



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

INTERNATIONAL
LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

alleging a representation dispute
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended

involving employees of

TRADEPOINT RAIL, LLC

45 NMB No. 16

CASE NO. R-7515
CASE NO. R-7516
(FILE NO. CR-7156)

FINDINGS UPON
INVESTIGATION

March 15, 2018

This determination addresses the applications of the International Longshoremens' Association, AFL-CIO (ILA or Organization), alleging a representation dispute pursuant to the Railway Labor Act (Act or RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth).¹ The ILA alleged representation disputes among the following employees of Tradepoint Rail, LLC (Carrier or TPR): Maintenance of Way Employees; Mechanics; Locomotive Engineers; Clerical, Office, Station, and Storehouse Employees; and Carmen and Coach Cleaners. The applied-for employees are currently unrepresented.

¹ 45 U.S.C § 151, *et seq.*

For the reasons set forth below, the National Mediation Board (NMB or Board) concludes that the proper crafts or classes for the employees covered by the applications are Operating Employees and Non-Operating Employees.

PROCEDURAL BACKGROUND

On October 25, 2016, the ILA filed applications alleging representation disputes involving the following five crafts or classes at the Carrier: “Carmen”; “Clerical Office Employees”; “Locomotive Mechanics”; “Maintenance of Way Employees”; “Train and Engine Service Employees”; and “Yardmaster.” The applications were assigned NMB File No. CR-7156 and Eileen M. Hennessey was assigned as the Investigator.

On November 16, 2016, TPR submitted the List of Potential Eligible Voters (List), and signature samples for those potential voters. The Carrier also filed an initial position statement on November 16, 2016. The ILA responded to the Carrier’s initial position statement on November 30, 2016. TPR provided additional requested information, including relevant job descriptions, on December 22, 2016 and provided additional information on January 31, 2017, February 21, 2017, May 30, 2017 and May 31, 2017. The ILA provided additional information on January 5, 2017, February 7, 2017, and April 19, 2017.

ISSUE

What are the proper crafts or classes for the employees covered by the applications?

CONTENTIONS

TPR

TPR contends that the 33 employees covered by the applications belong in a single craft or class of Operating and Non-Operating Employees. The Carrier states that “[e]ach employee routinely performs a wide variety of work functions necessary to the operation and maintenance of the railroad and other site development and work unrelated to the railroad, regardless of designated job title.” TPR maintains “work is assigned and executed on a team basis” and that dividing its workforce into “5 traditional crafts or classes based on job titles rather than actual work functions and assignments . . . would create dysfunction in TPR’s operations.”

ILA

The ILA asserts that the employees covered by the applications belong in the following five crafts or classes: Maintenance of Way Employees; Mechanics; Locomotive Engineers; Clerical, Office, Station, and Storehouse Employees; and Carmen and Coach Cleaners. ILA alternatively argues that some combining of the crafts or classes may be appropriate but that a single craft or class covering all of the applied-for employees is not. The ILA states that employees at TPR work in three general categories: transportation employees – Engineers and Conductors and Clerks; train maintenance/repair employees – Mechanics and Carmen; and track maintenance/repair employees – Maintenance of Way Employees. The ILA acknowledges that certain employees have received training to perform tasks outside of their regular duties and therefore, across traditional craft or class lines. However, the ILA argues, that the “cross-functioning” is predominantly in one direction. When work is needed in the track maintenance division, Engineers, Conductors and Mechanics are set to work with Maintenance of Way Employees but it is rare for Maintenance of Way Employees to be assigned to different crafts or classes. Therefore, the ILA maintains that the Carrier, as the party advocating consolidation of the crafts and classes, bears the burden of establishing that true cross-utilization takes place at a sufficient level to justify the consolidation. The ILA also contends that the Carrier has included management employees on the List and these employees should be removed from the List.

FINDINGS OF LAW

Determination of the issues in this case is governed by the Act, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

I.

TPR is a carrier as defined in 45 U.S.C. § 151, First.

II.

The ILA is a labor organization and/or representative as provided by 45 U.S.C. § 151, Sixth, and § 152, Ninth.

III.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions, “the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter.”

IV.

45 U.S.C. § 151, Fifth defines employee as “includ[ing] every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect”

V.

45 U.S.C. § 152, Ninth, provides that the Board has the duty to investigate representation disputes and to designate who may participate as eligible voters in the event an election is required.

