



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

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

involving employees of

PORT AUTHORITY TRANS-
HUDSON CORPORATION

34 NMB No. 14

CASE NO. R-7113
(File No. CR-6908)

FINDINGS UPON
INVESTIGATION –
AUTHORIZATION OF
ELECTION

February 5, 2007

This determination addresses the application filed by the International Brotherhood of Electrical Workers (IBEW or Applicant) alleging a representation dispute pursuant to the Railway Labor Act¹ (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth). IBEW seeks to represent the craft or class of Transportation Operations Examiners at the Port Authority Trans-Hudson Corporation (PATH or Carrier).

For the reasons discussed below, the National Mediation Board (Board or NMB) finds that Transportation Operation Examiners are not management officials and that Transportation Operations Examiners is an appropriate craft or class. Accordingly, the Board authorizes an election.

PROCEDURAL BACKGROUND

On August 17, 2006, the IBEW filed an application with the Board alleging a representation dispute involving the Transportation Operations Examiners at PATH. On September

¹ 45 U.S.C. § 151, *et seq.*

1, 2006, PATH filed a list of potential eligible voters with the Board and an initial position statement asserting that these employees are management officials and are ineligible to vote in a representation election. On October 3, 2006, Investigator Eileen M. Hennessey directed the Carrier to provide additional information which the Carrier supplied on October 6, 2006. PATH supplemented its initial position statement on October 18, 2006. On October 31, 2006, the IBEW responded to PATH's submissions. On November 15, 2006, PATH replied to the IBEW's submission. IBEW filed a final submission on November 20, 2006.

ISSUE

Are PATH's Transportation Operations Examiners management officials ineligible for representation?

If not, do PATH's Transportation Operations Examiners constitute an appropriate craft or class under the RLA?

CONTENTIONS

I. PATH

PATH argues that Transportation Operations Examiners are not an appropriate craft or class. PATH contends that the Transportation Operations Examiners do not share a work-related community of interest with the "divergent groups" they supervise and IBEW has not shown that Transportation Operations Examiners is a traditionally recognized craft or class under the RLA.

PATH also asserts that Transportation Operations Examiners are management officials and are therefore, ineligible to vote. PATH states that Transportation Operations Examiners have the authority to: effectively recommend discipline; supervise yard supervisors, engineers, "engineers/switching", and conductors on a daily basis; conduct regular training and testing; grant overtime; transfer or establish assignments; and create Carrier policy. In addition, Transportation Operations Examiners receive supervisory and managerial training, and compensation and benefits comparable to other management employees. PATH

also states that Transportation Operations Examiners represent the Carrier in initial inspections by the Federal Railroad Administration (FRA) and other agencies.

II. IBEW

IBEW argues that Transportation Operations Examiners are employees or subordinate officials and are therefore, eligible to vote under the RLA. In support of this contention, IBEW argues that Transportation Operation Examiners cannot terminate employees. The Applicant argues that Transportation Operations Examiners' recommendations to promote or demote employees they are training are often disregarded by the Superintendent, Assistant Superintendent and Chief Operations Examiner, who make those decisions. IBEW asserts that Transportation Operations Examiners' role in the disciplinary process is reportorial. Transportation Operations Examiners file reports after service interruptions and rules violations but do not recommend discipline. Finally, Transportation Operations Examiners' authority to determine whether employees must submit to drug and alcohol screening is circumscribed by FRA regulations.

IBEW states that Transportation Operations Examiners have no authority to establish or alter employee assignments, other than to arrange the schedules of trainees. The Applicant further states that the two instances when two Transportation Operations Examiners participated in PATH manual revisions do not establish that these employees create Carrier policy. IBEW states that Transportation Operations Examiners are paid on an hourly basis, like engineers, conductors, tower operators, and yard supervisors, all of whom are represented employees under the RLA.

IBEW argues that the RLA does not require that Transportation Operations Examiners share a community of interest with any of the groups they may supervise, or that they must fall within a traditional craft or class. All that is required, states the IBEW, is that the employees in the proposed craft or class share a community of interest with each other.

FINDINGS OF LAW

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

I.

PATH is a common carrier by rail as defined in 45 U.S.C. § 151, First.

II.

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

STATEMENT OF FACTS

I.

According to a Promotion Examination Announcement (Announcement) dated June 27, 2006, the duties of Transportation Operations Examiners are as follows:

Under the direct supervision of the Chief Operations Examiner, the Operations Examiner:

- Supervises Yard Supervisors, Engineers, Engineers/Switching, and Conductors on a day-to-day basis.
- Assists in overseeing train operations during peak and non-peak traffic periods and takes appropriate action to prevent delays and maintain service.
- Monitors construction sites to assure the safe operation of trains and the safe movement of passengers through or around the site.
- Investigates performance irregularities and takes or recommends corrective action.
- Responds to service disruptions, i.e., derailments, accidents, signal failures, fire or smoke conditions.
- Establishes a Communications Command Post when necessary to coordinate the activities of responding emergency personnel with the Control Center.
- Conducts training for new personnel and administers promotional qualifying examinations.
- Conducts Crew Refresher Training for operating employees and performs other duties as may be assigned by his/her supervisors.
- Conducts “On Track Safety” training and flagging classes.
- Conducts re-certification testing and performance appraisals on train engineers as required by the FRA certification program.

