is the “internal pattern” already established by the Carrier and several of its Organizations in agreements or tentative agreements.

The claim of “internal pattern” is based upon Agreements that Amtrak reached in 2003 and 2004 with three organizations for agreements that were amendable December 31, 2004 – the TCU, the Amtrak Service Workers Council (“ASWC”), ARASA (On Board Services) (“OBS”). Amtrak also relied upon two Tentative Agreements (“TAs”) that were overwhelmingly rejected by the membership and never took effect – one for the ATDA in 2004 and one for the Brotherhood of Locomotive Engineers and Trainmen (“BLET”) in 2007. A summary of the TCU, ASWC, and ARASA (OBS) Agreements, as well as briefer descriptions of the rejected 2004 ATDA and 2007 BLET TAs follow.

## 3. Transportation Communications Union

The TCU represents clerical employees including ticket clerks, reservation sales agents, crew dispatchers, baggagemen, Red Caps and service workers.<sup>2</sup> Their Agreement with Amtrak covers 3,577 employees, the largest single segment in Amtrak’s organized workforce. Amtrak and the TCU reached agreement in 2004, effective October 1, 2003.

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<sup>2</sup> The Carmen Division of the JCC and ARASA are also affiliated with the TCU.

The amendable date of that Agreement was December 31, 2004. A Harris COLA benefit of \$.75 from an earlier agreement was rolled into the base wage rate before any percentage increases were applied. Additional wage increases were: 3.5% on October 1, 2003; 3% increase on July 1, 2004; 3% increase on October 1, 2004. These increases were different in timing and amount from those provided under the Freight Agreement. (The 2000-04 Freight Agreements provided for General Wage Increases of 3.5%, effective January 1, 2001, and periodic cost of living adjustments during the remainder of the Agreement.)

The most notable feature of the agreement in the health care insurance area was its provision for pre-tax cost-sharing. Borrowing from the innovation contained in the recently negotiated Freight Agreement, the TCU Agreement required employees to contribute \$50 per month on and after October 1, 2003 and \$75 per month on and after October 1, 2004. (This compared with the rates in effect for July 1, 2003-June 30, 2004 of \$79.74 and for July 1, 2004-June 30, 2005 of \$91.32 for the Freights.)

The Parties also agreed to opt-out provisions for employees otherwise covered by health care insurance – another innovation of the Freight Agreement. As in the case of the Freights, employees who opted out because they were covered by other insurance were not required to make the cost-sharing contribution; unlike the Freights, however, the TCU represented employees of Amtrak did not receive additional monies over and above the waiver of employee contributions.

The 2003 TCU-Amtrak Agreement also contained a number of changes to prior work rules, including changed rules with respect to an extra board, bidding procedures, overtime rules, work scheduling and modifications to the grievance procedure. The

complex, carefully crafted rules, far too numerous and detailed to recount here, appear to have been the product of detailed discussion and negotiations.

#### 4. Amtrak Service Workers Council

ASWC employees perform service on board the trains in the galley and dining cars. Some of the work is relatively unskilled such as stocking supplies, cleaning, dishwashing and garbage disposal. Following ratification of the TCU Agreement, on March 5, 2004, Amtrak and the ASWC adopted an Agreement with an effective date of January 1, 2000, to become amendable on December 31, 2004. It provided a signing bonus of \$400 to each employee who had an employment relationship on the date of ratification and had rendered compensated service within six months prior to the date of ratification. The Agreement covered 1,639 on-board employees.

The wage and benefits package (including the introduction of employee cost-sharing for health insurance) mirrored that of the 2003 TCU-Amtrak Agreement. The Agreement also established a new utility worker position to be paid 75% of the full rate already scheduled for several positions. Existing jobs were protected by contract language that limited assignment of the utility worker to occasions where “the addition of the position will result in an increase in the total number of crew positions and without reduction in the number of positions. . . .” Amtrak’s Vice President of Labor Relations testified that an important change in work rules was a reduced layover payment that meant the first 90 minutes of a six-hour layover would be unpaid.