STATEMENT OF FACTS

Background

TPR is a short line railroad operating on the former site of Bethlehem Steel’s steel mill at Sparrow’s Point, Maryland. The steel mill ceased operations in 2012. In 2014, TPR’s parent company, Tradepoint Atlantic, LLC (TPA) purchased the Sparrow’s Point site. Since that time, the mill buildings have been demolished and TPA has begun redeveloping the site into a manufacturing, distribution and logistics campus. TPR has deep water marine terminal facilities, 100 miles of railroad track throughout the 3,100 acre site, and connections to two Class I railroads. According to the Carrier, redevelopment is ongoing and repair and replacement of the property including the rail and marine infrastructure assets will take many years to complete. TPR employees are involved in the redevelopment project.

From the date of TPA’s purchase of the Sparrow’s Point site until December 31, 2015, the site’s short line railroad was operated by a third party contractor. Effective January 1, 2016, TPR hired the former operator’s rail employees and

assumed formal control of the rail operations. Currently, TPR provides switching, car storage, other services for multiple customers. TPR's 33 employees also play a significant role in TPA's ongoing redevelopment activities by constructing and reconfiguring track to meet the needs of new and potential tenants and customers.

All TPR employees receive the same handbook and are required by the Carrier to pass the same rules test. Affidavits submitted by TPR provide examples of employee cross-training: a Clerk received training as a Switch Inspector; a Carman received training as a Yardmaster and will also receive training as a Conductor.² TPR has instituted a program to cross-train maintenance of way personnel as operating personnel. Three Track Laborers have been trained as Conductors with the eventual goal of certifying them as Engineers.

TPR states that the "ebb and flow" between its rail operations and site development requires substantial cross-utilization. For example, the Carrier states that the Carmen regularly perform landscaping and site maintenance; and that "their car repair work is limited to occasional, minor, safety-related repairs and does not constitute a regular line of business." Similarly, TPR's mechanics only spend a small portion their time actually performing locomotive mechanical work. Instead, much of their time is spent working on non-rail vehicles owned by TPR and TPA, fixing and maintaining maintenance of way equipment, repairing plumbing and heating systems in the buildings, and painting.

The Carrier has a common "assignment pool." At the start of each day employees report for a morning meeting in a common breakroom and assignments are given out "based on the daily needs of both rail operations and overall site development." TPR claims that "compensation decisions are made on an individualized basis, not according to traditional job titles or along craft or class lines."

The ILA provided several affidavits from employees working in the applied-for crafts or classes, as well as company documents it states support its contention that TPR has included on the List management officials and other employees not working in the applied-for crafts or classes. The ILA provided a TPR employee roster which is sectioned off by department. This roster lists the following titles in the first section: "VP Rail Op; Terminal Manager; Chief Engineer; Track Department [Track Gang Foreman]; Dir. Admin.; Acct. Manager; and Shop Sup." ILA states that "these managerial employees are listed on TPR's

² There is no Yardmaster position on the List.

employee roster ... at the top of the document, separate from the subordinate employees.” In addition, in support of its contention that the Carrier has included management officials on the List, the ILA provided a screenshot of a document purporting to be TPR’s Notification Procedures for absence, lateness and PTO [Personal Time Off] Requests that lists the following three individuals as Direct Supervisors: MOE- Tim Martin [Shop Superintendent]; T&E –Jason Neidinger [Terminal Manager]; and MOW- Mike Michalski [Track Gang Foreman].

Position Descriptions

During the course of the investigation the Investigator requested position descriptions, cross-utilization information, and rates of pay for the positions on the List. The Carrier provided a TPR organization chart, wage and/or salary data for its employees, “all of the job descriptions it had in its files,” as well as multiple affidavits from Paul Thomas, Vice President of TPR³, to supplement the information provided in the job descriptions.⁴

Thomas states that all employees are covered by the same benefit plan and all are covered by the Railroad Retirement Act for pension purposes. All employees are covered by the same TPR Employee Handbook which sets forth TPR’s employment, compensation and benefits policies. The Positions of Terminal Manager, Locomotive/Garage Supervisor, Shop Superintendent, Chief Engineer, Track Gang Foreman, Director of Administration, and Account Manager are salaried positions with annual compensation ranging from \$50,000 to \$96,430. The following positions are compensated on an hourly basis: Engineer/Conductor; General Railroad Laborer; Track Laborer; Equipment

³ Thomas is also identified in other documents submitted by the Carrier as VP Rail Operations.

