

BEFORE THE AMTRAK/PRLBC ARBITRATION BOARD

IN THE MATTER OF:)
)
NATIONAL RAILROAD PASSENGER)
CORPORATION (AMTRAK))
)
and)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES (BMWED),)
affiliated with TEAMSTERS RAIL) NMB NO. A-13638
CONFERENCE, INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS)
)
and)
)
BROTHERHOOD OF RAILROAD)
SIGNALMEN, AFL-CIO (BRS))
)
and their representative)
)
PASSENGER RAIL LABOR)
BARGAINING COALITION (PRLBC))

**PRE-HEARING BRIEF OF PASSENGER RAIL
LABOR BARGAINING COALITION (PRLBC)**

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INTRODUCTION

This brief is submitted on behalf of two Organizations, Brotherhood of Maintenance Way Employes Division/IBT (“BMWED”) and Brotherhood of Railroad Signalmen (“BRS”). For the purposes of negotiations with the National Railroad Passenger Corporation (“Amtrak”) and these proceedings, these Organizations have joined together under the banner of the Passenger Rail Labor Bargaining Coalition (“PRLBC”), which serves as their “representative” for purposes of §§ 1, Sixth and 2, Third of the Railway Labor Act, 45 U.S.C. §§ 151, Sixth and 152, Third.

In the last bargaining round, after eight years of unsuccessful conferences and mediation, PRLBC and other Organizations persuaded PEB 242 of the wisdom of continued adherence to the historical and “unmistakable” linkage of wages, benefits and work rules on Amtrak to those existing on the Class I freight carriers (“the Freights”). (JX¹ 57, PEB 242, at 22 (2007)) Respecting the arbitral principle of comparable pay for comparable labor (*id.* at 22-23), PEB 242’s recommendation reaffirmed the wisdom of its predecessor, PEB 234, which in 1997 likewise concluded that the BMWED-Amtrak agreement for the 1995-99 period was most fairly patterned after the agreement existing in the free market on the for-profit Freight carriers. PEB 234 adhered to the then-historical linkage between the Amtrak and freight agreements because, among other reasons, labor should not be singled out to subsidize a national passenger rail service, and the freight agreement’s market-based pattern for identical jobs fairly presents the “public benefit” value issue of taxpayer subsidies for Amtrak to the elected policymakers in

¹ As used herein, “JX” refers to Joint Exhibits to which the parties solely stipulate to introduction and authenticity. Other Exhibits referenced herein (“Ex.”) will be identified by their witness proponent and number. “Roth Stmt.” references the Summary Statement of PRLBC’s expert witness, Thomas R. Roth.

Congress who properly bear responsibility for making that policy-based decision. (*Id.*; JX 56, PEB 234, at p. 3)

The inability of Amtrak and these Organizations to reach agreements in this round again turns on whether the historical linkage between the freight and Amtrak agreements will be maintained or will be severed in favor of an alleged “internal pattern” Amtrak erroneously claims to exist. From the outset of the parties’ negotiations in 2010, it has been Amtrak’s position that there existed a new “internal pattern” of agreements with other unions having common general wage increases (GWIs), common employee contributions to AmPlan, Amtrak’s self-funded health plan, a cost containment change to AmPlan (increasing emergency room co-pay from \$50 to \$75), and a uniform pattern of work rule changes. PRLBC rejects the notion that an “internal pattern” exists on Amtrak, as a matter of both existing and historical fact.

Consistent with the “package” approach adopted by PEB 242 in the last round of Amtrak bargaining, the PRLBC has urged adoption by Amtrak of PEB 243’s November 2011 recommendations to resolve the major dispute on the freight carriers since February 2012. PRLBC’s proposal to Amtrak was for adoption of the freight agreements in their entirety by including every employee improvement and concession made. The differences between the freight agreements compared to Amtrak’s so-called “internal pattern” are as follows: the freight agreements (1) compounded GWIs over a 5-year term 1.7% higher than the Amtrak proposal; (2) provided an additional lump sum of 1% straight time earnings between November 1, 2010 and October 31, 2011; (3) made numerous structural and monetarily significant benefit changes to the National Plan, which has identical benefits to AmPlan, that increase costs to users of medical services and reduce costs to the Plan; and (4) froze employee contributions to the National Plan

until July 1, 2016 at the level in effect on December 31, 2009, the termination date of the moratorium period of the prior freight and Amtrak agreements.

The freight agreement contained no general changes to existing work rules. In contrast, the Amtrak “internal pattern” offers to BMWED and BRS each include a number of unacceptable proposed work rule changes, including onerous and draconian, craft-specific ones, which would adversely affect the quality of life of a large proportion of members of the Engineering crafts and/or reduce their compensation.