The Agreement contained some other work rule changes peculiar to the craft or class that need not be detailed here.

5. American Railway and Airway Supervisors Association (On Board Services)

As first line supervisors (“subordinate officials”) are eligible for union representation under the Railway Labor Act, the 150 On-Board Supervisors of Service Worker employees adopted an agreement with Amtrak in 2004. Represented are employees in positions such as the On-Board Service Inspector, On-Board Operations Supervisor and Supervisors of the Crew Base, Planning and Scheduling. Details of changes to the prior agreement that resulted from those negotiations are not available in this record, but it is generally agreed by the Parties that the agreement followed the TCU pattern for wage increases and health care contributions.

It should be noted that the 1999 Agreement that appears in the record before the PEB includes long-standing language in its Scope Clause that refers to sub-contracting.

It reads as follows:

Amtrak may not contract out work normally performed by an employee in a bargaining unit covered by a contract between a labor organization and Amtrak or a rail carrier that provided intercity rail passenger transportation on October 30, 1970, if contracting out results in the layoffs of an employee in the bargaining unit.

6. American Train Dispatchers Association

Dispatchers are responsible for directing and monitoring the movement of trains over the carrier’s system. The ATDA agreement with Amtrak became amendable in January 2000. A tentative agreement was reached on September 1, 2004. That agreement increased wages by 3.5% upon ratification. A second increase in the amount of 3% was to be granted immediately after the initial increase was calculated. Finally, a third wage increase of 3% was scheduled to become effective on October 1, 2004. In addition, and like the previously described agreements, a \$.75 COLA would be rolled into the base wage before the specified percentage increases were implemented.

The TA included a difference in the employee contributions to AmPlan. The monthly employee contribution, effective September 1, 2004, was to be \$75 per month and was scheduled under the TA to increase on October 1, 2004 to \$100 per month.

Like the other agreements, the ATDA TA included work rule changes. Some examples of the changes are an increase in the length of the probationary period from 60 days to 120 days; elimination of the \$19 training allowance; and clarification of the definitions of work day and work week which would redefine overtime as only time worked over 40 hours in a given work week. The record does not show how those changes contributed, if at all, to the failure of ratification. The ATDA TA failed ratification by a vote of 84 to 38.

7. Fraternal Order of Police (“FOP”)

Amtrak and the FOP reached agreement during the time that the Carrier and its operating, supervisory and craft unions were pursuing negotiations. The Board is not convinced that there is a sufficient parallel between traditional railroad craft unions and a police union to make their agreement relevant or instructive. Therefore, other than to find that an agreement was reached, no additional detail will be provided.

8. Brotherhood of Locomotive Engineers and Trainmen

Amtrak and the BLET reached a TA covering 1,216 employees in July 2007. The agreement followed the wage pattern established in the 2003 TCU Agreement, the 2004 ASWC Agreement, the 2004 ARASA-OBS Agreement and the 2004 ATDA TA through the end of 2004. Seven additional General Wage Increases would have been effective after 2004 that mirror Amtrak’s wage proposal in this proceeding, including the lack of retroactivity and a signing bonus of \$4,500 per employee who had worked 2000 hours in

the year beginning July 1, 2006. Employees who worked less than 2000 hours were to be paid a pro rata share based on their hours worked.

This TA, like other agreements on the property and like the freight agreement of 2007, included changes to the health care plan and provided for an employee cost-sharing contribution. But the amount required to be contributed was greater than the amounts in the earlier agreements, starting at \$166.25 per month, the same amount as was payable under the Freight Agreements. The TA would have increased the employee contribution effective July 1, 2008, to the same formula contained in Amtrak's proposal in this proceeding – which is a close variant of the Freight Agreement provisions for employee cost-sharing, and would have made the other changes to health care contained in Amtrak's proposal in this proceeding.