⁴ TPR provided the Investigator two versions of nine job descriptions: – an “as drafted” version and a “track-changes” version. The Carrier states that the “as drafted” job descriptions use material from position descriptions on Class I Railroads and that “track changes” versions of the job descriptions “(as edited) accurately reflect the actual duties performed in those positions.” The ILA objects to the consideration of the “track changes” version by the Investigator arguing that this version was created solely in response to the present inquiry from the NMB. The ILA has also provided affidavits from TPR employees attesting to the activities the affiants have observed employees in the disputed job titles performing. The Board recognizes that the duties actually performed by employees may differ from their stated position description and notes that the two versions of the position descriptions for the majority of the applied-for employees do not differ significantly. For consistency, the Board has considered the “as drafted” version of the position descriptions, supplemented by Thomas’ testimony and the statements in the ILA’s affidavits, in making its craft or class determination.

Operator; Operations Clerk, Electrician; Car Repairman; Pipefitter, Welder & Mechanic; Locomotive Mechanic; Garage Mechanic; Switch Inspector; Foreman; and Track Gang Foreman. Each position has separate pay range or rate of pay. The range for all of the hourly positions is \$15- \$34 per hour.

Train Operations

Terminal Manager

The Terminal Manager directs the supervision of Train and Engine (T&E) employees, Clerks, and Yardmasters and reviews the performance of T&E employees. In addition, the Terminal Manager works closely with Engineering, Mechanical, and other terminal and field management personnel, in the handling of crews and operations and to make decisions regarding safety, service, and cost goals. This position is accountable for the investigation of train accidents and service disruptions. On the organization chart provided, the Engineer/ Conductor position reports to the Terminal Manager.

The Carrier states that the qualifications for this position include: Five or more years of previous rail management experience; experience in transportation, logistics or warehousing operations; RSI yard systems skill; B.A. Degree in Business Administration or related field and an MBA is preferred.

According to the January 31, 2017 affidavit provided by Thomas, the Terminal Manager can only impose discipline at the express direction of the TPR Vice President. On one occasion, when Thomas was unreachable, the Terminal Manager sent an employee home who was “combative and abusive to the Terminal Manager.” Thomas also states that this position has the authority to direct employees to switch from one task to another but cannot transfer or reassign employees from one position to another.

Engineer/Conductor

The Engineer/Conductor position controls and coordinates the train movements to facilitate the unloading and loading of railcars in a safe and efficient manner. This position is a manual labor position and requires that the incumbent become proficient in certain skills, duties, and requirements within a prescribed training and introductory period. Qualifications for this position include: high school diploma or equivalent; certified conductor and engineer preferred; three years of experience on a railroad is preferred; and the ability to pass training and required testing.

Operations Clerk

No position description was provided. Thomas states in his May 30, 2017 affidavit that the Clerk fields calls from customers about moving cars and other more immediate operation issues. The position deals with moving cars on the computer but is not personally involved in the physical movement of the cars. Approximately 65-75 percent of his time is spent on switching work- with 10 percent of that in customer contact and the rest of the time in switching. When the Clerk is not involved in switching, he performs other tasks such as equipment inventory, purchase order processing, and yard checks. This position's hours are 7:00 a.m. to 3:00 p.m.

Maintenance of Way

There are three non-supervisory Maintenance of Way positions: Equipment Operator; General Railroad Laborer; and Track Worker. Thomas states the positions of Track Laborer and Equipment Operator existed when he joined TPR. He created the position of General Railroad Laborer when he joined TPR and since he has been Vice President he has hired five new hires into the Track Laborer position and five new hires into the General Railroad Laborer position. According to Thomas:

there are not clear divisions where one type of work is performed by Equipment Operators, another type of work is performed by Railroad General Laborers, and a third type of work is performed by Track Laborers. All of the employees working in the field operate some type of equipment and perform general labor tasks daily.

According to the organization chart, these positions report to one of three Foremen. The Foremen report to a Track Gang Foreman.

General Railroad Laborer⁵

This position is responsible for general landscaping and facility maintenance. It is a manual labor position which requires that the individual become proficient in certain skills, duties, and requirements within a prescribed training and introductory period. Qualifications include: high school diploma or

⁵ The titles General Railroad Laborer, Track Laborer and Equipment Operator appear on the List. The incumbents to these positions are sometimes listed differently on the organization chart provided by the Carrier. For consistency, the employees will be referred to as they appear on the List.

equivalent; a successful driving record; welding experience; ability to operate machinery (mowers, plows, backhoe, fork truck, etc.); and the ability to pass training and required testing. In addition to these qualifications, the General Railroad Laborer position has the following physical requirements: the ability to lift up to 50 lbs. with or without reasonable accommodation; the ability to climb in and out of a large truck and ladders on a railcar; and the ability to work in all weather conditions. This position states that there is exposure on a regular basis to outdoor weather conditions and exposure to dust from various grain, fertilizer, and minerals.

