

BEFORE PRESIDENTIAL EMERGENCY BOARD NO. 242

**Disputes Between the
National Railroad Passenger Corporation**

and

Its Employees Represented by Certain Labor Organizations

Carrier's Post-Hearing Brief

NATIONAL RAILROAD PASSENGER CORPORATION

December 20, 2007

SUMMARY

This Presidential Emergency Board should make its recommendations with strong consideration of Amtrak's inability to pay the Unions' retroactive pay demand.

The Unions' retroactive pay demand – an average of approximately \$13,000 for each union-represented employee – simply is not affordable for Amtrak. The total cost of this demand is approximately \$150 million, in addition to the almost \$700 million that Amtrak is committed to pay in prospective wage increases for its union-represented workforce.

Amtrak depends on the federal government to subsidize its operating losses, which are projected to rise from \$475 million in Fiscal Year 2008 to \$572 million by Fiscal Year 2010. This \$100 million projected rise in operating losses is the product of the generous prospective wage increases – increases of more than 30% based on freight railroad rates – that Amtrak has offered to these Unions. These projected losses optimistically assume that Amtrak will meet aggressive revenue targets based on increased ridership, and that Amtrak will achieve additional efficiencies and productivity improvements through changes to collectively-bargained work rules and health care cost containment.

Congress and the President have demonstrated that they are unwilling to fund Amtrak operating losses beyond the \$475 million that is projected for Fiscal Year 2008. Just this week in the Omnibus Budget Reconciliation Act, Congress appropriated an operating subsidy of exactly \$475 million for Fiscal Year 2008, a reduction of \$10 million from Fiscal Year 2007. Based on discussions with Congress and the Administration, Amtrak expects that its operating subsidy will continue to decline in

Fiscal Years 2009 and 2010. Despite intense lobbying by Amtrak and the Unions during this round of bargaining, there is no basis to expect that the federal government will provide any additional funds, let alone the \$150 million special appropriation needed to pay for the Unions' retroactive pay demand.

The Unions' position, as articulated most extremely at the hearing, is that if the federal government is unwilling to fund full retroactive pay, then Amtrak "doesn't deserve to be in business." The Unions want this Board to follow the approach of PEB No. 234 in 1997 and issue a recommendation that would adopt such reasoning as an ultimatum to Congress and the President. The 1997 Board's recommendation was wrong and, in fact, led to unfunded agreements that Amtrak could not afford, which set the stage for a financial crisis at Amtrak in 2001 and 2002. Amtrak cannot make the same mistake again.

The parties have been unable to reach an agreement over the past eight years. That impasse resulted from the financial crisis at Amtrak and the parties' respective bargaining positions. Amtrak told the Unions, beginning in 2002, that it would not pay retroactive pay and that it needed work rule reform. The Unions told Amtrak that they wanted the freight railroads' wage increases, including retroactivity, with no work rule reform. The National Mediation Board chose not to release the parties, apparently waiting for external conditions to change the parties' bargaining positions. While finger pointing concerning this prolonged impasse is easy, it should not be the function of this Board and will not lead the parties towards settlement.

While the issue of retroactivity by definition involves looking backward, Amtrak is firmly committed to moving forward in all respects, including compromising

this collective bargaining dispute and working with the Unions to deliver reliable and efficient passenger rail service. Amtrak must do so responsibly, however, and therefore will not sign an agreement that it cannot afford.

The PEB should recommend that the parties follow the pattern of agreements that Amtrak has negotiated with several unions since 2003. This pattern, illustrated most recently under the 2007 BLET tentative agreement, provides generous prospective wage increases of over 30%, plus a \$4,500 signing bonus in lieu of retroactive pay, health care cost containment, and reasonable work rule reform. Amtrak has stretched the limits of its ability to pay in order to make this offer to all of the Unions that are involved in this proceeding. The Unions' demand for almost \$13,000 in retroactive pay per employee, including those who are no longer in the bargaining unit, is well beyond the limits of Amtrak's ability to pay. Therefore, a PEB recommendation supporting the Unions' demand for full retroactive pay will not provide a useful basis for resolution of this collective bargaining dispute.

I. Amtrak Does Not Have an "Ability to Pay" the Unions' Retroactive Pay Demand.

A. Amtrak's Financial Condition and Dependence on Federal Subsidies Is Uncontested.

The central point of Amtrak's case – particularly as presented through witnesses Joe McHugh (Vice President Government Affairs), William Campbell (Chief Financial Officer), and Alex Kummant (President and CEO) – is that even assuming *arguendo* that the Unions can establish a case for retroactive pay for the more than five year period since July 1, 2002 (when the first round of negotiated freight railroad raises became applicable), Amtrak simply does not have the ability to pay the approximately \$150 million in retroactive pay demanded by the Unions. While Amtrak challenges the

Unions' claim of entitlement to retroactive pay, as discussed below, Amtrak's ability to pay is the central point which should shape the PEB's recommendations.

Amtrak's ability to pay argument is uncommon. Amtrak maintains that it has the ability to pay and is prepared to provide substantial wage increases – totaling more than 30% over three years – to the eight Unions and nine crafts that are before this Board. Amtrak is prepared to match this offer also with the 60% of its union-represented employees who are not represented in this PEB. Under Amtrak's offer, the total impact of prospective wage increases, including Railroad Retirement taxes, is over \$688 million. *See* Carrier Ex. 4 (Statement of William H. Campbell), at Ex. 18. Amtrak can pay these increases, assuming it receives the projected federal subsidies and meets its aggressive revenue targets.

The Unions' retroactive pay demand would add an additional \$150 million to Amtrak's incremental costs, moving settlement into the unaffordable range. The total cost of the Unions' retroactive pay demand is \$150 million, assuming (as Amtrak must) that the pattern established with the nine crafts in this proceeding would be applied to the other crafts on Amtrak.

