

THE WHITE HOUSE
WASHINGTON

DATE: 8/16/96

TO: Jennifer O'Connor

FROM: *Kathi Whalen*
White House Counsel
Room 136, OEOB, x6-6229

☒ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

*for you +
it's old
plus
extra*

*full
rail
freight*

REPORT

to

THE PRESIDENT

by

EMERGENCY BOARD

NO. 231

***SUBMITTED PURSUANT TO EXECUTIVE ORDER NO. 13012
DATED JULY 18, 1996
AND SECTION 9a OF
THE RAILWAY LABOR ACT, AS AMENDED***

***Investigation of disputes between Southeastern Pennsylvania Transportation Authority
and the Brotherhood of Locomotive Engineers.***

(National Mediation Board Case No. A-12627)

***WASHINGTON, D.C.
AUGUST 16, 1996***

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August 16, 1996

The President
The White House
Washington, D.C.

Dear Mr. President:

On July 18, 1996, pursuant to Section 9a of the Railway Labor Act, as amended, and by Executive Order 13012, you established an Emergency Board to investigate a dispute between the Southeastern Pennsylvania Transportation Authority and its employees represented by the Brotherhood of Locomotive Engineers.

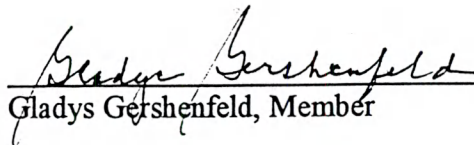
The Board now has the honor to submit its Report and Recommendations to you concerning an appropriate resolution of the dispute between the above-named parties.

The Board records its grateful appreciation for the generous assistance and good counsel given by Joyce M. Klein, Esq., of the National Mediation Board staff, who served as Special Counsel in these proceedings.

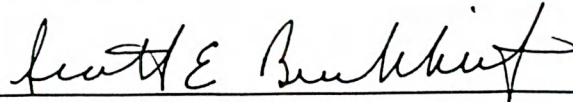
Respectfully,



Robert E. Peterson, Chairman



Gladys Gershenfeld, Member



Scott E. Buchheit, Member

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I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 231 (Board) was established by the President pursuant to Section 9a of the Railway Labor Act, as amended, 45 U.S.C. §151 et seq. including §159a (RLA or Act), and by Executive Order 13012, dated July 18, 1996. The Board was ordered to investigate and report its findings and recommendations regarding an unadjusted dispute between the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority) and certain of its employees represented by the Brotherhood of Locomotive Engineers (BLE or Organization). A copy of the Executive Order is attached as Appendix A.

On July 18, 1996, the President appointed Robert E. Peterson, an arbitrator from Briarcliff Manor, New York, as Chairman of the Board, and Gladys Gershenfeld, an arbitrator from Flourtown, Pennsylvania, and Scott E. Buchheit, an arbitrator from Haddonfield, New Jersey, as Members. The National Mediation Board (NMB) appointed Joyce M. Klein, Esq., as Special Counsel to the Board.

II. PARTIES TO THE DISPUTE

A. The Carrier

SEPTA is a regional agency created in 1964 to consolidate and operate privately owned transportation services in the City of Philadelphia and the four surrounding Pennsylvania counties of Bucks, Chester, Delaware and Montgomery. In 1983, pursuant to the Rail Passenger Services Act as amended by the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. §590, SEPTA assumed operation of commuter rail lines previously operated by the Consolidated Rail Corporation (Conrail).

SEPTA operates a total of 2358 bus and rail vehicles over 129 routes. It carries an annual total of 292 million passengers and operates 71 million route miles annually. SEPTA employs approximately 10,000 employees. Approximately 8100 of those employees are covered by Agreements with 17 Unions and Organizations. SEPTA's Commuter Rail Division employs 1588 employees, including the employees covered by the Agreement at issue in this proceeding.

SEPTA has four operating divisions: (1) the City Transit Division which provides bus, subway, trackless trolley and light-rail service in the City of Philadelphia, (2) the Suburban Transit Division which provides bus, trolley and third-rail interurban service in the four suburban counties, (3) the Paratransit Division which uses independent contractors to provide service to physically impaired individuals in Philadelphia and the four suburban counties and (4) the Commuter Rail Division. SEPTA's Commuter Rail Division operates 346 rail cars on seven routes, all sharing three stations in Center City Philadelphia. The Commuter Rail Division also provides service to

Division. SEPTA's Commuter Rail Division operates 346 rail cars on seven routes, all sharing three stations in Center City Philadelphia. The Commuter Rail Division also provides service to Wilmington, Delaware and Trenton, New Jersey. The Commuter Rail Division serves approximately eight percent of the total passengers carried by SEPTA. Every week, the Commuter Rail Division carries approximately 89,000 passengers. Its passenger service operates over a system covering approximately 282 miles of track.

B. The Organization

The General Committee of Adjustment of the Brotherhood of Locomotive Engineers represents approximately 180 locomotive engineers employed by SEPTA. Approximately 25 percent of SEPTA's engineers who originally transferred from Conrail continue to retain "flow back" rights to employment on Conrail.

III. HISTORY OF THE DISPUTE

In 1983 the dispute over the terms and conditions of the transfer of commuter rail operations from Conrail to SEPTA led to the creation of Emergency Board No. 196 and a subsequent 108-day strike before the parties reached settlement. Since that time, SEPTA and BLE have resolved their major disputes through negotiations and mediation without resort to self-help or the assistance of an emergency board.

In this round of negotiations, in accordance with the Act, BLE served a Section 6 notice on July 20, 1993 for changes in rates of pay, rules and working conditions. The parties were unable to reach an agreement on the issues during negotiations. Consequently, on April 5, 1994, BLE filed an application for the NMB's mediation services. Despite mediation conducted by then NMB Chairwoman Magdalena G. Jacobsen and Mediators John J. Bavis, Samuel J. Cognata and Robert E. Cerjan, and intermittent negotiations by the parties, little progress at settling the dispute had been made by May of 1996. On May 31, 1996, the NMB proffered arbitration of the dispute under Section 5 of the Act. In the weeks that followed this proffer, NMB Member Jacobsen and Mediator Bavis made further attempts to assist the parties to resolve their dispute. However, their efforts were unsuccessful and, on June 18, 1996, BLE rejected the proffer of arbitration. On that same date, the NMB released the parties from mediation, establishing a thirty-day "cooling off" period.

On June 24, 1996, SEPTA requested that President Clinton create an emergency board pursuant to Section 9a of the Act, which provides procedures for the resolution of bargaining impasses involving publicly funded and operated commuter authorities. This Board was created on July 18, 1996, and a new status quo period was established.

IV. ACTIVITIES OF THE EMERGENCY BOARD

An organizational telephone conference was held with the parties on July 19, 1996, at which time procedural issues were discussed and a schedule of hearings was determined. Pursuant to that schedule, both parties made opening statements to the Board on July 24, 1996. Hearings continued on July 25, August 6 and 8, 1996. Both parties were provided adequate opportunity to present testimony, documentary evidence and argument. The Board held executive sessions with the parties on July 24 and August 8, 1996. On July 24 and August 7, 13, 14 and 15, 1996, the Board itself met in executive session in Philadelphia, Pennsylvania and Washington, D.C. to consider the dispute and prepare its report.

V. SCOPE OF THE BOARD'S AUTHORITY

During the hearings, the parties disagreed about the scope of the Board's authority to issue recommendations on proposals not included in BLE's Section 6 notice. The Board determined that it would hear testimony as each party chose to present it and would rule subsequently on the scope of its authority.

SEPTA objects to the Board's consideration of any proposals not included in a Section 6 notice. Specifically, SEPTA objects to Board consideration of a six-year agreement, a certification allowance or an increase in pension benefits. It asserts that these items were not specifically included in BLE's Section 6 notice.

BLE asserts that the Board may consider all of its proposals. In support of its position, BLE directs the Board to its proposals for settlement submitted during the bargaining process which covered each of these issues. BLE also cites Flight Engineers International Association v. Eastern Airlines, 208 F.Supp. 182 (S.D.N.Y. 1962), where the court found that a new Section 6 notice was not necessary to permit Eastern Airlines to engage in self-help over a crew consist question which had not been included in the Carrier's Section 6 notice. In FEIA v. EAL, the court noted that requiring the Carrier to file a new Section 6 notice over each new issue that arose as a major dispute could result in instability from continually starting the Act's processes over again. The court declined to elevate form over substance and instead focused on a question relevant to this proceeding: "Have the parties negotiated with respect to those fundamental issues dividing them within the context of the 'major dispute' proceedings under the Railway Labor Act?" 208 F.Supp. at 190.

The Board determines that the scope of its authority encompasses each of the issues as presented by the parties. The BLE filed its Section 6 notice in July 1993. It filed for mediation on April 5, 1994. During the course of negotiations and mediation, BLE and SEPTA each made a series of proposals involving various issues to resolve the dispute. BLE's proposals included, among other things, a six-year wage package, certification allowance and pension improvements. SEPTA also made a six-year proposal including wages and other items. While the "dispute" initially may have been confined to the proposals contained in the Section 6 notice, the dispute evolved with the

negotiations and mediation process. The Act's definition of "dispute" includes "changes in rates of pay, rules or working conditions not adjusted by the parties in conference." 45 U.S.C. §155, First. In the Board's view, the "dispute" which has become the subject of this Board included a range of proposals proffered at different times during the negotiations process, including each of the issues presented to the Board. Therefore, the Board will address each of the issues raised by the parties.

VI. POSITIONS OF THE PARTIES

A. BLE

In its presentation to the Board, the Organization identified the dispute as involving: (1) Term of Agreement, (2) Wages, (3) Certification Allowance, (4) Training Allowance, (5) Vacations, (6) Pensions and (7) Extra Board. The proposals of BLE on each of these items are as follows:

1. Term of Agreement

A six-year agreement, beginning July 15, 1994 and concluding July 13, 2000.

2. Wages

- Within thirty days after the effective date of Agreement, each engineer shall receive a lump-sum bonus of \$500 which shall not be rolled into the wage rate.
- Effective July 15, 1994, the Pay for Performance program is converted into wages with the base rate being increased by \$.50 per hour.
- Effective October 15, 1995, the base wage rate shall be increased by 3.5%.
- Effective October 15, 1996, the base wage rate shall be increased by 3.5%.
- Effective April 15, 1997, the base wage rate shall be increased by 3.5%.
- Effective July 14, 1997, the base wage rate shall be increased by an equity adjustment in the amount of \$1.00 per hour.
- Effective April 15, 1998, the base wage rate shall be increased by 3%.
- Effective April 15, 1999, the base wage rate shall be increased by 3%.
- Effective April 15, 2000, the base wage rate shall be increased by 3%.
- Effective July 14, 2000, the base wage rate shall be increased by an equity adjustment in the amount of \$1.00 per hour.
- The current cost-of-living allowance is continued through the term of the Agreement.

3. Certification Allowance

Beginning the effective date of the Agreement, each engineer shall be paid a certification allowance of \$12.00 per day in addition to all other payments for each day the engineer performs service or is required to be available for service.

4. Training Allowance

Beginning with the effective date of the Agreement, engineers with five or more years of service shall receive a training allowance of \$.50 per compensated hour, provided that the engineers have not had their certificate validly revoked within the preceding twelve months. In exchange for this payment, the engineers agree to provide training to engineer trainees and other employees as SEPTA may properly assign to ride the head end of trains. Engineers may decline in writing, on an annual basis, the opportunity to provide instruction as defined herein, but will forfeit the allowance for any period during which they decline.

Engineers who provide training as outlined in the preceding paragraph shall be paid an additional \$.50 per hour for each hour they are assigned to directly and immediately supervise a certified student engineer in their charge.

5. Vacations

Effective January 1, 1997, the weekly allowance for engineers' vacation pay shall be calculated on 1/52 of the preceding year's gross wages or 40 times the hourly rate, whichever is greater. For vacations taken in less than a weekly installment, effective January 1, 1997, the daily vacation allowance shall be paid in an amount equal to 1/260 of the engineer's preceding year's gross wages, or eight times the applicable hourly rate, whichever is greater, for each day of vacation taken. Each week of vacation converted into daily increments under the provisions of this paragraph shall be considered five vacation days.

6. Pensions

SEPTA shall create a §401(a) retirement plan for engineers with a \$1000 annual contribution by SEPTA, effective January 15, 1997. SEPTA's annual contribution shall increase to \$2000, effective January 15, 2000.

7. Extra Board

Effective with the first picking following the effective date of this Agreement, extra list engineers will be guaranteed eight hours' wages for each day they are required to be available with a minimum of five and a maximum of six days per week.

B. SEPTA

In its presentation to the Board, SEPTA identified the dispute as involving a term of agreement and a general wage increase. The proposals of SEPTA on each of these items are as follows:

1. Term of Agreement

A three-year Agreement, beginning July 15, 1994 and concluding July 14, 1997.

2. Wages

- A \$500 lump-sum payment upon ratification.
- 3.5 % increase after 15 months.
- 3.5 % increase 12 months later.
- 3.5 % increase 6 months later.

SEPTA proposes that increases should be based upon the BLE Agreement's amendable date of July 15, 1994, with no retroactivity. In other words, based upon BLE's amendable date, the first wage increase would have been due on October 15, 1995. According to SEPTA, that increase would now be payable to engineers upon ratification. If an Agreement is ratified by October 15, 1996, the second 3.5 % increase would be payable to engineers on that date, and, assuming an Agreement is ratified by April 15, 1997, the final increase would be payable to engineers on that date.

VII. RECOMMENDATIONS

A. Term of Agreement

The Board recommends that the parties' Agreement be for a term of six years, covering the period from July 15, 1994 through July 13, 2000. As previously noted, the Board concludes that it does indeed have authority to make a recommendation for a period covering six years. Moreover, the Board concludes that the present circumstances make it advisable to do so. If the Agreement were for a period of only three years in length, the new amendable date would be on or about July 14, 1997, less than one year from now. While an Agreement three years in length would be preferable to no Agreement at all, it is much less desirable than an Agreement six years in length. The parties need only look to the time and effort they have already expended on these negotiations to reveal the truth of this observation. The parties now need a substantial period of labor peace. Were it necessary for them to engage formally in a new round of negotiations covering the period from 1997 through 2000, it would likely be disruptive to sound labor relations and create renewed instability in the parties' relationship.

B. Wages

The BLE contends that the wage increases, equity adjustments, Pay for Performance conversion and COLA it seeks are necessary to achieve parity with the wage rate received by engineers who work for other commuter railroads. It notes that engineers working for New Jersey Transit, Metro-North Commuter Railroad and the Long Island Rail Road all receive wages far greater than engineers who work for SEPTA. According to BLE, there is no justification for this disparity and it must therefore be eliminated over the life of this Agreement. BLE does not give credence to the Authority's arguments concerning the need to adhere to internal patterns, as it believes that a practice exists on this property of granting engineers economic wages and benefits beyond those received by other employees. Finally, BLE maintains that there is no justification for SEPTA's refusal to make its offer retroactive, as it has previously granted a retroactive wage increase.

The Authority asserts that the wage increase it offers BLE for 1994-1997 adheres to a pattern of settlement that exists on its property. It contends that consistent with the historical practice on the property, this pattern was first established in the 1992 settlement between SEPTA and the Transport Workers Union of America (TWU) and followed in every subsequent Agreement involving all Unions and Organizations representing SEPTA employees. The Authority also argues that the wage increase sought by BLE far exceeds this pattern of settlement and were it achieved, pattern bargaining would be destroyed. SEPTA considers issues of external parity to be irrelevant in light of the finding of Emergency Board No. 196 that wages should be based upon local conditions. The Authority further maintains that while a second pattern of wage settlement is now occurring based upon the 1995-1998 SEPTA/TWU settlement, the annual 3% wage increases therein are all self-funded by other modifications in the Agreements. Concerning retroactivity, SEPTA contends that its position here is consistent with its longstanding practice of not granting retroactivity, and this practice is necessary in order to compel timely resolution of new Agreements.

The Board recommends that wages be increased during the term of the Agreement consistent with the internal pattern of settlement followed by all other Unions and Organizations on the Authority's property. More specifically, for the first three years of the Agreement, each bargaining unit member shall receive a \$500 lump-sum payment and a 3.5% general wage increase upon ratification, a 3.5% general wage increase in October 1996 (27 months from the amendable date of term) and a third 3.5% general wage increase six months thereafter. The COLA formula will remain unchanged with COLA adjustments to be paid from the first payroll period subsequent to ratification. For the last three years of the Agreement, wages should be increased by 3% in each year, with corresponding cost-saving offsets in the spirit of the 1995 SEPTA/TWU Agreement and the other Agreements with Unions and Organizations which have subsequently followed.

The Board is compelled to make these recommendations based upon the unbroken internal pattern of wage settlement for Agreements covering comparable time periods involving SEPTA and all other Unions and Organizations on the Authority's property. More specifically, aside from the issue of retroactivity, the wages the Board recommends are the same as those agreed upon in the SEPTA/TWU Agreement covering the period from 1992 through 1995. This Agreement covered

approximately 5000 SEPTA employees, by far the largest bargaining unit on the property. Thereafter, all other Unions and Organizations on SEPTA's property, except for the BLE, agreed to identical wage settlements. Further, more than half the Unions and Organization on the property have by now also agreed to new wage settlements identical to those contained in the 1995-1998 SEPTA/TWU Agreement.