The TA was rejected by approximately 70% of the membership who voted and, therefore, failed ratification. Amtrak asserts that, in spite of the failed ratification, the BLET TA should serve as the pattern for the Organizations before this PEB because it evidences the upper boundary of the Carrier's ability to address the outstanding demand for back pay and provides an example of the kind of settlement Amtrak needs in order to access new skill sets and work efficiencies. Amtrak acknowledges that the post-2004 wage proposal herein and in the rejected BLET TA were based on the freight rates and closely approach the wage proposals made herein by the Organizations. Amtrak does not contend that its proposal on wages, other than retroactivity, has its genesis solely in internal patterns. But it argues that the recent BLET TA is the best evidence of “an arm's length negotiated set of conditions.”

The Organizations strenuously object to the concept of using a failed TA as a “pattern” for negotiations and note that its overwhelming rejection highlights the fact that Amtrak’s proposals in the areas of work rules and pay, particularly retroactive pay, do not represent a package that is likely to be acceptable if put to a vote by their memberships.

#### 9. Other Possible Patterns

Neither the Organizations nor the Carrier urged adoption of another pattern. In the course of arguments about the propriety of the Freight pattern, however, reference was made to the wages and benefits and work rules of the Commuter Rail and Urban Transit carriers and some limited reference to the wages paid to employees in similar titled classifications in the airline industry. Some reference was also made to wage trends in the economy as a whole (both governmental and private) and to Bureau of Labor Statistics data regarding job titles that are similar to a number of the crafts and classes in this proceeding.

While all of that evidence has been considered, the Board is unpersuaded that they provide compelling evidence of patterns upon which to ground a recommendation in this case. Several factors support this conclusion.

First, the evidence is strong that the Parties historically have patterned their bargains on the Freight Agreements, not any of these alternatives. While there has been some limited variation from the Freight pattern for a number of years, the linkage between the wage and benefits of the Freights and Amtrak is unmistakable. Not only have the Parties’ agreements in the past mirrored the Freight pattern, but their proposals in this dispute borrow heavily from the Freight pattern. The Organizations’ proposals track the Freight pattern fairly closely. The Carrier’s proposals on pay (other than

retroactivity) and on benefits, including health contributions, also track the Freight pattern, albeit to a lesser degree. The industry is the same. The job classes and crafts perform very similar duties under similar, albeit not identical, operating conditions. The training, skills, and necessary certifications are parallel. When the present linkage is combined with the strong historical linkage and these similarities, it is difficult to argue with the finding that the most appropriate pattern for the Amtrak employees involved in this proceeding are the Freight Agreements.

Amtrak's observations that the Freights are very profitable enterprises not dependent upon governmental subsidies and not involved in the transport of passengers provide no basis for rejection of the Freight Agreements as the appropriate pattern. Those differences have been true since virtually the inception of Amtrak and, despite those differences, the Carrier and the Organizations and prior PEBs have relied upon the Freight pattern. Moreover, if one were persuaded that those differences rendered the Freight patterns inapplicable, the result would not necessarily be one in which there would be no pattern, beyond what Amtrak itself negotiated with earlier settling organizations. One would then be compelled to more closely examine similarities between Amtrak's operations and those of Commuter Rail and Urban Transit in which wages and benefits are significantly higher.

Reference to general economic wage trends are of little value in the Board's task of making appropriate wage and benefits recommendations. Those wage trends were not shown to involve jobs or operations that are truly comparable, notwithstanding some similarity of job titles. The training, job duties, and experience of seasoned rail employees are unique. If considered as evidence of wage movement generally or as

changes in the cost of living generally, they support use of the Freight pattern herein. There was no showing that Amtrak employees are overpaid when compared to truly comparable counterparts in other rail and non-rail organizations, particularly after taking into account the geographic location in which most of the employees in this proceeding live and work.

10. Amtrak's Internal Pattern Claim is Not Persuasive in this Case

The settlements reached by Amtrak with the TCU, the AWSC, and ARASA (OBS) in 2003 and 2004 are clearly relevant to consider in this matter. Avoidance of internal wage or benefit inequity is a legitimate consideration. There are a number of reasons why this Board cannot accept Amtrak's argument that the claimed internal pattern trumps or modifies the Freight Agreements as the appropriate relevant pattern in this case.