According to Thomas' May 30, 2017 affidavit, he created the General Railroad Laborer position as an entry level position for new hires who had less railroad or other relevant experience than the incumbent Track Laborer and Equipment Operators. This position has a pay range of \$15-\$16 per hour.

Track Laborer

The position description for Track Worker⁶ states that the incumbent "works as a member of a crew to install new railroad track, maintain existing track and right-of-way." Qualifications include: high school diploma/GED; 18 years of age or older; and a valid driver's license. Preferred qualifications include: experience working outside (e.g. construction, heavy equipment operation, farming, landscaping); welding experience; commercial driver's license (CDL); and equipment operating (Backhoe, Loader, Dozer, etc.). The pay range for this position is \$21.50-\$25.32.

Thomas stated in his May 30, 2017 affidavit that three of the Track Laborers have been certified to also perform as conductors.

Randy Constantino is listed as a Track Laborer on the List. According to Thomas' January 31, 2017 affidavit, Constantino is a good example of how TPR cross-utilizes employees. "In a one year period, Constantino has worked in car repair, as a track laborer, in the locomotive shop as a mechanic and as a welder." In addition, Constantino was given approximately three weeks of training in clerk operations and yard operating systems.

Equipment Operator⁷

According to Thomas' May 30, 2017 affidavit, this position operates

⁶ The position description provided was for "Track Worker." The List and other documents provided by the Carrier use the term "Track Laborer."

⁷ On the List one of the Foreman, Brian Mooney, was listed as an Equipment Operator.

on-track equipment, ballast regulators, switch inserters, backhoes, and forklifts.

Foreman/ Track Foreman

The Track Foreman is responsible for the oversight of both the maintenance and repair activities surrounding the Maintenance of Way functions. The Foreman has supervisory responsibilities and provides daily supervision of staff to “perform cost effective repairs and maintenance resulting in safe track, right of way, and facility conditions for an assigned territory of moderate scope.” Qualifications for the Foreman position include: a high school diploma; five years of railroad track experience; and a valid driver’s license. Preferred qualifications include: a college degree; FRA213 (track standards) and FRA214 (safety) qualified; and proficiency in Microsoft Office / Web Based Data systems.

In his May 30, 2017 affidavit, Thomas states that three individuals perform Foreman work. According to Thomas, Foreman Brian Mooney, spends 90 percent of his time performing non-supervisory physical labor in field operations. The remaining 10 percent of his time is spent directing other employees, predominantly performing the Foreman functions described in the Track Foreman position, given the work and leave schedules of the other Foremen. In his May 30, 2017 affidavit, Thomas states that Foreman Gary Medvidovich spent virtually all his time on “physical work” in the previous two months. This includes “building frogs and other track components, rehabilitating track and performing other welding projects.” Foreman Storm Neidinger was on Medical Leave in February and March and in the previous two months has been working as an engineer.

Track Gang Foreman/Roadmaster

According to Thomas, this position is generally described in the Track Foreman position description.⁸ Thomas states this position works with multiple gangs because of his “knowledge of track welding and mechanical equipment.” At times, the Track Gang Foreman does manage a single gang. While this position does switch employees from one task to another during the day, Thomas has the sole authority to transfer or reassign employees from one position to another. The ILA states that the duties of Track Gang Foreman are different from that of Track Foreman in that the Track Gang Foreman supervises all gangs and does not manage a gang himself.

⁸ On the List the employee Michael Michalski is listed as Track Gang Foreman and on the organization chart provided by the Carrier this position was listed as Roadmaster.

Maintenance of Equipment

Car Repairman⁹

The Car Repairman is responsible for the general inspection and the repair of rail cars. This position ensures compliance with all railroad rules and regulations for safety, operations, of the Federal Railroad Administration (FRA). Qualifications include: high school diploma/GED; 18 years of age or older; a valid driver's license; mechanical experience; one or more years of welding and fabrication experience; ability to work a nonstandard workweek, overtime, and various shift work; complete annual training and pass safety rules examination; may require random testing for drugs and/or alcohol; may require a post-offer medical examination, including drug and physical capabilities test; and must pass all required assessments.

