



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the
**AMERICAN TRAIN DISPATCHERS
ASSOCIATION**

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

involving employees of
PAN AM RAILWAYS

37 NMB No. 52

CASE NO. R-7242

FINDINGS UPON
INVESTIGATION-
AUTHORIZATION OF
ELECTION

July 28, 2010

This determination addresses the application filed by the American Train Dispatchers Association (ATDA or Applicant) alleging a representation dispute pursuant to the Railway Labor Act¹ (RLA), 45 U.S.C. 152, Ninth (Section 2, Ninth). ATDA seeks to represent the craft or class of Train Dispatchers at Pan Am Railways (Pan Am or Carrier).

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

PROCEDURAL BACKGROUND

On March 30, 2010, the ATDA filed an application with the Board alleging a representation dispute among the Train Dispatchers at Pan Am. On April 13, 2010, Pan Am stated its position that its Train Dispatchers are ineligible to vote because they are management officials under Section 9.211 of

¹ 45 U.S.C. § 151, *et seq.*

the Board's Representation Manual (Manual). By letter dated April 19, 2010, the Board requested that the Applicant respond to Pan Am's position. On April 28, 2010, ATDA filed a response including employee declarations. On May 4, 2010, Pan Am requested the opportunity to provide additional information. Pan Am submitted an additional statement with supplemental information on May 11, 2010 and ATDA responded on May 17, 2010.

ISSUE

Are Pan Am's Train Dispatchers management officials ineligible for representation?

CONTENTIONS

I. PAN AM

Pan Am contends that the employees in question, Train Operations Managers (TOMs) and Assistant Directors of Train Operations (ADTOs), make managerial decisions throughout the day. According to Pan Am, "our Train Operations Managers have the authority to issue direct orders to train crew personnel, remove train crews from service and recommend that hearing procedures be initiated in connection with train crew activity." The Carrier also contends that TOMs make managerial decisions, such as altering the operating plan and authorizing overtime.

The Carrier further contends that the ADTOs have managerial authority over TOMs and have taken such actions as dismissing employees. According to Pan Am, "ADTOs maintain a heightened level of responsibility on a regular basis, during the entire period of time that they are promoted from a TOM to an ADTO."²

II. ATDA

It is ATDA's contention that both TOMs and ADTOs are Train Dispatchers eligible for representation.

² The majority of the Carrier's contentions are based on the costs it will incur if the Carrier must enter into a bargaining relationship with these employees. The Carrier's concerns about these costs are speculative and irrelevant to the determination of these employees' eligibility to participate in an NMB election and exercise their right to choose a representative under Section 2, Ninth.

ATDA contends that Pan Am's position is identical to that taken by its predecessor when the Board determined that TOMs and ADTOs were not managerial officials in *Guilford Rail Division*, 19 NMB 24 (1991). ATDA asserts that the TOMs do not have a supervisory relationship with other employees. According to ATDA, the TOMs have no authority to unilaterally hire, fire, or otherwise discipline other employees; to grant or deny leave; or to promote or demote employees. ATDA also contends that the TOMs do not participate in the Carrier's budget process or commit Carrier funds. ATDA contends that the TOMs have not gained any authority or responsibilities since the Board determined that they were not managerial employees in 1991.

ATDA further contends that any additional responsibilities that ADTOs receive when they are promoted from TOMs are only performed sporadically. According to ATDA:

It is ATDA's position that these five employees fall within the same craft or class as the TOMs. The additional responsibilities they perform are done on an irregular basis, as the documentation the Carrier's filing shows. Much of what that documentation shows is the ADTOs' performance of responsibilities that ordinarily are part of the job of a train dispatcher, i.e., promoting the efficient movement of trains along the Carrier's line, reporting and reacting to operations issues that affect that movement, reporting to higher level personnel after-the-fact how such problems have been addressed, and explaining how certain dispatching decisions were made in order not to delay trains.

Finally, ATDA argues that the evidence provided by the Carrier merely indicates that the TOMs make suggestions to management and that "[a]ny carrier employee can make suggestions to a carrier that could lead to more efficient operations. But that doesn't make the employee a management official."

FINDINGS OF LAW

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

I.

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

II.

ATDA 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 the 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

Pan Am provided position descriptions for the ADTOs and TOMs. The position description for ADTOs includes the following:

Reports to the Director of Train Operations. Responsible for making systemwide operating decisions regarding the safe, efficient and economical movement of trains over the system. Responsible for supervising and providing assistance to Train Operations Managers, as well as performing all TOM duties as needed and for which they are qualified. Issues orders to TOMs, Crew Dispatchers, clerks, agents, train crew personnel. Works directly with Train Masters in the field throughout the system. Participates in the development of the Carrier’s operating strategies. Adjusts overall operating plan on any given district(s) on the system as needed.