In April 2013, the United Transportation Union (UTU), Amtrak’s second largest organization representing 12% of the union population, entered into the last of Amtrak’s alleged “internal pattern” agreements. The UTU agreement contains a unique provision for cash compensation, a “performance bonus” equal to \$1,250 per year per Conductor. The bonus eligibility essentially requires nothing more than maintaining the qualifications necessary to perform the job of Passenger Conductor, including applicable FRA certification, and showing up for work not less than 120 days during a 6-month “performance period.” This annual bonus, computed at a PRLBC average rate, is equivalent to a 2% GWI which, if included in Amtrak’s “pattern” offer to PRLBC, would exceed the Organizations’ proposed GWI increases over the term of the agreement. (Roth. Stmt., at 19-20)

This annual bonus for UTU Conductors is apparently subject to me-too provisions negotiated by Amtrak’s other unions. Its inclusion in the last agreement settled further confirms PRLBC’s position that there is no stable “internal pattern” on Amtrak’s property. Adoption of Amtrak’s alleged “internal pattern” would sever the historical linkage between wages, benefits and work rules in the freight and Amtrak agreements, introducing future bargaining instability on the Amtrak property, and make Amtrak workers the worst compensated railroad workers in the

nation without any justification, financial or otherwise. This Arbitration Board should, for the reasons earlier PEBs have repeatedly articulated, determine that parity among freight and Amtrak workers performing identical tasks be maintained.

During the July 2013 mediation sessions, Amtrak amended its offer to the PRLBC Organizations, which the Carrier describes in its Pre-Hearing Statement of Position. Amtrak has valued the health plan design changes of the freight agreement to equal an additional 1% GWI and is willing to incorporate that swap into its “internal pattern” offer to the PRLBC Organizations. To further close the gap, Amtrak also identifies additional AmPlan concessions and a smorgasbord of oft-rejected work rules it has arbitrarily monetized, any of which the Organizations may opt to accept in exchange for increased GWIs equal to Amtrak’s assignment of value. The PRLBC has no interest in making and refuses to make this choice. The offered rules would either adversely affect quality of life or simply reduce compensation currently paid for overtime. The freight agreement already incorporates the appropriate market-based compromises of wages, health plan design changes, employee contributions and absence of work rules. Comparable GWIs alone do not equate to parity. The freight agreement in its entirety is the appropriate pattern.

The Organizations do not propose to this Board their initial and unattainable Section 6 bargaining demands, although that is a typical approach taken by parties in past Presidential Emergency Boards and interest arbitrations. By not doing so, the Organizations do not concede their initial demands could not be justified. For example, although Amtrak employees are responsible for the safe transportation of passengers, surely the most valuable commodity, they have never enjoyed anything even close to the pay, benefits and working conditions of their peers working for other subsidized passenger rail carriers. For historical rather than equitable

reasons, Amtrak's workers' wages and benefits have, since 1971 when Amtrak was carved out of the freight railroads by Congress to preserve a national passenger rail system, always been patterned upon the wages, benefits and work rules determined in national freight agreement bargaining. Here, the PRLBCs' witnesses once again will present the facts establishing the historical relationship between the Amtrak and freight agreements.

Consistent with this four-decade historical relationship, the PRLBC Organizations submit that their most recent freight agreements, which apply to employees performing identical work to Amtrak employees, are the best evidence of a reasonable and fair compromised settlement in the rail industry marketplace. The Freighters continue to enjoy unprecedented prosperity with these agreements in place. The evidence will show that Amtrak is similarly experiencing its most successful performance since its creation. Amtrak does not face a financial crisis. The gap between the parties is relatively small. There is simply no justification for creating a new bottom tier of compensation for railroad workers populated by Amtrak workers.

To assist the Board, the PRLBC Organizations will present the comprehensive testimony of Thomas R. Roth, a labor economist, who will establish the historical relationship between Freight and Amtrak wages and demonstrate that Amtrak not only does not have a labor cost problem, but is in fact enjoying soaring labor productivity and record financial performance. BMWED General Chairman Jed Dodd and BRS General Chairman David Ingersoll will offer testimony about the negotiations, and will respond to the numerous rule changes Amtrak demands, either as part of its "internal pattern" offer or as the price for obtaining the freight wage settlement. Mr. Dodd will also rebut Amtrak's claim that there is any uniformity of work rule pattern among other union settlements. This brief will try to provide a road map and overall perspective to the Organizations' presentation.

I. HISTORY OF THE DISPUTE

BMWED served Amtrak with a Section 6 notice on December 1, 2009. BRS served Section 6 notices on January 1, 2010 and February 25, 2010. On March 15, 2010, BMWED, BRS and three other Organizations² agreed to coordinate their bargaining and appointed PRLBC their bargaining representative. On April 7, PRLBC served its Section 6 notice. (JX 7-11)

Direct bargaining with Amtrak began in April 2010 with Amtrak informing PRLBC at the first conference that an “emerging internal pattern” was forming evidenced by tentative agreements with TCU and the Shopcrafts. In June 2010, Amtrak delivered its “internal pattern” proposal to the Organizations, while indicating a willingness to bargain over a different agreement, so long as its incremental cost, in relative terms, was essentially the same as the TCU and Shopcrafts tentative agreements. PRLBC rejected this proposal as well as the notion that an “internal pattern” existed on the property in actual or historical fact. The parties continued conferences throughout 2010, but made no progress, hampered by the fact that agreements between the Freights and the Organizations had not yet been settled.