This is a manual labor position and requires the ability to lift up to 70 pounds occasionally, and up to 100 pounds on a rare basis; stoop/bend/kneel/crouch/balance/climb on an occasional basis; walk long distances over uneven terrain; demonstrate auditory and visual acuity/tracking/inspection; ability to tolerate exposure to equipment that intensifies the heat factor on an occasional basis.

Pipefitter, Welder & Mechanic and Garage Mechanic

No position descriptions were provided. On the organization chart there are two Mechanics listed. On the List there is a Pipefitter, Welder & Mechanic position and a Garage Mechanic position.

Locomotive Mechanic

No position description was provided. This position is not on the List but is listed on the rates of pay and has an hourly rate of pay of \$27. On the organization chart that was provided by TPR there is a position listed as "Loco Shop." The incumbent in that position, James D. Clark, is listed as Locomotive/Garage Supervisor on the List. Thomas' May 30, 2017 affidavit states "Locomotive Shop- primarily serves as a locomotive mechanic". However the position of Locomotive/ Garage Supervisor (see below) is a salaried position earning substantially more than \$27 per hour.

⁹ On the organization chart there are three Carmen listed. On the List these individuals are listed as Track Laborer, Car Repairman, and Switch Inspector.

Thomas' May 30, 2017 affidavit states "Mechanics- Maintenance, repair and service of railed and wheeled vehicles (including vehicles for TPA) perform work on track equipment, and wash cars. In addition, Mechanic Opert [Jeffrey Opert- Pipefitter, Welder & Mechanic] repairs and replaces leaking pipes."

Electrician

No position description was provided. Thomas states in his May 30, 2017 affidavit that this position is responsible for maintenance, repair and troubleshooting of locomotive electronics, and some work as a locomotive mechanic. The incumbent Electrician has been cross-trained and is certified as an engineer; and from March 1 to May 30, 2017 spent nearly 100 percent of his time as an engineer.

Switch Inspector

No position description was provided for Switch Inspector. According to Thomas' January 31, 2017 affidavit, Michael Rutter was hired as a painter by TPR, appears on the List as a Switch Inspector, and is now working as a Carman. In Thomas' May 30, 2017 affidavit he states that the incumbent is both a Carman and a Switch Inspector with approximately 80 percent of his time performing Carman functions.¹⁰

Locomotive /Garage Supervisor

No position description was provided. On the organization chart this position is listed as "Loco Shop." The incumbent in that position, James D. Clark is listed as Locomotive/Garage Supervisor on the List. Thomas' May 30, 2017 affidavit states "Locomotive Shop- primarily serves as a locomotive mechanic." On the organization chart the Carman and Electrician positions report to the Locomotive/Garage Supervisor and the Locomotive/Garage Supervisor reports to the Shop Superintendent.

Shop Superintendent

No position description was provided. Thomas, in his May 30, 2017 affidavit, states that this position is responsible for running the locomotive shop and the vehicle maintenance areas and for ensuring the general cleaning and safety inspections of the facility are completed. Thomas also states that the Shop Superintendent's "role in directing employees predominantly is relaying messages. Approximately 50% of the Shop Superintendent's time is spent performing general labor work, predominantly painting and maintenance tasks."

¹⁰ Michael Rutter is listed on the List as a Switch Inspector and appears on the organization chart as a Carman.

Other Positions

Chief Engineer

According to the job description provided, the Chief Engineer has the “primary responsibility of producing a complete, accurate, biddable, and buildable set of plans for all the structures in a project with the least possible manpower expenditures.” This position “ensures compliance with all regulatory requirements as they relate to rail systems, construction of rail facilities, engineering standards, design review, and any and all federal requirements including but not limited to the FRA, and the State of Maryland Department of Labor, Licensing & Regulation Safety Inspection Unit.” Preferred qualifications for this position include: a Bachelor’s degree in Engineering; experience in railroad engineering; proficiency in Microsoft Office / Web Based Data systems; and proficiency in AutoCAD.

Thomas states that the Chief Engineer has no supervisory responsibilities and performs cross-functional tasks such as inspection of track and bridges, maintaining track inventory, processing receipts for payment, and scheduling deliveries of track equipment and parts.

The ILA provided affidavits from two members of the craft or class that stated that the Chief Engineer does not perform cross-functional tasks and does not perform track maintenance or installation. The affiants further testified that this is primarily a supervisory, office position with occasional inspection of track.