In these circumstances, the Board finds persuasive the Authority's argument that the internal pattern of wage settlements during this round of negotiations should be given controlling weight. There is extensive testimony and evidence in the record concerning the importance of adhering to an internal pattern of wage settlement. The breaking of an internal pattern of wage settlement by the last Organization in a long line of settlements could indeed adversely impact upon SEPTA's relationship with its other bargaining units. Were the Board here to recommend a wage increase consistent with that sought by BLE, and were that increase granted by the Authority, one of two consequences, or a combination thereof, would likely occur. Morale of employees represented by other Unions and Organizations would be negatively impacted by realization that BLE members had achieved a result better than that which they had achieved and/or other bargaining units would use the BLE settlement as a springboard to seek increased benefits during the next round of negotiations. Other Unions and Organizations would also make compelling external parity arguments. These results, however, would adversely effect the continuity and stability of employment and the public interest.

In making its wage recommendation, the Board is mindful of the fact that since the initial Agreements between SEPTA and the Organizations representing rail employees, BLE members, particularly those who entered the Authority's service at a new starting wage rate, have received increases in economic benefits beyond those received by other employees. As argued by BLE, both it and the Authority have implicitly if not explicitly recognized that some of the recommendations of Emergency Board No. 196 did not work in the marketplace with respect to retention of engineers. Nonetheless, it is not clear that there currently exists a marketplace need for wage adjustments beyond the pattern in this round of negotiations. Thus, the Board believes that the considerations mitigating in favor of adherence to the internal pattern of wages on balance outweigh considerations mitigating towards any possible pattern of engineers receiving wage increases beyond those of other organizations.

The Board also recognizes that BLE has argued forcefully that it should receive wage increases in excess of the internal pattern to make up for internal compression of wages between it and employees represented by other Organizations as well as to eliminate the negative external comparisons with engineers on other commuter railroads. The Board concludes, however, that these considerations are on balance an insufficient reason for now breaking the rigid pattern of wage settlements agreed to by all other Unions on the Authority's property. This is true for several reasons. The internal pattern of wage increases is not a meager one. More specifically, in the first three years alone it allows for a \$500 lump-sum payment upon ratification, three increases of 3.5% and maintenance of the COLA. Nor does it include any major loss of benefits for the Organization's members. The acceptability of the Board's recommendations must also be viewed in light of

SEPTA's economic condition. While BLE skillfully and creatively argues that funds are available to grant the wage increases it seeks, it is beyond dispute that SEPTA suffers from severe economic difficulties. In order to maintain basic operations, the Authority has needed to use substantial capital funds for daily operating expenses and has further needed to reduce its management staff by a considerable amount. Finally, adherence to the pattern of wage settlements does not preclude economic adjustments in other areas.

As to retroactivity, the Board recommends pattern the manner in which this issue was handled in the most recent Agreement between SEPTA and the United Transportation Union (UTU). That settlement, based upon the 1992-1995 SEPTA/TWU Agreement, was the only one achieved more than 15 months after the original amendable date and thus the only one in which retroactivity was a major issue. That settlement did not include retroactivity, although it did include other new benefits of value to the UTU members. Similarly, this Board's recommendation does not include retroactivity but does include recommendations for other new benefits, most notably a certification allowance, which are of value to BLE members. In any event, the full value of the SEPTA/BLE Agreement should not be less than the full value of employee wages and benefits included in settlements with other Organizations and Unions on SEPTA's property, particularly the most recent SEPTA/UTU Agreement.

Finally, the Board's recommendation does not include the Organization's request to convert the Pay for Performance program into wages. SEPTA's position is that this program terminated on the amendable date. The Board cannot determine whether or not the program continues to exist. That dispute is currently the subject of a Section 3 claim, and this Board expresses no opinion as to the proper outcome of the claim. The Board notes, however, that it may be in the best interest of both sides now to resolve that dispute as part of a comprehensive new Agreement.

C. Certification Allowance

The BLE contends that since certification now plays such an important role in the manner in which engineers may be held accountable for their job performance, engineers are entitled to a monetary allowance for the responsibility and sanctions associated with that historical change in their employment relationship. BLE thus asks that engineers be granted an allowance of \$12 a day, in addition to all other payments, for each day that an engineer performs service or is required to be available for duty.

According to SEPTA, if engineers were to be provided a certification allowance, it could impact upon its entire transit operation because no certification premium is provided to other employees. Notwithstanding the absence of such an allowance, SEPTA submits that virtually all of its employees have some kind of certification or licensing requirement for their jobs. Reference is made to the certification or licensing of shop craft employees in order to be able to perform such work as welding, plumbing, and air conditioning.

The Board recommends that a certification allowance be included in the Agreement.

The Board is persuaded by the Organization's argument that enactment of the Rail Safety Improvement Act of 1988 (PL 100-342, June 28, 1988) (RSIA) had a dramatic impact upon the conditions of employment for engineers. RSIA essentially made individuals civilly responsible for violations of Federal Railroad Administration (FRA) regulations or safety statutes. It specifically provided for fines of up to \$20,000 for willful violations of regulations. It empowered the FRA to remove someone from safety sensitive service if it had a problem with that person's conduct. It directed the FRA to develop a program of licensing or certification for locomotive engineers.

It is apparent to the Board that it has also been determined on other properties that RSIA had a dramatic impact upon the conditions of employment for engineers. More specifically, the record establishes that certification allowances range from \$15 per day on both the Southern Pacific and Grand Trunk railroads to \$4 per day on a short line railway in the Midwest. In the more immediate geographic area, New Jersey Transit has agreed to a \$5 per day allowance, and both the Long Island Rail Road and Metro-North Commuter Railroad have a \$10 per day certification allowance.

The Board is sensitive to SEPTA's concern that the granting of a certification allowance to engineers will result in similar demands from other employees. It is convinced, however, that the certification of engineers is distinguishable from the licensing of all other employees on the property. No other group of SEPTA employees are so affected by the stringent performance standards, sanctions and higher responsibilities which are now required under the FRA certification program. Moreover, the record reveals that while it normally takes eight to nine months for an individual to become a qualified engineer, it normally takes an individual about one month to become licensed as a bus operator. In addition, the penalty for a shop craft employee not becoming qualified for the various items of work mentioned by SEPTA is that the employee would be disqualified from working on jobs which specifically require a license. Unlike engineers, shop craft employees are not subject to a suspension from service or a loss of employment as a consequence of a failure to obtain or maintain a license.

In short, engineer certification is unique. Further, it is not unusual for an Agreement on this property to address a concern unique to a particular class of employees.

As to the form and amount of the certification allowance, the Board recommends that there be a \$500 lump-sum payment to each engineer upon ratification of an Agreement as reimbursement for costs associated on a direct and indirect basis for having engaged in the certification procedures. In addition, the Board recommends that there be a certification allowance of \$4.00 for each day that service is performed as an engineer subsequent to ratification of the Agreement. The daily certification allowance shall remain in effect until the amendable date, that is July 13, 2000. Thereafter, it shall terminate unless subsequently reincorporated into the parties' Agreement through negotiations. This arrangement will best reconcile the legitimate desires of the Organization for a certification allowance with the Authority's legitimate concerns over the present and future impact of such a program.

D. Training Allowance

The Organization associates its training proposal with the testimony it elicited on a chronic shortage of certified engineers on the property and the resulting need to continually train new engineers. According to BLE data, 276 engineers left SEPTA between 1993 and 1996, and of 197 engineers trained by SEPTA, 69 have left. The BLE also argues that compensation for engineer-instructors is a common practice in the railroad industry.

The Authority maintains that its turnover rate is low at present, 2.9 % from 1990 through 1995. SEPTA data show approximately 200 engineers who have left its employ and a gradual decline in loss of engineers except for the years 1984 and 1987. SEPTA cites efforts that it made in 1984 and 1988 as evidence that if a serious shortage exists, the Authority will take whatever action is required to address the problem.

The Board recommends that there be a limited training allowance incorporated within the parties' Agreement.

In reaching this conclusion, the Board has found the history of this item to be an important consideration. On or about July 3, 1984, faced with a severe shortage of engineers that required a reduction in service, the parties entered into an agreement to provide engineer-instructors for on-the-job training of student engineers. Payment, in accordance with this Agreement was provided as follows:

A differential of \$.50 per hour will be paid (with a minimum of \$2.00 per day) in addition to other earnings for a tour of duty performed as an engineer-instructor.

In 1988, SEPTA addressed another period of serious shortage of engineers by implementing a stabilization program that provided incentive pay for reductions in turnover. Currently, however, neither the training program nor the stabilization program are in effect. Supervisors are doing the on-the-job training after new employees complete their certification training.

Although the work force is stable at present--only two engineers had left in 1995--the Board believes it would be in the interest of both parties to reinstitute a plan whereby the Authority can direct certified engineers to train new employees as the need arises. Such a plan reflects the concern of BLE members about accountability for the proper operation of equipment by student engineers.

The BLE proposal, however, expands the concept in the 1984 agreement and provides (1) \$.50 per hour for all engineers available for training, as well as (2) \$.50 per hour while engaged in instruction. It is the Board's opinion that the first portion is unrealistic, particularly in a period of fiscal strain. Further, when the problem was severe in 1984, payment was provided only for actual hours of instruction, and the need is not evident now for a different compensation basis.

Thus, the Board recommends that the parties include in their Agreement provision for an allowance more limited than that sought by BLE. This provision would provide that effective upon ratification, engineers with five years of seniority, who indicate their availability to serve as instructors and who are so directed by SEPTA, will receive a payment of \$.50 per hour while engaged in instructing trainees.

E. Vacations

Section 901 (e) of the parties' current Agreement provides the following method of calculating vacation pay:

Regular employees will receive 44 hours of pay at their regular hourly rate for each week of vacation. Extra employees will be paid 8 hours straight time pay based on five days per week at the employee's regular rate.

The BLE contends that the current vacation payment of 44 hours does not compensate for hours actually worked. According to the Organization, a majority of the engineers currently work six days a week and the engineers' weekly pay on average is for 60 hours of work. The proposed standard of 1/52 of the previous year's earnings is based on a railroad industry practice, which includes overtime earnings as well as straight-time earnings. The 1/260 standard is designed to cover vacations taken as single days, which are allowed under the parties' Agreement.

According to SEPTA, the matter of a 1/52 vacation allowance was a major issue in contention during the first contract negotiations in 1983 between SEPTA and BLE. SEPTA cites this issue as an example of a railroad work rule that it found unacceptable and notes that the negotiated vacation clause that was eventually placed in the SEPTA/BLE Agreement was based upon the SEPTA/TWU Agreement. Moreover, SEPTA expresses concern that an increase in the vacation allowance for engineers would spread throughout the property as other Unions and Organizations seek the same benefit.

The Board recommends that Section 901(e) of the parties' Agreement be amended as hereinafter described.

SEPTA's initial agreement with UTU, representing conductors, provided the same 44-hour language as that in the BLE Agreement. In the most recent UTU Agreement, however, SEPTA and the UTU agreed that employees scheduled to work six days a week will receive an increase of four hours' vacation allowance, or a total of 48 hours' pay for each week of vacation. The Board believes that a parallel modification should now be made in the SEPTA/BLE Agreement. That modification would not, however, be expanded to include the proposed 1/52 and 1/260 allowances sought by BLE, which the Board finds excessive under the financial conditions surrounding these negotiations.

The Board appreciates the Authority's concern that an increase in the vacation allowance for engineers would cause other employees also to seek improvements in their various vacation benefits.

Employees represented by the UTU and BLE, however, work under circumstances unique to operating employees. The UTU vacation modification recognized the large number of operating employees in the Commuter Rail Division who work six days a week, which is not claimed to be the prevalent work schedule for other divisions of the Authority. The BLE Agreement should now reflect a similar recognition. Moreover, the Board believes that increasing the BLE vacation allowance by four hours would serve as an incentive as well as an acknowledgment of the heavy work schedule of engineers.

Accordingly, the Board recommends that SEPTA and BLE modify Section 901 (e) of their Agreement and model the new vacation allowance on the language of the most recent SEPTA/UTU Agreement.

F. Pensions

The BLE has requested a pension enhancement of \$1,000 per year effective January 1, 1997 and a \$2,000 per year enhancement effective January 1, 2000.

The Board recommends that this proposal be withdrawn.

The BLE has offered insufficient rationale for granting a pension enhancement. Further, it is obvious that the cost impact of this item makes it unrealistic for the Board to recommend.

G. Extra Board

The BLE has proposed that effective with the first pick of assignments following the effective date of settlement of this dispute, extra list engineers be guaranteed eight hours of wages for each day that they are required to be available, with a minimum of five days and a maximum of six days per week. This proposal would have the effect of increasing the guarantee for six days from 44 to 48 hours of pay per week.

The Board recommends that this proposal be withdrawn.

In the most recent SEPTA/UTU settlement, it was agreed that the guarantee for six days be increased from 40 to 44 hours per week. The BLE has presented insufficient evidence to support an increase in its guarantee beyond that of UTU.

H. Health and Welfare Cost Containmentment

The parties reached agreement on August 17, 1992 that certain health cost containments would be included as part of their next settlement. The Board endorses the actions of the parties in this regard and recommends that their agreement be made a part of the settlement of this dispute.

VIII. CONCLUSIONS

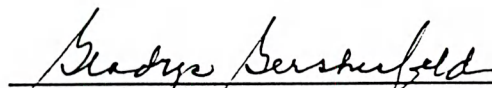
The formal presentations of the parties before the Board were exceptional. Advocacy was vigorous. Each side fully and skillfully represented its constituency. An extensive record of the issues was developed that has enabled the Board to consider all aspects of the dispute. The recommendations of the Board provide a realistic basis for settlement of the dispute. The time is now ripe for that settlement to occur. Clearly, further continuation of this dispute would no longer be in the best interest of either side. The Board therefore urges SEPTA and BLE to use these recommendations in a renewed effort to reach a negotiated settlement.

Finally, the Board concludes its work by offering its grateful appreciation to Joyce M. Klein, Esq., of the National Mediation Board staff. Her generous assistance and advice as Special Counsel to the Board were invaluable.

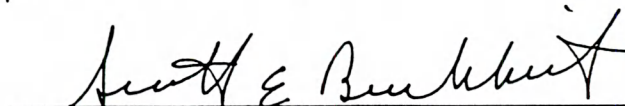
Respectfully,



Robert E. Peterson, Chairman



Gladys Gershenfeld, Member



Scott E. Buchheit, Member

EXECUTIVE ORDER

13102
- - - - -ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE
BETWEEN THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY AND THEIR EMPLOYEES REPRESENTED BY
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

A dispute exists between the Southeastern Pennsylvania Transportation Authority and its employees represented by the Brotherhood of Locomotive Engineers.

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

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

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

NOW, THEREFORE, by the authority vested in me as President, by the Constitution and the laws of the United States, including Section 9A of the Act, it is hereby ordered as follows:

Section 1. Establishment of the Board. There is established effective July 19, 1996, a Board of three members to be appointed by the President to investigate this dispute. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier. The Board shall perform its functions subject to the availability of funds.

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

Sec. 3. Maintaining Conditions. As provided by Section 9A(c) of the Act, from the date of the creation of the Board and for 120 days thereafter, no change, except by agreement of the parties, shall be made by the carrier or the employees in the conditions out of which the dispute arose.

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 submission of the report provided for in section 2 of this order.

William S. Clinton

THE WHITE HOUSE,
July 18, 1996.

REPORT

to

THE PRESIDENT

by

EMERGENCY BOARD

NO. 231

***SUBMITTED PURSUANT TO EXECUTIVE ORDER NO. 13012
DATED JULY 18, 1996
AND SECTION 9a OF
THE RAILWAY LABOR ACT, AS AMENDED***

***Investigation of disputes between Southeastern Pennsylvania Transportation Authority
and the Brotherhood of Locomotive Engineers.***

(National Mediation Board Case No. A-12627)

***WASHINGTON, D.C.
AUGUST 16, 1996***

Washington, D.C.
August 16, 1996

The President
The White House
Washington, D.C.

Dear Mr. President:

On July 18, 1996, pursuant to Section 9a of the Railway Labor Act, as amended, and by Executive Order 13012, you established an Emergency Board to investigate a dispute between the Southeastern Pennsylvania Transportation Authority and its employees represented by the Brotherhood of Locomotive Engineers.

The Board now has the honor to submit its Report and Recommendations to you concerning an appropriate resolution of the dispute between the above-named parties.

The Board records its grateful appreciation for the generous assistance and good counsel given by Joyce M. Klein, Esq., of the National Mediation Board staff, who served as Special Counsel in these proceedings.

Respectfully,



Robert E. Peterson, Chairman

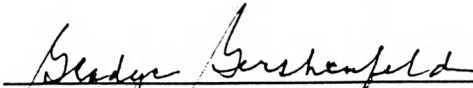
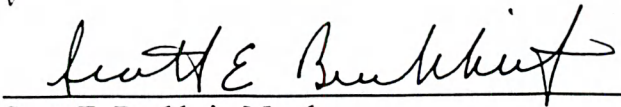

Gladys Gershenfeld, Member
Scott E. Buchheit, Member

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I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 231 (Board) was established by the President pursuant to Section 9a of the Railway Labor Act, as amended, 45 U.S.C. §151 et seq. including §159a (RLA or Act), and by Executive Order 13012, dated July 18, 1996. The Board was ordered to investigate and report its findings and recommendations regarding an unadjusted dispute between the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority) and certain of its employees represented by the Brotherhood of Locomotive Engineers (BLE or Organization). A copy of the Executive Order is attached as Appendix A.

On July 18, 1996, the President appointed Robert E. Peterson, an arbitrator from Briarcliff Manor, New York, as Chairman of the Board, and Gladys Gershenfeld, an arbitrator from Flourtown, Pennsylvania, and Scott E. Buchheit, an arbitrator from Haddonfield, New Jersey, as Members. The National Mediation Board (NMB) appointed Joyce M. Klein, Esq., as Special Counsel to the Board.