Following PEB 243’s November 5, 2011 recommendations and their incorporation into the Organizations’ freight agreements, PRLBC proposed to Amtrak in February 2012 that the National Freight Agreement be implemented for Amtrak’s Engineering crafts. Amtrak rejected that approach in early March 2012 and, on March 13, 2012, the parties filed a joint request for NMB mediation. (JX 28, 40)

Multi-day mediation sessions were held in May, June, July and August 2012 with an NMB mediator, as the parties attempted to find a way to apply the freight settlement at Amtrak

² The three Shopcraft Organizations (SMWIA, NCFO and IBB) that withdrew from the PRLBC in 2011 and entered agreements with Amtrak which Amtrak claims are consistent with its “internal pattern” represented a small minority of PRLBC-represented employees.

without triggering the “me-too” clauses contained in the settlements with other crafts. To this end, with the help of outside experts, the parties exchanged much financial and operational information, completed various costing exercises, explored the feasibility of achieving productivity improvements through work rule changes, considered savings available to AmPlan from the freight agreement’s cost containment features, and even examined availability of labor cost and administrative savings in connection with capital improvements. None of these approaches proved to be both feasible and capable of closing the cost gap between the freight agreement and the Amtrak settlements. (JX 40)

On September 10, 2012, the PRLBC requested the NMB to proffer arbitration as provided for in Section 5, First of the Act. (*Id.*) Following the NMB’s refusal, additional mediation sessions held in 2013 culminated in Amtrak’s July 2013 “internal pattern” offer presented to this Board. (JX 45-54) To expeditiously resolve this dispute, the parties subsequently agreed to arbitrate it pursuant to Sections 7 and 8 of the RLA. (JX 1)

II. STATEMENT OF POSITION

It is the position of these Organizations that the entire National Freight Agreement “package” covering the period January 1, 2010 through December 31, 2014 should be applied, including the letter of agreement providing for a January 1, 2015 3.0% GWI if the bargaining round beginning January 1, 2015 is resolved through arbitration or other administrative proceedings. The freight agreement evidences the applicable, real-world compromise solution reached in the relevant market.

PRLBC submits it would not be useful to evaluate the compromises on wages, cost containment reforms, and the amount of employee contributions within the freight agreement in isolation. They must be viewed as part of a package, including concessions by both labor and

management to leave work rules unchanged. After all, rule changes which alter agreements affecting hours worked or receipt of overtime pay impact an employee's compensation just like wage increases and employee contributions to fund benefits. To isolate features of a comprehensive agreement and value them in isolation to come up with a proposal for a different agreement ignores the reality of collective bargaining. PEB 219 (1991) put it this way: "[T]he recommendations regarding wages which follow must be read in conjunction with the rules and Health and Welfare changes which are discussed elsewhere in this report, which changes will have a profound impact upon both the wages and the working conditions of the employees." *Id.* at 64.

PRLBC's position before this Board, in addition to being consistent with marketplace reality, is supported by the following indisputable conclusions established by the evidence the PRLBC will present: (1) Amtrak's wages, benefits and work rules have historically been patterned upon those negotiated in national freight agreements for employees performing comparable work; (2) the cost containment concessions achieved in the freight agreement, if applied to Engineering craft workers, result in significant monetary benefits to Amtrak it does not currently enjoy, as well as establish a framework for addressing the ever increasing cost of health insurance in future agreements; (3) the GWIs and 1% lump sum agreed upon in the freight agreement are reasonable by any economic measure; (4) there is no uniform set of terms which set an internal pattern at Amtrak; (5) ability to pay is not a relevant consideration in this case because the difference between the cost of PRLBC's proposal and Amtrak's budgeted expectation is minimal and, even if the other unions exercise their me-too provisions, the change in Amtrak's fiscal condition is insignificant; and (6) Amtrak does not have a compelling need to

change work rules. We now turn to an overview of the PRLBC's evidence that will establish these conclusions.

A. The historical relationship between Amtrak and freight agreements

1. Wages

With regard to wages, the historical relationship between the Amtrak and national freight agreements is especially compelling. PEB 242 concluded:

There is no dispute that ... the Freight Agreements have served over the years as the historical pattern referenced for establishment of wages, benefits, and working conditions, at Amtrak. For over 30 years, the Parties have used the Freight Agreements as the pattern for purpose of negotiating new Amtrak Agreements with the Organizations. Presidential Emergency Boards which have issued reports in connection with Amtrak ... have treated the Freight Agreements as the pattern against which fair and reasonable agreements may be measured. (JX 57, at 14)

In PEB 234 (1997) (JX 56), Amtrak argued a wage freeze was necessary, "that endorsing the alleged freight pattern might spell the end of Amtrak," "Amtrak is not tied to any freight pattern, and has never rigidly adhered to freight compensation rates and rule changes." (*Id.* at 4) (emphasis added) Based on evidence summarized on page 7 of its report, PEB 234 concluded there were "historic relationships" between Amtrak and freight industry employees existing since Amtrak was carved out of the freight railroads in 1971 to create a national passenger rail system, and that the wage provisions of the national freight agreement should be "recommend[ed] ... as a fair and reasonable set of conditions that are consistent with those of employees performing comparable work for freight railroads." (*Id.* at 7, 8) The last two agreements between Amtrak and the Organizations covering a 15-year period followed these recommendations.