First, the record contains no evidence that the TCU, AWSC, or ARASA (OBS) agreements have historically been used as patterns for the settlements of the Agreements for the Organizations involved in this dispute, particularly given the fact that the cited settlements from 2003 and 2004 involved operating crafts. Nor was there evidence that, even if not used as a pattern, the wages and benefits provided to these operating crafts bore some lock-step relationship with the wages and benefits provided to the employees of the Organizations in this dispute.

Second, the settlements cover a minority of Amtrak's unionized working forces and did not prove acceptable as a basis for reaching agreement with the Organizations in this dispute or other organizations at Amtrak. In fact, several Tentative Agreements

based upon that claimed “pattern” failed ratification by significant margins, both in 2004 (ATDA) and in 2007 when circumstances had changed (BLET).

Third, there is no real “pattern” at all regarding the period after December 31, 2004. No Agreement that passed ratification and became effective for Amtrak employees was introduced.

Fourth, even if there is some limited linkage between the wages and benefits generally of the operating crafts who did settle for the pre-2005 period, there was no showing that their work rules and other working conditions have been used by Amtrak and the Organizations in this proceeding as pattern indicators of any type.

This stands in stark contrast to the very strong evidence of linkage relative to pay, benefits, work rules, and other working conditions that has existed for over 30 years between Amtrak and the Freights for the classes and crafts represented by the Organizations.<sup>3</sup>

The finding of pattern does not mean that deviations may not be recommended or bargained when appropriate. That brings the Board to the central issues in this dispute – whether the particular deviations sought by Amtrak (and in a very few respects by the Organizations) relative to wage rates, retroactive pay, health and other welfare benefits, and work rules should be recommended notwithstanding their deviation from the Freight pattern. It is well established that the burden rests upon the Party seeking a variance from

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<sup>3</sup> The Board appreciates that the general wage increases provided under the TCU, ASWC, and ARASA (OBS) Agreements of 2003 and 2004 mirror to a significant degree the Freight Agreement of 2000-04 and that general wage increase provisions of the rejected BLET TA of 2007 mirrors to a significant degree the 2003-04 internal pattern of ratified agreements and the Freight Agreement of 2005-09. The finding in this case that the Freight Agreements provide the most fair and appropriate pattern for the Organizations in this dispute is grounded squarely upon historical considerations and also record facts and should not be construed as opining on whether in the future some pattern other than the Freight Agreement might be fair and appropriate.

the pattern and from the existing provisions of the applicable Agreements to justify the particular variance or change. This is particularly true if the proposed variance is significant.

We now discuss application of these traditional collective bargaining principles to the facts of this case.

### **C. Wages**

#### **1. General Wage Increases**

As a result of the fact that there has been no new Agreement since the 1997 Agreement became amendable on December 31, 1999, wages for the employees represented by the Organizations have been maintained at 1999 levels during the subsequent eight years, with the exception of Harris COLA adjustments.<sup>4</sup>

The Organizations seek the following General Wage Increases:

July 1, 2002	6.087%
July 1, 2003	3.00%
July 1, 2004	3.25%
July 1, 2005	2.50%
July 1, 2006	3.00%
July 1, 2007	3.00% <sup>5</sup>
July 1, 2008	4.00%
July 1, 2009	4.50%

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<sup>4</sup> “Harris COLA” payments are cost of living adjustments that are paid during the period after the amendable date of agreements and during the often lengthy periods of bargaining that occur under the Railway Labor Act. The term is derived from PEB 219 (Robert O. Harris, Chair) that recommended a modified, post-moratorium COLA for a particular situation. Its use has become customary in the industry to mitigate the effects of extended post-moratorium periods without negotiated increases and, following agreement on terms of a successor agreement, offsets are typically provided for Harris COLA payments made during the post-moratorium period. Despite recognition of the fact that negotiations under the RLA often take years, the Board is unaware of any dispute that has spanned an eight year period as in the instant case.