II. PARTIES TO THE DISPUTE

A. The Carrier

SEPTA is a regional agency created in 1964 to consolidate and operate privately owned transportation services in the City of Philadelphia and the four surrounding Pennsylvania counties of Bucks, Chester, Delaware and Montgomery. In 1983, pursuant to the Rail Passenger Services Act as amended by the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. §590, SEPTA assumed operation of commuter rail lines previously operated by the Consolidated Rail Corporation (Conrail).

SEPTA operates a total of 2358 bus and rail vehicles over 129 routes. It carries an annual total of 292 million passengers and operates 71 million route miles annually. SEPTA employs approximately 10,000 employees. Approximately 8100 of those employees are covered by Agreements with 17 Unions and Organizations. SEPTA's Commuter Rail Division employs 1588 employees, including the employees covered by the Agreement at issue in this proceeding.

SEPTA has four operating divisions: (1) the City Transit Division which provides bus, subway, trackless trolley and light-rail service in the City of Philadelphia, (2) the Suburban Transit Division which provides bus, trolley and third-rail interurban service in the four suburban counties, (3) the Paratransit Division which uses independent contractors to provide service to physically impaired individuals in Philadelphia and the four suburban counties and (4) the Commuter Rail Division. SEPTA's Commuter Rail Division operates 346 rail cars on seven routes, all sharing three stations in Center City Philadelphia. The Commuter Rail Division also provides service to

Division. SEPTA's Commuter Rail Division operates 346 rail cars on seven routes, all sharing three stations in Center City Philadelphia. The Commuter Rail Division also provides service to Wilmington, Delaware and Trenton, New Jersey. The Commuter Rail Division serves approximately eight percent of the total passengers carried by SEPTA. Every week, the Commuter Rail Division carries approximately 89,000 passengers. Its passenger service operates over a system covering approximately 282 miles of track.

B. The Organization

The General Committee of Adjustment of the Brotherhood of Locomotive Engineers represents approximately 180 locomotive engineers employed by SEPTA. Approximately 25 percent of SEPTA's engineers who originally transferred from Conrail continue to retain "flow back" rights to employment on Conrail.

III. HISTORY OF THE DISPUTE

In 1983 the dispute over the terms and conditions of the transfer of commuter rail operations from Conrail to SEPTA led to the creation of Emergency Board No. 196 and a subsequent 108-day strike before the parties reached settlement. Since that time, SEPTA and BLE have resolved their major disputes through negotiations and mediation without resort to self-help or the assistance of an emergency board.

In this round of negotiations, in accordance with the Act, BLE served a Section 6 notice on July 20, 1993 for changes in rates of pay, rules and working conditions. The parties were unable to reach an agreement on the issues during negotiations. Consequently, on April 5, 1994, BLE filed an application for the NMB's mediation services. Despite mediation conducted by then NMB Chairwoman Magdalena G. Jacobsen and Mediators John J. Bavis, Samuel J. Cognata and Robert E. Cerjan, and intermittent negotiations by the parties, little progress at settling the dispute had been made by May of 1996. On May 31, 1996, the NMB proffered arbitration of the dispute under Section 5 of the Act. In the weeks that followed this proffer, NMB Member Jacobsen and Mediator Bavis made further attempts to assist the parties to resolve their dispute. However, their efforts were unsuccessful and, on June 18, 1996, BLE rejected the proffer of arbitration. On that same date, the NMB released the parties from mediation, establishing a thirty-day "cooling off" period.

On June 24, 1996, SEPTA requested that President Clinton create an emergency board pursuant to Section 9a of the Act, which provides procedures for the resolution of bargaining impasses involving publicly funded and operated commuter authorities. This Board was created on July 18, 1996, and a new status quo period was established.

IV. ACTIVITIES OF THE EMERGENCY BOARD

An organizational telephone conference was held with the parties on July 19, 1996, at which time procedural issues were discussed and a schedule of hearings was determined. Pursuant to that schedule, both parties made opening statements to the Board on July 24, 1996. Hearings continued on July 25, August 6 and 8, 1996. Both parties were provided adequate opportunity to present testimony, documentary evidence and argument. The Board held executive sessions with the parties on July 24 and August 8, 1996. On July 24 and August 7, 13, 14 and 15, 1996, the Board itself met in executive session in Philadelphia, Pennsylvania and Washington, D.C. to consider the dispute and prepare its report.

V. SCOPE OF THE BOARD'S AUTHORITY

During the hearings, the parties disagreed about the scope of the Board's authority to issue recommendations on proposals not included in BLE's Section 6 notice. The Board determined that it would hear testimony as each party chose to present it and would rule subsequently on the scope of its authority.

SEPTA objects to the Board's consideration of any proposals not included in a Section 6 notice. Specifically, SEPTA objects to Board consideration of a six-year agreement, a certification allowance or an increase in pension benefits. It asserts that these items were not specifically included in BLE's Section 6 notice.

BLE asserts that the Board may consider all of its proposals. In support of its position, BLE directs the Board to its proposals for settlement submitted during the bargaining process which covered each of these issues. BLE also cites Flight Engineers International Association v. Eastern Airlines, 208 F.Supp. 182 (S.D.N.Y. 1962), where the court found that a new Section 6 notice was not necessary to permit Eastern Airlines to engage in self-help over a crew consist question which had not been included in the Carrier's Section 6 notice. In FEIA v. EAL, the court noted that requiring the Carrier to file a new Section 6 notice over each new issue that arose as a major dispute could result in instability from continually starting the Act's processes over again. The court declined to elevate form over substance and instead focused on a question relevant to this proceeding: "Have the parties negotiated with respect to those fundamental issues dividing them within the context of the 'major dispute' proceedings under the Railway Labor Act?" 208 F.Supp. at 190.

The Board determines that the scope of its authority encompasses each of the issues as presented by the parties. The BLE filed its Section 6 notice in July 1993. It filed for mediation on April 5, 1994. During the course of negotiations and mediation, BLE and SEPTA each made a series of proposals involving various issues to resolve the dispute. BLE's proposals included, among other things, a six-year wage package, certification allowance and pension improvements. SEPTA also made a six-year proposal including wages and other items. While the "dispute" initially may have been confined to the proposals contained in the Section 6 notice, the dispute evolved with the

negotiations and mediation process. The Act's definition of "dispute" includes "changes in rates of pay, rules or working conditions not adjusted by the parties in conference." 45 U.S.C. §155, First. In the Board's view, the "dispute" which has become the subject of this Board included a range of proposals proffered at different times during the negotiations process, including each of the issues presented to the Board. Therefore, the Board will address each of the issues raised by the parties.

VI. POSITIONS OF THE PARTIES

A. BLE

In its presentation to the Board, the Organization identified the dispute as involving: (1) Term of Agreement, (2) Wages, (3) Certification Allowance, (4) Training Allowance, (5) Vacations, (6) Pensions and (7) Extra Board. The proposals of BLE on each of these items are as follows:

1. Term of Agreement

A six-year agreement, beginning July 15, 1994 and concluding July 13, 2000.

2. Wages

- Within thirty days after the effective date of Agreement, each engineer shall receive a lump-sum bonus of \$500 which shall not be rolled into the wage rate.
- Effective July 15, 1994, the Pay for Performance program is converted into wages with the base rate being increased by \$.50 per hour.
- Effective October 15, 1995, the base wage rate shall be increased by 3.5%.
- Effective October 15, 1996, the base wage rate shall be increased by 3.5%.
- Effective April 15, 1997, the base wage rate shall be increased by 3.5%.
- Effective July 14, 1997, the base wage rate shall be increased by an equity adjustment in the amount of \$1.00 per hour.
- Effective April 15, 1998, the base wage rate shall be increased by 3%.
- Effective April 15, 1999, the base wage rate shall be increased by 3%.
- Effective April 15, 2000, the base wage rate shall be increased by 3%.
- Effective July 14, 2000, the base wage rate shall be increased by an equity adjustment in the amount of \$1.00 per hour.
- The current cost-of-living allowance is continued through the term of the Agreement.

3. Certification Allowance

Beginning the effective date of the Agreement, each engineer shall be paid a certification allowance of \$12.00 per day in addition to all other payments for each day the engineer performs service or is required to be available for service.

4. Training Allowance

Beginning with the effective date of the Agreement, engineers with five or more years of service shall receive a training allowance of \$.50 per compensated hour, provided that the engineers have not had their certificate validly revoked within the preceding twelve months. In exchange for this payment, the engineers agree to provide training to engineer trainees and other employees as SEPTA may properly assign to ride the head end of trains. Engineers may decline in writing, on an annual basis, the opportunity to provide instruction as defined herein, but will forfeit the allowance for any period during which they decline.

Engineers who provide training as outlined in the preceding paragraph shall be paid an additional \$.50 per hour for each hour they are assigned to directly and immediately supervise a certified student engineer in their charge.

5. Vacations

Effective January 1, 1997, the weekly allowance for engineers' vacation pay shall be calculated on 1/52 of the preceding year's gross wages or 40 times the hourly rate, whichever is greater. For vacations taken in less than a weekly installment, effective January 1, 1997, the daily vacation allowance shall be paid in an amount equal to 1/260 of the engineer's preceding year's gross wages, or eight times the applicable hourly rate, whichever is greater, for each day of vacation taken. Each week of vacation converted into daily increments under the provisions of this paragraph shall be considered five vacation days.

6. Pensions

SEPTA shall create a §401(a) retirement plan for engineers with a \$1000 annual contribution by SEPTA, effective January 15, 1997. SEPTA's annual contribution shall increase to \$2000, effective January 15, 2000.

7. Extra Board

Effective with the first picking following the effective date of this Agreement, extra list engineers will be guaranteed eight hours' wages for each day they are required to be available with a minimum of five and a maximum of six days per week.

B. SEPTA

In its presentation to the Board, SEPTA identified the dispute as involving a term of agreement and a general wage increase. The proposals of SEPTA on each of these items are as follows:

1. Term of Agreement

A three-year Agreement, beginning July 15, 1994 and concluding July 14, 1997.

2. Wages

- A \$500 lump-sum payment upon ratification.
- 3.5 % increase after 15 months.
- 3.5 % increase 12 months later.
- 3.5 % increase 6 months later.

SEPTA proposes that increases should be based upon the BLE Agreement's amendable date of July 15, 1994, with no retroactivity. In other words, based upon BLE's amendable date, the first wage increase would have been due on October 15, 1995. According to SEPTA, that increase would now be payable to engineers upon ratification. If an Agreement is ratified by October 15, 1996, the second 3.5 % increase would be payable to engineers on that date, and, assuming an Agreement is ratified by April 15, 1997, the final increase would be payable to engineers on that date.

VII. RECOMMENDATIONS

A. Term of Agreement

The Board recommends that the parties' Agreement be for a term of six years, covering the period from July 15, 1994 through July 13, 2000. As previously noted, the Board concludes that it does indeed have authority to make a recommendation for a period covering six years. Moreover, the Board concludes that the present circumstances make it advisable to do so. If the Agreement were for a period of only three years in length, the new amendable date would be on or about July 14, 1997, less than one year from now. While an Agreement three years in length would be preferable to no Agreement at all, it is much less desirable than an Agreement six years in length. The parties need only look to the time and effort they have already expended on these negotiations to reveal the truth of this observation. The parties now need a substantial period of labor peace. Were it necessary for them to engage formally in a new round of negotiations covering the period from 1997 through 2000, it would likely be disruptive to sound labor relations and create renewed instability in the parties' relationship.

B. Wages

The BLE contends that the wage increases, equity adjustments, Pay for Performance conversion and COLA it seeks are necessary to achieve parity with the wage rate received by engineers who work for other commuter railroads. It notes that engineers working for New Jersey Transit, Metro-North Commuter Railroad and the Long Island Rail Road all receive wages far greater than engineers who work for SEPTA. According to BLE, there is no justification for this disparity and it must therefore be eliminated over the life of this Agreement. BLE does not give credence to the Authority's arguments concerning the need to adhere to internal patterns, as it believes that a practice exists on this property of granting engineers economic wages and benefits beyond those received by other employees. Finally, BLE maintains that there is no justification for SEPTA's refusal to make its offer retroactive, as it has previously granted a retroactive wage increase.

The Authority asserts that the wage increase it offers BLE for 1994-1997 adheres to a pattern of settlement that exists on its property. It contends that consistent with the historical practice on the property, this pattern was first established in the 1992 settlement between SEPTA and the Transport Workers Union of America (TWU) and followed in every subsequent Agreement involving all Unions and Organizations representing SEPTA employees. The Authority also argues that the wage increase sought by BLE far exceeds this pattern of settlement and were it achieved, pattern bargaining would be destroyed. SEPTA considers issues of external parity to be irrelevant in light of the finding of Emergency Board No. 196 that wages should be based upon local conditions. The Authority further maintains that while a second pattern of wage settlement is now occurring based upon the 1995-1998 SEPTA/TWU settlement, the annual 3% wage increases therein are all self-funded by other modifications in the Agreements. Concerning retroactivity, SEPTA contends that its position here is consistent with its longstanding practice of not granting retroactivity, and this practice is necessary in order to compel timely resolution of new Agreements.

The Board recommends that wages be increased during the term of the Agreement consistent with the internal pattern of settlement followed by all other Unions and Organizations on the Authority's property. More specifically, for the first three years of the Agreement, each bargaining unit member shall receive a \$500 lump-sum payment and a 3.5% general wage increase upon ratification, a 3.5% general wage increase in October 1996 (27 months from the amendable date of term) and a third 3.5% general wage increase six months thereafter. The COLA formula will remain unchanged with COLA adjustments to be paid from the first payroll period subsequent to ratification. For the last three years of the Agreement, wages should be increased by 3% in each year, with corresponding cost-saving offsets in the spirit of the 1995 SEPTA/TWU Agreement and the other Agreements with Unions and Organizations which have subsequently followed.

The Board is compelled to make these recommendations based upon the unbroken internal pattern of wage settlement for Agreements covering comparable time periods involving SEPTA and all other Unions and Organizations on the Authority's property. More specifically, aside from the issue of retroactivity, the wages the Board recommends are the same as those agreed upon in the SEPTA/TWU Agreement covering the period from 1992 through 1995. This Agreement covered

approximately 5000 SEPTA employees, by far the largest bargaining unit on the property. Thereafter, all other Unions and Organizations on SEPTA's property, except for the BLE, agreed to identical wage settlements. Further, more than half the Unions and Organization on the property have by now also agreed to new wage settlements identical to those contained in the 1995-1998 SEPTA/TWU Agreement.

In these circumstances, the Board finds persuasive the Authority's argument that the internal pattern of wage settlements during this round of negotiations should be given controlling weight. There is extensive testimony and evidence in the record concerning the importance of adhering to an internal pattern of wage settlement. The breaking of an internal pattern of wage settlement by the last Organization in a long line of settlements could indeed adversely impact upon SEPTA's relationship with its other bargaining units. Were the Board here to recommend a wage increase consistent with that sought by BLE, and were that increase granted by the Authority, one of two consequences, or a combination thereof, would likely occur. Morale of employees represented by other Unions and Organizations would be negatively impacted by realization that BLE members had achieved a result better than that which they had achieved and/or other bargaining units would use the BLE settlement as a springboard to seek increased benefits during the next round of negotiations. Other Unions and Organizations would also make compelling external parity arguments. These results, however, would adversely effect the continuity and stability of employment and the public interest.

In making its wage recommendation, the Board is mindful of the fact that since the initial Agreements between SEPTA and the Organizations representing rail employees, BLE members, particularly those who entered the Authority's service at a new starting wage rate, have received increases in economic benefits beyond those received by other employees. As argued by BLE, both it and the Authority have implicitly if not explicitly recognized that some of the recommendations of Emergency Board No. 196 did not work in the marketplace with respect to retention of engineers. Nonetheless, it is not clear that there currently exists a marketplace need for wage adjustments beyond the pattern in this round of negotiations. Thus, the Board believes that the considerations mitigating in favor of adherence to the internal pattern of wages on balance outweigh considerations mitigating towards any possible pattern of engineers receiving wage increases beyond those of other organizations.

The Board also recognizes that BLE has argued forcefully that it should receive wage increases in excess of the internal pattern to make up for internal compression of wages between it and employees represented by other Organizations as well as to eliminate the negative external comparisons with engineers on other commuter railroads. The Board concludes, however, that these considerations are on balance an insufficient reason for now breaking the rigid pattern of wage settlements agreed to by all other Unions on the Authority's property. This is true for several reasons. The internal pattern of wage increases is not a meager one. More specifically, in the first three years alone it allows for a \$500 lump-sum payment upon ratification, three increases of 3.5% and maintenance of the COLA. Nor does it include any major loss of benefits for the Organization's members. The acceptability of the Board's recommendations must also be viewed in light of

SEPTA's economic condition. While BLE skillfully and creatively argues that funds are available to grant the wage increases it seeks, it is beyond dispute that SEPTA suffers from severe economic difficulties. In order to maintain basic operations, the Authority has needed to use substantial capital funds for daily operating expenses and has further needed to reduce its management staff by a considerable amount. Finally, adherence to the pattern of wage settlements does not preclude economic adjustments in other areas.

As to retroactivity, the Board recommendations pattern the manner in which this issue was handled in the most recent Agreement between SEPTA and the United Transportation Union (UTU). That settlement, based upon the 1992-1995 SEPTA/TWU Agreement, was the only one achieved more than 15 months after the original amendable date and thus the only one in which retroactivity was a major issue. That settlement did not include retroactivity, although it did include other new benefits of value to the UTU members. Similarly, this Board's recommendation does not include retroactivity but does include recommendations for other new benefits, most notably a certification allowance, which are of value to BLE members. In any event, the full value of the SEPTA/BLE Agreement should not be less than the full value of employee wages and benefits included in settlements with other Organizations and Unions on SEPTA's property, particularly the most recent SEPTA/UTU Agreement.