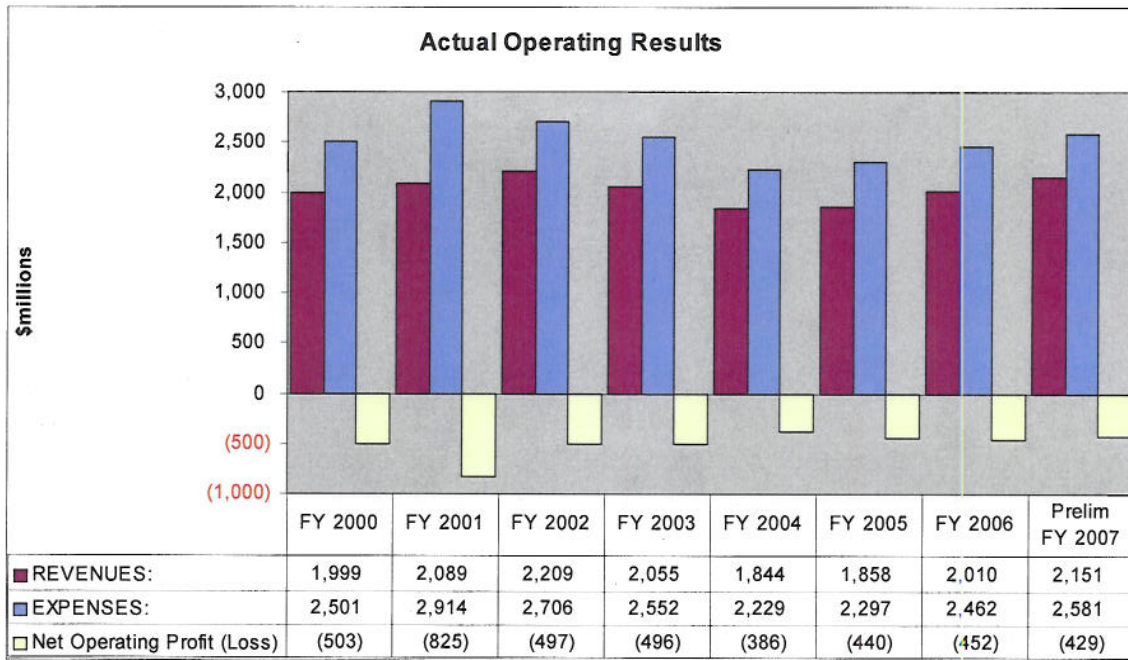
	Union Proposal	
Per FTE retro	\$	13,500
FTE's		15,440
Total	\$	<u>208,440,000</u>
Gross up with RRTA 19.75%	\$	249,606,900
Less credit for prior settled wage increases (\$77.7 plus RRTA)	\$	93,045,750
Net retro	\$	<u>156,561,150</u>

See Carrier Ex. 4 (Statement of William H. Campbell), at Ex. 22.¹ Amtrak's proposal for prospective increases, coupled with the Unions' retroactive pay demand, would total over \$830 million. This is simply a bridge too far for Amtrak.

Amtrak's substantial operating losses and continued dependence on federal subsidies are uncontested. The Unions made no serious effort at the hearing to contest Amtrak's numbers.² During the last several years, Amtrak has had recurring operating losses, in the range of \$400 million to \$500 million:

¹ At the hearing, the Unions clarified that their retroactive pay demand amounts to \$12,848 per employee, on average, as opposed to the \$13,500 figure the Unions had cited in an earlier proposal. See Transcript Vol. II (Dec. 12, 2007) at 215. The total cost difference between these demands is immaterial – approximately \$156 million for the \$13,500 figure, and approximately \$149 million for the \$12,848 figure. See Transcript Vol. III (Dec. 13, 2007) at 223.

² In closing argument, the Unions' counsel, Roland Wilder, attempted to argue that the Unions' demand for full retroactive pay is affordable because Amtrak's cost projections do not account for the employees' proposed health insurance contributions. See Transcript Vol. III (Dec. 13, 2007) at 223-24. This is demonstrably incorrect. These proposed contributions, in amounts that would rise from \$36 million in Fiscal Year 2008 to \$48 million in Fiscal Year 2010, are clearly reflected in Amtrak's projected operating losses. See Carrier Exhibit 12 (Campbell Demonstrative) at 20. Even accounting for these contributions, Amtrak's operating losses are expected to rise from \$475 million in Fiscal Year 2008 to \$572 million in Fiscal Year 2010 under Amtrak's proposal. See *id.* Furthermore, these employee contributions would not result in a net cost savings; rather, these contributions would serve only to control the growth of Amtrak's health insurance costs. Even with these contributions, Amtrak's health insurance costs in 2010 will be equivalent to what they are now. See Carrier Ex. 13 (Rand Demonstrative) at 10.