<sup>5</sup> The cumulative effect of the pre-July 1, 2007 increases is 22.68%. Thus, if an Agreement is reached prior to July 1, 2008, the net effect on wages, after taking into consideration the loss of the \$1.44 in Harris COLA and the effect of the health insurance contributions of \$166.25 per month, will be equivalent (on a consolidated basis) to a wage increase (ignoring the tax effects of the health insurance contributions being pre-tax monies) of 9.34%.

The Organizations also propose that the \$0.27 Harris COLA paid as of January 1, 2001, be incorporated into basic rates of pay, effective June 30, 2002, and that the Harris COLA paid between July 1, 2001 and October 1, 2007 (a total of \$1.44 per hour) be eliminated as of that date, but be reinstated after December 31, 2009. With the exception of the “pop up” of the Harris COLA after December 31, 2009, this is patterned after the Freight Agreements.

The Carrier proposes the following General Wage Increases:

1) payment of a \$4,500 lump sum signing bonus to employees on payroll as of the date of ratification in lieu of retroactivity;

2) subtraction of the accumulated Harris COLA from the wage rates as of the date of ratification; and

3) increase to the resulting wages by the following percentage adjustments on the following dates:

30 days after written notice of ratification	18.8516% <sup>6</sup>
April 1, 2008	1.5%
October 1, 2008	3.5%
October 1, 2009	3.5%

The Carrier’s proposal appears to match the wage provisions of the 2003 TCU Agreement for the period 2000-04, but makes no adjustment for the retroactive pay provided to the TCU. The increases provided thereafter do not match either the Freight Agreements or wages reflected in any comparator agreement (there is no TCU Agreement extending beyond December 31, 2004) or wages actually paid to any other

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<sup>6</sup> This is the result of compound increases immediately imposed 30 days after receipt of written notice of ratification of 3.5%, 3.0%, 3.0%, 2.5%, 2.0%, 1.5%, and 2.0%.

employee group. The Carrier's wage proposal does match exactly, however, the wage provisions of the rejected 2007 BLET TA.<sup>7</sup>

The Carrier proposes that the term of the Agreement end on September 30, 2010. The Organizations propose that the term of the Agreement end on December 31, 2009, the same ending date contained in the 2005-09 Freight Agreement.

The difference in wage rates between the two proposals is relatively modest over the respective terms of the Agreement. The difference in dollar cost is significant, largely due to the Parties' contrasting positions on retroactivity.

The Organizations cost out their proposal as providing for nominal wage increases of 35.2% (3.1% per year) over term, with the increase net of the health insurance contributions of 29.2% (2.6% per year) over term. By contrast, the Organizations cost out the Carrier's wage proposal as providing for nominal wage increases of 34.5% (2.8% per year) over that same term, with the increase net of the health insurance contributions of 28.3% (2.3% per year) over that term.

The total incremental dollar cost of the two proposals through December 31, 2009, however, as projected by the Organizations, including retroactivity, is \$198.3 million for the Organizations' wage proposal and \$109.3 million for the Carrier's wage proposal. This differential assumes that, as requested by the Organizations, full retroactivity is provided for all affected employees who worked during the period after December 31, 1999.

The Organizations propose to suspend Harris COLA payments after the Agreement takes effect through December 31, 2009, but to resume those payments

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<sup>7</sup> Inasmuch as the BLET Tentative Agreement was rejected, it was never implemented and no BLET employees were actually compensated in accord with the terms contained therein.

thereafter. They point to the inordinate length of time that the instant dispute has taken and urge that Harris COLAs thereafter be reinstated to mitigate the continuing harm to employees of working under frozen wage rates. The Carrier proposes to eliminate Harris COLA after the Agreement is ratified and opposes reinstatement of the Harris COLA in the post-moratorium period. In that regard, the Carrier relies upon the fact that the Freight Agreements provided for elimination of the Harris COLA, but not for reinstatement of the Harris COLA in the period after contract expiration.

## 2. Findings and Recommendations – General Wage Increases

The Board is persuaded that the Organizations' Wage Proposals are the most reasonable, fair and equitable package of compensation after consideration of the relevant factors which, in this case, include consideration of the Freight pattern, consideration of the maintenance of internal equity among different groups of Amtrak employees, consideration of changes in the cost of living and wage movements in the period of other comparable employee groups, both inside and outside the railroad industry, and consideration of Amtrak's financial situation.