The position description for TOMs includes the following:

Reports of [sic] Director and ADTOs. Responsible for controlling the movement of trains over the system in a safe, efficient and economical manner, in compliance with existing rules regulations and/or instructions. . . . Exercises supervision and authority over agents and operators with respect to their duties and responsibilities concerned with train movement. Makes managerial decisions in connection with moving freight throughout the system. Alters the operating plan in his/her district as required. . . May authorize overtime for train crews as necessary. Reports violations of Carrier operating rules and policies. Authority to issue direct orders to train crew personnel, remove train crews from service and recommend that hearing procedures be initiated in connection with train crew activity. Serves as witness at administrative hearings when relevant, presents charges as Charging Officer when applicable and conducts hearings as Hearing Officer for the Carrier when required. . . .

Both TOMs and ADTOs are paid monthly and participate in a management 401K plan and health and welfare plan.

ATDA provided employee declarations describing the position of Train Operations Managers at Pan Am. According to the declarations, TOMs are the equivalent of train dispatchers on other railroads.

Our responsibilities include controlling the movement of freight and passenger trains on the Carrier's lines and protecting track workers and signalmen who are working on the lines. . . . Train Operations Managers work one of three shifts, 7-3, 3-11, and 11-7, around the clock. We are all located in a separate office inside Pan Am's Iron Horse Park complex at North Billerica, MA. Our direct supervisor is Larry Ferguson, whose title is Acting General Manager-West. He works the day shift. . . . The relationship between Train Operations Managers and operating craft employees is not a supervisory one. We have no authority to hire,

fire, and otherwise discipline other employees or to recommend that employees be hired, fired, or disciplined. We do not assign work to other employees or transfer employees between assignments. We don't grant or deny leave. We don't promote or demote employees. We do not participate in the company's budget process or create Carrier policy. We have no authority to commit carrier funds. If we observe a violation of an FRA regulation or a NORAC rule, we are obligated to report it to Mr. Ferguson immediately, who either handles the matter himself or has another managerial employee take care of it. We do not remove the crew from service or recommend that disciplinary proceedings be initiated. Our only role at that point would be as a witness at an investigation.

The Carrier provided communications from TOMs and ADTOs to management officials that it argues establish that these employees have managerial authority. For example, Pan Am provided a June 2009 email from a TOM explaining why he authorized overtime for a train crew. The TOM concluded the communication with "I wanted to be sure you knew why I allowed this overtime and give the explanation for it in advance of seeing the overtime from this crew." The Carrier also provided a November 2009 letter from a TOM to the General Manager of Transportation recommending discipline for an Engineer which included the following language: "The purpose of this letter is to state that (the employee) should be taken out of service until he is re-educated on how to operate locomotives, specifically air brakes."

The Carrier also provided a 2007 letter written by an ADTO to Larry Ferguson notifying him of a problem and suggesting a solution. The letter stated the following: "I wanted to let you know about a continual problem we are having with trains coming off of the Rumford Branch. . . . If we cannot have these trains properly classified on the Rumford Branch we are ending up with unnecessary extra cost. Just thought I would bring this to your attention for the morning." Another 2007 letter to Larry Ferguson from an ADTO described a situation where the ADTO provided direction to a yardman. The letter stated that "I told (the employee) to have the crew . . . wait for a taxi cab. They explained they had not had lunch. I told (the employee) to have them take lunch right there and to have the crew fax a list of delays to the transportation office."

The chain of command within the Carrier's Transportation Department as described by the Carrier is the following:

- Director of Train Operations
- Assistant Directors of Train Operations
- Train Operations Managers
- Non-Exempt Employees

According to the Carrier, the Director of Train Operations reports directly to the Vice President of Transportation who reports directly to the Executive Vice President and President of the Carrier.

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). Considering the evidence here cumulatively, the Board finds, for the reasons set forth below, that the TOMs and ADTOs are not management officials.

In *Guilford Rail Division*, 19 NMB 24 (1991), the Board rejected Pan Am's predecessor's argument that TOMs and ADTOs were management officials. The Board noted that it considers job functions, and not job titles, in determining whether employees are management officials. *Id.* at 28. See also *Wheeling & Lake Erie R.R. Co.*, 17 NMB 460, 465 (1990); *USAir*, 17 NMB 117 (1990); *Buffalo & Pittsburgh R.R.*, 17 NMB 14 (1989). In *Guilford*, the Board noted that despite the job titles that the Carrier gave to its employees, the employees in question were "essentially dispatchers, and, do not have sufficient indicia of managerial authority to be considered management officials." *Guilford Rail*, *above*, at 29.

As discussed in *Guilford*, Train Dispatchers have traditionally been subordinate officials. *Id.* at 27. TOMs and ADTOs at Pan Am perform the traditional work of Train Dispatchers, described in the TOMs' and ADTOs' position descriptions as being "[r]esponsible for making systemwide operating decisions regarding the safe, efficient and economical movement of trains over the system."