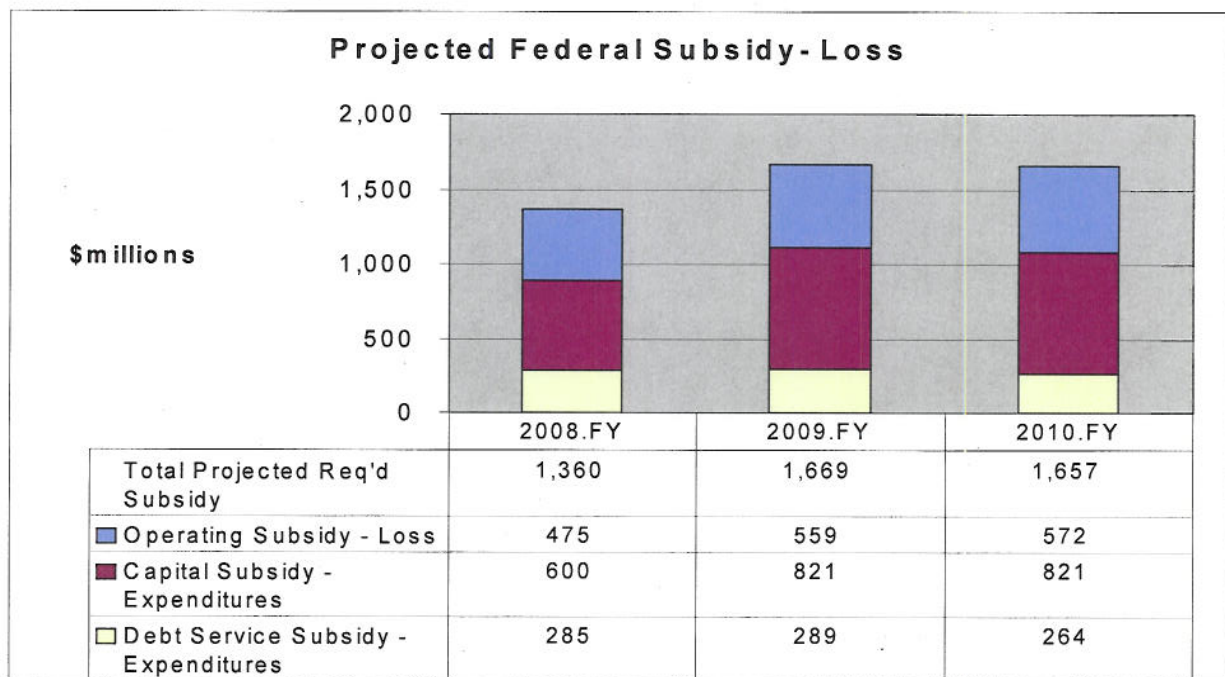
Carrier Ex. 12 (Campbell Demonstrative), at 6.

While Amtrak is making strides in its effort to dig out of the financial morass of 2001-2002, Amtrak is and will continue to be dependent on federal subsidies for the foreseeable future. Amtrak's financial statement for Fiscal Year 2007 shows a net operating loss of \$429 million – a figure that is on par with Amtrak's operating results since Fiscal Year 2002. *See id.* Amtrak projects an even greater operating loss over the three year term of the new agreement: the Fiscal Year 2009 operating loss is projected to be \$559 million; and the Fiscal Year 2010 operating loss is projected to be \$572 million. *See* Carrier Ex. 12 (Campbell Demonstrative), at 14. This uncontested record evidence demonstrates that Amtrak cannot afford the Unions' retroactive pay demand.

B. There Is No Realistic Prospect of a Special Appropriation to Pay for the Unions' Retroactive Pay Demand.

Most importantly, there is no realistic expectation that Congress and the Administration will increase Amtrak's operating subsidy to cover the additional costs of the Unions' retroactive pay demand. At hearing, Amtrak presented evidence of its

projected federal subsidies. While the Fiscal Year 2008 projections were based on the current appropriations process, the Fiscal Year 2009 and Fiscal Year 2010 projections were based on the authorizations in Senate Bill S.294. As experience has taught, and as Amtrak's witnesses testified, appropriations predictably fall short of authorizations. See Transcript Vol. I (Dec. 11, 2007) at 130, 246. Furthermore, despite the projected rise in operating losses shown below, Amtrak's operating subsidies are expected to decline over time. See *id.* at 131.



Carrier Ex. 12 (Campbell Demonstrative), at 14.

As this brief was being prepared, Congress was completing work on the Omnibus Budget Reconciliation Act. Under what currently appears to be the final numbers for Fiscal Year 2008, Amtrak will receive the following subsidies:

Total	\$1,325 million
Operating	\$475 million
Capital	\$565 million

Debt service \$285 million

H.R. Rep. No. 110-497, at 559-61 (2007) (a copy of the relevant section of the omnibus bill is attached as Exhibit 1).

The bottom line is that for Fiscal Year 2008, there will be no extra \$150 million dollar appropriation from Congress to pay for the Unions' retroactive pay demand.

Consequently, Amtrak has no ability to pay for the Unions' demand for retroactive pay.

The leadership of the BLET recognized this reality when they entered into their tentative agreement with Amtrak in 2007. As General Chairman Mark Kenny stated in his July 30, 2007 letter to all active BLET members on Amtrak: "Pure and simple, the fact of the matter is that payment of back pay would require a special Congressional appropriation to cover the cost." *See* Carrier Ex. 3 (Statement of Joseph M. Bress), at Ex. 19, at 4. General Chairman Kenny also recognized, however, that such a special appropriation – totaling between \$150 million and \$200 million – could not be obtained, even from a labor-friendly Democratic Congress:

[E]ven though our continuing lobbying efforts of the past several years on Capitol Hill have made all the key leaders of Congress fully aware of the Amtrak contract stalemate; including the issue of retroactive pay, the Amtrak appropriations bill proposed in the House just last month, made no provision whatsoever for back pay for the Fiscal Year beginning this October. And ... the White House is already making it well known that it intends to veto the Amtrak bill when it arrives.

Id.

The Unions in this proceeding implicitly acknowledged this reality when they refused to embrace Member Jaffe's suggestion of possibly making a recommendation of full retroactive pay conditional on appropriate funding from Congress and the Administration. *See* Transcript Vol. II (December 12, 2007), at 177-78.

Instead, the Unions' economic witness articulated the irresponsible position that this PEB should recommend full retroactive pay, and then leave it up to Congress and the Administration to decide whether to fund it or put Amtrak out of business. As Thomas R. Roth testified:

If nevertheless in the wisdom of the Congress it refuses to finance the public good that we recognize ourselves and that has been historically identified and paid for, then we believe that Amtrak should go out of business.

Id. at 296. In response to a question from Member Javits, Mr. Roth confirmed that the Unions' position, "which was not hyperbole," is that if the government does not fund full retroactive pay, Amtrak "doesn't deserve to be in business." *See id.* at 302-03.³

C. The Legal Standard for Inability to Pay

Amtrak's inability to pay argument is consistent with PEB and interest arbitration decisions recognizing "ability to pay" as a defense to a union bargaining demand. The ability to pay defense is widely recognized in PEBs and in interest arbitration.

