



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

(202) 692-5000

In the Matter of the  
Application of the

THE INDEPENDENT RAILWAY  
SUPERVISORS ASSOCIATION

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

involving employees of

LONG ISLAND RAILROAD  
COMPANY

37 NMB No. 49

CASE NO. R-7253  
(File No. CR-6969)

FINDINGS UPON  
INVESTIGATION –  
AUTHORIZATION OF  
ELECTION

July 16, 2010

This determination addresses the application filed by the Independent Railway Supervisors Association (IRSA) alleging a representation dispute pursuant to the Railway Labor Act<sup>1</sup> (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth). IRSA seeks to represent the craft or class of Road Foreman of Engines (Road Foremen) at the Long Island Railroad Company (LIRR or Carrier).

For the reasons discussed below, the National Mediation Board (Board or NMB) finds that the Road Foremen are not management officials. Accordingly, the Board authorizes an election.

PROCEDURAL BACKGROUND

On November 30, 2009, the IRSA filed an application with the Board alleging a representation dispute involving the Road Foremen at LIRR. On December 14, 2009, LIRR filed a list of potential eligible voters with the Board and an initial position statement asserting that these employees are

<sup>1</sup> 45 U.S.C. § 151, *et seq.*

management officials. IRSA also filed an initial position statement on December 14, 2009, stating that these employees are not management officials. On December 16, 2009, Investigator Susanna F. Parker directed the Carrier to provide additional information by December 23, 2009. The Carrier requested a two week extension to file the requested materials. The Investigator granted the request. On January 4, 2010, the Carrier requested an additional extension. The Investigator granted the extension and the Carrier supplied the information on January 13, 2010.

On January 19, 2010, IRSA requested an opportunity to respond to LIRR's submission. The Investigator granted the request and set a deadline of February 12, 2010. On February 8, 2010, IRSA requested an extension of time to file a response. The Investigator granted the extension and IRSA submitted a response on February 26, 2010. On March 8, 2010, the LIRR requested until March 17, 2010 to submit a reply to IRSA's filing. The Investigator granted the extension and the LIRR submitted a reply on March 17, 2010. On March 23, 2010, IRSA requested an opportunity to respond to the Carrier's March 17, 2010 submission. The Investigator granted the request and IRSA provided a response on March 29, 2010.

### ISSUE

Are LIRR's Road Foremen management officials ineligible for representation?

### CONTENTIONS

#### I. LIRR

LIRR argues that Road Foremen are management officials; therefore, the application should be dismissed. LIRR states that Road Foremen have the authority to: hire Locomotive Engineer Trainees (LETs); evaluate LETs; discipline Engineers; supervise LETs and Engineers; grant and authorize overtime; modify assignments; make staffing decisions which trigger overtime and premium pay; and adjust grievances. In addition, Road Foremen contribute to the creation of Carrier policy; receive management compensation and benefits; and fill in for senior management during absences.

The LIRR does not dispute IRSA's claim that Lead Road Foremen should be included in the Road Foreman of Engines craft or class. However, the Carrier disagrees with IRSA's claim that Lead Road Foremen are not management officials. The LIRR contends that the Lead Road Foreman routinely supervises Road Foremen, including assigning work and transferring

Road Foremen to maintain operations. Additionally, the Carrier argues that the Lead Road Foreman works closely with the Superintendent and the Superintendent sometimes seeks input from the Lead Road Foreman in the performance evaluations of the Road Foremen.

Finally, relying on *Long Island R.R.*, 7 NMB 303 (1980), the Carrier states that Road Foremen have historically been considered managerial.

## II. IRSA

IRSA argues that Road Foremen are employees or subordinate officials and are, therefore, eligible to vote under the RLA. In support of this contention, IRSA argues that Road Foremen are on the lowest level of supervision in LIRR's organizational hierarchy. IRSA contends that Road Foremen do not have actual or effective authority to: hire, fire or discipline employees; create regular work assignments; spend Carrier funds; create Carrier policy; adjust grievances; or regularly authorize overtime. Additionally, IRSA argues that Road Foremen's supervision of LETs or Engineers is very limited.

IRSA also asserts that Lead Road Foremen should also be included in the List of Eligible Voters (List). IRSA contends that the Lead Road Foreman's responsibility to create the duty roster and attend overtime meetings with the Superintendent of Engine Service is insufficient to establish that the Lead Road Foreman is a management official.

Finally, IRSA argues that LIRR's reliance on *Long Island R.R.*, *above*, is misplaced. IRSA states that the NMB has held that employees who perform similar duties to Road Foremen are not management officials.