Finally, the Board's recommendation does not include the Organization's request to convert the Pay for Performance program into wages. SEPTA's position is that this program terminated on the amendable date. The Board cannot determine whether or not the program continues to exist. That dispute is currently the subject of a Section 3 claim, and this Board expresses no opinion as to the proper outcome of the claim. The Board notes, however, that it may be in the best interest of both sides now to resolve that dispute as part of a comprehensive new Agreement.

C. Certification Allowance

The BLE contends that since certification now plays such an important role in the manner in which engineers may be held accountable for their job performance, engineers are entitled to a monetary allowance for the responsibility and sanctions associated with that historical change in their employment relationship. BLE thus asks that engineers be granted an allowance of \$12 a day, in addition to all other payments, for each day that an engineer performs service or is required to be available for duty.

According to SEPTA, if engineers were to be provided a certification allowance, it could impact upon its entire transit operation because no certification premium is provided to other employees. Notwithstanding the absence of such an allowance, SEPTA submits that virtually all of its employees have some kind of certification or licensing requirement for their jobs. Reference is made to the certification or licensing of shop craft employees in order to be able to perform such work as welding, plumbing, and air conditioning.

The Board recommends that a certification allowance be included in the Agreement.

The Board is persuaded by the Organization's argument that enactment of the Rail Safety Improvement Act of 1988 (PL 100-342, June 28, 1988) (RSIA) had a dramatic impact upon the conditions of employment for engineers. RSIA essentially made individuals civilly responsible for violations of Federal Railroad Administration (FRA) regulations or safety statutes. It specifically provided for fines of up to \$20,000 for willful violations of regulations. It empowered the FRA to remove someone from safety sensitive service if it had a problem with that person's conduct. It directed the FRA to develop a program of licensing or certification for locomotive engineers.

It is apparent to the Board that it has also been determined on other properties that RSIA had a dramatic impact upon the conditions of employment for engineers. More specifically, the record establishes that certification allowances range from \$15 per day on both the Southern Pacific and Grand Trunk railroads to \$4 per day on a short line railway in the Midwest. In the more immediate geographic area, New Jersey Transit has agreed to a \$5 per day allowance, and both the Long Island Rail Road and Metro-North Commuter Railroad have a \$10 per day certification allowance.

The Board is sensitive to SEPTA's concern that the granting of a certification allowance to engineers will result in similar demands from other employees. It is convinced, however, that the certification of engineers is distinguishable from the licensing of all other employees on the property. No other group of SEPTA employees are so affected by the stringent performance standards, sanctions and higher responsibilities which are now required under the FRA certification program. Moreover, the record reveals that while it normally takes eight to nine months for an individual to become a qualified engineer, it normally takes an individual about one month to become licensed as a bus operator. In addition, the penalty for a shop craft employee not becoming qualified for the various items of work mentioned by SEPTA is that the employee would be disqualified from working on jobs which specifically require a license. Unlike engineers, shop craft employees are not subject to a suspension from service or a loss of employment as a consequence of a failure to obtain or maintain a license.

In short, engineer certification is unique. Further, it is not unusual for an Agreement on this property to address a concern unique to a particular class of employees.

As to the form and amount of the certification allowance, the Board recommends that there be a \$500 lump-sum payment to each engineer upon ratification of an Agreement as reimbursement for costs associated on a direct and indirect basis for having engaged in the certification procedures. In addition, the Board recommends that there be a certification allowance of \$4.00 for each day that service is performed as an engineer subsequent to ratification of the Agreement. The daily certification allowance shall remain in effect until the amendable date, that is July 13, 2000. Thereafter, it shall terminate unless subsequently reincorporated into the parties' Agreement through negotiations. This arrangement will best reconcile the legitimate desires of the Organization for a certification allowance with the Authority's legitimate concerns over the present and future impact of such a program.

D. Training Allowance

The Organization associates its training proposal with the testimony it elicited on a chronic shortage of certified engineers on the property and the resulting need to continually train new engineers. According to BLE data, 276 engineers left SEPTA between 1993 and 1996, and of 197 engineers trained by SEPTA, 69 have left. The BLE also argues that compensation for engineer-instructors is a common practice in the railroad industry.

The Authority maintains that its turnover rate is low at present, 2.9 % from 1990 through 1995. SEPTA data show approximately 200 engineers who have left its employ and a gradual decline in loss of engineers except for the years 1984 and 1987. SEPTA cites efforts that it made in 1984 and 1988 as evidence that if a serious shortage exists, the Authority will take whatever action is required to address the problem.

The Board recommends that there be a limited training allowance incorporated within the parties' Agreement.

In reaching this conclusion, the Board has found the history of this item to be an important consideration. On or about July 3, 1984, faced with a severe shortage of engineers that required a reduction in service, the parties entered into an agreement to provide engineer-instructors for on-the-job training of student engineers. Payment, in accordance with this Agreement was provided as follows:

A differential of \$.50 per hour will be paid (with a minimum of \$2.00 per day) in addition to other earnings for a tour of duty performed as an engineer-instructor.

In 1988, SEPTA addressed another period of serious shortage of engineers by implementing a stabilization program that provided incentive pay for reductions in turnover. Currently, however, neither the training program nor the stabilization program are in effect. Supervisors are doing the on-the-job training after new employees complete their certification training.

Although the work force is stable at present--only two engineers had left in 1995--the Board believes it would be in the interest of both parties to reinstitute a plan whereby the Authority can direct certified engineers to train new employees as the need arises. Such a plan reflects the concern of BLE members about accountability for the proper operation of equipment by student engineers.

The BLE proposal, however, expands the concept in the 1984 agreement and provides (1) \$.50 per hour for all engineers available for training, as well as (2) \$.50 per hour while engaged in instruction. It is the Board's opinion that the first portion is unrealistic, particularly in a period of fiscal strain. Further, when the problem was severe in 1984, payment was provided only for actual hours of instruction, and the need is not evident now for a different compensation basis.

Thus, the Board recommends that the parties include in their Agreement provision for an allowance more limited than that sought by BLE. This provision would provide that effective upon ratification, engineers with five years of seniority, who indicate their availability to serve as instructors and who are so directed by SEPTA, will receive a payment of \$.50 per hour while engaged in instructing trainees.

E. Vacations

Section 901 (e) of the parties' current Agreement provides the following method of calculating vacation pay:

Regular employees will receive 44 hours of pay at their regular hourly rate for each week of vacation. Extra employees will be paid 8 hours straight time pay based on five days per week at the employee's regular rate.

The BLE contends that the current vacation payment of 44 hours does not compensate for hours actually worked. According to the Organization, a majority of the engineers currently work six days a week and the engineers' weekly pay on average is for 60 hours of work. The proposed standard of 1/52 of the previous year's earnings is based on a railroad industry practice, which includes overtime earnings as well as straight-time earnings. The 1/260 standard is designed to cover vacations taken as single days, which are allowed under the parties' Agreement.

According to SEPTA, the matter of a 1/52 vacation allowance was a major issue in contention during the first contract negotiations in 1983 between SEPTA and BLE. SEPTA cites this issue as an example of a railroad work rule that it found unacceptable and notes that the negotiated vacation clause that was eventually placed in the SEPTA/BLE Agreement was based upon the SEPTA/TWU Agreement. Moreover, SEPTA expresses concern that an increase in the vacation allowance for engineers would spread throughout the property as other Unions and Organizations seek the same benefit.

The Board recommends that Section 901(e) of the parties' Agreement be amended as hereinafter described.

SEPTA's initial agreement with UTU, representing conductors, provided the same 44-hour language as that in the BLE Agreement. In the most recent UTU Agreement, however, SEPTA and the UTU agreed that employees scheduled to work six days a week will receive an increase of four hours' vacation allowance, or a total of 48 hours' pay for each week of vacation. The Board believes that a parallel modification should now be made in the SEPTA/BLE Agreement. That modification would not, however, be expanded to include the proposed 1/52 and 1/260 allowances sought by BLE, which the Board finds excessive under the financial conditions surrounding these negotiations.

The Board appreciates the Authority's concern that an increase in the vacation allowance for engineers would cause other employees also to seek improvements in their various vacation benefits.

Employees represented by the UTU and BLE, however, work under circumstances unique to operating employees. The UTU vacation modification recognized the large number of operating employees in the Commuter Rail Division who work six days a week, which is not claimed to be the prevalent work schedule for other divisions of the Authority. The BLE Agreement should now reflect a similar recognition. Moreover, the Board believes that increasing the BLE vacation allowance by four hours would serve as an incentive as well as an acknowledgment of the heavy work schedule of engineers.

Accordingly, the Board recommends that SEPTA and BLE modify Section 901 (e) of their Agreement and model the new vacation allowance on the language of the most recent SEPTA/UTU Agreement.

F. Pensions

The BLE has requested a pension enhancement of \$1,000 per year effective January 1, 1997 and a \$2,000 per year enhancement effective January 1, 2000.

The Board recommends that this proposal be withdrawn.

The BLE has offered insufficient rationale for granting a pension enhancement. Further, it is obvious that the cost impact of this item makes it unrealistic for the Board to recommend.

G. Extra Board

The BLE has proposed that effective with the first pick of assignments following the effective date of settlement of this dispute, extra list engineers be guaranteed eight hours of wages for each day that they are required to be available, with a minimum of five days and a maximum of six days per week. This proposal would have the effect of increasing the guarantee for six days from 44 to 48 hours of pay per week.

The Board recommends that this proposal be withdrawn.

In the most recent SEPTA/UTU settlement, it was agreed that the guarantee for six days be increased from 40 to 44 hours per week. The BLE has presented insufficient evidence to support an increase in its guarantee beyond that of UTU.

H. Health and Welfare Cost Containmentment

The parties reached agreement on August 17, 1992 that certain health cost containments would be included as part of their next settlement. The Board endorses the actions of the parties in this regard and recommends that their agreement be made a part of the settlement of this dispute.

VIII. CONCLUSIONS

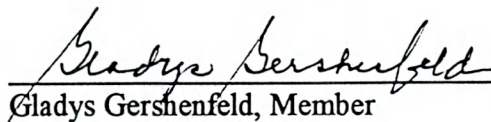
The formal presentations of the parties before the Board were exceptional. Advocacy was vigorous. Each side fully and skillfully represented its constituency. An extensive record of the issues was developed that has enabled the Board to consider all aspects of the dispute. The recommendations of the Board provide a realistic basis for settlement of the dispute. The time is now ripe for that settlement to occur. Clearly, further continuation of this dispute would no longer be in the best interest of either side. The Board therefore urges SEPTA and BLE to use these recommendations in a renewed effort to reach a negotiated settlement.

Finally, the Board concludes its work by offering its grateful appreciation to Joyce M. Klein, Esq., of the National Mediation Board staff. Her generous assistance and advice as Special Counsel to the Board were invaluable.

Respectfully,



Robert E. Peterson, Chairman



Gladys Gershenfeld, Member



Scott E. Buchheit, Member

EXECUTIVE ORDER

13102
- - - - -ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE
BETWEEN THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY AND THEIR EMPLOYEES REPRESENTED BY
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

A dispute exists between the Southeastern Pennsylvania Transportation Authority and its employees represented by the Brotherhood of Locomotive Engineers.

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

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

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

NOW, THEREFORE, by the authority vested in me as President, by the Constitution and the laws of the United States, including Section 9A of the Act, it is hereby ordered as follows:

Section 1. Establishment of the Board. There is established effective July 19, 1996, a Board of three members to be appointed by the President to investigate this dispute. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier. The Board shall perform its functions subject to the availability of funds.

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

Sec. 3. Maintaining Conditions. As provided by Section 9A(c) of the Act, from the date of the creation of the Board and for 120 days thereafter, no change, except by agreement of the parties, shall be made by the carrier or the employees in the conditions out of which the dispute arose.

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 submission of the report provided for in section 2 of this order.

William S. Clinton

THE WHITE HOUSE,

July 18, 1996.

REPORT

to

THE PRESIDENT

by

EMERGENCY BOARD

NO. 231

***SUBMITTED PURSUANT TO EXECUTIVE ORDER NO. 13012
DATED JULY 18, 1996
AND SECTION 9a OF
THE RAILWAY LABOR ACT, AS AMENDED***

***Investigation of disputes between Southeastern Pennsylvania Transportation Authority
and the Brotherhood of Locomotive Engineers.***

(National Mediation Board Case No. A-12627)

***WASHINGTON, D.C.
AUGUST 16, 1996***

Washington, D.C.
August 16, 1996

The President
The White House
Washington, D.C.

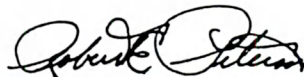
Dear Mr. President:

On July 18, 1996, pursuant to Section 9a of the Railway Labor Act, as amended, and by Executive Order 13012, you established an Emergency Board to investigate a dispute between the Southeastern Pennsylvania Transportation Authority and its employees represented by the Brotherhood of Locomotive Engineers.

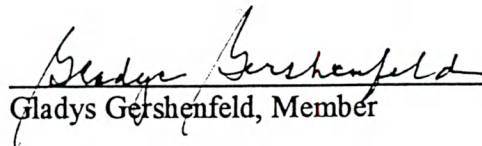
The Board now has the honor to submit its Report and Recommendations to you concerning an appropriate resolution of the dispute between the above-named parties.

The Board records its grateful appreciation for the generous assistance and good counsel given by Joyce M. Klein, Esq., of the National Mediation Board staff, who served as Special Counsel in these proceedings.

Respectfully,



Robert E. Peterson, Chairman



Gladys Gershenfeld, Member



Scott E. Buchheit, Member

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I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 231 (Board) was established by the President pursuant to Section 9a of the Railway Labor Act, as amended, 45 U.S.C. §151 et seq. including §159a (RLA or Act), and by Executive Order 13012, dated July 18, 1996. The Board was ordered to investigate and report its findings and recommendations regarding an unadjusted dispute between the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority) and certain of its employees represented by the Brotherhood of Locomotive Engineers (BLE or Organization). A copy of the Executive Order is attached as Appendix A.

On July 18, 1996, the President appointed Robert E. Peterson, an arbitrator from Briarcliff Manor, New York, as Chairman of the Board, and Gladys Gershenfeld, an arbitrator from Flourtown, Pennsylvania, and Scott E. Buchheit, an arbitrator from Haddonfield, New Jersey, as Members. The National Mediation Board (NMB) appointed Joyce M. Klein, Esq., as Special Counsel to the Board.

II. PARTIES TO THE DISPUTE

A. The Carrier

SEPTA is a regional agency created in 1964 to consolidate and operate privately owned transportation services in the City of Philadelphia and the four surrounding Pennsylvania counties of Bucks, Chester, Delaware and Montgomery. In 1983, pursuant to the Rail Passenger Services Act as amended by the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. §590, SEPTA assumed operation of commuter rail lines previously operated by the Consolidated Rail Corporation (Conrail).

SEPTA operates a total of 2358 bus and rail vehicles over 129 routes. It carries an annual total of 292 million passengers and operates 71 million route miles annually. SEPTA employs approximately 10,000 employees. Approximately 8100 of those employees are covered by Agreements with 17 Unions and Organizations. SEPTA's Commuter Rail Division employs 1588 employees, including the employees covered by the Agreement at issue in this proceeding.

SEPTA has four operating divisions: (1) the City Transit Division which provides bus, subway, trackless trolley and light-rail service in the City of Philadelphia, (2) the Suburban Transit Division which provides bus, trolley and third-rail interurban service in the four suburban counties, (3) the Paratransit Division which uses independent contractors to provide service to physically impaired individuals in Philadelphia and the four suburban counties and (4) the Commuter Rail Division. SEPTA's Commuter Rail Division operates 346 rail cars on seven routes, all sharing three stations in Center City Philadelphia. The Commuter Rail Division also provides service to

Division. SEPTA's Commuter Rail Division operates 346 rail cars on seven routes, all sharing three stations in Center City Philadelphia. The Commuter Rail Division also provides service to Wilmington, Delaware and Trenton, New Jersey. The Commuter Rail Division serves approximately eight percent of the total passengers carried by SEPTA. Every week, the Commuter Rail Division carries approximately 89,000 passengers. Its passenger service operates over a system covering approximately 282 miles of track.

B. The Organization

The General Committee of Adjustment of the Brotherhood of Locomotive Engineers represents approximately 180 locomotive engineers employed by SEPTA. Approximately 25 percent of SEPTA's engineers who originally transferred from Conrail continue to retain "flow back" rights to employment on Conrail.

III. HISTORY OF THE DISPUTE

In 1983 the dispute over the terms and conditions of the transfer of commuter rail operations from Conrail to SEPTA led to the creation of Emergency Board No. 196 and a subsequent 108-day strike before the parties reached settlement. Since that time, SEPTA and BLE have resolved their major disputes through negotiations and mediation without resort to self-help or the assistance of an emergency board.

In this round of negotiations, in accordance with the Act, BLE served a Section 6 notice on July 20, 1993 for changes in rates of pay, rules and working conditions. The parties were unable to reach an agreement on the issues during negotiations. Consequently, on April 5, 1994, BLE filed an application for the NMB's mediation services. Despite mediation conducted by then NMB Chairwoman Magdalena G. Jacobsen and Mediators John J. Bavis, Samuel J. Cognata and Robert E. Cerjan, and intermittent negotiations by the parties, little progress at settling the dispute had been made by May of 1996. On May 31, 1996, the NMB proffered arbitration of the dispute under Section 5 of the Act. In the weeks that followed this proffer, NMB Member Jacobsen and Mediator Bavis made further attempts to assist the parties to resolve their dispute. However, their efforts were unsuccessful and, on June 18, 1996, BLE rejected the proffer of arbitration. On that same date, the NMB released the parties from mediation, establishing a thirty-day "cooling off" period.

On June 24, 1996, SEPTA requested that President Clinton create an emergency board pursuant to Section 9a of the Act, which provides procedures for the resolution of bargaining impasses involving publicly funded and operated commuter authorities. This Board was created on July 18, 1996, and a new status quo period was established.