Numerous PEBs have weighed an employer's ability to pay in their recommendations. For instance, SEPTA's ability to pay weighed heavily in the recommendations of PEB No. 196. Many of the unions before that PEB sought to apply their Conrail agreements to SEPTA. PEB No. 196 rejected this position, based in part on SEPTA's financial condition and dependence on government subsidies:

The Board must point out here again that SEPTA has no tax base and must go hat-in-hand to governments to seek additional funding at a time in history when such funding is least likely to be doled out by the financially hard-pressed

³ In closing argument, the Unions' counsel, Roland Wilder, backed away from an assertion that the Unions wish to put Amtrak out of business. *See Transcript Vol. III (Dec. 13, 2007) at 197.* Nonetheless, the Unions clearly are engaged in brinksmanship on the issue of retroactive pay.

governments . . . It follows, therefore, that should the Conrail agreements be adopted for SEPTA, the financial burden which would ensue would sound the death knell for commuter services in metropolitan Philadelphia. The result would be a hollow victory for the labor organizations -- wages and work rules that they desire, but no jobs for their members and therefore no benefits to anyone -- labor, management, or the public.

Report of PEB No. 196, at 14.

Similarly, the recommendations of PEB No. 192, which involved the Long Island Rail Road, accounted for "the Carrier's financial condition". Report of PEB No. 192, at

13. The Board found:

There is no doubt that any settlement will worsen the dismal financial position of the LIRR and the MTA. Even without any improvement in the collective bargaining agreements on the LIRR, the MTA will need to raise \$200 million in subsidies in 1980 to meet its expenses.

Id. at 12.

In the freight industry, the financial problems of the Southern Pacific in 1991 were recognized as a possible basis for divergence from the freight railroad pattern and the recommendations of PEB No. 219, including on the issues of general wage increases and retroactive pay. *See* Report of the Special Board (102-29), at 5-6 (copy attached as Exhibit 2). The parties ultimately resolved their dispute through an agreement that provided for no lump sum payments, signing bonus, or general wage increases. *See* Memorandum of Agreement between Southern Pacific Transportation Co. and BMW, dated October 1, 1991 (copy attached as Exhibit 3).

Even PEB No. 236, which in the airline industry recommended retroactive pay based on an internal pattern and the carrier's specific commitment to pay it, nonetheless

considered the carrier's ability to pay and the financial impact of the 2001 terrorist attacks in addressing the means of payment:

The consequences of September 11, 2001 on the Company's cash flow may legitimately be considered, however, when addressing the manner in which retro pay will be provided to the IAM. To burden the Company on the DOS with the impact of paying that significant retro pay in cash would result in unreasonable risks of accelerating the Company's financial woes to the point of possibly triggering the need to restructure in the near future.

Report of PEB No. 236, at 19.⁴

The ability to pay standard is also applied in interest arbitration, particularly in the public sector. Ability-to-pay issues rarely arise in the private sector because interest arbitration is far less common among private sector employers. However, even in cases of private sector interest arbitration, courts have chastised arbitrators for failing to consider an employer's ability to pay in awarding wage increases and retroactive pay. *See, e.g., Daily News, L.P. v. Mail Deliverers' Union*, 1999 WL 1095613, at *7 (S.D.N.Y. Dec. 2, 1999) (overturning award of retroactive wage increases when there was clear evidence that paying the increases would put the employer in dire financial straits: "The court holds that the Arbitrator manifestly disregarded evidence of the most critical nature, raising the issue of whether enforcement of the awarded wage increases would threaten to bankrupt and close the News because of their 'enormity' ... and the inability of the News to pay these increases.").

Public employers rely heavily on the ability-to-pay argument when they cannot afford to fund wage increases, particularly in times of fiscal crisis. In such cases,

⁴ In fact, United Airlines filed a bankruptcy petition later that year. *See UAL Corp., Bankruptcy Petition No. 02-48191* (Bankr. N.D. Ill. filed Dec. 9, 2002).

arbitrators have found that a public employer's ability to pay outweighs a comparability analysis of similarly situated employees. In *Detroit School Board*, 93 Lab. Arb. (BNA) 648 (Gould, 1989), the arbitration panel examined evidence of pressure on the school board to meet increased standards while having no control over its budget. The panel explained that, as such, an ability-to-pay analysis was more appropriate than a comparative-salary analysis in the determination of wage increases. "The ability to pay is not dispositive," the panel wrote, "but an important consideration for us." *Id.* at 656. "There is no alternative to this reality." *Id.*

In *City of Buffalo v. Rinaldo*, 41 NY.2d 764 (N.Y. 1977), the court upheld an interest arbitration decision limiting an award based on inability-to-pay due to the city's financial problems. The court held that the panel's award was not irrational, even where the employees did not earn wages comparable to those in neighboring municipalities. The court determined that the panel had the right to balance the ability of the city to pay against the interests of the employees. "It can be argued that a finding of the city's ability to pay based on expectations of increased revenue sharing, or even the availability of grants under federal public works programs, might be so speculative as to approach irrationality." *Id.* at 768.

There are many other examples of public sector bargaining disputes in which ability to pay was a major consideration in the interest arbitration award. *See, e.g., Metro Area Express*, 103 Lab. Arb. Rep. (BNA) 1, 4 (Baroni, 1994) ("The 'ability to pay' criterion is, perhaps, the chief countervailing determinant or standard customarily applied in interest arbitration cases, especially in public sector cases. Consideration must always be given to the effect of wage and benefit concessions on the solvency of the employer,

and, in the case of the public employer, upon the loss of a public service to the community.” (citing Elkouri & Elkouri, *How Arbitration Works* (4th Edition), Chapters 3 and 18)); *Waterloo School District*, 99 Lab. Arb. Rep. (BNA) 385, 389 (Dilts, 1992)) (“[T]he financial evidence is clear and convincing that the Union’s final offer is less reasonable than the Employer’s final offer in the light of the District’s current financial position and the potential for further adverse effects on the District’s programs . . . It is the current financial situation faced by the District that must be given the greatest weight by this Arbitrator.”).