## 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.

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

### II.

IRSA 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 LIRR’s “Position Description Questionnaire,” (Questionnaire) dated October 2007, the Road Foreman of Engines: “Assumes responsibility for the safe, efficient and economical operation of locomotives and multiple unit trains throughout Zones A&C. Assures that train and engine movements are on time and in compliance with current rules of the Operating Department in addition to those of the Federal Railroad Administration.” According to the Questionnaire, Road Foremen:

- Develop and assess operating strategies to understand customer needs. Investigate and evaluate customer correspondence concerning train performance. Ensure that operating decisions are as customer-driven as possible.
- Direct, evaluate and supervise the activities of locomotive engineers in the production of specified standards for on-time performance; effective train handling and energy conservation. Recommend terminal and route changes.
- Supervise commission hour operations at assigned terminals to ensure proper equipment/crew availability, safety and movement in accordance with timetable schedules. Respond to service disruptions

and/or emergencies on a 24/7 basis as required.

- Conduct skill performance evaluations of locomotive engineers in accordance with CFR Part 240. Ensure that all locomotive engineers have been exposed to at least one covert and one overt evaluation in each calendar year.
- Conduct trials/investigations, take statements of fact concerning operating problems; make recommendations in the issuance of discipline and review overtime procedures. Evaluate rules violations, determine responsibility, and assess discipline/training.
- Investigate and evaluate disruptions of service, i.e. derailments, breakdowns and accidents that retard normal operations. Report on findings, develop and implement remedial actions.

Road Foremen must be qualified and certified as Engineers and the Questionnaire states that Road Foremen “must have seven years combined management and operating experience.” Section VI of the Questionnaire entitled, “Authority and Decision-making” reads:

What typical decisions does this job have complete authority for making?

Normal operating decisions, training requirements, customer service issues (fare disputes) and qualifications of engine crews.

What typical decisions are referred to others for approval? To whom are these decisions referred?

Decisions having adverse effect on the LIRR and outside agencies of the MTA. Matters affecting company policy. Decisions [having] significant impact on budgetary assumptions.

According to the organizational charts submitted by the Carrier, Road Foremen are part of LIRR’s Transportation Division. Road Foremen report to the Lead Road Foreman, who reports to the Superintendent, Engine Service, who reports to the General Superintendent – Transportation, who reports to

the Vice President, Transportation Services, who reports to the Senior Vice President, Operations, who reports to the President.

LIRR submitted an affidavit from Bret Becker, Superintendent of Engine Service. According to Becker:

Road Foremen are not assigned specific crews for supervision and management. Rather, on a monthly basis, they are assigned, as applicable, 'Main Duties & Responsibilities,' 'Projects,' 'Initiatives' and 'Miscellaneous Responsibilities.' . . .

When performing their "normal" or "routine" daily activities, Road Foremen make numerous decisions which significantly impact LIRR operations on a daily basis, including, but not limited to: cancelling trains, adjusting train schedules, and adding or skipping scheduled stops.

. . . .

. . . [E]ngineer positions are recruited and filled initially by LETs. After LET vacancies are posted . . . a Human Resources representative screens the applications, conducts an 'exploratory interview' and submits external candidates for background checks . . . Road Foremen occasionally participate in the "exploratory interview" process when they attend job fairs or open houses. Once initially screened, candidates are then interviewed by a Human Resources representative and a Road Foreman, who serves as the Transportation Department representative in the hiring process. To fulfill this role, Road Foremen are given training or interviewing skills. Notes of the interviews are taken by both the Human Resources representative and the Road Foreman and are then usually consolidated into a single set of notes. Once the interview is completed, the interviewers grade the candidates on a variety of subject criteria, coming to an overall conclusion as to whether the candidate should be accepted for further consideration or rejected. Decisions by the Road Foremen that candidates are not suitable or qualified, which occur

from time to time, are final. . . . [T]he decisions by the Road Foremen to hire a candidate to enter the LET training program are final as well. . . .

Once hired, the LETs undergo two training phases . . . . During this time, the LET is probationary. . . . [R]oad Foremen have an active role in evaluating the LETs, who are subject to a series of written and practical examinations administered by the Road Foremen. During this process, the Road Foremen conduct probationary reviews and have the authority to decide whether LETs have sufficient train handling and air brake skills to graduate from the training program and pass probation. On those occasions when a Road Foreman concludes that a LET is not qualified to pass probation, the LET has the right to appeal the decision either to my position (Superintendent) or to Steven Drayzen, Vice-President of Labor Relations.