As discussed in the prior section of this Report, there is strong evidence of the Parties' historical use of the Freight Agreements as a pattern for wages and benefits for the Amtrak employees represented by these Organizations. In the past, the Parties have looked principally to the Freight Agreements as the basis of their wage and fringe benefit bargain. When they have proceeded to impasse, the only two Presidential Emergency Boards to address the matter – PEB 222 and PEB 234 – both found the Freight Agreements to be appropriate pattern comparators for Amtrak employees. No persuasive basis has been shown on this record that some better pattern or referent is currently

available for determining the wages, benefits, or other working conditions of the Amtrak employees represented by the Organizations in this proceeding.

The Organizations' proposal on wages (excluding retroactivity which will be discussed later) has as its principal advantage that it retains the historical linkage between wages at Amtrak and wages for comparable jobs at the Freights. The Carrier's proposal on wages and those of the Organizations are relatively close. The available evidence regarding Amtrak's financial situation failed to show that the Freight pattern was not affordable. As it relates to "ability to pay," there was no showing that the General Wage Increase proposals of the Organizations are so much more costly than the General Wage Increase proposal of the Carrier that they are beyond the ability of Amtrak to provide them, under its present funding, even ignoring the trend of increasing ridership and passenger revenues. The present financial situation of Amtrak, including its need to maintain a state of good repair, simply was not shown to preclude the General Wage Increases sought by the Organizations – which are consistent with traditional pattern principles and are consistent with maintenance of real wage levels. Nor was any other basis shown that would support a finding by this Board that those Freight wages would be unfair or inequitable, particularly in light of the tremendous gains in productivity in recent years by the employees represented by the Organizations.

For reasons previously noted, the claim of an "internal pattern" that would trump the Freight pattern relative to wages is unpersuasive in this case and cannot provide a basis for a recommendation that the Parties depart from the Freight pattern on the issue of general wages.

The Board declines to recommend the Organizations' position relative to Harris COLA and, instead, recommends adoption of the Carrier's position concerning the elimination of the Harris COLA without "pop up." This will mirror the terms of the Freight Agreements. Despite concerns based upon the record evidence of the behavior of the Carrier and the Organizations regarding the lengthy period of negotiations in this case, we are unpersuaded that these concerns merit a departure from the Freight pattern relative to the elimination of Harris COLAs.

Finally, the Board would be remiss if it did not observe the significant increases in employee productivity, as measured by seat miles per total hours paid for that further support the Organizations' wage requests. The record data showed increases in that indicator of approximately 50% between 2000 and the present, largely as a function of significant reductions in employee headcount.<sup>8</sup> While not relied upon affirmatively by the Organizations to support a request for greater than pattern increases in compensation, we note that the significant increases in productivity provide further support for a full Freight pattern package of wage increases in this case.

#### **D. Retroactive Pay**

The primary issue separating the Parties in this dispute relates to the Organizations' claim for retroactive pay. Although, as noted above, the proposed percentage adjustments to pay are uniform across the various Organizations, the hourly rates of pay and paid work hours vary between and within crafts and classes.

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<sup>8</sup> The composite employment for the Organizations in this dispute declined from 10537 in January 2000 to 6729 as of September 2007 – a reduction of over 36% - despite a much smaller reduction in seat miles (0.5%) in that same period. Some of this reduction was the result of Amtrak contracts in Boston and San Diego being assumed by other contractors.

The Organizations' expert, Thomas R. Roth, President, Labor Bureau, Inc., testified that, on a consolidated basis, the retroactive pay claim was follows:

Wage Retroactivity as of January 1, 2008 (after subtracting Harris COLA)	\$20,335
Employee Health Insurance Contributions as of January 1, 2008	\$ 7,487
Net Retroactive Pay	\$12,848

The average net retroactive pay varies from the Coach Cleaners, the lowest paid employee group (based upon hourly rates of pay), of \$5,139 to \$34,433 for the Supervisor C&S group. Individual employees' retroactive pay will, of course, be more or less than these averages, based upon the hours worked by those employees in any given time period and their individual rates of pay.