Amtrak may argue again that PEB 222 (1992) (JX 55) established a principle that Amtrak would not always be bound by the freight agreement pattern because it concluded an Amtrak internal "pattern" regarding wages then existed by reason of voluntary agreements Amtrak had

made with organizations covering 60% of its workforce. It is important to understand, however, that the dispute which led to PEB 222 involved the amount of wage increase in excess of the national freight agreement that was appropriate because of a temporary wage deferral that had existed on Conrail and Amtrak in the 1980's. Since a majority of employees had settled for increases that made up for the prior deferral and re-established wage parity with freight employees, PEB 222 concluded that stable labor relations and the public interest would be damaged if competition among unions for supremacy of benefits was recommended. (*Id.* at 15) Accordingly, PEB 222 recommended wage increases in 1992 far in excess of the congressionally imposed recommendations of PEB 219 for the freights to re-establish parity with freight employees. (Roth Stmt., at 14-16) Regardless, as explained below in the discussion of the reasonableness of the Organizations' wage proposal independent of the freight agreement, there is no Amtrak "internal pattern" established by the agreements of other unions.

While Amtrak may consider temporary differences between Amtrak and freight wages existing for limited time periods as evidence that it has not "rigidly" adhered to the freight pattern, the historical data presented by the Organizations' labor economist Thomas Roth is compelling evidence to the contrary. Despite periodic differences spanning a 35-year period, BMWED wage increases under the freight agreements are exactly the same as under Amtrak agreements and the difference between BRS cumulative wage increases are less than 3 percent. (*Id.* at 18) The indisputable point is that Amtrak wages have historically been linked to national freight agreements the Organizations have negotiated with the NCCC for employees performing identical work.

2. Health and Welfare Benefits

PEB 242 describes in detail the historical linkage between AmPlan and the Freights' National Plan and their identical benefit structure. (JX 57 at 41-44) In the last two bargaining rounds, 2000-09, the Freight carriers obtained employee cost sharing contributions, benefit changes and cost containment features. The PEB concluded that "[i]t would be inappropriate to model the employee contribution change on the Freight Agreements, which is of enormous benefit to Amtrak at significant cost to employees, but then to divorce as irrelevant the other changes effected as part of the give and take of bargaining in the pattern Freight negotiations." (*Id.* at 44)

The same conclusion should be reached in this case. In addition to cost containment programs, the Freights obtained valuable benefit reductions designed to alter the medical utilization habits of National Plan participants. Among these concessions were the Plan's implementation of annual deductibles for the first time in the amount of \$200 per individual and \$400 per family for which fixed dollar co-payments do not apply, 5% employee coinsurance, and significant increases in what participants pay for brand-name drug prescriptions. Amtrak values these benefit reduction and cost containment provisions to be worth 1% GWI. As part of the freight bargain, the parties also agreed to freeze employee contributions until July 1, 2016 at the level in effect on December 31, 2009, which is \$177.54 for AmPlan. Amtrak should not be permitted to accept the benefit reductions and cost containment provisions of the freight agreement, but not the employee contribution freeze.

3. Work Rules

Organization witnesses Jed Dodd and David Ingersoll will testify that work rules on the Freights and Amtrak are indistinguishable for the Engineering crafts. The 2010 freight

agreement included no work rule changes, including rules proposed by the BMWED and other organizations. Our witnesses will describe how the rules proposed by Amtrak within its “internal pattern” proposal will adversely impact employees’ quality of life and family obligations, which cannot be monetized, and/or reduce the compensation earned by a significant portion of Engineering craft workers. The rules at issue here are addressed in detail *infra* at pages 14-24. Maintenance of the freight pattern at Amtrak precludes imposition of the work rules sought by Amtrak.

B. The wage increases in the national freight agreement are reasonable; there is no stable Amtrak “internal pattern” and there is no inability to pay issue

The 1.7% difference in the cumulative amount of general wage increases proposed by Amtrak and the Organizations is not large. Whether measured by the government’s Employment Cost Index, the cost of living or rising real wages, the Organizations’ wage proposal is reasonable and moderate. (Roth Stmt. at 22-25) That should come as little surprise inasmuch as the Organizations’ wage proposal is based upon an actual wage settlement established in the real world for workers performing identical jobs. Even if the freight wage pattern is applied to all Amtrak workers covered by “me-too” provisions, the incremental cost to Amtrak is minimal. (*Id.* at 32-33)

The notion that Amtrak’s claimed “internal pattern” should trump the historical linkage between the freight and Amtrak agreements should be rejected. In the first place, UTU, the last Organization to settle and the second largest on the property representing 12% of the union population, settled for economic terms greater than other unions. The UTU’s “performance bonus” equals \$1,250 per year and the bonus is paid essentially for being qualified for the Conductor job and showing up to work. This annual bonus is equivalent to a 2% PRLBC GWI

which, if included in Amtrak's offer, would exceed the freight agreement's GWI increases. (*Id.* at 19-20) Nor is there a consistent pattern of work rule changes among settled unions.