. . . [O]ne of the Road Foremen, currently Jeff Van Essendelft, is responsible for . . . the "At Risk Matrix." In this role he coordinates data on disciplinary matters, including attendance and rule violations by the Engineers, as well as determining and coordinating appropriate follow-up. Jeff is responsible for identifying "at-risk" Engineers, identifying patterns of behavior and ensuring that Engineers with potentially unacceptable patterns of attendance, violations and disciplinary infractions receive appropriate counseling and corrective action. In this role, he effectively recommends further corrective action to the Superintendent who is responsible for imposing the actual discipline. In my tenure as Superintendent, I have adopted Jeff's recommendations routinely.

. . . [A]ll Road Foremen review observed or reported accidents with the Engineers to determine whether follow-up should be initiated. Train handling incidents can come to the attention of the Road Foremen through various channels, among them customer complaints (which would normally be routed to and delegated by me for investigation by a Road Foreman),

employee irregularity reports, or irregularities observed by a Road Foreman. . . . When a Road Foreman learns of an incident or irregularity, s/he always speaks with the Engineer and crew involved, as appropriate; based on the information gathered, the Road Foreman makes an initial determination. If satisfied with the Engineer's explanation, or believing that informal counseling will be sufficient, in virtually all cases, the matter is closed without the involvement of more senior management. Where the Road Foreman believes the incident/irregularity to be more serious or reflect a rules violation, the matter is documented and subject to review by higher management.

. . . [T]he decision to remove an Engineer from service . . . can only be made following a preliminary investigation by the Road Foreman of a serious Rules violation, followed by a drug test. While the Road Foremen do not have the authority to terminate non-probationary Engineers, they provide information and, in some cases recommendations, upon which such decisions are made.

. . . [P]ursuant to the BLE collective bargaining agreement, Engineers are entitled to an "Investigation," with a BLE representative present, before certain levels of disciplinary action can be taken. Road Foremen can be . . . assigned as Conducting Officer for such disciplinary investigations. When serving in this capacity, at the conclusion of such Investigations, the Conducting Officer usually makes recommendations as to further disciplinary action.

. . . .

Road Foremen . . . authorize overtime by routinely making work assignments which trigger extra compensation under the BLE contract.

. . . .

Engineer assignments initially are established by seniority pursuant to the BLE contract. However . . .



Road Foremen have and routinely exercise the authority to change assignments and transfer Engineers to accomplish the objectives of efficient, effective and safe on-time performance. In their exercise of their authority to transfer Engineers, Road Foremen expend substantial Carrier funds. . . .

While Carrier policy normally is created at the senior executive level, in their area of expertise, Road Foremen make recommendations regarding Carrier policy and routinely contribute to the creation of such policy.

With regard to Lead Road Foremen, Becker states that the Lead Road Foreman “has responsibilities beyond those of Road Foremen . . . assigns and reassigns work among the Road Foremen whenever coverage adjustments are operationally necessary.” Additionally, Becker notes that the Lead Road Foreman “attends bi-weekly overtime meetings which are designed to identify ways to reduce or minimize overtime.” Becker acknowledges that more senior management employees also attend these meetings. Becker also states that he himself has “relied on the input of the Lead Road Foreman in the performance evaluations of the Road Foreman.”

LIRR also submitted an affidavit from Christina Cosgriff, Manager – Crew Management Services in the Transportation Department at LIRR. Cosgriff stated, in part, the following:

All employee/union monetary pay claims on behalf of Locomotive Engineers, Train Service Employees, Yardmasters, Tower Employees and Train Dispatchers are filed with my office.

A Road Foreman of Engines reviews these claims as related to Engineers and exercises discretion in interpreting the BLE collective bargaining agreement. The Road Foreman reviews such claims with managers from my staff and at times with union representatives. The Road Foreman makes the determination as to whether such claims should be paid or denied. I would estimate that 100 claims per month are reviewed and determined by the Road Foreman. If the determination is made to pay a claim, the decision is final and binds the LIRR. If the claim is denied, the

employee or the BLE can appeal the denial through the contractual grievance procedure to the LIRR's labor relation department.

The Carrier also submitted an affidavit from Steven Drayzen, Vice President, Labor Relations. Citing *Long Island R.R.*, 7 NMB 303 (1980), *Long Island R.R.*, 9 NMB 551 (1982), and Presidential Emergency Board Report No. 202, 1984, Drayzen states, "The Road Foremen at the LIRR historically have been treated as officials of the Carrier."