IV. ACTIVITIES OF THE EMERGENCY BOARD

An organizational telephone conference was held with the parties on July 19, 1996, at which time procedural issues were discussed and a schedule of hearings was determined. Pursuant to that schedule, both parties made opening statements to the Board on July 24, 1996. Hearings continued on July 25, August 6 and 8, 1996. Both parties were provided adequate opportunity to present testimony, documentary evidence and argument. The Board held executive sessions with the parties on July 24 and August 8, 1996. On July 24 and August 7, 13, 14 and 15, 1996, the Board itself met in executive session in Philadelphia, Pennsylvania and Washington, D.C. to consider the dispute and prepare its report.

V. SCOPE OF THE BOARD'S AUTHORITY

During the hearings, the parties disagreed about the scope of the Board's authority to issue recommendations on proposals not included in BLE's Section 6 notice. The Board determined that it would hear testimony as each party chose to present it and would rule subsequently on the scope of its authority.

SEPTA objects to the Board's consideration of any proposals not included in a Section 6 notice. Specifically, SEPTA objects to Board consideration of a six-year agreement, a certification allowance or an increase in pension benefits. It asserts that these items were not specifically included in BLE's Section 6 notice.

BLE asserts that the Board may consider all of its proposals. In support of its position, BLE directs the Board to its proposals for settlement submitted during the bargaining process which covered each of these issues. BLE also cites Flight Engineers International Association v. Eastern Airlines, 208 F.Supp. 182 (S.D.N.Y. 1962), where the court found that a new Section 6 notice was not necessary to permit Eastern Airlines to engage in self-help over a crew consist question which had not been included in the Carrier's Section 6 notice. In FEIA v. EAL, the court noted that requiring the Carrier to file a new Section 6 notice over each new issue that arose as a major dispute could result in instability from continually starting the Act's processes over again. The court declined to elevate form over substance and instead focused on a question relevant to this proceeding: "Have the parties negotiated with respect to those fundamental issues dividing them within the context of the 'major dispute' proceedings under the Railway Labor Act?" 208 F.Supp. at 190.

The Board determines that the scope of its authority encompasses each of the issues as presented by the parties. The BLE filed its Section 6 notice in July 1993. It filed for mediation on April 5, 1994. During the course of negotiations and mediation, BLE and SEPTA each made a series of proposals involving various issues to resolve the dispute. BLE's proposals included, among other things, a six-year wage package, certification allowance and pension improvements. SEPTA also made a six-year proposal including wages and other items. While the "dispute" initially may have been confined to the proposals contained in the Section 6 notice, the dispute evolved with the

negotiations and mediation process. The Act's definition of "dispute" includes "changes in rates of pay, rules or working conditions not adjusted by the parties in conference." 45 U.S.C. §155, First. In the Board's view, the "dispute" which has become the subject of this Board included a range of proposals proffered at different times during the negotiations process, including each of the issues presented to the Board. Therefore, the Board will address each of the issues raised by the parties.

VI. POSITIONS OF THE PARTIES

A. BLE

In its presentation to the Board, the Organization identified the dispute as involving: (1) Term of Agreement, (2) Wages, (3) Certification Allowance, (4) Training Allowance, (5) Vacations, (6) Pensions and (7) Extra Board. The proposals of BLE on each of these items are as follows:

1. Term of Agreement

A six-year agreement, beginning July 15, 1994 and concluding July 13, 2000.

2. Wages

- Within thirty days after the effective date of Agreement, each engineer shall receive a lump-sum bonus of \$500 which shall not be rolled into the wage rate.
- Effective July 15, 1994, the Pay for Performance program is converted into wages with the base rate being increased by \$.50 per hour.
- Effective October 15, 1995, the base wage rate shall be increased by 3.5%.
- Effective October 15, 1996, the base wage rate shall be increased by 3.5%.
- Effective April 15, 1997, the base wage rate shall be increased by 3.5%.
- Effective July 14, 1997, the base wage rate shall be increased by an equity adjustment in the amount of \$1.00 per hour.
- Effective April 15, 1998, the base wage rate shall be increased by 3%.
- Effective April 15, 1999, the base wage rate shall be increased by 3%.
- Effective April 15, 2000, the base wage rate shall be increased by 3%.
- Effective July 14, 2000, the base wage rate shall be increased by an equity adjustment in the amount of \$1.00 per hour.
- The current cost-of-living allowance is continued through the term of the Agreement.

3. Certification Allowance

Beginning the effective date of the Agreement, each engineer shall be paid a certification allowance of \$12.00 per day in addition to all other payments for each day the engineer performs service or is required to be available for service.

4. Training Allowance

Beginning with the effective date of the Agreement, engineers with five or more years of service shall receive a training allowance of \$.50 per compensated hour, provided that the engineers have not had their certificate validly revoked within the preceding twelve months. In exchange for this payment, the engineers agree to provide training to engineer trainees and other employees as SEPTA may properly assign to ride the head end of trains. Engineers may decline in writing, on an annual basis, the opportunity to provide instruction as defined herein, but will forfeit the allowance for any period during which they decline.

Engineers who provide training as outlined in the preceding paragraph shall be paid an additional \$.50 per hour for each hour they are assigned to directly and immediately supervise a certified student engineer in their charge.

5. Vacations

Effective January 1, 1997, the weekly allowance for engineers' vacation pay shall be calculated on 1/52 of the preceding year's gross wages or 40 times the hourly rate, whichever is greater. For vacations taken in less than a weekly installment, effective January 1, 1997, the daily vacation allowance shall be paid in an amount equal to 1/260 of the engineer's preceding year's gross wages, or eight times the applicable hourly rate, whichever is greater, for each day of vacation taken. Each week of vacation converted into daily increments under the provisions of this paragraph shall be considered five vacation days.

6. Pensions

SEPTA shall create a §401(a) retirement plan for engineers with a \$1000 annual contribution by SEPTA, effective January 15, 1997. SEPTA's annual contribution shall increase to \$2000, effective January 15, 2000.

7. Extra Board

Effective with the first picking following the effective date of this Agreement, extra list engineers will be guaranteed eight hours' wages for each day they are required to be available with a minimum of five and a maximum of six days per week.

B. SEPTA

In its presentation to the Board, SEPTA identified the dispute as involving a term of agreement and a general wage increase. The proposals of SEPTA on each of these items are as follows:

1. Term of Agreement

A three-year Agreement, beginning July 15, 1994 and concluding July 14, 1997.

2. Wages

- A \$500 lump-sum payment upon ratification.
- 3.5 % increase after 15 months.
- 3.5 % increase 12 months later.
- 3.5 % increase 6 months later.

SEPTA proposes that increases should be based upon the BLE Agreement's amendable date of July 15, 1994, with no retroactivity. In other words, based upon BLE's amendable date, the first wage increase would have been due on October 15, 1995. According to SEPTA, that increase would now be payable to engineers upon ratification. If an Agreement is ratified by October 15, 1996, the second 3.5 % increase would be payable to engineers on that date, and, assuming an Agreement is ratified by April 15, 1997, the final increase would be payable to engineers on that date.

VII. RECOMMENDATIONS

A. Term of Agreement

The Board recommends that the parties' Agreement be for a term of six years, covering the period from July 15, 1994 through July 13, 2000. As previously noted, the Board concludes that it does indeed have authority to make a recommendation for a period covering six years. Moreover, the Board concludes that the present circumstances make it advisable to do so. If the Agreement were for a period of only three years in length, the new amendable date would be on or about July 14, 1997, less than one year from now. While an Agreement three years in length would be preferable to no Agreement at all, it is much less desirable than an Agreement six years in length. The parties need only look to the time and effort they have already expended on these negotiations to reveal the truth of this observation. The parties now need a substantial period of labor peace. Were it necessary for them to engage formally in a new round of negotiations covering the period from 1997 through 2000, it would likely be disruptive to sound labor relations and create renewed instability in the parties' relationship.

B. Wages

The BLE contends that the wage increases, equity adjustments, Pay for Performance conversion and COLA it seeks are necessary to achieve parity with the wage rate received by engineers who work for other commuter railroads. It notes that engineers working for New Jersey Transit, Metro-North Commuter Railroad and the Long Island Rail Road all receive wages far greater than engineers who work for SEPTA. According to BLE, there is no justification for this disparity and it must therefore be eliminated over the life of this Agreement. BLE does not give credence to the Authority's arguments concerning the need to adhere to internal patterns, as it believes that a practice exists on this property of granting engineers economic wages and benefits beyond those received by other employees. Finally, BLE maintains that there is no justification for SEPTA's refusal to make its offer retroactive, as it has previously granted a retroactive wage increase.

The Authority asserts that the wage increase it offers BLE for 1994-1997 adheres to a pattern of settlement that exists on its property. It contends that consistent with the historical practice on the property, this pattern was first established in the 1992 settlement between SEPTA and the Transport Workers Union of America (TWU) and followed in every subsequent Agreement involving all Unions and Organizations representing SEPTA employees. The Authority also argues that the wage increase sought by BLE far exceeds this pattern of settlement and were it achieved, pattern bargaining would be destroyed. SEPTA considers issues of external parity to be irrelevant in light of the finding of Emergency Board No. 196 that wages should be based upon local conditions. The Authority further maintains that while a second pattern of wage settlement is now occurring based upon the 1995-1998 SEPTA/TWU settlement, the annual 3% wage increases therein are all self-funded by other modifications in the Agreements. Concerning retroactivity, SEPTA contends that its position here is consistent with its longstanding practice of not granting retroactivity, and this practice is necessary in order to compel timely resolution of new Agreements.

The Board recommends that wages be increased during the term of the Agreement consistent with the internal pattern of settlement followed by all other Unions and Organizations on the Authority's property. More specifically, for the first three years of the Agreement, each bargaining unit member shall receive a \$500 lump-sum payment and a 3.5% general wage increase upon ratification, a 3.5% general wage increase in October 1996 (27 months from the amendable date of term) and a third 3.5% general wage increase six months thereafter. The COLA formula will remain unchanged with COLA adjustments to be paid from the first payroll period subsequent to ratification. For the last three years of the Agreement, wages should be increased by 3% in each year, with corresponding cost-saving offsets in the spirit of the 1995 SEPTA/TWU Agreement and the other Agreements with Unions and Organizations which have subsequently followed.

The Board is compelled to make these recommendations based upon the unbroken internal pattern of wage settlement for Agreements covering comparable time periods involving SEPTA and all other Unions and Organizations on the Authority's property. More specifically, aside from the issue of retroactivity, the wages the Board recommends are the same as those agreed upon in the SEPTA/TWU Agreement covering the period from 1992 through 1995. This Agreement covered

approximately 5000 SEPTA employees, by far the largest bargaining unit on the property. Thereafter, all other Unions and Organizations on SEPTA's property, except for the BLE, agreed to identical wage settlements. Further, more than half the Unions and Organization on the property have by now also agreed to new wage settlements identical to those contained in the 1995-1998 SEPTA/TWU Agreement.

In these circumstances, the Board finds persuasive the Authority's argument that the internal pattern of wage settlements during this round of negotiations should be given controlling weight. There is extensive testimony and evidence in the record concerning the importance of adhering to an internal pattern of wage settlement. The breaking of an internal pattern of wage settlement by the last Organization in a long line of settlements could indeed adversely impact upon SEPTA's relationship with its other bargaining units. Were the Board here to recommend a wage increase consistent with that sought by BLE, and were that increase granted by the Authority, one of two consequences, or a combination thereof, would likely occur. Morale of employees represented by other Unions and Organizations would be negatively impacted by realization that BLE members had achieved a result better than that which they had achieved and/or other bargaining units would use the BLE settlement as a springboard to seek increased benefits during the next round of negotiations. Other Unions and Organizations would also make compelling external parity arguments. These results, however, would adversely effect the continuity and stability of employment and the public interest.

In making its wage recommendation, the Board is mindful of the fact that since the initial Agreements between SEPTA and the Organizations representing rail employees, BLE members, particularly those who entered the Authority's service at a new starting wage rate, have received increases in economic benefits beyond those received by other employees. As argued by BLE, both it and the Authority have implicitly if not explicitly recognized that some of the recommendations of Emergency Board No. 196 did not work in the marketplace with respect to retention of engineers. Nonetheless, it is not clear that there currently exists a marketplace need for wage adjustments beyond the pattern in this round of negotiations. Thus, the Board believes that the considerations mitigating in favor of adherence to the internal pattern of wages on balance outweigh considerations mitigating towards any possible pattern of engineers receiving wage increases beyond those of other organizations.

The Board also recognizes that BLE has argued forcefully that it should receive wage increases in excess of the internal pattern to make up for internal compression of wages between it and employees represented by other Organizations as well as to eliminate the negative external comparisons with engineers on other commuter railroads. The Board concludes, however, that these considerations are on balance an insufficient reason for now breaking the rigid pattern of wage settlements agreed to by all other Unions on the Authority's property. This is true for several reasons. The internal pattern of wage increases is not a meager one. More specifically, in the first three years alone it allows for a \$500 lump-sum payment upon ratification, three increases of 3.5% and maintenance of the COLA. Nor does it include any major loss of benefits for the Organization's members. The acceptability of the Board's recommendations must also be viewed in light of

SEPTA's economic condition. While BLE skillfully and creatively argues that funds are available to grant the wage increases it seeks, it is beyond dispute that SEPTA suffers from severe economic difficulties. In order to maintain basic operations, the Authority has needed to use substantial capital funds for daily operating expenses and has further needed to reduce its management staff by a considerable amount. Finally, adherence to the pattern of wage settlements does not preclude economic adjustments in other areas.

As to retroactivity, the Board recommends pattern the manner in which this issue was handled in the most recent Agreement between SEPTA and the United Transportation Union (UTU). That settlement, based upon the 1992-1995 SEPTA/TWU Agreement, was the only one achieved more than 15 months after the original amendable date and thus the only one in which retroactivity was a major issue. That settlement did not include retroactivity, although it did include other new benefits of value to the UTU members. Similarly, this Board's recommendation does not include retroactivity but does include recommendations for other new benefits, most notably a certification allowance, which are of value to BLE members. In any event, the full value of the SEPTA/BLE Agreement should not be less than the full value of employee wages and benefits included in settlements with other Organizations and Unions on SEPTA's property, particularly the most recent SEPTA/UTU Agreement.

Finally, the Board's recommendation does not include the Organization's request to convert the Pay for Performance program into wages. SEPTA's position is that this program terminated on the amendable date. The Board cannot determine whether or not the program continues to exist. That dispute is currently the subject of a Section 3 claim, and this Board expresses no opinion as to the proper outcome of the claim. The Board notes, however, that it may be in the best interest of both sides now to resolve that dispute as part of a comprehensive new Agreement.

C. Certification Allowance

The BLE contends that since certification now plays such an important role in the manner in which engineers may be held accountable for their job performance, engineers are entitled to a monetary allowance for the responsibility and sanctions associated with that historical change in their employment relationship. BLE thus asks that engineers be granted an allowance of \$12 a day, in addition to all other payments, for each day that an engineer performs service or is required to be available for duty.

According to SEPTA, if engineers were to be provided a certification allowance, it could impact upon its entire transit operation because no certification premium is provided to other employees. Notwithstanding the absence of such an allowance, SEPTA submits that virtually all of its employees have some kind of certification or licensing requirement for their jobs. Reference is made to the certification or licensing of shop craft employees in order to be able to perform such work as welding, plumbing, and air conditioning.

The Board recommends that a certification allowance be included in the Agreement.

The Board is persuaded by the Organization's argument that enactment of the Rail Safety Improvement Act of 1988 (PL 100-342, June 28, 1988) (RSIA) had a dramatic impact upon the conditions of employment for engineers. RSIA essentially made individuals civilly responsible for violations of Federal Railroad Administration (FRA) regulations or safety statutes. It specifically provided for fines of up to \$20,000 for willful violations of regulations. It empowered the FRA to remove someone from safety sensitive service if it had a problem with that person's conduct. It directed the FRA to develop a program of licensing or certification for locomotive engineers.

It is apparent to the Board that it has also been determined on other properties that RSIA had a dramatic impact upon the conditions of employment for engineers. More specifically, the record establishes that certification allowances range from \$15 per day on both the Southern Pacific and Grand Trunk railroads to \$4 per day on a short line railway in the Midwest. In the more immediate geographic area, New Jersey Transit has agreed to a \$5 per day allowance, and both the Long Island Rail Road and Metro-North Commuter Railroad have a \$10 per day certification allowance.

The Board is sensitive to SEPTA's concern that the granting of a certification allowance to engineers will result in similar demands from other employees. It is convinced, however, that the certification of engineers is distinguishable from the licensing of all other employees on the property. No other group of SEPTA employees are so affected by the stringent performance standards, sanctions and higher responsibilities which are now required under the FRA certification program. Moreover, the record reveals that while it normally takes eight to nine months for an individual to become a qualified engineer, it normally takes an individual about one month to become licensed as a bus operator. In addition, the penalty for a shop craft employee not becoming qualified for the various items of work mentioned by SEPTA is that the employee would be disqualified from working on jobs which specifically require a license. Unlike engineers, shop craft employees are not subject to a suspension from service or a loss of employment as a consequence of a failure to obtain or maintain a license.

In short, engineer certification is unique. Further, it is not unusual for an Agreement on this property to address a concern unique to a particular class of employees.

As to the form and amount of the certification allowance, the Board recommends that there be a \$500 lump-sum payment to each engineer upon ratification of an Agreement as reimbursement for costs associated on a direct and indirect basis for having engaged in the certification procedures. In addition, the Board recommends that there be a certification allowance of \$4.00 for each day that service is performed as an engineer subsequent to ratification of the Agreement. The daily certification allowance shall remain in effect until the amendable date, that is July 13, 2000. Thereafter, it shall terminate unless subsequently reincorporated into the parties' Agreement through negotiations. This arrangement will best reconcile the legitimate desires of the Organization for a certification allowance with the Authority's legitimate concerns over the present and future impact of such a program.