Secondly, the inclusion of "me-too" provisions in the other union agreements is tacit acknowledgement of doubt whether any "internal pattern" would be found more appropriate than the historical pattern linked to the freight agreements. Thirdly, UTU's additional cash compensation is apparently subject to "me-too" claims by the other settling unions, making the finality of their agreements uncertain at best at this time. And why should the Organizations before this Board, which would not be eligible for "me-too" relief, be penalized for standing on principle to maintain the linkage that protects all Amtrak workers from becoming the nation's worst compensated? Delinking Amtrak and freight agreement wages, and establishing different health plan terms and work rules will lead to future labor instability at Amtrak. The parties will be left without any true comparators upon which to base their agreements.

Amtrak does not have an ability to pay problem. The fact of the matter is that there is not a passenger rail carrier in the world that is not subsidized by taxpayer dollars. Amtrak receives its subsidy from the deepest pocket on earth. Amtrak will concede that its passenger rail service provides a public benefit that is properly paid for by the public, even if some members of the general public do not use it. (*Id.* at 27) Profitability is not the standard of Amtrak's operating and financial successes.

Amtrak has the smallest percentage subsidy of any passenger rail carrier in the nation. Its revenues from passenger traffic and other services finance 87.6 percent of its total operating expenses. This recovery rate far exceeds the recovery rate from revenue of any other sector of the public transportation industry. (*Id.* at 29) It is the seventh largest "commuter" rail operator in the nation. Its labor costs as a percent of its revenues have fallen steadily from 90 percent in

1987, to 80 percent in 1999 and to 71 percent in 2012. (*Id.* at 28) Amtrak does not have a labor cost problem or productivity problem. It carries more passengers today and has record revenues with significantly fewer employees than at any time in its existence. (*Id.* at 28-31) There is no credible inability to pay claim that Amtrak can articulate in this case.

C. Work Rule Changes Sought By Amtrak To Offset Costs of Wage and Benefit Improvements Should Not be Adopted

The Board should not adopt any of Amtrak's proposed work rule changes in this round of bargaining. First, this dispute should not be resolved by cherry-picking the integrated compromises made in voluntary agreements reached in the national freight industry over the last three bargaining rounds. The freight carriers which compete in the relevant marketplace judged their work rules to be sufficiently flexible and efficient to enable them to maintain highly productive operations. In each round, their officers made the pragmatic decision that the wage levels, cost containment features and employee cost sharing compromises they obtained (with the assistance of PEB 243 in the 2010 round) to be sufficiently valuable to forgo the risk of sacrificing them for work rule changes of the sort Amtrak seeks. The economic and operational successes of the rail freight industry over the past decade under the collective bargaining structure we urge in this proceeding surely counsels continued reliance on the freight pattern at Amtrak.

This viewpoint is reinforced by Amtrak's experience over the past decade under the rail freight pay rates, benefits and rules. As Economist Thomas R. Roth's analysis shows,

It is clear that the historical application of freight railroad wage and benefit standards to Amtrak's work force has not impaired the company's commercial success. Total labor costs have consumed a diminishing portion of the revenue dollar, and in real terms, have dropped 8.5 percent over the past-10 year agreement. Throughout this period, Amtrak has been able to achieve and sustain a cost recovery level [of 87.6 % measured by commercial revenue as a percent of

total operating expense, which is] superior to any other mode of passenger transportation. [*Id.* at 29.]

Particularly in light of its recent experience, Amtrak's inability to articulate the necessity for the work rules changes it proposes in operational terms reveals that -- far from a pattern argument -- it is urging a Bankruptcy Code, 11 U.S.C. § 1113, approach in which work rule changes are unconvincingly assigned a speculative monetary value and then offset against the difference in cost between the national freight pattern and what Amtrak claims is an internal pattern. In typical Section 1113 fashion, it maintains that the PRLBC crafts can select any package of work rule changes they want, so long as the supposed cost savings achieved erase the difference between the parties' wage proposals. It thus urges the Board to replace the undeniably successful rail bargaining experience of the last decade with the least successful bargaining approach ever and one that is inapplicable to the rail industry. 11 U.S.C. § 1167.