According to Tom McCaffery, Road Foreman of Engines, Road Foremen conduct one covert and one overt evaluation of Engineers. In McCaffery's affidavit, McCaffery states:

Road Foremen observe Engineers' performance, either announced or unannounced. Upon information and belief, Road Foremen record their evaluation on a form titled, "Locomotive Engineer Skills Performance Evaluation." . . . This form contains a checklist of skills that the Engineer is required to demonstrate, and Road Foremen only check "yes", "no", or "N/A" beside each skill listed. Road Foremen conclude the evaluation by checking either "pass" or "fail" at the bottom of the evaluation. . . . The Superintendent of Engine Service must approve all of these evaluations.

Road Foremen submit the results of the observations and evaluations they perform to an electronic database. If any of these results indicate that an employee failed to perform a particular skill, the database automatically sends an email to the Trial Office. Although these failures may perform a basis for discipline, Road Foremen do not recommend or impose discipline. They only record factual information about the employee's performance.

Road Foremen are not responsible for setting Engineers' regular work schedules. . . . Under special circumstances, such as inclement weather, a sporting event, or a test train, Road Foremen may request an additional crew that is not in the crew book. Road Foremen do not make these requests on a regular basis, and may only do so when it is necessary to

ensure that trains run smoothly. Road Foremen do not have the authority to determine which Engineers will be on the additional crew.

....

Road Foremen cannot spend LIRR funds without approval. To request that LIRR spend funds, they must submit a procurement request form, which must be approved by a Superintendent in the Transportation Department, the Chief Transportation Officer, and the head of the Procurement Department. . . .

In addition to my regular responsibilities as a Road Foreman, I verify non-routine pay claims, which include claims made by employees that are entitled to overtime pay. . . .

My role is to review the time cards for a clerk in the Manpower Office and verify that the employees actually worked the hours that they claim. Occasionally I will provide the clerk with applicable terms of collective bargaining agreements concerning penalty payments, among other matters, but I do not interpret the meaning of these agreements. In reviewing the time cards, I do not assign work, but only verify that employees worked the overtime hours that they claim on the time cards. I do not exercise any discretion as to whether or not an employee's claim is payable. Upon information and belief, the procedure for verifying time cards is set forth in the LIRR Transportation Policy and Procedure Manual.

The Carrier's Transportation Policy and Procedure Manual, Time Slip Verification, states that all time card claims are verified by the Crew Management Office.

McCaffery served as a Lead Road Foreman from May 2006 to October 2007. According to McCaffery, the Lead Road Foreman attends LIRR's bi-weekly overtime meetings.

All Superintendents in the Transportation Department, the Lead Transportation Managers, and the General

Superintendent-Transportation attend these meetings. At the meeting, the Lead Road Foreman offers ideas about how to reduce the amount that LIRR pays its Transportation Department employees in overtime and penalty payments, such as proposing that extra Engineers be assigned to help crews or individuals who are overburdened. The Lead Road Foreman must get approval from the Superintendent of Engine Service before implementing these assignment changes.

### DISCUSSION

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.

These factors are considered cumulatively. See *Pan Am. World Airways, Inc.*, 5 NMB 112 (1973). Further, the Board's determination regarding an

individual's authority to hire, fire and discipline is "dependent not only upon whether the subject individual possess(es) such authority, but also on whether (he/she) actually exercise(s) this authority or effectively recommend(s) actions in these areas." *Challenge Air Cargo*, 17 NMB 501, 515 (1990); *So. Jersey Airways, Inc.*, 13 NMB 404 (1986); *British Airways, Inc.* 7 NMB 369 (1980).

Considering the evidence cumulatively, the Board finds, for the reasons set forth below, that the Road Foremen are not management officials.

LIRR relies on the role of Road Foremen in hiring, in evaluating, in disciplining, in supervising, in making staffing decisions, and in formulating Carrier policy. In *Port Authority Trans-Hudson Corp.*, 34 NMB 81 (2007), the NMB stated that although "The position of Transportation Operations Examiner is unique to PATH . . . the position's duties include work that is performed by . . . Road Foremen . . . at other railroads. One of a Transportation Operation's Examiner's primary supervisory duties is to train and evaluate engineers and conductors." In *Port Authority, above*, the Board found that Transportation Operations Examiners are not management officials. The Road Foremen's duties and responsibilities at LIRR are similar to that of the Transportation Operations Examiners in *Port Authority, above*.

The Carrier also relies on *Long Island R.R.*, 7 NMB 303 (1980) and *Long Island R.R.*, 9 NMB 551 (1982) for the proposition that Road Foremen at the LIRR historically have been treated as management officials. In *Long Island R.R.*, 7 NMB 303 (1980), the parties stipulated that "Trainmaster/Road Foremen of Engines," "Terminal Trainmaster/Road Foremen of Engines," and "Chief Air Brake Examiner/Road Foremen of Engines" were Carrier officials. The parties also stipulated that the position of "Assistant Road Foremen of Engines" was that of an employee or subordinate official under the Act. *Id.* The Board stated, "The Board's acceptance of the stipulation insofar as it *excluded* certain personnel from the coverage of the Act is not to be considered precedential, and will not constitute a bar to consideration of their status in a properly filed case in the future." *Id.* at 318 (emphasis in original).