Particularly given the publicly-funded, public service that Amtrak provides, the Board should treat Amtrak like a public sector employer and carefully consider the corporation’s inability to pay retroactive wage increases. Much like the public sector employers mentioned above, Amtrak provides a public service and is unable to operate without significant public funding. Amtrak has been dependent on the federal government for funds to meet its operating and capital needs since its creation. Therefore, like any government-funded organization, Amtrak and this Board should consider that Amtrak’s ability to pay limits the range of settlements it can entertain.

D. Summary

Amtrak respectfully submits that the Board should reject the Unions’ arguments to define away or convince the Board not to consider Amtrak’s ability to pay. Amtrak is under clear, public limitations on its funding that constrain its ability to agree to the Unions’ wage demands. Amtrak has moved substantially on prospective wages to meet the Unions’ demands for freight pay increases. By additionally demanding 100% retroactive pay from the date of the freight railroads’ July 1, 2002 wage increases, the Unions have overreached and made a demand that Amtrak simply cannot afford to meet.

The Board's appropriate role is not to issue ultimatums to the President or to Congress, as occurred with PEB No. 234. In 1997, that PEB's recommendations led to a settlement that Amtrak could not afford and ultimately contributed to Amtrak's financial crisis early in this bargaining round. This Board should decline to repeat this approach.

II. The Unions Have No Entitlement to Retroactive Pay.

Retroactive pay is not an entitlement, but a collectively-bargained term. As such, the Unions' retroactive pay demand is simply that, a bargaining demand. Similarly, Amtrak's position in this bargaining round that it would not pay retroactive pay also was simply that: a bargaining position. Amtrak believes this Board can and should address the retroactive pay issue by treating it as an expensive Union proposal, and should not become embroiled in claims of "entitlement." Amtrak offers this portion of the brief in order to clear away any misconception about the entitlement issue.

A. The Nature of Retroactive Pay

In Railway Labor Act collective bargaining agreements, the parties often agree to make wage increases retroactive. There are practical reasons for this. Railway Labor Act negotiations are often protracted, as a matter of history and culture. Retroactive pay is something of a bargaining "convention" – the parties agree explicitly or implicitly that any pay increases will be retroactive, because it is often in both parties' interest to remove time pressure from negotiations.

But that convention does not make retroactive pay an entitlement, either statutorily or contractually. Retroactive pay clearly is not mandated by the Railway Labor Act, which is silent on the issue. Nor is it here a bargained-for term of the Unions' collective bargaining agreements with Amtrak, unlike the agreements at issue in PEB No. 240. *See* Report of PEB No. 240, at 12-13. Indeed, the parties negotiated a different

contractual provision to deal with delays in the bargaining process: a COLA provision, which remains applicable during this status quo period.

Because there is no statutory or contractual entitlement to retroactive pay, the Unions' demand for retroactive pay must be judged according to the expectations and commitments – or lack thereof – that were made in this round of bargaining.

B. There Was No Reasonable Expectation of Retroactive Pay in This Round.

The Amtrak employees involved in this round of bargaining had no reasonable expectation of retroactive pay.

This is most obvious by comparing them to the United Airlines employees in PEB No. 236. In PEB No. 236, United's mechanical employees did have a reasonable expectation that they would receive retroactive pay in that round of bargaining because United Airlines had "*repeatedly promised* during the course of negotiations and in the 1997 Agreement that any wage adjustment made in the successor Agreement would be retroactive for eligible employees to July 12, 2000." Report of PEB No. 236, at 19 (emphasis added). This is evidence of a bargaining convention – an express agreement during negotiations that pay increases would be made retroactive. Therefore, PEB No. 236 concluded that the delays in bargaining "provide no legitimate basis for ignoring the *expectations* of the IAM-represented employees" and that it would be "unfair to rescind that *commitment*" by United Airlines to provide retroactive pay. *Id.* (emphasis added).

The opposite is true in this case – Amtrak made no promise or commitment to provide retroactive pay in this round of bargaining. To the contrary, Amtrak's former President, David Gunn, explicitly told the Unions in December 2002 that one of the conditions of an agreement to pay the freight railroads' prospective wage increases

(which became applicable in July 2002) was that Amtrak would not (and could not) agree to provide retroactive pay.⁵ This was an important condition because Amtrak, at the time of the December 2002 meeting, had experienced a financial crisis that had almost bankrupted the corporation earlier that year. Amtrak, in fact, had mortgaged its assets, including Penn Station, simply in order to survive and make payroll. *See* Transcript Vol. I (Dec. 11, 2007) at 104, 161, 227-28. Yet, in the midst of this crisis, Amtrak did not seek concessionary wage reductions from its employees, as Amtrak's competitors in the passenger airline industry were doing at that time. Instead, President Gunn outlined the parameters of a deal that would provide Amtrak employees with the same prospective wage increases that had been negotiated by the freight railroads, but without retroactive pay.

In claiming an entitlement to retroactive pay, the Unions are ignoring both the financial crisis that overshadowed most of this round (and that threatens to be repeated if Amtrak were to sign an agreement that it cannot afford), and the explicit statements of Amtrak's bargaining representatives from December 2002.

There was a cost justification for the December 2002 statement, and it remains valid today. Amtrak continues to lose hundreds of millions of dollars each year, and therefore is dependent on federal subsidies for its continued survival. Amtrak has committed to paying the generous prospective wage increases negotiated by the freight railroads, but must meet aggressive revenue targets in order to pay for those wage

⁵ Amtrak's former President and CEO made that statement in a meeting with the Unions at the AFL-CIO's Transportation Trades Department ("TTD") in December 2002. *See* Transcript Vol. I (Dec. 11, 2007) at 164-65. Although the Unions have accused Amtrak of "Boulwarism" that is hardly a strategy that any railroad employer – especially one with the financial fragility of Amtrak – would attempt to imitate or announce to such an audience.

increases. Furthermore, Amtrak must achieve cost savings in order to contain its projected operating losses over the term of the proposed agreement – operating losses that are expected to climb from \$475 million to \$572 million under Amtrak’s proposal. *See* Carrier Ex. 12 (Campbell Demonstrative), at 20. Among the cost containment measures that Amtrak must achieve in order to afford this deal are health care savings and productivity and work rule improvements. This too was clearly articulated by President Gunn in December 2002.