Account Manager

The position description for the Account Manager states that the position is “focused on developing new customer prospects to expand the customer base, and volume of Tradepoint Rail as well as manage current customer relationships with onsite rail customers.” The Account Manager is responsible for building relationships with current and potential customers. The TPR Account Manager is also responsible for integrating the supply chain and logistical advantages that TPA provides potential customers to develop a commercial strategy to achieve the goals of TPR. The position reports to the VP Rail Operations.

Qualifications for this position include: a Bachelor’s degree in Finance, Accounting, Business Administration or related field required; a minimum of one-to five years’ experience in sales or marketing; strong interpersonal and communications skills (oral and written); computer skills (Power Point, Excel and MS Outlook preferred); and an understanding of margin, profitability and other relevant business principles.

Thomas states that the Account Manager regularly meets and interacts with the Vice President of Commercial Development (VP-CD). The VP-CD is an employee of TPR's parent company, TPA. Thomas states that "TPA runs the maritime operations and coordinates with TPR to provide transportation solutions for both the maritime terminals and rail side of goods movement. ... TPA [also] provides certain back office services to TPR. These include accounting, revenue tracking, payroll, marketing and public affairs." The Account Manager is a salaried position and starts at 8:00 a. m.

Director of Administration

The Director of Administration is responsible for all areas of daily administrative rail operation, focused on safety, administration, maintenance, train performance, and productivity. According to the position description provided, this position "develops and drives terminal strategies and solutions through people, systems and process to continuously ensure excellence in safety, profitability and service." Qualifications include: B.A. Degree in Business Administration or related field MBA preferred; previous rail management experience; experience in transportation, logistics or warehousing operations; proficiency in Microsoft Office / Web Based Data systems; and RSI yard systems skill. This position generally has a starting time of 7:30 a.m.

DISCUSSION

The Appropriate Craft or Class

In determining the proper craft or class for a group of employees, the Board considers a number of factors, including functional integration, work classifications, terms and conditions of employment, and work-related community of interest. *Bauxite & N. Ry.*, 44 NMB 7 (2017); *Columbia & Cowlitz, Ry., LLC*, 38 NMB 264 (2011)(*Columbia & Cowlitz*); *Florida Northern R.R.*, 34 NMB 142 (2007); *Frontier Airlines, Inc.*, 29 NMB 28 (2001); *United Airlines, Inc.*, 28 NMB 533 (2001). The Board makes craft or class determinations case by case, based upon Board policy and precedent. *USAir*, 15 NMB 369 (1988); *Simmons Airlines*, 15 NMB 124 (1988).

The Board recognizes that "historical patterns of representation in the railroad industry provide the basis for craft or class determinations." *Terminal R.R. Ass'n of St. Louis*, 28 NMB 187, 199 (2000); *Duluth, Missabe & Iron Range Ry. Co.*, 16 NMB 495, 500 (1989). The Board has recognized that on some smaller carriers, employees may work in more than one craft or class over a

period of time. See *Florida East Coast R.R. Co.*, 21 NMB 35, 44 (1993). “[O]n smaller carriers with a significant degree of cross-utilization,” the Board explained, “perpetuating historic crafts and classes could result in artificial fragmentation of employees[.]” *Id.* at 44. As a result, when a carrier is small and when its employees are cross-utilized, the Board may look beyond traditional craft or class designations. *Id.* at 45; see also *Eastern Illinois Railroad Company*, 43 NMB 35 (2015); *Columbia & Cowlitz Ry.*, *above*.

TPR states that it is in the early stages of a multi-year redevelopment project of the Sparrow’s Point site and urges the Board to consider that “in contrast to the single customer environment when its predecessors performed intra-plant switching for the former steel mill, TPR’s business is subject to significant ‘ebb-and-flow’. Much of the switching and transloading work performed by TPR is ‘spot’ business and not steady or consistent” as is the work performed by TPR in connection with redevelopment. The Carrier argues that the start-up nature of its enterprise as well as the business itself should compel the Board to modify the RLA’s traditional craft or class lines.

It is long-established precedent that the NMB looks at a carrier’s current operations in making representation determinations. The Board stated in *Chicago & North Western Ry. Co.*, 4 NMB 240 (1965) that:

In representation disputes the Act deals with the present status and the present interest of the employees involved and not with potential future status and potential future interests of the employees. The Board has long adhered to the established and recognized practice to vote employees in the one craft in which they are employed at the time of the election.

The record demonstrates that there is a significant amount of cross-training and cross-utilization at TPR; perhaps more than at a typical short-line railroad because of the redevelopment, repair and maintenance of the marine and rail facilities. As such, the Board finds that some consolidation of the applied-for crafts or classes is appropriate. However, the single Operating/ Non-Operating Employees craft or class that the Carrier argues for is not appropriate.