D. Training Allowance

The Organization associates its training proposal with the testimony it elicited on a chronic shortage of certified engineers on the property and the resulting need to continually train new engineers. According to BLE data, 276 engineers left SEPTA between 1993 and 1996, and of 197 engineers trained by SEPTA, 69 have left. The BLE also argues that compensation for engineer-instructors is a common practice in the railroad industry.

The Authority maintains that its turnover rate is low at present, 2.9 % from 1990 through 1995. SEPTA data show approximately 200 engineers who have left its employ and a gradual decline in loss of engineers except for the years 1984 and 1987. SEPTA cites efforts that it made in 1984 and 1988 as evidence that if a serious shortage exists, the Authority will take whatever action is required to address the problem.

The Board recommends that there be a limited training allowance incorporated within the parties' Agreement.

In reaching this conclusion, the Board has found the history of this item to be an important consideration. On or about July 3, 1984, faced with a severe shortage of engineers that required a reduction in service, the parties entered into an agreement to provide engineer-instructors for on-the-job training of student engineers. Payment, in accordance with this Agreement was provided as follows:

A differential of \$.50 per hour will be paid (with a minimum of \$2.00 per day) in addition to other earnings for a tour of duty performed as an engineer-instructor.

In 1988, SEPTA addressed another period of serious shortage of engineers by implementing a stabilization program that provided incentive pay for reductions in turnover. Currently, however, neither the training program nor the stabilization program are in effect. Supervisors are doing the on-the-job training after new employees complete their certification training.

Although the work force is stable at present--only two engineers had left in 1995--the Board believes it would be in the interest of both parties to reinstitute a plan whereby the Authority can direct certified engineers to train new employees as the need arises. Such a plan reflects the concern of BLE members about accountability for the proper operation of equipment by student engineers.

The BLE proposal, however, expands the concept in the 1984 agreement and provides (1) \$.50 per hour for all engineers available for training, as well as (2) \$.50 per hour while engaged in instruction. It is the Board's opinion that the first portion is unrealistic, particularly in a period of fiscal strain. Further, when the problem was severe in 1984, payment was provided only for actual hours of instruction, and the need is not evident now for a different compensation basis.

Thus, the Board recommends that the parties include in their Agreement provision for an allowance more limited than that sought by BLE. This provision would provide that effective upon ratification, engineers with five years of seniority, who indicate their availability to serve as instructors and who are so directed by SEPTA, will receive a payment of \$.50 per hour while engaged in instructing trainees.

E. Vacations

Section 901 (e) of the parties' current Agreement provides the following method of calculating vacation pay:

Regular employees will receive 44 hours of pay at their regular hourly rate for each week of vacation. Extra employees will be paid 8 hours straight time pay based on five days per week at the employee's regular rate.

The BLE contends that the current vacation payment of 44 hours does not compensate for hours actually worked. According to the Organization, a majority of the engineers currently work six days a week and the engineers' weekly pay on average is for 60 hours of work. The proposed standard of 1/52 of the previous year's earnings is based on a railroad industry practice, which includes overtime earnings as well as straight-time earnings. The 1/260 standard is designed to cover vacations taken as single days, which are allowed under the parties' Agreement.

According to SEPTA, the matter of a 1/52 vacation allowance was a major issue in contention during the first contract negotiations in 1983 between SEPTA and BLE. SEPTA cites this issue as an example of a railroad work rule that it found unacceptable and notes that the negotiated vacation clause that was eventually placed in the SEPTA/BLE Agreement was based upon the SEPTA/TWU Agreement. Moreover, SEPTA expresses concern that an increase in the vacation allowance for engineers would spread throughout the property as other Unions and Organizations seek the same benefit.

The Board recommends that Section 901(e) of the parties' Agreement be amended as hereinafter described.

SEPTA's initial agreement with UTU, representing conductors, provided the same 44-hour language as that in the BLE Agreement. In the most recent UTU Agreement, however, SEPTA and the UTU agreed that employees scheduled to work six days a week will receive an increase of four hours' vacation allowance, or a total of 48 hours' pay for each week of vacation. The Board believes that a parallel modification should now be made in the SEPTA/BLE Agreement. That modification would not, however, be expanded to include the proposed 1/52 and 1/260 allowances sought by BLE, which the Board finds excessive under the financial conditions surrounding these negotiations.

The Board appreciates the Authority's concern that an increase in the vacation allowance for engineers would cause other employees also to seek improvements in their various vacation benefits.

Employees represented by the UTU and BLE, however, work under circumstances unique to operating employees. The UTU vacation modification recognized the large number of operating employees in the Commuter Rail Division who work six days a week, which is not claimed to be the prevalent work schedule for other divisions of the Authority. The BLE Agreement should now reflect a similar recognition. Moreover, the Board believes that increasing the BLE vacation allowance by four hours would serve as an incentive as well as an acknowledgment of the heavy work schedule of engineers.

Accordingly, the Board recommends that SEPTA and BLE modify Section 901 (e) of their Agreement and model the new vacation allowance on the language of the most recent SEPTA/UTU Agreement.

F. Pensions

The BLE has requested a pension enhancement of \$1,000 per year effective January 1, 1997 and a \$2,000 per year enhancement effective January 1, 2000.

The Board recommends that this proposal be withdrawn.

The BLE has offered insufficient rationale for granting a pension enhancement. Further, it is obvious that the cost impact of this item makes it unrealistic for the Board to recommend.

G. Extra Board

The BLE has proposed that effective with the first pick of assignments following the effective date of settlement of this dispute, extra list engineers be guaranteed eight hours of wages for each day that they are required to be available, with a minimum of five days and a maximum of six days per week. This proposal would have the effect of increasing the guarantee for six days from 44 to 48 hours of pay per week.

The Board recommends that this proposal be withdrawn.

In the most recent SEPTA/UTU settlement, it was agreed that the guarantee for six days be increased from 40 to 44 hours per week. The BLE has presented insufficient evidence to support an increase in its guarantee beyond that of UTU.

H. Health and Welfare Cost Containment

The parties reached agreement on August 17, 1992 that certain health cost containments would be included as part of their next settlement. The Board endorses the actions of the parties in this regard and recommends that their agreement be made a part of the settlement of this dispute.

VIII. CONCLUSIONS

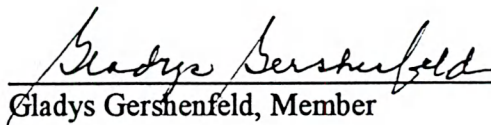
The formal presentations of the parties before the Board were exceptional. Advocacy was vigorous. Each side fully and skillfully represented its constituency. An extensive record of the issues was developed that has enabled the Board to consider all aspects of the dispute. The recommendations of the Board provide a realistic basis for settlement of the dispute. The time is now ripe for that settlement to occur. Clearly, further continuation of this dispute would no longer be in the best interest of either side. The Board therefore urges SEPTA and BLE to use these recommendations in a renewed effort to reach a negotiated settlement.

Finally, the Board concludes its work by offering its grateful appreciation to Joyce M. Klein, Esq., of the National Mediation Board staff. Her generous assistance and advice as Special Counsel to the Board were invaluable.

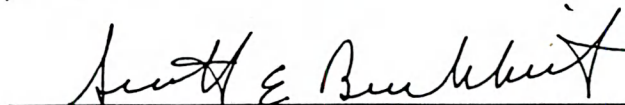
Respectfully,



Robert E. Peterson, Chairman



Gladys Gershenfeld, Member



Scott E. Buchheit, Member

EXECUTIVE ORDER

13102
- - - - -ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE
BETWEEN THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY AND THEIR EMPLOYEES REPRESENTED BY
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

A dispute exists between the Southeastern Pennsylvania Transportation Authority and its employees represented by the Brotherhood of Locomotive Engineers.

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

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

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

NOW, THEREFORE, by the authority vested in me as President, by the Constitution and the laws of the United States, including Section 9A of the Act, it is hereby ordered as follows:

Section 1. Establishment of the Board. There is established effective July 19, 1996, a Board of three members to be appointed by the President to investigate this dispute. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier. The Board shall perform its functions subject to the availability of funds.

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

Sec. 3. Maintaining Conditions. As provided by Section 9A(c) of the Act, from the date of the creation of the Board and for 120 days thereafter, no change, except by agreement of the parties, shall be made by the carrier or the employees in the conditions out of which the dispute arose.

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 submission of the report provided for in section 2 of this order.

William S. Clinton

THE WHITE HOUSE,

July 18, 1996.

EXECUTIVE OFFICE OF THE PRESIDENT

File
PR

27-Dec-1995 05:15pm

TO: Oconnor_J
FROM: Lieber, Janno
SUBJECT: UP-SP Merger

You recently inquired about status of this merger. UP,SP filed application with ICC Nov 30. We (Sec'y's office, FRA) have invited railroads to come in and meet with us about their positions on the merger (not just applicant RR's; also KC Southern and other opponents). Labor has been invited to brief us on their position and will be coming in within the next few weeks. I will try to attend labor meetings and then get back to you.

I haven't learned anything yet about potential hearings, but will let you know when I do.

File

UPDATE ON RAILROAD RETIREMENT BOARD MATTERS

RRB Matters now at OMB: OMB has two of the three issues identified in earlier summaries -- 20 CFR Part 230 (work deductions from annuities); and 20 CFR Part 211 (crediting compensation). In addition, OMB is reviewing a regulation on recovery of overpayments (20 CFR Part 255).

RRB Matters Declined by OMB. OMB declined to review a proposal on 20 CFR Part 261 concerning administrative finality. This proposal would change the rules regarding timeframes for reopening RRB decisions on individual pensions. Labor criticizes this initiative as one-sided (it allows reopening if errors made that increased an individual's benefits, but not if they reduced payment levels). They also complain that it sets up rules inconsistent with those applied by the Social Security Administration, and that OMB should intervene in the interest of consistency.

RRB Medicare Carrier. It is not entirely clear why this issue has heated up again, though Bower did recently write an unsolicited letter to the Health Care Finance Agency (HCFA) asking to meet on the subject. Also, recently HCFA assigned a very low per claim "bottom line unit cost" for administrative expenses to the RRB's current carrier. This has given rise to speculation that they are trying ~~to get the company~~ to force the company to dump its contract with RRB so HCFA can take over. Unions have geared up again in response.

OMB is reviewing changes to three parts of the Board's regulations: parts 211, 230, and 255. Also being changed is part 261 which OMB has not asked to review.

Part 211 relates to crediting of compensation for benefit computation purposes. Part 230 pertains to the manner in which the Board reduces benefits when retirees have excess earnings from post-retirement work. Part 255 of the regulation provides for the manner the Board attempts to collect overpayments.

The information may be more than you really want and, in some cases, somewhat technical, but I wanted the package to be complete. Most of the stuff can be skimmed.

As to which of the regulations is most important, our staff in Chicago is adamant that parts 230 and 255 are both very important and could affect a large number of people. Part 211 would affect relatively few people. The issue with respect to all three is fairness. None of the proposed changes, as far as Rail Labor is concerned, is fair or warranted.

Part 230 probably would affect more people, costing them quite a bit in benefits. Furthermore, part 230 runs contrary to the spirit of Public Law 104-121 signed by President Clinton on March 29, 1996. That Public Law increases the amount retirees may earn without losing social security or railroad retirement benefits. However, the part 230 changes proposed by the Board's majority, if implemented, would subject a larger portion of a railroad retirement annuity to such deductions, thus neutralizing much of the effect of the public law. This regulatory change would cost individuals over \$20 in million in benefit payments over the next seven years.

Part 255, if implemented, would cause hardship to some individuals who were overpaid through no fault of their own. Results in some overpayment cases can be most unfair, and the proposed change to section 255 would give the Board additional authority to harass people in cases where the Board itself was at fault in causing the overpayment.

1994

- Proposed Rule 211

Bower and the Management Member of the Board have approved proposed rule 211 which presents a major change in the crediting of railroad compensation and service. With this change no employee would receive creditable railroad compensation for service performed prior to the 4 year statute of limitation referenced in Section 9 of the Railroad Retirement Act, unless the employee establishes to the satisfaction of the Board that all employment taxes have been paid. Consequently, there will be a number of cases where an employee will lose railroad credits which up until now, would have been granted if there was good cause for extending the 4 year limit.

Subsequently, Bower has also proposed amending the Railroad Retirement Act to reduce the statute of limitation under Section 9 from 4 years to 3 years.

20 CFR Part 211 - Finality of Records of Compensation

Proposed 20 CFR Part 211, published in the Federal Register on December 26, 1995, with a 60-day comment period, proposes to adopt regulations concerning finality of compensation. Section 9 of the Railroad Retirement Act (RRA) places a 4 year limit on the correction of records of compensation filed by employers under the RRA. The Board has generally limited the application of Section 9 to instances where an employee tries to amend his record of compensation more than 4 years after his railroad employer filed a return of compensation (or failed to file a return). Section 9 would bar such an amendment thus giving finality to the record of compensation. (See Section 211.16(a) of the regulations.) In the past, Section 9 has not been applied to situations in which the Board has retroactively held a company or an individual as covered under the RRA. (See Sections 211.16(b)(3) and (4) of the proposed regulation in question.) Rail Labor feels the proposed regulation radically changes and the way the Board applies Section 9..

Section 211.16(b) of the regulations describes when the Board will correct a compensation record, or lack thereof, beyond the 4 year limit of Section 9 of the RRA. Labor's problem is with Section 211.16(c) of the proposed rule which greatly restricts the application of (b) by tying the crediting of service under the RRA beyond the 4 year limitation found in Section 9 to the proper payment of taxes under the Railroad Retirement Tax Act, which is administered by the Internal Revenue Service. Section 211.16(c) would act to bar the crediting of service beyond the 4 years, as provided for in paragraph (b), in all instances where the railroad retirement taxes had not been paid. This

is particularly troublesome in situations covered by Section 211.16(b) (3) and (4), that is, what the Board calls "coverage cases." (It is also difficult to see how Section 211.16(c) would have any application to Section 211.16(b)(1),(2), or (5))

Coverage decisions made by the Board often retroact past the 4 year period. The burden should not be put on the employee, when the employee by error, or design, fails to submit proper compensation reports, pay appropriate payroll taxes or when the Board delays action in it's coverage determination.

An example will highlight Labor's concerns. Company A is an affiliate of a railroad. It has been in existence 5 years and pays FICA taxes instead of railroad retirement taxes in the good faith belief that it is not covered under railroad retirement. The Board discovers the existence of A and 2 years later issues a decision that it is an employer within the definition of Section 1(a)(1)(ii) of the RRA retroactive to the date of its inception. A files an administrative appeal under part 259 of the Board's regulations and 2 years later the Board issues a final decision affirming its initial decision. A has been in existence now for 9 years. Under Section 211.16(c) presumably employees of A would not receive any credits for service under the RRA for any year beyond 4 years retroactive from the date of the Board's final decision unless A pays the correct amount of railroad retirement taxes for those years. (It is unclear at what point to start tracking the four years.) However, there is no statutory basis which ties the crediting of service under the RRA to the payment of taxes under the Railroad Retirement Tax Act. Once it is recognized that Section 9 does not limit the retroactive crediting of service in coverage cases, as the

regulations do, the Board cannot add a requirement to limit the crediting of service under the RRA which has no basis in law.

Furthermore, limiting retroactivity in this manner, is unfair to the employee who has no control over whether his employer pays railroad retirement taxes and who may be deprived of service under the RRA because the employer was under no obligation to pay railroad retirement taxes because of a statute of limitation in the Internal Revenue Code or because the employer may simply be financially unable to pay these taxes as in the case of bankruptcy.

Furthermore, where as in the above example, an employee is not given service because of the operation of Section 211.16(c) the employee can be put in a "catch 22" situation. Where compensation has erroneously been reported to the Social Security Administration by a railroad employer, the employee's status under the Social Security Act for the period may be put into question by Social Security once the Board finds the employer covered under the RRA. If no railroad retirement taxes had been paid, the employee would receive no more than 4 year retroactive railroad retirement credit by virtue of the operation of 211.16(c). As a consequence, the employee may end up with no credit under either statute for the period beyond the 4 years.

To the extend that Section 211.16(c) can be read to make the employee accountable for the employer's taxes under the RRTA in order to get credit under the RRA, it is of questionable legality. Indeed, the Supreme Court has held that an employer may not, by

contract shift its obligations for employment taxes to some other person (Bartels v. Birmingham, 332 U.S. 126 (1947)). Yet, this is precisely what the proposed Section 211.16(c) permits if the employer erroneously, in good faith, or otherwise, fails to report compensation paid to its employees.

Rail Labor sees the majority's action in proposing these regulations as a continuing pattern of partisan anti-employee conduct. Many comments were received from the rail community, all of them in disagreement with the proposal to limit employee compensation and service as stated in Section 211.16(c).

211-4

1995

- Proposed Rule 230

Bower and the Management Member of the Board have approved proposed rule 230 which revises the Railroad Retirement Board's regulation with respect to the effect of work on the payment of railroad retirement annuities. This proposed revision would change the method used to compute work deductions for employee and spouse annuitants, causing substantial reductions in benefits for our working beneficiaries. Moreover, implementation of the change will result in significant administrative costs and disruption to our agency. There is no legal basis for this proposed change and appears to be merely a transparent attempt to reduce benefits.