- Conducts performance checks on train crews and re-instructs on proper procedures as required.

The Announcement states that “two years of experience as a current certified Train Engineer is required. Previous supervisory experience desirable.” The position is filled based upon an interview, performance appraisal and a written examination. Transportation Operations Examiners are required to maintain engineer operating certificates while holding the Transportation Operations Examiner position.

According to the organizational charts submitted by the Carrier, Transportation Operations Examiners are part of PATH’s Transportation Division. Transportation Operations Examiners report to the Chief Operations Examiner, who reports to the Assistant Superintendent, who reports to the Superintendent of the Transportation Division, who reports to the Director/General Manager of PATH. In PATH’s organizational hierarchy, Transportation Operations Examiners are placed at a level similar to Assistant Trainmasters, Train Dispatchers or Station Supervisors.

PATH submitted a sworn statement from Kevin Lejda, Assistant Superintendent of the Transportation Division. According to Lejda:

The work that OE’s perform is varied and difficult to pigeonhole. For instance, Operations Examiner Martin T. Den Bleyker, who retired on March 25, 2006, but is still available, was actively involved in the revisions to the PATH Book of Rules, and his work was incorporated into the current Book of Rules that was issued in 2000. . . .

Assistant Trainmaster Brian Fitzsimmons, who was promoted from the Operations Examiner position on July 30, 2005, during his tenure in that position, drafted the Accident Investigation Manual detailing procedures to be followed for an accident investigation. . . .

Operations Examiners are involved in hiring and promotion decisions. The PATH hiring and promotion process includes an evaluation by a two-member panel composed of a Human Resources Department representative and an Operations Examiner, during which candidates seeking promotion are interviewed and their suitability is evaluated. The PATH representative and the HR representative compare their scores on established selection matrices, and based upon those scores the decision is made whether or not to hire or promote the individual. PATH Operations Examiners serve as PATH representatives in this process, and are involved in assistance in the development of the test, as well as the interview and selection criteria. They participate in hiring and promotion of candidates to the following job titles: Passenger Information Agent, Temporary Passenger Information Agent, Conductor, Engineer-Switching and Engineer.

OE's are instrumental in counseling or disciplining subordinate employees, whether through initiating the discipline process as the result of an investigation that they perform, or if appropriate, counseling and re-instructing employees.

OE's have the authority to determine if they will take train crews out of service for serious infractions as well as for drug and alcohol testing.

OE's have the authority to grant non-scheduled overtime, such as for holiday holdover coverage; to order an employee to hold over (on overtime) for re-instruction; or if warranted to hold over for drug and alcohol testing.

PATH also submitted an affirmation from Brian Fitzsimmons, Assistant Trainmaster, who worked as a Transportation Operations Examiner from 1988 to 2005. Fitzsimmons stated, in part, the following:

While the OE does not have the authority to terminate or demote employees directly, their reports and observations generated as a result of incident investigations are a major tool employed by the division's upper management in making such decisions.

While the Chief Operations Examiner participates in the majority of interviews, he can and does delegate this function to members of his staff. In 16 years as an OE, I participated in numerous such interviews.

PATH also submitted a statement from Martin Den Bleyker, a retired PATH Transportation Operations Examiner, who stated the following:

Within the railroad community both within and outside this railroad, PATH has always had a certain problem with terminology when being compared to other "traditional" railroads. An example is the PATH dispatcher, who would be a station master elsewhere. Part of this altered semantics comes from the small size of the physical railroad. A reduced staff covers a different range of duties, usually more, as appropriate to its size. This does lend a certain flexibility. The Operations Examiner at PATH includes the positions of Trainmaster, Road Foreman, Rules Examiner and instructor (such as Motor Instructor) as defined by other railroads.

The current annual base salary range for Transportation Operations Examiners is \$61,282 - \$80,340. Transportation Operations Examiners are non-exempt employees and are eligible for overtime.

DISCUSSION

I. Are PATH's Transportation Operations Examiners Management Officials?

Section 151, Fifth, of the RLA specifically defines employees subject to its coverage to include subordinate officials. Section

9.211 of the Board's Representation Manual (Manual) details factors to be considered in determining whether an individual is a management official and ineligible to vote. These factors include:

- (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.

See also Pan American World Airways, Inc., 5 NMB 112 (1973) (the factors the Board examines are considered cumulatively).