Because Amtrak placed these specific conditions on any agreement to pay the freight railroads’ prospective wage increases, the Unions cannot legitimately claim that the wage increases are a “loan” that now must be repaid in the form of retroactive pay. *See* Transcript Vol. III (Dec. 13, 2007) at 203. If the Unions wished to pursue a “loan” approach, that should have been negotiated in December 2002. The Unions were put on notice that they would not receive these wage increases retroactively if they delayed in making a deal. Unions covering 30% of Amtrak’s workforces, particularly the TCU and the ASWC, made deals based on the principles outlined by President Gunn in 2002. Indeed, the leadership of two of the Unions that are before this PEB – ATDA and ARASA MW – also made such deals, but failed to obtain membership ratification. *See* Carrier Ex. 3 (Statement of Joseph M. Bress), at Exs. 14 & 15.

The other Unions before this PEB, however, made a deliberate decision not to engage Amtrak on these terms, and to wait instead for a dramatic change in Amtrak’s political and financial fortunes. Whatever can be said about that decision in hindsight, it was a deliberate decision made by the Unions, knowing full well that a deal was available in 2003 on the same terms agreed to by the TCU, ASWC, and ARASA OBS.

In addition, as testified by Amtrak witnesses McHugh and Campbell, Amtrak is a federally subsidized entity that has no ability to set aside funds for a future payment of retroactive pay. As William Campbell, an experienced financial officer in the federal sector, testified: “unlike a typical commercial firm, we are unable to retain funds year over year.” *See* Transcript Vol. I (Dec. 11, 2007) at 223. “If we have too much cash on hand, it may jeopardize our following year’s operating subsidy.” *Id.* at 224. Amtrak’s finances are transparent. In failing to make deals, the Unions knew that there was no pot of money set aside by Amtrak to make retroactive payments.

Thus, it is untenable for the Unions to claim an unqualified entitlement to retroactive pay. If retroactive pay is an unqualified entitlement, as the Unions now claim, why did two of them enter into agreements in 2004 that did not include retroactive pay? The answer is that the leadership of the ATDA and ARASA MW wisely recognized that they must “take the bitter with the sweet” (to borrow the Unions’ turn of phrase from their opening argument). *See* Transcript Vol. I (Dec. 11, 2007) at 66. The Unions now, however, want to ignore the bitter (no retroactive pay) and take only the sweet (prospective increases following the freight pattern). That is the central flaw in their claim for retroactive pay – there is no entitlement to take only the sweet.

C. The Unions’ Proposal to Continue the Harris COLA Confirms That There Is No Entitlement to Retroactive Pay.

The only commitment that the parties have made concerning pay during this round of bargaining is their agreement to provide a cost-of-living-adjustment (“COLA”). In this round, the COLAs paid amounted to a pay increase of about nine percent. *See* Transcript Vol. I (Dec. 11, 2007) at 185. Although Amtrak has proposed to terminate the Harris COLA permanently in the new agreement (following the freight agreements) the

Unions have proposed to restart the Harris COLA once the new agreement becomes amendable in 2010. These COLA payments are a substitute, albeit a lesser substitute, for retroactive pay. Indeed, even under the Unions' calculations, COLA payments are deducted from the retroactive pay demand. *See* Transcript Vol. II (Dec. 12, 2007) at 213-15; Summary Statement of Thomas R. Roth, at Attachment 2.

The fact that the Unions are proposing to restart the Harris COLA payments during the next bargaining round confirms that retroactive pay is not an automatic entitlement. If it were an entitlement, the Harris COLA would be unnecessary. The Unions' articulated reason for continuing the COLA – contrary to the freight pattern they invoke – is that this round taught them the risk of delay. But such delay is something over which a bargaining party has control. If the Unions had sought a compromise settlement earlier on – as other Amtrak unions did – the retroactive pay issue would not have become a major obstacle to reaching a deal.

III. The Internal Amtrak Pattern on Retroactive Pay Should Be Followed.

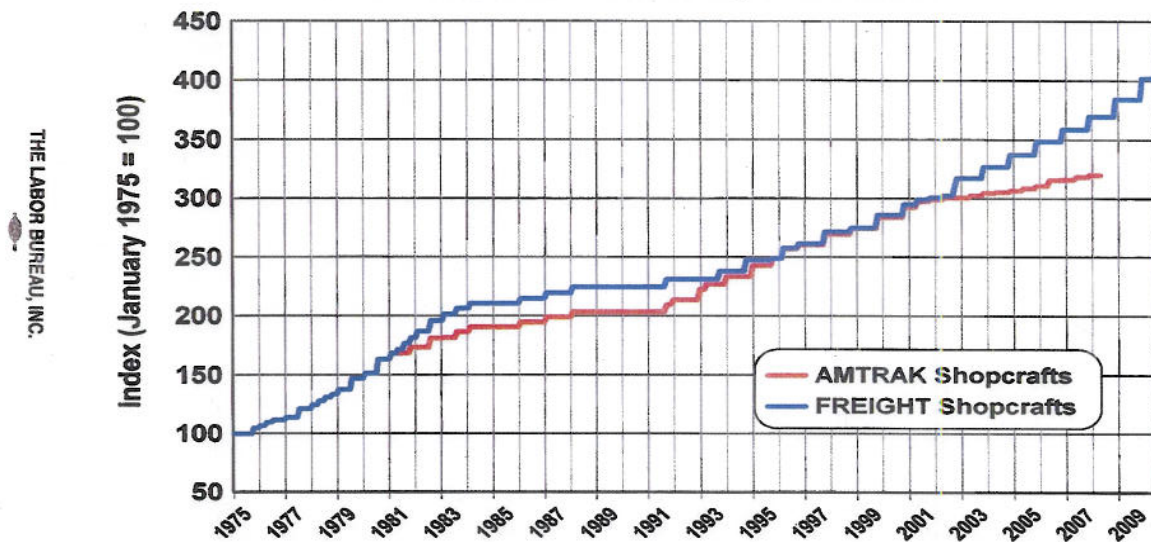
Much of this case has been articulated – by both sides – as related to patterns. While the Unions argue that the “freight pattern” carries with it retroactive pay, history is to the contrary. Further, the established internal pattern on Amtrak provides no retroactive pay.