While the evidence indicates that the TOMs and the ADTOs have some authority to grant overtime and recommend discipline for other employees, this alone does not establish that they are management employees. In *Long Island R.R.*, 9 NMB 551 (1982), the Board determined that the employees at issue in that case, Assistant Road Foremen of Engines, were not managerial employees despite the fact that they had the power to dismiss employees in discipline cases. The Board stated that "this factor is insufficient to categorize these employees as management officials, since they spend only 5% of their time dealing with discipline and related administrative matters." *Id.* at 554. In the instant case, Pan Am provided evidence of sporadic instances of TOMs and ADTOs making decisions regarding employee discipline since 2007. These few instances over a four year period do not establish that these employees spend a significant amount of time on matters related to employee discipline. In addition, the Board has previously determined that the ability to remove employees from work for violations of work or safety rules does not establish

managerial authority. *Port Authority Trans-Hudson*, 37 NMB 3, 15 (2009).

The Carrier also argues that TOMs and ATDOs are management officials because they have acted as Charging Officers and Hearing Officers in discipline proceedings. The Board has stated that involvement in discipline hearings is not sufficient to establish managerial authority if the final decision is made by management officials. *Id.* The Board has determined that an employee is a carrier official when acting as a Charging Officer in a discipline proceeding. *Guilford Rail Division*, 19 NMB 32, 47 (1991). Here, however, the Carrier only provided evidence that one employee, who is currently the Assistant to the Vice President, served as a Charging Officer in 2006 when he held the title of ATDO. In addition, the Carrier provided evidence that only one employee who currently holds that title of TOM or ATDO served as a Hearing Officer sporadically during the past two years. Although the ATDO's position description includes reference to serving as Charging Officer or Hearing Officer, such occasional and isolated instances do not establish that the ADTOs actually exercise this authority. The Board's determination over whether an individual possesses authority in discipline matters is "dependent not only upon whether the subject individually possess(es) such authority, but also on whether (he/she) actually exercise(s) this authority" *Port Authority Trans-Hudson*, *above*, at 15 (citing *Challenge Air Cargo*, 17 NMB 501, 515 (1990)).

Like a job title, a position description is not controlling. In determining whether an individual is a management official, what matters is the authority actually possessed and the work actually performed. The paper authority granted by a position description is insufficient to establish that an individual is a management official without evidence that the individual actually exercises that authority. Further, the exercise of that authority must be more than sporadic or intermittent. In the instant case, the evidence merely established that the TOMs and ATDOs have sporadically exercised some level of authority in relation to discipline matters. The Carrier has not provided persuasive evidence in support of its assertion that the TOMs and ADTOs are management officials based on their role in employee discipline.

In addition, there is no evidence that the TOMs or ADTOs create Carrier policy or commit Carrier funds. The Board has 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). The Carrier provided examples of isolated incidents of these employees exercising some level of authority; however, many were examples of the TOMs or ATDOs merely offering suggestions to management.

The few examples provided by the Carrier of TOMs and ADTOs making suggestions to managers do not establish that they participate in the formulation of company policy. The communications include language indicating that management officials had been involved in the decision-making process. For example, in letter in which an ADTO discusses his involvement in an investigation, he stated that “[a]fter my last conversation with Larry (Ferguson), we decided that the tapes should be analyzed to find out what happened.” Furthermore, the Carrier has not provided evidence that management officials followed through with or implemented the suggestions of the TOMs and ATDOs. The Carrier provided a communication from a TOM to the Vice President of Transportation, Edwin Motte. The Carrier acknowledged, however, that “[u]ltimately, Mr. Motte decides whether to take into account the analysis and suggestions of lower management, which he often does.”

The Carrier has provided evidence that the TOMs and ADTOs share some responsibilities with management officials but has not established that these employees can unilaterally make management decisions or establish Carrier policy or commit Carrier funds. The Board has determined in previous decisions that “while there are certain factors indicating some level of authority, when all factors are viewed cumulatively the individuals at issue generally are first-line supervisors, not management officials.” *Pinnacle Airlines, Inc.*, 31 NMB 33, 37 (2003) (citing *Airtran Airways, Inc.*, 29 NMB 77, 87 (2001)). Viewed cumulatively, the evidence here establishes that the employees are traditional Train Dispatchers who have some minimal level of management authority but are not management officials.

The Board finds that Pan Am’s Train Dispatchers are employees or subordinate officials and not management officials.

CONCLUSION

As discussed above, the Train Dispatchers are employees eligible for representation under the RLA. The Board finds a dispute to exist in NMB Case No. R-7242, among the Train Dispatchers of Pan Am, sought to be represented by ATDA and presently unrepresented. An Internet and TEV election is hereby authorized using the cut-off date of February 28, 2010.

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".

Mary L. Johnson
General Counsel