In support of its argument for a single craft or class, the Carrier cites *Columbia & Cowlitz Ry.*, *above*. In that case, most of the employees shared a single job title, Transportation Worker, performed non-operations work and operations work, were trained as engineers/conductors or would be trained as engineers/ conductors in the near future. The facts in the case at hand stand in contrast to the facts of *Columbia & Cowlitz Ry.* TPR employs 33 employees in 19 different job titles; some, but not most of the employees have been cross-

trained in some, but not all, operations and there is no definitive training plan to accomplish universal cross-training across the TPR system. In addition, each job title has differing responsibilities and qualifications, and the compensation ranges from \$15 per hour to a \$96,430 annual salary.

Some TPR employees have received cross-training in other positions but there is no defined plan or schedule to fully cross-train and cross-utilize all employees. The anecdotal evidence provided by Thomas' testimony is that cross-utilization goes in one direction, with more skilled employees performing less skilled maintenance and maintenance of way work as needed. This supports the ILA's assertion that while there is cross-training of employees, it is rare for employees in the track maintenance or train maintenance departments to regularly work as an Engineer/Conductor or vice versa. Moreover, the Engineer/Conductor position requires additional training and certification. While the Carrier has provided Conductor training to three Track Workers, this training falls short of the requisite level of cross-training and cross-utilization required to support an Operating/ Non-Operating Employees craft or class, and stands in marked contrast to the facts in *Columbia & Cowlitz Ry., above*. Therefore, the Board finds that two crafts or classes are appropriate for the applied-for employees—an Operating Employees craft or class comprised of Engineers/Conductors and a Non-Operating Employees craft or class comprised of General Railroad Laborers, Track Laborer, Equipment Operator, Operations Clerk, Electrician, Car Repairman, Pipefitter, Welder & Mechanic, and Garage Mechanic.¹¹

Positions Challenged by the ILA

In determining the eligibility of the positions challenged by the ILA as “management,” the Board must employ a two part analysis. First, it must determine whether the positions meet the criteria of management officials and therefore, are excluded from the RLA's coverage. If the positions are not excluded from the Act's coverage, the Board must then determine whether the disputed positions belong within the craft or class. When determining the second issue, the Board considers among other factors “the functions, duties, and responsibilities of the employees; the general nature of their work; and the extent of community of interest existing between job classifications.” NMB Representation Manual (Manual) Section 9.1.

¹¹ No position description was provided for Switch Inspector. Michael Rutter is listed as a Switch Inspector on the List. However, the Carrier states Rutter is working as a Carman and is therefore, in the Non-Operating Employees craft or class. The Position of Locomotive Mechanic is referred to in testimony and in compensation data provided by the company, but no position description was provided and this position is not on the List.

The RLA's coverage extends to a carrier's employees and subordinate officials. Management officials, however, are excluded from the Act's coverage. Section 9.211 of the Manual states that:

Management officials include individuals with: (1) the authority to dismiss and/or discipline employees or to effectively recommend the same; (2) the authority to supervise; (3) the ability to authorize and grant overtime; (4) the authority to transfer and/or establish assignments; (5) the authority to create carrier policy; and, (6) the authority to commit carrier funds. The Investigator also considers: (1) whether the authority exercised is circumscribed by operating and policy manuals; (2) the placement of the individual in the organizational hierarchy of the carrier; and, (3) any other relevant factors regarding the individual's duties and responsibilities.

The Board considers the criteria in Manual Section 9.211 cumulatively, not separately. *Pan American World Airways, Inc.*, 5 NMB 112, 115 (1973); see also *USAir, Inc.*, 24 NMB 38 (1996); *Comair, Inc.*, 22 NMB 175 (1995); *American Int'l Airways, Inc.*, 20 NMB 94 (1992); *Challenge Air Cargo*, 17 NMB 501 (1990); *USAir, Inc.*, 17 NMB 117 (1990); *Tower Air, Inc.*, 16 NMB 338 (1989). In many cases, the Board finds that while there are certain factors indicating some level of authority, when the factors are viewed cumulatively the individuals at issue may be supervisors, but are not management officials.