A. The Freight Pattern Does Not Require Retroactive Pay on Amtrak.

The Unions' historical comparison of freight railroad wage rates and Amtrak wage rates does not support their claim for retroactive pay. As admitted in the testimony of Thomas R. Roth, the collectively bargained wage increases on Amtrak lagged behind the freight railroads by 12% from 1981 to 1993 – a period of about 12 years. *See*

Summary Statement of Thomas R. Roth, at 21-22 & Attachments 8, 10 & 12. The 12% lag is illustrated in the following graph prepared by Mr. Roth:

SHOPCRAFTS WAGE CHANGE FROM 1975 AMTRAK and Class I Freight Railroads



Note: Indexes are based on histories of wage changes for Amtrak and national freight railroads as applied to the same January 1975 rate.

Amtr Shopcrafts forward.gpw

However, employees did not receive retroactive pay for this 12-year period when the 12% “deferral” (Mr. Roth’s terminology) was restored in 1993. Mr. Roth attempts to justify this by arguing that Conrail (which also had the 12% deferral) was the pattern at that time, and the profitable Class I freight railroads were less relevant. *See* Transcript Vol. II (Dec. 12, 2007) at 230, 234-35. That justification is a hollow attempt to explain away the obvious fact that retroactive pay was not provided.

Therefore, even if Mr. Roth’s testimony is accepted for the proposition that Amtrak’s wage increases should follow the freight railroads, it does not follow that Amtrak employees are entitled to retroactive pay for any period in which their wage

increases have fallen behind the freights. To the contrary, history shows that Amtrak employees have not received retroactive pay for such periods – even one that lasted for 12 years.

B. The Internal Pattern on Amtrak Provides No Retroactive Pay.

In this bargaining round, Amtrak and other unions have established an internal bargaining pattern that does not call for retroactive pay. Amtrak's 2003 agreement with the TCU, covering approximately 3,600 clerks, started this internal pattern. *See* Carrier Ex. 3 (Statement of Joseph M. Bress), at Ex. 11. Then, the ASWC and ARASA OBS followed this pattern in their 2004 agreements with Amtrak, which included a \$400 signing bonus and no retroactive pay. *See id.* at Exs. 12 & 13. Later that year, ATDA and ARASA MW – *two of the Unions that are now before this PEB* – made tentative agreements that followed the internal pattern of no retroactive pay. *See id.* at Exs. 14 & 15. Amtrak's 2007 tentative agreement with BLET also followed the internal pattern of no retroactive pay. The BLET tentative agreement provided a \$4,500 signing bonus in lieu of retroactive pay, which was equivalent to about one-third of the Unions' retroactive pay demand. *See id.* at Ex. 17.

At the hearing, the Unions argued that these agreements are not sufficient to create a pattern because they cover only about 30% of Amtrak's workforce. *See* Transcript Vol. II (Dec. 12, 2007) at 164. This is inaccurate. These pattern agreements, including the tentative agreements, cover a total of 7,010 Amtrak employees – more than the 6,733 employees who are represented before this PEB. *See* Carrier Ex. 3 (Statement

of Joseph M. Bress), at Ex. 2.⁶ The smaller group of employees that are before this PEB should not be permitted to break a pattern that was established by a larger group of employees, especially when the leadership of two of the Unions that are before this PEB followed the pattern of no retroactive pay.

The Unions also have argued that tentative agreements cannot form the basis for a pattern, and challenged Amtrak to cite any example of a case in which a tentative agreement was found to set a pattern. Recently, PEB No. 240 recognized the pattern-setting significance of a tentative agreement. In PEB No. 240, the Coalition and Metro-North had outlined a tentative settlement, a “Term Sheet,” which was not presented to the membership for ratification. As the Board found, there was “strong rank and file opposition to the Term Sheet”. Report of PEB No. 240, at 9. Yet, the Board found that the Term Sheet was a “good faith effort to resolve the dispute,” and its report concluded that the Term Sheet “was deemed at the time to be the best compromise of their divergent demands that either side was able to attain in this round of collective bargaining.” *Id.* at 9 & 20. The report of PEB No. 240 continued: “The last-minute proposal of the Coalition, that surfaced for the first time in hearings before the Board, *is simply too far removed from the principles of pattern bargaining and the agreed upon objectives contained in the Term Sheet* to be recommended as a basis for overall settlement of the dispute.” *Id.* at 20 (emphasis added).

PEB No. 199, involving the Long Island Rail Road, also based its recommendations on unratified tentative agreements. The Board’s recommendations

⁶ This comparison counts the ATDA and the ARASA MW in both groups, since they were party to tentative agreements that followed the pattern of no retroactive pay and they are also now before this PEB.

simply stated: “The Board urges the parties to ratify all of the tentative agreements immediately, and to put them into effect.” Report of PEB No. 199, at 6. The Board further stated that “[r]eferences to a ‘pattern’ will encompass all of the agreements discussed above” including the tentative agreements. *Id.*

Congress has stepped in at other times to impose unratified tentative agreements on the parties. For instance, as noted in *International Bhd. of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D.C. Cir. 1972), Congress imposed a tentative agreement on the parties even though the agreement had failed ratification by the membership of one of the unions involved in the dispute. *Id.* at 1159.