20 CFR Part 230 - Reduction and Non-Payment of Annuities by Reason of Work

Proposed Regulation 20 CFR Part 230, relating to the revision of the Railroad Retirement Board's (RRB) regulation that explains how employment or self-employment performed after the beginning of an annuity may cause a reduction in, or non-payment of, the annuity was published in the Federal Register August 24, 1995, with a 30-day comment period. Numerous comments were received, and all, with the exception of those from the American Association of Railroads, objected to revised section 230.9. Section 230.9 proposes a revised interpretation of the computation of the amount of the employee and spouse tier I subject to deduction for excess earnings.

The revised interpretation would substantially overvalue the amount of an employee and spouse railroad retirement tier I subject to work deductions when compared to the present formula.

EXAMPLE 1, ASSESSING WORK DEDUCTIONS AT RETIREMENT

The employee is a career railroad employee with 492 months of railroad service, and minimal Social Security (SS) covered earnings. On his retirement application he indicated he plans to work for an SS covered employer after his retirement from the railroad industry, and plans to earn over the exempt amount.

230-1

CURRENT CALCULATIONS

TIER 1	\$1107.60
AMOUNT SUBJECT TO WORK DEDUCTION	<u>432.70</u>
NET TIER 1	\$ 674.90

PROPOSED CALCULATIONS

TIER 1	\$1107.60
AMOUNT SUBJECT TO WORK DEDUCTION	<u>825.90</u>
NET TIER 1	\$ 281.70

Monthly difference in work deduction component \$393.20.

Discussion: If the proposed regulation change is implemented before this employee retired, the proposed calculation would be used when the annuity was initially awarded. If the employee is already receiving an annuity prior to the implementation date, his annuity would have to be decreased by \$393.20 effective with the implementation date. If there was a spouse annuity payable, her annuity would also have to be adjusted since her annuity is subject to his earnings. In general, her work deduction component is 1/2 the employee's

NOTE: To keep these examples as simple as possible,
the normal Tier 1 dollar rounding rules were not considered.

230-2

The Labor Member of the Railroad Retirement Board strongly objected to this revision and his position was included in the preamble of the regulation at the time of publication.

The Labor Member believes that to change the current method of assessing work deductions under the RRA which has been in effect for over 20 years would be costly, administratively disruptive to the agency and to our working beneficiaries, and would probably not withstand legal challenge.

Section 2(f)(1) of the Railroad Retirement Act (RRA) provides that:

"That portion of the individual's annuity as is computed under section (a) of this Act on the basis of (A) his compensation and years of service subsequent to December 31, 1974, and (B) his wages and self-employment income derive from employment and self-employment under the Social Security Act and that portion of the individual's annuity as is computed under section 3(h) of this Act shall be subject to deductions on account of work pursuant to the provisions of section 203 of the Social Security Act in the same manner as if such portion of such annuity were a monthly insurance benefit under the Act..."

Section 2(f)(1) requires a determination of the portion of the tier I component that is based on the employee's social security covered wages and post-1974 railroad service, but does not mandate how it is to be determined. This is the same as the language contained in the original RRA of 1974 enacted October 16, 1974, and that language was contained

in H.R. 15301 which was submitted by representatives of rail labor and management in response to Public Law 93-69, which directed that labor and management present joint recommendations to Congress for restructuring the railroad retirement system. In August 1974, the Board's Assistant General Counsel (later General Counsel) who drafted the provisions of H.R. 15301, interpreted that provision as follows:

"Since none of the tier 1 benefit based on compensation prior to 1975 is subject to work deductions, that portion of tier 1 should always be paid to the employee regardless of the amount of excess earnings. Consequently, the amount of the tier 1 benefit that is subject to deduction on account of work is the difference between the PIA based on combined wages and compensation and the PIA based on compensation prior to 1975"

The Assistant General Counsel believed that the current interpretation for assessing work deductions for employee and spouse annuitants was the only one which would give full effect to the overall intention of the parties, who formulated the fundamental principles and approved the legislative language drafted, resulting in the RRA of 1974. Specifically, rights and expectations accrued prior to 1975 were to be preserved under the 1974 Act. Moreover, Congress never directed the Board to change this interpretation despite numerous opportunities to do so. This interpretation was never questioned until 1990 by the Management Member of the Board, 15 years after implementation.

Prior to the majority of the Board adopting Section 230.9, the Board's General Counsel cautioned that changing an administrative interpretation which has been followed for two

decades should be done only based upon the most compelling of reasoning. Rail labor is convinced that the only reason for supporting the change in this interpretation is that the revision will save money by making a greater portion of the tier 1 benefit subject to reduction on account of excess earnings. The Board's General Counsel continues to find the present method for computing work deductions to be an acceptable interpretation of the RRA and at no time has the former or current General Counsel found it to be incorrect.

It is ironic that this change is being proposed at a time when Congress is introducing legislation to liberalize excess earnings limitations. This proposed regulation change clearly runs counter to this initiative.

revised downward

It is also a matter of great concern that if the majority of the Board adopts Section 230.9, it will cost the agency almost \$1 million and 30,000 staff hours to implement at a time when agency funding level is being significantly reduced. It will draw key personnel away from automation projects that are vitally important at a time when the Board must make the most of its dwindling resources. There will also be costs for additional changes that cannot be accurately determined at this time. Furthermore, the Board's management has stated that there would be a category of recurring overpayments resulting from this change because the exact amount of the benefits subject to work deductions will not be known at the beginning of each calendar year.

EXAMPLE 2

REASSESSING TEMPORARY WORK DEDUCTIONS TO CONSIDER ADDITIONAL EARNINGS

This example is similar to Example 1, i.e., the employee is a career railroad employee with 492 months of railroad service, who plans on working after his retirement from the railroad industry. However, it is now the year after he retired and he earned \$30,000 last year, and plans to continue to work. In this example, we are assuming his annuity was initially awarded after the implementation of the proposed regulation change.

AT ANNUITY BEGINNING DATE (before considering earnings after retirement)

TIER 1	\$1107.60
WORK DEDUCTION	<u>825.90</u>
NET TIER 1	\$ 281.70

CONSIDERING EARNINGS AFTER RETIREMENT (January 1 of the following year)

TIER 1	\$1108.80
WORK DEDUCTION	<u>848.60</u>
NET TIER 1	\$ 260.20

Monthly Difference in Work Deduction Component \$21.50

230-6

Discussion: In this example, the additional year's earnings caused a tier 1 increase of \$1.20 and a work deduction increase of \$22.70. This case was representative of the examples.

Under current processing, when an annuitant reports plans to work after retirement and earn over the exempt amount, we withhold temporary work deductions from the annuity. This amount is usually the amount of the tier 1 subject to work deduction. Permanent work deductions are calculated the following year once the annuitant reports final earnings. In many cases, as long as the annuitant does not earn substantially less than estimated, the permanent work deductions equal the temporary work deductions. Any tier 1 increase resulting from the earnings is usually not paid until a mass adjustment is run in October of the following year when the Social Security Administration (SSA) posts the earnings.

With the proposed change, we could no longer assess temporary work deductions in the same manner. As this example indicates, the amount of the tier 1 subject to work deductions must increase effective January 1 of the following year to include the additional earnings. This type of change does not occur with the current work deduction calculation because the work deduction amount is based on a subtractive amount using compensation prior to 1974, and these earnings do not change after a person retired. The proposed new calculation is more dynamic because it is based on all SS wages, and all compensation after 1974, including any "lag" earnings, which are earnings not yet reported to SSA or the Railroad Retirement Board. Since these earnings are not yet reported, we cannot

consider them in our temporary work deductions, so the annuitant will likely be overpaid.

This amount which is effective on January 1, should reflect all earnings through December, of the prior year. However, this information is not available until later in the year. A retroactive adjustment would need to be made later in the year when the prior year earnings become available. Overpayments would result when this generates a larger increase in the work deduction amount than the tier 1 amount as a whole. This could be prevented by overwithholding, but to do so would create a new category of underpayments. Scarce agency resources will have to be used to process the requests for waiver, reconsideration, and appeals of these overpayments, and of course, it would result in undue anxiety for overpaid beneficiaries.

The Board's Inspector General has commented on the proposed change to Section 230.9 as well. He states that changing a long-standing interpretation of the law may subject the RRB to potential legal challenges, and implementing the change could result in a new backlog of work when the RRB is reducing staffing levels. If the RRB lost a legal challenge, it would have wasted a significant amount of time and resources and would then be required to expend additional time and resources to reimplement the original procedures.

230.8

In view of the above, Rail Labor feels it is totally unreasonable for the agency to change its long-standing interpretation of the work deduction provisions for employee and spouse annuitants, and sees the majority's action as an attempt to legislate by regulation.

830-9

September 12, 1995

Ms. Beatrice Ezerski
Secretary to the Board
Railroad Retirement Board
844 Rush Street
Chicago, Illinois 60611

Dear Ms. Ezerski:

On behalf of all Rail Labor, we vigorously protest the arbitrary and unfair changes being proposed by the Chairman and Management Member of the Railroad Retirement Board to Part 230 of the Board's regulations.

Rail Labor has thoroughly reviewed the proposed changes to Part 230 of the Board's regulations published in the Federal Register on August 16, and August 24, 1995. The proposal would drastically alter the manner in which the Railroad Retirement Board reduces benefits whenever beneficiaries have excess earnings. As a result of the change, much larger portions of annuities would be subject to reduction for excess earnings, including annuity portions previously entirely exempt from excess earnings reductions. This means that annuitants would be forced to work less, so as to hold down their earnings, or they would be subject to substantially higher benefit reductions than they previously received based on the same earnings. For a number of reasons, Rail Labor vigorously protests this arbitrary and unfair proposal by the Chairman and Management Member.

Rail Labor's first objection to the proposed regulation is that the current Board procedure for earnings reductions has been in effect for over 20 years, has been endorsed by Congress, and has been approved by the Board's Office of General Counsel. The current procedure is relied upon by annuitants. Therefore, under standard principles of administrative law, the current procedure should not be changed in the absence of a strong and compelling reason. No reason, compelling or otherwise, exists to justify the proposed regulation change.

The current Board procedure for making excess earnings deductions was implemented shortly after the Railroad Retirement

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Act of 1974 was enacted into law. Since then, the Congress has enacted four major sets of amendments to the Railroad Retirement Act of 1974. If Congress felt that the procedure adopted by the Board after the 1974 Act became law was wrong, it could have forced the Board to change its procedure in any of those subsequent amendments. Congress did not do so. Interestingly, the 1981 and 1983 amendments, enacted against a backdrop of financial crisis in the railroad retirement system, included virtually every change which Congress could adopt to save money, but Congress did not include the change now being forced on the rail community by the Chairman and Management Member. The 1981 amendments even contained "clarifying" provisions dealing with work deductions, but still did not include the changes now being proposed. Clearly, the absence of corrective action by Congress when it was searching for savings, even when it dealt with, and "clarified", work deductions in the 1981 amendments, is a clear endorsement by that body of the current methodology.

Along this same line, it is to be noted by everyone, Congress, the Courts, retirees, Rail Labor and Management, that the Railroad Retirement Board's Office of General Counsel has approved the current method as being entirely legal, proper, and correct. This is a matter of record. Thus, the Board cannot now claim it is correcting a 20-year-old mistake. Obviously, annuitants have for years planned both the date of their retirements and their post-retirement work activity based on the current procedure for making work deductions.

All of these factors show that the current methodology is valid, legal, and fully accepted by the Congress. Annuitants rely on the current procedure. As we indicated, for these reasons, no change should be made in the absence of a strong and compelling justification. There is no justification of any kind at this time. Congress has not enacted any new legislation to warrant new regulations on this issue. There is no financial crisis requiring benefit reductions pursuant to Section 22 of the Railroad Retirement Act. No one has discovered a mistake in how the current provisions of law are being administered. The proposed regulations are not part of the current effort to reduce and simplify regulations, and, in fact, they go in the opposite direction. Clearly, no justification exists to warrant implementing this harsh new procedure which will harm beneficiaries.

Why then are the new regulations being proposed? It seems clear to us that the Management Member has proposed the new regulations simply to reduce benefits, and to make a gift of the savings to the Nation's railroads. The Chairman has eagerly approved the changes for the same reason. In short, two members of the Board are implementing an unlegislated benefit reduction. They are usurping the legislative authority of Congress. The action of

September 12, 1995

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the Chairman and Management Member is nothing less than an attempt to confiscate benefits based on pre-1975 railroad earnings. Their heavy-handed attempt to implement this change without justification after the current procedure has been in effect for over 20 years violates fundamental principles of administrative law.

Rail Labor is not opposed to saving money through adoption of more efficient administrative procedures, or by eliminating waste, fraud and abuse. Implementing changes enacted by Congress is also a valid way of reducing outlays. But reducing benefits by changing computational procedures which have been legal for over 20 years, in the absence of any new Congressional enactment, when the trust fund is completely solvent, is a substantive change in law. Such an action is beyond the Board's legitimate authority, and it is completely arbitrary and capricious.

As indicated, the proposal would force retirees to produce less earnings if they want to protect their benefits. In making such a proposal, the Chairman Management Member are not only usurping Congressional legislative authority, they are also insulting this particular Congress. Allowing American retirees to work and earn more money has not only been made a high priority by the current Republican majority in the Senate and House of Representatives, it is a plank in the Contract with America as enacted by the House. Democrats in Congress and the Administration have also endorsed some version of higher post-retirement earnings.

It does not surprise us that the Management Member's proposal runs directly contrary to this clearly expressed Congressional intent. What is surprising to us is that the Chairman, a former Republican legislator and an appointee of the Bush Administration, has endorsed the proposed change. In doing so, he has completely repudiated a major plank in his own party's Contract with America. His action discriminates against railroad retirees who he is suppose to protect. While Congress is trying to make earnings limitations less restrictive for older Americans, Mr. Bower has joined the Management Member in an effort to make the earnings limits for retired rail workers more restrictive. When the Contract with America's provisions on "Senior Citizens Fairness" become law, raising the Social Security earnings limit, Mr. Bower, by his support of the Management Member's unfair proposal, will be at direct odds with every Republican in Congress, with most Democrats, and probably with the President.

A second major reason for Rail Labor's opposition to the proposed regulation is that its adoption would violate a tradition of basing substantive Railroad Retirement Act changes on Rail Labor/Management agreements. The change proposed by the Chairman and Management Member affects benefit levels. It is substantive. It has not been discussed by Rail Labor and Management. The current

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procedure for work deductions is based on the Board's interpretation of the Railroad Retirement Act of 1974. That act was based on a Rail Labor/Management agreement. Since the current work deduction procedure went into effect over 20 years ago, Rail Labor and Management have held numerous lengthy discussions over retirement and unemployment issues in 1981, 1983, 1984, 1985, 1986, 1993 and 1994. The work deduction procedure now being proposed was not even discussed during those discussions. Obviously, if anyone in the ranks of Rail Labor or Management believed that the Board's current work deduction procedure failed in any way to follow the labor/management agreement which underlies the 1974 Act, they surely would have brought it up during the hours of discussions in those years. Clearly, both Rail Labor and Management believed during all those years that the current procedure properly interprets the 1974 agreement. That procedure should now remain in effect unless changed by Rail Labor and Management by agreement.

The reason Rail Labor and Management believe that the Board's current work deduction procedure represents a correct interpretation of the 1974 Act is because the labor/management agreement underlying the 1974 Act sought to preserve as vested any benefits that accrued prior to 1975. Those benefits were not subject to work deductions. The Board's current work deduction procedure is entirely consistent with that policy. Thus, the Chairman and Management Member are attempting confiscate collectively bargained benefits based on pre-1975 rail service. The financial impact of any change in this area is on the Railroad Retirement Account, and fundamental changes in such matters should be worked out between Rail Labor and Management.

Unfortunately, this is not the first time that the Management Member has sought to circumvent the labor/management negotiation process. However, his effort still disappoints us. Ignorance of the process may have been his excuse in the past, but surely by now his colleagues in the industry would have informed him that substantive retirement and unemployment changes are based on labor/management agreements. Since the Management Member continues to make the same mistake in this regard, his repeated efforts to unilaterally impose benefit reductions without discussion with Rail Labor may have the support of some of his management colleagues. In any event, it is unclear for how much of the industry he is speaking. Sooner or later, such efforts are going to adversely affect relations between Rail Labor and Management, and seriously impair labor/management cooperation in areas where the parties could otherwise work together.

However, if the effort by the Management Member to impose benefit reductions on retirees, without any discussions with Rail Labor, has a chance of succeeding on this particular occasion, it is because he has the support of the Board's Chairman. Once again

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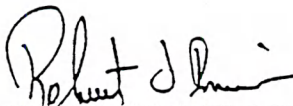
Mr. Bower is demonstrating to us both his total confusion about the role of Chairman of the Railroad Retirement Board, and his complete lack of respect for Rail Labor and the bargaining process.

Finally, Rail Labor opposes the proposed regulation for administrative reasons. The change proposed by the Management Member and the Chairman is administratively burdensome and expensive. The Board is going through difficult internal changes because its budget has been reduced and its personnel ceiling has been drastically lowered. Offices are being closed, experienced people are being let go, efforts are being made to do more with less. Nevertheless, two Members of the Board are still proposing changes which will cost a million dollars or more to implement, will needlessly divert already scarce personnel resources, and will generate stacks of new overpayments. If the implementation of this regulation becomes the bureaucratic fiasco we think it will, Rail Labor will spare no effort in seeing that the authors of the fiasco are given the recognition they deserve, especially by our key committees in Congress.

In summary, Rail Labor protests the proposed regulation changes offered by the Management Member and the Chairman to increase excess earnings reductions and thus reduce benefits. The change is not necessitated by new legislation or anything else. The current procedure is legal and has been in effect over 20 years. Congress has endorsed the current procedure, as has the Board's Office of General Counsel. The changes fly in the face of current indications of Congressional intent and the provisions of the Contract with America.