Second, no compelling operational need for any of Amtrak's work rules proposals was shown at or away from the bargaining table. For the Carrier, it was enough to present a list of work rule modifications that have been considered and withdrawn during past bargaining rounds, often after rejection by Presidential Emergency Boards, and invite the PRLBC crafts to select the least objectionable to "fund" the freight industry wage pattern. Amtrak did not even attempt to justify any of its proposals by arguing that new or changed operational problems have emerged in recent years, which cannot be satisfactorily addressed by proper administration of existing rules. Even as late as the pre-hearing conference, Amtrak declined to enumerate the rules changes it wanted the Board to include in the Engineering crafts' agreements. There can be no clearer demonstration that this case is not about work rules; it is about whether the historic freight wage and benefit pattern will continue to apply at Amtrak, or will be replaced by a local pattern whose stability is unproven and already wavering. (Roth Stmt. at 19-20)

Third, many of Amtrak's work rule proposals implicate core craft job security concerns. "A significant showing of propriety and need" must be made prior to abolishing these long-standing protections, in the interest of affected employees, and because their "abrupt abandonment . . . would likely include significant instability and, in the short run, would create more productivity problems than would be solved." (JX 57, PEB 242 at 56-57) As will be shown by the testimony of BMWED General Chairman Jed Dodd and BRS General Chairman Dave Ingersoll, respectively, implementation of the "possible work rule changes . . . identified as generating cost savings that could be converted to GWIs . . ." in Amtrak's Statement of Position, Nov. 15, 2013, at 8, would have just such destabilizing effects for both Engineering crafts.

Fourth, since the Board's decision should mirror results achievable through good-faith, arms-length collective bargaining, it is pertinent that the comprehensive changes to existing work rules sought by Amtrak to justify the national freight pattern of wages and benefits have virtually no chance of being agreed to by the Organizations or ratified by their memberships. Amtrak offers no countervailing concessions in wages or benefits, let alone ones of sufficient importance, to obtain the far-reaching, radical rule changes it has so offhandedly thrown on the bargaining table. Their rejection is thus assured. (JX 57, PEB 242 at 57)

These considerations call for rejection of the Carrier's work rules proposals. In the event the Board nonetheless elects to address each rule individually, a discussion of individual changes proposed by Amtrak is set forth below to the extent we are able given that the proposals are just ideas, which are not supported by a detailed implementation plan. This discussion, in our view, demonstrates both the complexity of work rule negotiations and how imbalance to a "package" proposal can frustrate overall agreement.

1. Work Rule Proposals Common to Both PRLBC Crafts

a. Disciplinary Rules Modifications

Amtrak proposes to change three disciplinary rules. The first change is the most problematic. It calls for the immediate termination of wages to employees pending investigation in disciplinary cases and reversion to its policy, abandoned in 1997, of discretionarily suspending pay as soon as charges are filed and well before their guilt is determined preliminarily at a hearing on the property. Its “guilty until proven innocent” policy enabled Amtrak to hold employees disfavored by line management out of service for many months. Employees thus faced the dubious choice of waiting for a hearing, or of accepting a time-served suspension in order to return to work. Whether right or wrong, the Carrier often limited or avoided altogether payment of remedial back pay.

Minority employees were disproportionately affected by Amtrak’s manipulation of the disciplinary process; a Title VII class action, in which the Pennsylvania Federation BMW became a party, was initiated and later settled. *Thornton v. National R.R. Passenger Corp.*, No. 98cv0890 (EGS), D.D.C. The consent decree achieved substantial reform in the Carrier’s disciplinary rules. In 1997, Amtrak agreed with BMW and BRS that employees would be paid regular salary if taken out of service, for other than medical reasons, until a decision on the propriety of the charges against them is made by the hearing officer upon the record developed at the on-property hearing. These agreements markedly improved the disciplinary process by sharply reducing the number of employees taken out of service for less serious offenses, minimizing fictitious charges and expediting trials. Both Engineering crafts oppose change of the current “innocent until proven guilty” rule. Indeed, as the *Thornton* case teaches, the annual

savings claimed by Amtrak by reverting to the pre-1997 rule will be erased by just one successful discrimination case.

The second change in the disciplinary rules sought by Amtrak as part of the so-called “internal pattern” is also serious. For notices suggesting discipline short of discharge, Amtrak proposes that within seven days from the employee’s receipt of a written notice of intent to discipline, the employee and his representative must meet with management to attempt to resolve the matter. The parties will either agree on the amount of discipline to be assessed, if any, or a formal investigation will begin. If the employee fails to attend the meeting, Amtrak may assess whatever discipline it considers appropriate subject to appeal. This rule change is unnecessary. Nothing under the current rules prevents early settlements in disciplinary cases after adequate notice of the charges is given, and the employee is afforded an opportunity to defend himself by confronting his accusers and disputing the evidence against him. Existing practice demonstrates that the information needed by the employee and his representative to participate in a settlement conference will not be available in seven days. Thus, in practical terms, the meeting envisioned by the rule change sought is designed only to facilitate guilty pleas and assessment of discipline by consent. This is not what employee representation in the Engineering crafts is about.