The Carrier urges that no retroactive pay be provided, but proposes a \$4,500 signing bonus, which is equivalent in cost, on a consolidated basis, to 35.0% of the retroactive pay claims.<sup>9</sup> Its impact would be uneven, however, providing 87.6% of retroactive pay, on average, for the Coach Cleaners, but only 13.1% of retroactive pay, on average, for the Supervisor C&S group. In closing, the Carrier noted that it would not object to a retroactive pay approach that took the \$4,500 amount and allocated it to the totality of retroactive pay claims ratably. The amount of money devoted to retroactive pay, rather than its allocation, was central to the Carrier's position in this matter.

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<sup>9</sup> During the hearings in this matter, Amtrak estimated its proposal as equivalent to 30% to 32% of the Organizations' request for retroactive pay. The \$4,500 bonus is equivalent to one-third of the \$13,500 figure that was cited prior to the start of these hearings as the composite average retroactivity amount. Beyond the question of who is eligible to receive retroactive pay, there is no significance to labeling the retroactivity a signing bonus since the Organizations' claim for retroactivity is also in the form of a cash payment; the wage proposals of Amtrak and the Organizations attempt to provide employees with roughly the same wages prospectively for the remainder of the Agreement that would have been payable if the earlier pattern wage increases had been made over the prior eight year period.

The Carrier relied upon its fiscal situation, asserting that anything more than \$4,500 was simply not possible from a budgetary perspective in FY 2008. It also relied upon the “internal pattern” based upon the rejected BLET TA to support the \$4,500 bonus amount. The Carrier also stressed that it had informed the Organizations as early as 2002 of its opposition “as a matter of principle” to any retroactive pay and further claimed that the Organizations bore significant responsibility for the duration of the dispute. The Carrier speculated that the Organizations waited until the present time in the hopes that the political climate would change and a more favorably inclined Congress would fund the claim for retroactivity. The Carrier also cited to the 2003 TCU Clerks Agreement which it asserted did not provide for full retroactive pay.

The Organizations asserted that the Carrier’s retroactivity proposal was not equivalent to the TCU Agreement, even if one treated the TCU Agreement as an appropriate pattern (which they maintained it was not). They project that the wages employees would have received had the TCU Agreement’s wage and benefit terms been applied to them would have generated a pay differential that was, measured on a nominal and composite basis, \$7,072 higher than that received by the Organizations’ members – an amount equivalent to slightly more than 55% of full retroactivity (before application of the health insurance contributions). If one then adjusts for the health insurance contributions due under the formula contained in the TCU Agreement (which is lower than the formula under the Freight pattern), the equivalent retroactivity number becomes \$6,397, or approximately 50% of full retroactivity sought herein.

The Organizations urged that full retroactivity should be granted as a matter of basic equity. They maintained that, having gone eight years without an amended

Agreement through no fault of their own, it would be inequitable to allow Amtrak to benefit from its behavior at the bargaining table. According to the Organizations, the timing of wage increases is an integral part of the “pattern” and if the value of the wage package is to mirror the Freight pattern settlements, then full retroactive pay is warranted to compensate for the difference between the amount that employees would have received if the pattern settlement had been timely agreed to and the amount that employees actually received in wages. They stress that, even under their proposal – which does not include any interest atop the dollar value of the “lost” wages – Amtrak will have received an eight year, interest free “loan” equal to the value represented by the retroactive pay. The Organizations argue further that if the claim for retroactive pay is rejected, in whole or in substantial part, it will place a premium upon not reaching agreement and allow the Carrier to effectively force upon the remaining employee groups whatever agreement may be reached with the first organizations to settle.