The changes were never discussed by Rail Labor and Management and will be expensive to implement. Most of all, the changes will hurt people by reducing benefits at the same time that the trust fund is financially sound. The changes are not only arbitrary and capricious, they are unfair and mean spirited.

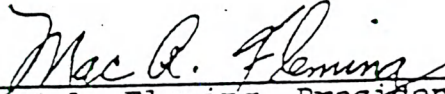
Sincerely,

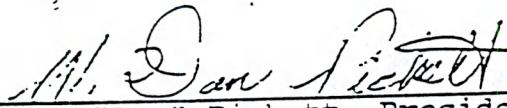


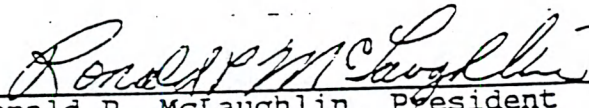
Robert J. Irvin, President
American Train Dispatchers Dept.
Int'l. Brotherhood of Locomotive
Engineers

September 12, 1995

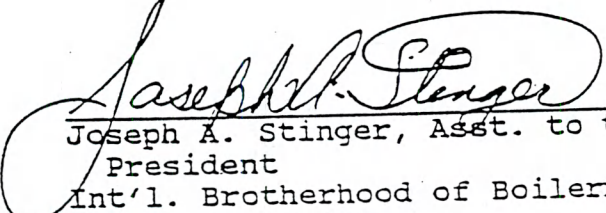
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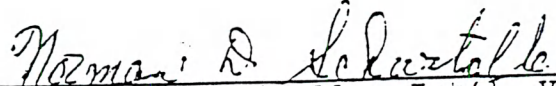

Mac A. Fleming, President
Brotherhood of Maintenance of Way
Employees


W. D. "Dan" Pickett, President
Brotherhood of Railroad Signalmen

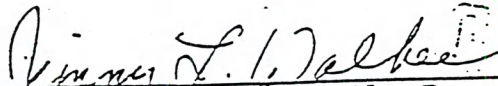

Ronald P. McLaughlin, President
Brotherhood of Locomotive Engineers


Issac Monroe, Admin. Asst. to the
General President
Hotel Employees and Restaurant
Employees Int'l. Union

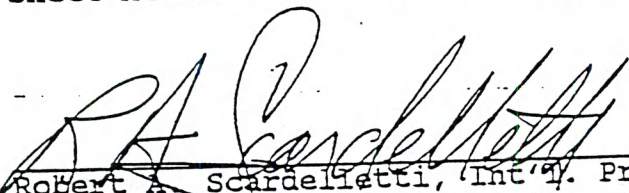

Joseph A. Stinger, Asst. to the
President
Int'l. Brotherhood of Boilermakers
and Blacksmiths

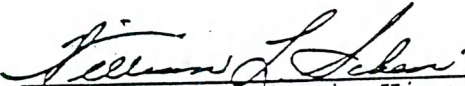

Norman D. Schwitalla, Int'l. Vice
President
Int'l. Brotherhood of Electrical
Workers

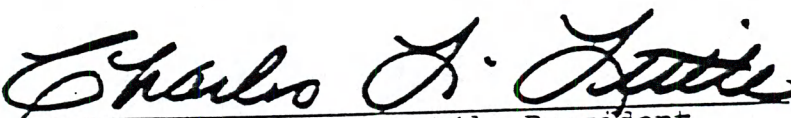
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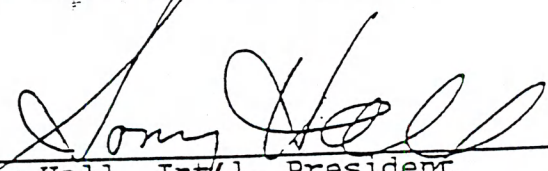

Jimmy L. Walker, Int'l. President
The Nat'l. Conference of Firemen &
Oilers, SEIU


Donald C. Buchanan, Dir. of Railroad
Workers
Sheet Metal Workers Int'l. Assn.


Robert A. Scardelletti, Int'l. President
Transportation • Communications Int'l.
Union


William L. Scheri, Vice President
Int'l. Association of Machinists and
Aerospace Workers


Charles L. Little, Int'l. President
United Transportation Union


Sonny Hall, Int'l. President
Transport Workers Union of America

1995

- Proposed Rule 255

Proposed Rule 255 revises the Railroad Retirement Board's regulation with respect to recovery of erroneous payments. The proposed rule, approved by Bower and the Management Member is completely slanted against the overpaid individual, takes a much stricter approach to the handling of recoveries than does the Social Security Administration, and substantially restricts opportunities for waiver of overpayments. The focus is clearly on collecting as much as possible, to the detriment of the overpaid individual.

20 CFR PART 255, RECOVERY OF OVERPAYMENTS

Under the guise of "updating," these regulations drastically alter the way the Railroad Retirement Board (RRB) handles overpayments. These regulations lack fairness and are in great need of a balanced approach to sensible debt collection. Some examples are illustrated below.

Section 255.12(c)(2) now includes non-liquid assets in the list of resources to be considered when determining whether an individual, who was without fault in causing the overpayment has the ability to make repayment. Presumably non-liquid assets would include an individual's home. Rail Labor thinks it would be unconscionable to expect anyone to liquidate one's home or personal property for the purpose of repaying an overpayment for which he or she was not at fault, and accordingly feels that consideration of non-liquidated assets has no place in any waiver consideration.

Example (1) in this same section is meant to illustrate when recovery would not be contrary to the purpose of the Railroad Retirement Act (RRA), but, in fact, it is a one-sided attempt to construct as narrow a definition of financial hardship as possible, with the intention to leave the individual with as little as possible in the recovery process. In this example a widow who was not at fault in causing the overpayment, but who has \$12,000 in assets (\$10,000 in cash), would be required to repay \$6,000 to the RRB leaving her with only \$6,000, in spite of the beneficiary's statement that she needed her savings for a progressive disease that she has. The example states that this recovery is not contrary to the purpose of the RRA, that it would not prevent the individual from being able to meet ordinary and necessary living expenses. In effect, the example implies that potential or future expenses are not to be considered in a waiver decision.

Section 255.15 does not allow waiver when recovery is sought from the estate of an overpaid individual. However, a literal reading of section 10(c) of the RRA directs waiver consideration for estates, as well as individuals, when the qualifying criteria is met. If the RRA limited waiver to situations where there was no fault, and recovery would be "contrary to the purpose of the Act," then this restrictive interpretation presented by the majority would possibly have merit. But, since the RRA also allows for waiver when

recovery would be "against equity or good conscience," it should also be granted to the estate in situations where it would have been granted while the individual was alive. The proposed regulation is at odds with the statute on this point.

Proposed Section 255.16 states that where the amount of an overpayment is less than \$500, it may not be waived. The majority compared this proposal to the rule contained in section 340.10(e)(2) of the Board's regulations with respect to recovery of overpayments under the Railroad Unemployment Insurance Act (RUIA). This is not a valid comparison. Overpayments under the RUIA usually involve working individuals whose income from employment is only temporarily halted, which is in direct contrast to the situations at hand involving elderly or disabled individuals on fixed incomes. Moreover, waiver requests for both RUIA and RRA overpayments usually include a request to reconsider the amount of the overpayment. Small RUIA overpayments are usually less complex, thus less costly to recompute, providing more of an incentive to complete the recovery process. Conversely, RRA overpayments can involve various issues and complexities adding to the cost of adjudication. A more reasonable and fair approach is the allowance of a blanket relief from recovery in these small overpayment situations. From a business standpoint, the cost to the agency in trying to collect small overpayments will outweigh the benefits. Furthermore, past experience has shown that overpayments under \$500 because of their complexities routinely result from computational errors by the RRB where the beneficiary would have no knowledge that an incorrect payment was made. As a government agency with a responsibility to pay benefits accurately, the RRB, not the beneficiary, should be held accountable when the RRB fails to do so.

On the issue of "fault," if an individual received an incorrect annuity rate for a period of more than 5 months after the Board has received information which should have caused it to reduce the benefits, it has been a long-standing agency policy to consider the individual not at fault for any payment after the fifth month. This is provided that the continued issuance of the payments at the incorrect rate led the beneficiary to believe in good faith that he or she was entitled to the amount represented by the payment. The majority has refused to include such a provision in this proposed rule. Rather, it believes that the fault determination should be decided on a case-by-case basis. Rail Labor, on the other hand, believes that given the

advanced technology available to the RRB, the five-month rule should be incorporated into the proposed rule and, in fact, be reduced even further. The Social Security Administration (SSA) has a provision similar to the one that Rail Labor favors. (See 20 CFR 404.510(g).)

Rail Labor also takes exception to the majority's decision not to include a provision which would allow blanket relief from overpayment recovery clearly resulting from the fault of the agency, contending that the RRB must accept full responsibility for its own errors. Recovery is contrary to equity and good conscience regardless of the person's financial situation, particularly in cases where the overpayment results from the agency's gross negligence.

Section 255.12(d) of the proposed regulation provides that for purposes of determining an individual's resources for purposes of recovery, his assets disposed of after notice of the overpayment, other than cash expended to meet ordinary and living expenses shall be included. However, Section 10(c) of the RRA upon which the waiver provisions in Part 255 are based, provide that "there shall be no recovery . . . when recovery would be contrary to the purposes if the Act or would be against equity and good conscience." Thus, it is the financial condition of the individual at the time of recovery that is relevant, not his condition at the time he received notice of the overpayment (which could be a year earlier where the overpayment has been contested). Consequently, absent proof that the individual has been trying to conceal assets, it is inappropriate to focus on the individual's resources from the time a waiver decision is made.

In conclusion, the proposed rule is insensitive in tone and content and completely slanted against the overpaid individual. The SSA takes a far more sensible approach to handling overpayments than is presented in these regulations. Rail Labor now questions why beneficiaries paid under the RRA should be treated more harshly than beneficiaries paid under the SSA. Because a portion of the RRB benefit is considered to be the equivalent to SSA benefits, Rail Labor believes that the RRB benefit should be treated like SSA benefits. The majority of the Board views the Board more as a collection agency than one whose primary mission is the payment of benefits, and Rail Labor would like to see as much attention paid to preventing overpayments as there is to collecting them.



TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION

AFL-CIO, CLC

SOCIAL SERVICES DEPARTMENT

ROBERT A. SCARDELLETTI
International President

C. H. BROCKETT
International Vice President

File: 282-42-35

Subject: Railroad Retirement Act

January 29, 1996

U. S. Railroad Retirement Board
Secretary to the Board
844 North Rush Street
Chicago, Illinois 60611

Dear Sir:

This is in reference to the Board's action to revise proposed Rule Part 255, Recovery of Overpayments. I am submitting my comments on the process used by the Board to arrive at these proposed changes and the changes themselves.

As International President of TCU, I have had many opportunities over the years to witness the Board's overpayment recovery operations. I can testify that when a retiree receives a notice that an overpayment from the Board has occurred, he or she will predictably suffer great anguish and anxiety at the prospect that their very livelihood is being threatened, most often by action which was not their fault and over which they had little or no control.

I think that the foundation for the examination of this issue has to be the active, vocal participation by the Labor Member of the Board who speaks for hundreds of thousands of retirees and active railroad workers. The other members of the Board, in good conscience, must acknowledge the strength and validity of his voice. To do otherwise is to ignore the people who perform the work in the industry, create the value of the industry, and to whom the Board owes a statutory obligation for service. They are the reason for the Board's existence.

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Secretary to the Board
January 29, 1996
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Retirees and active railroad workers most often raise their concerns with their representatives and those concerns are regularly communicated to the Labor Member. I recognize that each Board Member has a constituency to which they must answer. I do not believe that the Labor Member is "more equal" than the other Members, but they must recognize that the Labor Member carries the message of many, many voices.

The goals of bureaucratic efficiency, short sighted cost savings, or the achievement of a political infighting victory cannot be allowed to win out over equity and fairness in the administration of the Board's regulations.

The Labor Member expressed his detailed concerns which were published in the Federal Register along with the proposed changes. I will make specific comment below on the details. "Reading between the lines," I share his overriding concern about the deterioration of the good relations between Board Members. That "climate of cooperation" used to facilitate the conduct of the Board's business even under "trying circumstances" where each Member, naturally, had a strong interest in the outcome of discussions on a particular issue.

I also sense a great deal of frustration, although not directly expressed by the Labor Member in his comments, that not only are the specific proposals lacking in fairness and equity but that the process used to arrive at these proposals did not include the traditional, complete "airing out" of the issues. Such a discussion can only be accomplished with the full, active, responsible participation of the Board with each Member showing an openness to hear all sides of the debate without prejudging that issue.

Railroad retirees and active employees participating in the Railroad Retirement system have a right to expect and demand that the full Board act as their advocate within the statutory boundaries. It is irresponsible at best to use the three member Board structure to promote an individual agenda. All of us in the system are ill served by any Board Member if he has lost sight of his primary responsibility to those who do the work and pay the Railroad Retirement taxes.

Since the changes proposed by the majority of the Board in this instance were made over the strenuous objections and published dissent of the Labor Member, I believe that their fairness and equity can be questioned in their totality. If the process that produced these changes was lacking in fairness and equity, then it is highly questionable that the changes themselves are equitable or fair.

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The specific changes recommended in this instance do not reflect an understanding of the situation of a retiree confronted with an overpayment, nor do they demonstrate compassion for such an individual. It is useful to remember how most retirees find themselves with an overpayment.

After spending a lifetime in the industry, most railroad workers look to the Board for the performance of certain basic functions. They have worked hard throughout a career and they ask only that they be given what they are entitled to at retirement. For the most part, they are familiar only with the most basic Board requirements for the receipt of an annuity. They must rely on the Board representatives to help them through the process.

Railroad workers have become proficient at their job as a clerk, carman, yardmaster, patrolman or supervisor. They expect that the Board representatives, to whom they speak and those they cannot see but who handle their retirement application, are also proficient at their job duties and responsibilities. Those seeking retirement also anticipate that the systems handling their application for, and payment of, benefits are well designed and effective in delivering their well deserved retirement checks each month.

For the overwhelming majority of retirees there is never a question about an overpayment. The Board's systems and personnel usually do an exemplary job of delivering on their promise of monthly payments for a retiree to live on. In those instances where an overpayment occurs, the tranquility of a well deserved retirement is rudely and shockingly interrupted. For those retirees, this is a time of fear and insecurity because it occurs when they are most vulnerable due to a diminished earnings capacity and, often, physical frailty.

With that in mind, it is with great dismay that I observe with the Labor Member that there is a proposed change in Section 255.12 which would include "non-liquid assets" in the list of resources to be considered when the question is "whether recovery of an overpayment would be contrary to the purpose of the Railroad Retirement Act." The prospect of the Board listing bowling trophies, lawn furniture, hubcaps, stamp collections and the like is sad. One can imagine a letter to a retiree stating that he should have just enough to pay back his overpayment to the Board if he can find someone to buy his "purple heart medal."

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Secretary to the Board
January 29, 1996
Page No. 4

The next section of the Labor Member's comments referencing example #(1) are well taken. The proposed language can only be seen as an attempt to artificially restrict the definition of financial hardship. I also agree with the Labor Member's observations on Section 255.13 that a person's financial circumstances should not be material in examining the credibility of the claim "that the individual detrimentally relied on the incorrect payment."

In reference to the proposed changes in Section 255.15, we agree again with the Labor Member that waiver should be allowed where an estate is involved since waiver would have been allowed if the claimant were alive. It is reprehensible and repugnant that the Board would not allow waiver in this instance simply because the claimant is not alive and able to defend himself.

The proposed changes to Section 255.16 stand out for their insensitivity and total lack of equity. The Board is choosing overpayments at an arbitrary and artificial level of \$500 and simply dispensing with any sense of reason in dealing with them. I would echo the Labor Member's comments again. It is the Board's responsibility to correctly compute an annuity amount and mistakes resulting in overpayments this small are surely due to miscalculations by the Board.

Where is the equity in turning a retiree's world upside down because of a minuscule overpayment which the retiree had no ability to find. The Board regulations are so complex I would dare say that an overpayment this small would most likely be caught only by audit. Why isn't the retiree given the total benefit of the doubt and granted waiver automatically in such instances? I also believe that the positive cost/benefit advantage of pursuing this type of overpayment is, most likely, so small it cannot be measured. In fact, when the "ill will" and bad publicity is considered, the Board would undoubtedly wind up heavily on the negative side of that ratio.

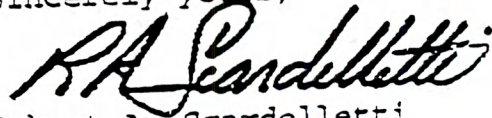
I also agree with the Labor Member's views on the issue of "waiver of an overpayment where an individual received an incorrect rate for a period of more than five months after the Board received information which should have caused it to reduce the benefits." The advanced technology available to the Board and the existence of a similar procedure at Social Security indicates that such is feasible and equitable.

U.S. Railroad Retirement Board
Secretary to the Board
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I would again state that I believe that the process used by the Board to arrive at the new procedures was flawed. The Management and Neutral Member of the Board should seek to renew the spirit of collegiality, cooperation and equity which has been a hallmark of the Board. That spirit once greatly facilitated the accomplishment of the Board's mission and, restored, could do so once again. I also strongly urge those Members of the Board to rededicate themselves to the role of advocate for the retirees, dependents, survivors and active participants in the Railroad Retirement system. I wish my objections to be registered for the record. I pledge to continue to monitor the Board's activities on behalf of the many TCU members and their families who are directly affected by the Board's actions.

Finally, I believe the best result would be for action of the implementation of the proposal to be deferred pending direct input from Rail Labor and Management. I fully support Labor Member Speakman's strong objection to the proposed regulations as written and wholeheartedly endorse his dissent.

Sincerely yours,



Robert A. Scardelletti
International President

cc: V. M. Speakman, LM-RRB