The position of Transportation Operations Examiner is unique to PATH. As PATH's witness, Martin Den Bleyker stated, the position's duties include work that is performed by Trainmasters, Road Foremen, Rules Examiners, and Instructors at other railroads. One of a Transportation Operations Examiner's primary supervisory duties is to train and evaluate engineers and conductors. The Board has generally recognized instructors as employees within the meaning of the RLA. The earliest decisions to recognize instructors as a distinct craft or class concerned some aspect of pilot training, including ground school instructors, flight simulator instructors, flight instructors, and check airmen. *See United Air Lines, Inc.*, 4 NMB 30 (1965), *Pan American World Airways, Inc.*, 4 NMB 151 (1967). While Board decisions have differed regarding whether instructors constitute a

distinct craft or class or are part of another craft or class², for over four decades Board precedent has been that training and evaluating personnel does not render a position outside of the RLA's coverage. *United, above*.

PATH places significant weight on the past involvement of two former Transportation Operations Examiners in the creation of two policy manuals. PATH asserts that this is evidence that the position creates Carrier policy. However, these individuals did not have the authority to create Carrier policy; rather, they submitted their recommendations to supervisors for final policy approval. These supervisors had the authority to create Carrier policy, not the Transportation Operations Examiners. Moreover, there is no evidence in the record that the ten current Transportation Operations Examiners have the authority to create Carrier policy.

Transportation Operations Examiners conduct incident investigations and write reports with their findings and recommendations. These reports may provide the basis for an employee's termination or discipline but Transportation Operations Examiners cannot fire or impose this discipline. The Division Superintendent, three levels up in the PATH hierarchy, has that authority. With regard to Transportation Operations Examiners' role in the hiring and promotion process, again their authority is only to recommend, as part of a panel, based upon the Carrier's detailed promotion and hiring guidelines.

In situations where an employee's actions pose an immediate danger or where the employee is insubordinate, Transportation Operations Examiners can remove an employee from service for the rest of their shift. This exercise of authority is an operational safety issue rather than an exercise of managerial discretion. *See United, above*. As the Board stated in *United*:

² See, e.g., *American Airlines*, 30 NMB 30 (2002); *Continental Airlines/Continental Express*, 27 NMB 99 (1999); *Delta Airlines*, 26 NMB 391 (1999).

In referring to the "management status" of the Flight Instructors, the Carrier further contends that "the ultimate and primary responsibility for safety" rests with management.

It is difficult to conceive of such a cardinal matter as safety can be divorced from the functions and responsibilities of every employee of the Carrier from the President on down. The Board cannot dispute the fact that the continued safe operations of any air carrier engaged in public transportation, is a mandatory responsibility of all individuals employed by the carrier regardless of their labor philosophy or affiliation. . . .

[T]he Board cannot reasonably deprive employees of the right to exercise a statutory right simply because of such an assumption.

Id. at 45.

Transportation Operations Examiners have the ability to grant overtime only when necessary for holiday coverage or for additional re-instruction. They do not typically transfer or establish assignments of the employees they supervise. According to the Announcement their authority is to "assist in overseeing train operations and non-peak traffic periods and take appropriate actions to prevent delays and maintain service." Other than their limited ability to authorize overtime, Transportation Operations Examiners have no authority to commit Carrier funds.

Considering the evidence cumulatively, the Board finds that PATH's Transportation Operations Examiners are not management officials.

II. Is Transportation Operations Examiners an Appropriate Craft or Class?

The RLA, unlike the National Labor Relations Act (NLRA), permits certification of a craft or class that consists of or includes "subordinate officials." In determining the appropriate craft or class, Manual Section 9.1 states:

In craft or class determinations, the NMB considers many factors, including the composition and relative permanency of employee groupings along craft or class lines; 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. Previous decisions of the NMB are also taken into account.

The Carrier asserts that Transportation Operations Examiners is not an appropriate craft or class because it is not a traditional railroad craft or class and because they do not share a work-related community of interest with the “divergent groups” they supervise. There has been no showing by PATH, however, that Transportation Operations Examiners do not share a work-related community of interest with each other. The issue is, therefore, whether Transportation Operations Examiners constitute a separate craft or class or are part of another craft or class. Here, the Board is persuaded by PATH’s own evidence and argument. Transportation Operations Examiners do not share a work-related community of interest with the divergent groups they supervise. Moreover, the position, Transportation Operations Examiner is unique to PATH, created to meet the Carrier’s operational needs. Therefore, the Board in this case, creates a separate craft or class for these employees—Transportation Operations Examiners.

CONCLUSION

As discussed above Transportation Operations Examiners, are employees eligible for representation under the RLA. As such, NMB Case No. CR-6908 is converted to NMB Case No. R-7113.

The Board finds a dispute to exist in NMB Case No. R-7113, among the Transportation Operations Examiners of PATH, sought to be represented by IBEW and presently unrepresented. A TEV election is hereby authorized using a cut-off date of August 19, 2006.

Pursuant to Manual Section 12.1, the Carrier is hereby required to furnish, within five calendar days, 1" X 2 5/8", peel-off labels bearing the alphabetized names and current addresses of those employees on the List of Potential Eligible Voters. The Carrier must print the same sequence number from the List of Potential Eligible Voters beside each voter's name on the address label. The Carrier must use the most expeditious method possible, such as overnight mail, to ensure that the Board receives the labels within five calendar days. Tally in Washington, D.C.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson
General Counsel

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