The final disciplinary change sought, also demanded as part of the Amtrak “internal pattern,” eliminates disciplinary investigations for violations of drug and alcohol waivers. Dismissal would be automatic, subject to appeal at the Director’s level of handling on the property. Both Engineering crafts object to this rule change. We acknowledge the difficulty of contesting results of a drug test in many cases. But not all due process hearings in drug cases end in the accused employee’s dismissal. Because refusal to provide a urine sample is considered a positive test subjecting the employee to dismissal, an employee may be found not

guilty because the Carrier had not given a clear and understandable order to the employee to provide a urine sample. Mistakes are made in collecting urine specimens, in the laboratory's analysis of specimens, in interpreting test results, and in maintaining the chain of custody. Due process standards tend to discipline both management and firms responsible for test administration to the betterment of the process. They should not be abandoned.

b. Payroll Efficiencies

Relatively minor administrative payroll changes were agreed to by all Organizations as part of Amtrak's internal pattern. Employees represented by those Organizations are paid bi-weekly instead of weekly, and paychecks are now deposited electronically instead of being handed out on the property. Defining the workweek for payroll purposes as Monday through Sunday enables the bi-weekly pay change. These proposed changes are opposed by large portions of both PRLBC Organizations' rank and file whose petitions opposing these changes make clear they will not support an agreement containing them.

c. Overtime Pay

Amtrak proposes to pay employees overtime only after they work more than 40 hours in the workweek. Adoption of this proposal would enable the Carrier to work employees more than 8 hours in one workday without additional compensation if, due to illness or other authorized leave, they do not complete a complete 40 hour workweek. PEB 222 rejected this proposal, concluding that overtime premiums should be paid whenever an employee works beyond his regular shift in a workday. "[W]e see no persuasive reason for departure from the present commitment of both parties to adhere to the overtime rule for those employees currently working a five-day eight-hour per day work week. (JX 55 at 68) If an employee routinely worked a ten-hour shift, the Board recommended overtime be paid whenever the employee worked more than

10 hours in a day or 40 hours in a workweek. There is no basis for eliminating the eight-hour day that has been a hallmark of railroading for nearly a century. Currently, overtime is paid for all hours worked after an eight or ten hour shift and on rest days. No change is warranted.

d. Holiday Pay

The current pay rule requires an employee to work the day before a holiday and the day after in order to receive holiday pay. Amtrak wants an amended rule to state that employees must work their complete shifts before and after the holiday to qualify for holiday pay. Employees scheduled to work on the holiday would forfeit holiday pay if they fail to work the entire shift. There is no basis to alter the rule. Employees need a supervisor's permission to leave work early; those who leave early without permission are subject to discipline. Supervisors need only decline requests for permission to leave early when employees are needed to complete productive work. If, on the other hand, employees are given permission to leave early before, after or on a holiday because of illness, personal emergency or work completion, it is difficult to see why they should forfeit holiday pay.

e. Force Assignments

The Carrier seeks the right to force assign new BMWED-represented employees and employees promoted after the new agreement becomes effective to the highest-rated positions available, if those positions are not filled through bidding. Amtrak wants to force assign BRS-represented employees beyond the current 45-mile limit up to 60 miles from their headquarters. The objections to both rule changes are the same. Employees must absorb higher unreimbursed commuting/lodging expenses. More importantly, with minor exceptions, employees now are able to bid and hold any position which they have the seniority and qualifications to fill. They use these rights to balance work and home lives, which may require working a lower-rated

position closer to home. Disruption of the work-life balance will at least cause hardship for employees, discourage recruitment and increase attrition. Amtrak's understaffing is at the root of the problem; its proposed solution will make the problem worse.

2. *Work Rule Proposals Specific to the BMWED*

a. Training

Amtrak proposes to modify the Training Agreement by increasing the training lock-in for new positions from six months to one year after training. This prospective change is to apply to assignments following future training and is said to be part of the Amtrak pattern, although no other pattern agreement includes this rule change. Like so many of Amtrak's rule proposals, this one is objectionable because of its relationship to other rules and the Carrier's inability to show an operational need for the change. A recent trainee can be force assigned to a position in his classification. His exposure to force assignments under current rules is limited to six months. Other than a conclusory claim that extending the lock-in will insure that employees develop necessary skills, Amtrak suggests no basis for doubling exposure to force assignments.

b. Temporary Shift Change

This is an overtime rule change in disguise, in that it is not designed to achieve greater operational efficiency within the Maintenance of Way craft, but to reduce compensation paid for overtime work that is essential to enable Amtrak's understaffed workforce to meet operational requirements. The proposed change will affect employees working under the maintenance rules of BMWED agreements, who comprise about 60% of the craft. The rest work under the production rules of the agreements, which already allow management, with minor exception, to change employee shifts. Maintenance employees are entitled to overtime only after completing their regular shifts at straight-time. So, to work a maintenance employee on a full eight-hour

overtime shift, the employee must be paid for both his regular shift and his overtime shift, totaling twenty hours, instead of just twelve hours representing the overtime payment. Amtrak's current capital track work requirements can be fulfilled under the production rules, where covered positions require paid meals, lodging, travel allowance and an hourly differential, and where incumbents bid for those positions knowing they will be subject to shift changes. Maintenance employees should not be unfairly disadvantaged by deprivation of their seniority-based shift choices simply to save Amtrak money.