In *Long Island R.R.*, 9 NMB 551 (1982), the Carrier claimed that the Assistant Road Foremen of Engines were supervisors who did not share a work-related community of interest with the craft or class of Engineers. However, the LIRR did not claim that these employees were management officials. According to the Carrier, the duties of the Assistant Road Foremen incorporated the duties of the Transportation Manager. The Board found that although Assistant Road Foremen of Engines had the authority to remove Engineers from their positions, this was insufficient to categorize these employees as management officials. The Board stated that these employees

spent “a majority of their time in on-site supervision of passenger train crews and in monitoring engine and equipment operations.” *Id.* at 554. Therefore, the Carrier’s reliance on these cases is misplaced.

With regard to Road Foremen’s role in hiring, their authority is only to recommend, as part of a panel, based upon Carrier-determined criteria.

Road Foremen conduct probationary reviews, coordinate data on disciplinary matters, and review observed and reported incidents. These reviews may provide the basis for an employee’s termination, but the Carrier acknowledges that Road Foremen do not have the authority to fire an Engineer. In situations where an employee’s action is a serious Rules violation, Road Foremen can remove an Engineer from service, followed by a drug test. This exercise of authority is an operational safety issue rather than an exercise of managerial discretion. *Port Authority Trans-Hudson Corp., above, United Air Lines, Inc.*, 4 NMB 30 (1965). Additionally, pursuant to the BLE collective bargaining agreement, Engineers are entitled to an Investigation before certain disciplinary action can be taken. Although Road Foremen are sometimes assigned to act as Conducting Officer for these investigations, the Conducting Officer only makes recommendations regarding further disciplinary action. Only a higher management official can make the decision to terminate or further discipline an employee.

Although the Lead Road Foreman attends bi-weekly overtime meetings to identify ways to reduce or minimize overtime, more senior management employees also attend these meetings. Additionally, there is no evidence that the Lead Road Foreman has the authority to authorize or grant overtime.

The Carrier states that Road Foremen make decisions as to whether pay claims should be paid or denied, however, the evidence demonstrates that Road Foremen do not make these decisions independently. Road Foremen review pay claims along with managers from Crew Management Services, Transportation Department, as well as union representatives. If the claim is denied, the employee or the BLE can appeal the denial. The Carrier has placed the responsibility of granting these claims in the hands of the Road Foremen, managers from Crew Management Services, and union representatives. Although this duty is one indication of management status, the totality of the Road Foremen’s duties and responsibilities requires the conclusion that Road Foremen are not management officials.

According to the Questionnaire, Road Foremen “recommend terminal and route changes” to ensure “on-time performance; effective train handling and energy conservation.” Other than their limited authority to change

assignments and transfer Engineers, which may result in overtime hours, Road Foremen have no authority to commit Carrier funds.

The Board has long held that if an individual actively participates “in the formulation of company policy and had the authority to establish such policy, this would be a strong indication that such a person was in fact a member of management.” *Pan Am. World Airways, Inc.*, 4 NMB 151, 156 (1967). In the instant case, there is no evidence that the Road Foremen of Engines establish Carrier policy. In fact, the Questionnaire states that Road Foremen do not have decision-making authority for “matters affecting company policy” or “decisions [having] significant impact on budgetary assumptions.”

Although the Superintendent of Engine Service sometimes relies on the input of the Lead Road Foreman in performance evaluations, there is no actual evidence that performance evaluations affect pay or discipline or that the Lead Road Foreman has the authority to dismiss and or discipline employees or to effectively recommend the same.

Considering the evidence cumulatively, the Board finds that LIRR’s Road Foremen’s duties and responsibilities support the conclusion that the Road Foremen are employees or subordinate officials and not management officials. Similarly, based on the cumulative evidence, the Board finds that the Lead Road Foremen are not management officials.

### CONCLUSION

As discussed above, the Road Foremen are employees eligible for representation under the RLA. The Board finds a dispute to exist in NMB Case No. R-7253, among the Road Foreman of Engines of LIRR, sought to be represented by IRSA and presently unrepresented. An Internet and TEV election is hereby authorized using the cut-off date of November 24, 2009.

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, DC.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson". The signature is written in black ink and is positioned above the printed name and title.

Mary L. Johnson  
General Counsel