The Carrier limited its proposal for the \$4,500 bonus to “each employee with 2,000 or more straight time hours paid for time worked, holidays, personal leave, compensatory/bank time and/or vacation during the period October 1, 2006 through September 30, 2007.” The Carrier’s proposal further proposes that: 1) pro-ration of the bonus amount be paid to employees who have fewer straight time hours (as defined) during the period October 1, 2006 through September 30, 2007; and 2) payment of the bonus to “each employee subject to this Agreement who has an employment relationship subject to this Agreement as of the date of this Agreement, or has retired or died

subsequent to the beginning of the applicable calendar year used to determine the amount of such payment.”<sup>10</sup>

The Organizations urged that retroactive pay be granted to all individuals, including employees who retired, died, quit, or were terminated since December 31, 1999, and noted that the lump sum bonus proposal would give an employee hired in 2006 the same retroactive pay as employees who worked for the entire eight year period without the benefit of the retroactive wage increases.

1. Findings and Recommendations

The principal issues with respect to retroactivity were the following:

- 1) the amount of the retroactive pay/signing bonus;
- 2) eligibility to receive the retroactive pay/signing bonus; and
- 3) the timing of the payment(s).

In making recommendations as to the disposition of these items, considerations of pattern, impact upon the duty to bargain in good faith, equity, and ability to pay, are all implicated.

A number of factors persuade the Board that the most appropriate recommendation in this case is one that would provide “full” retroactive pay, calculated as if the 2000-09 Agreement (both the retroactive wage increases and the retroactive employee contributions to health insurance) were in effect, but that the timing of the retroactive payments should be spread out to reflect the “ability to pay” issues raised by Amtrak.

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<sup>10</sup> No explanation was provided regarding that eligibility language and particularly the questions of: a) whether the date of this Agreement for this provision would be the date of ratification; and b) the reference to “applicable calendar year” when the bonus eligibility is based upon earnings in FY 2007.

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 Mittenthal 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/Mittenthal (regardless of service), or
3. remain furloughed.

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

In the case of the BMWWE 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 BMWWE 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 BMWWE 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 BMWWE 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 BMWWE 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 E 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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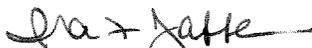
<sup>20</sup> The BMWWE proposed that certain changes to certain work rules made to comply with the Consent Decree in James Thornton et al. v. National Railroad Passenger Corporation (Docket No. 98CV0890) (EGS), pending before the Hon. Emmet G. Sullivan, and reflected in an Interim Agreement, be included 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.

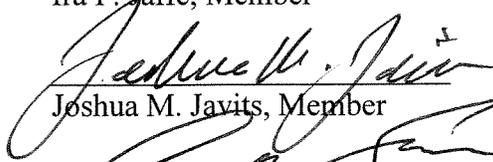
## VII. CONCLUSION

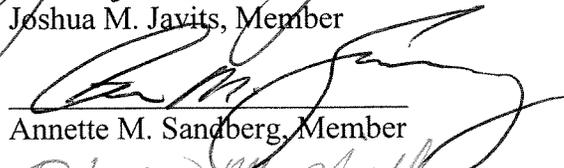
In closing, the Board gratefully acknowledges the counsel and professional assistance rendered by Norman L. Graber, Esq., and Eileen M. Hennessey, Esq. of the National Mediation Board throughout this process.

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

- 1 3 4 5 2 -

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:

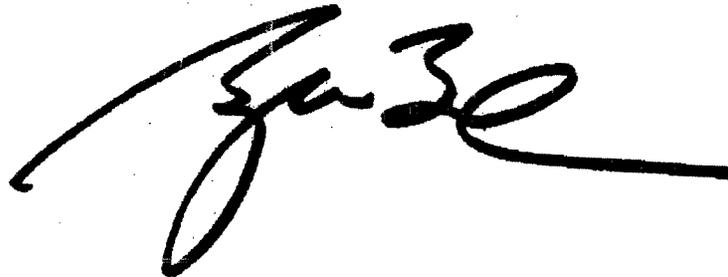
Section 1. Establishment of Emergency Board (Board). There is established, effective 12:01 a.m. eastern standard time on December 1, 2007, a Board of five members to be appointed by the President to investigate and report on these disputes. No member shall be pecuniarily or otherwise interested in any 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 'G. W. Bush'.

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