c. **Changes in Production Units**

Amtrak proposes to add "Tie Gangs" under Rule 89's provisions covering Northeast Units, and to enable all Rule 90 gangs to perform any capital improvement work and become subject to per diem and Special Construction Gang Agreements. The proposal calls for radical changes in two of the most complex provisions of the BMWED Agreement (Amtrak Ex. 4 at pp. 76, 82) which, if adopted, will diminish working conditions for hundreds of employees and dramatically change seniority relationships of hundreds more. Rule 90 gangs are defined by the seniority districts to which they are assigned, either the Northern or Southern District, while Rule 89 gangs work over both Districts. The capital construction work that both rules permit is described with particularity and access to this work is determined by different seniority rosters. To take the easiest example,, since rail tie installation is governed by Rule 90 in separate seniority districts, permitting Rule 89 gangs to perform this work across the Northern and Southern Districts would dramatically enlarge the pool of employees having rights to this important work and undercut protections unique to Rule 90. Put simply, Amtrak intends to force all production workers to operate under the most flexible work rules of the Agreement, even though those rules were designed for different situations. The existing rules are well suited for

their intended purposes; no compelling reason for their change has arisen since PEB 242 last rejected this proposal.

d. Contracting Out

Amtrak again seeks wide flexibility in contracting out work where such contracting does not result in the layoff of employees. This proposal was considered at length by PEB 242, at pp. 58-59, and rejected. Nothing has changed. Over the term of the current agreement, many agreements have been reached between the BMWED and Amtrak to enable necessary outsourcing of major projects. (Dodd Exs. 54, 57-58). The Carrier still has not provided “evidence of even a single instance in which Amtrak sought to contract out work, the Organization refused, and the work could not be accomplished satisfactorily and efficiently. Nor was proof provided as to any situation in which the application of the existing Work Rules caused significant operating inefficiencies, on-time performance problems, or featherbedding type situations. . . .” (JX 57, PEB 242 at 58) In fact, the current scope rule has worked remarkably well in balancing Amtrak’s legitimate contracting needs with the need for employee job protection. The Carrier’s frequent complaint about having to meet with the Union to discuss contracting specific scope work makes little sense under a statutory scheme calling for “a process of permanent conference and negotiation.” *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 753 (1945).

3. *Work Rule Proposals Specific to the BRS*

a. Tour of Duty/Workweek Proposals

Acknowledging “limited” flexibility it already possesses, Amtrak wants to modify existing scheduling rules to allow establishment of work gangs and positions with flexible starting times and workweeks, subject to modification according to service needs, without

potential disputes with BRS. The notion that other agreements abandoned scheduling protection for covered employees is wrong. There is no practice on the freight rails, commuters or at Amtrak that allows employees to be scheduled without limitation. After all, scheduling rules prevent tired employees from being assigned to the construction and maintenance of signal equipment that is integral to rail safety. The dramatic adverse impact of this rule change on the earning ability and quality of life of covered employees far outweighs the dubious benefit to Amtrak of avoiding potential contract disputes with the BRS.

b. Staffing

We reject Amtrak's attempt to abolish existing Trouble Desk positions. Assistant Foremen in this position are responsible for compliance with the Carrier's Engineering Practices. They are highly experienced in the practicalities of field operations and must have prior supervisory experience, since their function under existing guidelines is to guide field personnel (often less experienced Signal Maintainers) confronted with switch failures, signal circuit plans, jumper wires and similar technical issues (Ingersoll Ex. 64). Trouble Desks are thus important to the safety of the operation, and serve as central intake points for information about incidents impacting the Carrier's signal systems. *Id.* Their abolishment and re-assignment of incumbents to monitor fire and life safety systems in each division will simply result in the downgrading of a higher job classification, with potentially adverse safety implications, to achieve a slight cost reduction at the expense of affected employees.

c. C & S Construction Gangs

Amtrak's proposal to establish roving Signal production units with variable headquarters and work schedules to work over extended territories is highly objectionable and unnecessary. This attempt to re-invigorate moribund "Camp Car" gang provisions has been a non-starter in

every bargaining round almost since Amtrak's inception. The current approach agreed upon in bargaining is an *ad hoc* method, which permits employees to work across seniority district lines as needed, and has proven to meet the needs of the Carrier and Signal employees on every construction project. Amtrak cannot provide a single instance in which the BRS did not cooperate with management to enable the efficient scheduling and performance of signal construction work.

CONCLUSION

At hearing, the evidence will show that the national freight pattern established by the marketplace should once again be adopted by Amtrak and its Organizations because of its stability and adherence to the principle of comparable pay for comparable work. The applicable pattern does not include work rule changes going to "core craft and class job security concerns" where, as here and in the rail industry generally, a significant showing of the propriety and need for such changes has not been made for a decade. Many of the organizations accepting the Amtrak "internal pattern" were asked to accept only changes in payroll administration. Others made work rule concessions to obtain improvements outside the "internal pattern." The Engineering crafts ask for no work rule improvements and no wage or benefit improvements beyond the freight pattern. If the Board is not persuaded to adopt the freight pattern, they do ask that the so-called "internal pattern" with only the payroll rule changes be adopted. We are not prepared to sacrifice work rule protections developed in bargaining over many years to obtain the small difference in wages between the two patterns at issue in this proceeding.

Dated: December 27, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Pre-Hearing Brief on behalf of the Passenger Rail Labor Bargaining Coalition was served this 27th day of December, 2014 upon the following parties by email as indicated below:

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