The Board finds that the positions of Terminal Manager, Shop Superintendent, and Track Gang Foreman are management officials and are excluded from the Act's coverage. While these positions do not have the authority to unilaterally dismiss or discipline employees, they do bear other indicia of managerial authority including the ability to supervise the work of others, and to make assignments. In addition, according to the organization chart provided these employees are fairly high in the Carrier's organizational hierarchy and report to TPR's Vice President. With the exception of the Track Gang Foreman they are all salaried positions. The Track Gang Foreman is an hourly position but it is paid \$34.00 per hour – approximately \$7.00 more per hour than the other members of either the Operating Employees craft or class or the Non-Operating Employees craft or class.

In making craft-or-class determinations, a particularly important factor is whether employees share a work-related community of interest. *Endeavor Air, Inc.*, 41 NMB 281 (2014). Generally, employees share a work-related community of interest when their work environments, job duties, and interactions “ensure a mutuality of interest in the objective of collective bargaining.” *US Airways, Inc.*, 31 NMB 324 (2004).

The Carrier argues that the Account Manager, the Director of Administration and the Operations Clerk positions share a work related community of interest. The Board disagrees. While all three positions work in an office setting, the Operations Clerk, deals with moving cars on the computer and other clerical work and is paid at an hourly rate comparable to other Non-Operating Employees. In contrast, the Account Manager's position is focused on developing new customer prospects to expand the customer base and volume of TPR as well as manage current customer relationships with onsite rail customers. This position interacts with TPA's VP-CD in addition to TPR's Vice President. The Director of Administration is responsible for all areas of daily administrative rail operation, focused on safety, administration, maintenance, train performance and productivity. There is little evidence that these positions are cross-trained or cross-utilized with the other positions in the applied-for crafts or classes. In addition, both of these positions are salaried and have different hours of work from the other members of the crafts or classes.

In addition to not sharing a community of interest with the Operations Clerk specifically, the Account Manager and Director of Administration positions do not share a community of interest with other members of the Operating Employees craft or class or the Non-Operating Employees craft or class in general. These two positions work in an office environment unlike most of the other applied-for positions which work in the field, are salaried positions, have different hours of work from the other applied-for positions, and report directly to TPR's Vice President.

In contrast, the position of Foreman shares a work related community of interest with the other members of the craft or class of Non-Operating Employees. The Foreman positions require predominantly track maintenance work with little supervisory duties. Foremen are paid hourly at a rate that is comparable to other members of the craft or class.¹² Therefore, the employees working as Foremen are included in the craft or class of Non-Operating Employees.

Finally, there are two positions that do not share a community of interest with either craft or class. No position description was provided for the Locomotive/Garage Supervisor which is a salaried position. While Thomas states that this position performs locomotive mechanic work, the Locomotive/

¹² According to Thomas one of the Foreman, Storm Neidinger, has been working preponderantly as an Engineer. Therefore, Storm Neidinger should be listed as an Engineer/Conductor and be included on the Operating Employees List.

Garage Supervisor earns substantially more than any of the Mechanic positions which are paid hourly and have a pay range of \$23.83- \$27.00 per hour.

The position of Chief Engineer is also salaried and is a non-supervisory position. The Chief Engineer earns substantially more than the other Maintenance of Way positions which are hourly positions with a pay range of \$15- \$25.31. Thomas states that the Chief Engineer performs cross-functional tasks including “inspections of track and bridges, maintaining track inventory, processing receipts for payment, and scheduling deliveries of track equipment and parts.” However, these responsibilities are not cross-functional with any of the other Maintenance of Way positions which have responsibilities that include, installation of track, building maintenance, landscaping and operation of heavy equipment. In addition, the Chief Engineer’s preferred qualifications include a Bachelor’s degree in Engineering and Engineering experience. In contrast to the other Maintenance of Way positions which require a high school diploma or equivalent, a valid driver’s license, and the ability to operate certain equipment.

CONCLUSION

The Board finds that the proper crafts or classes for the employees covered by the applications are Operating Employees and Non-Operating Employees. Accordingly, NMB File No. CR-7156 is converted to NMB Case Nos. R-7515 (Operating Employees) and R-7516 (Non-Operating Employees).

Consistent with the direction of the Board’s October 26, 2016 docket letter, TPR must provide the Board with two alphabetized Lists of Potential Eligible Voters, one of all Operating Employees, and one of all Non-Operating Employees.¹³ These Lists are due by **4pm ET March 22, 2018**. Signatures samples were previously provided. Once the Lists of Potential Eligible Voters are provided, the Investigator will determine whether the ILA’s showing of interest is sufficient to proceed with the Board’s Investigation.

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

¹³ The Lists of Potential Eligible Voters must contain all individuals with an employee-employer relationship as of the last day of the last payroll period prior to October 25, 2016.

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