Interest arbitrators as well use tentative agreements as indicative of a pattern. Recently, in a dispute between the United States Postal Service and the National Rural Letter Carriers’ Association, Arbitrator Herbert Fishgold informed the parties that “they might influence me to make marginal changes to the tentative agreement, but certainly not changes of the sort sought by each side in their initial presentations.” *Id.* at 6 (copy attached as Exhibit 4). Thus, Arbitrator Fishgold ruled that “there would be no locality-based pay system as urged by the Postal Service, and no significant pay increases to move rural carrier pay closer to city carrier pay as urged by the Association.” *Id.* “I also indicated that I would not be entertaining standards changes proposed by either party other than what was addressed in the tentative agreement.” *Id.*

These cases only reinforce common sense. Amtrak admits that unratified agreements should not be accorded the same weight as ratified agreements for pattern purposes. But that does not mean that tentative agreements are entitled to no weight; in some circumstances, they deserve considerable weight. They are evidence of what arm’s

length negotiations have produced in dealing with the issues presently before the parties. Accordingly, the BLET's 2007 tentative agreement is entitled to weight because it is a more objective indication of a possible resolution than any position either party might advocate. With respect to ATDA and ARASA MW, their prior tentative agreements should be given considerable weight because these Unions should not be permitted to escape their leadership's prior commitment to the terms of a fair settlement.

The Unions that are before this PEB cannot legitimately claim a greater right to retroactive pay than the unions that are not. It would be fundamentally unfair and destabilizing for the Unions that are before this PEB to receive more on the issue of retroactive pay than the unions that reached earlier agreements. It would be all the more unfair and destabilizing because the unions that reached earlier agreements, in addition to foregoing any claim to retroactive pay, agreed to significant work rule reform. Permitting the Unions that are before this PEB to receive more after holding out on both of the key issues in dispute (retroactive pay and work rule reform) would destroy the internal equities on Amtrak and would provide a serious disincentive to reaching early agreements in future rounds.

Internal equities were a major consideration in the recommendations of PEB No. 236, which included an award of retroactive pay to the unions in that dispute on United Airlines. PEB No. 236 wrote that:

Any concessions must be achieved through the action of all affected employee groups. Consideration of internal pay equity and shared benefits from the continued operation of the carrier demand that appropriate contributions be made on a fair basis from all groups.

Report of PEB No. 236, at 18. We agree with PEB No. 236 on the issue of internal equity, and therefore urge this Board to follow the internal Amtrak pattern on the issue of retroactive pay.

IV. Equitable Considerations Do Not Favor the Unions' Claim for Retroactive Pay.

Admittedly, an eight year bargaining round without new agreements does not speak well of the Railway Labor Act procedures, and perhaps, of the parties' bargaining positions. It is difficult for the parties, and perhaps for the Board, not to ascribe blame and to be influenced by this delay. But this issue should have no bearing on the Board's deliberations on the retroactive pay issue.

Through its case, Amtrak has attempted to explain the external forces – federal funding, conditions in the intercity passenger business post-9/11, and the freight bargaining rounds – that influenced the positions of Amtrak and the Unions at the bargaining table and resulted in this protracted round. An explanation for this extended round will not be found merely by focusing on what occurred at the bargaining table.

Clearly, Amtrak stated early on, in December 2002, that it needed work rule reform and would not agree to provide retroactive pay. That position was based in Amtrak's financial position in 2002, the clear Congressional directives under the 1997 Act to achieve efficiencies and cost savings, *see* Carrier Ex. 2 (Statement of Joseph H. McHugh), at Ex. 3 (*see, e.g.*, Sec. 2(8)), and the express conditions of the Department of Transportation's 2002 loan to Amtrak. *See* Carrier Ex. 3 (Statement of Joseph M. Bress), at Ex. 7 (*see* ¶ 5). The Unions have characterized Amtrak's bargaining position, including the principle of no retroactive pay, as a "take it or leave it" position. The

reality is that it was an effort by Amtrak to find a way to provide its employees with the freight railroads' wage increases during a time of extraordinary financial distress.

Meanwhile, the Unions refuse to acknowledge their own failure to make a serious effort to bridge the divide over the past eight years. The Unions took an equally firm "take it or leave it" position – based on their preconceived commitment to follow freight patterns – that they wanted retroactive pay, and did not want to change any work rules.

As Amtrak's Vice President of Labor Relations, Joe Bress, explained:

[W]e presented our work rules. I personally presented them on a number of occasions.... [W]e went through them perhaps more than anyone wanted to hear us go through them, but the response was: You don't need it. We're not going to agree to it. Unless you do back pay, we're not going to talk about them.

There was no response in terms of countering, in terms of trying to ameliorate perhaps our position and say, can you do this instead of that. There was no response.

Transcript Vol. I (Dec. 11, 2007) at 210-11.

Except for the leadership of the ATDA and the ARASA MW, the Unions simply refused to temper their bargaining position in light of the difficult political and financial circumstances that confronted Amtrak for most of this round. Thus, by at least 2003 or 2004, both sides were firmly committed to bargaining positions that did not facilitate discussions, let alone settlement.

The National Mediation Board, which has plenary legal authority to control the timing of the mediation process, for whatever reasons, chose not to release the parties in 2003 or 2004. Perhaps the NMB believed that time would lead to a softening of positions, or perhaps the NMB was waiting for a change in external conditions, or

perhaps the NMB was forestalling a strike given Amtrak's fragile economic position.

Whatever the reason, the decision not to release was the NMB's decision.

A PEB hearing is not an "unfair labor practice" proceeding. It is an expedited process, which does not provide for cross-examination. The purpose of the process is to move the parties towards settlement, rather than to drive them farther apart through finger pointing. For nearly eight years, neither party chose to pursue refusal to bargain claims against the other.⁷ Thus, whatever "equities" there might be in this case involving the parties' respective responsibility for delay, such equities have not been developed through a full adjudication and are not an appropriate consideration given this Board's statutory role of making forward-looking recommendations for settlement. Indeed, it is clear that the Board lacks a full record to make an informed judgment on this issue. *See* Transcript Vol. III (Dec. 13, 2007) at 160-62. The Board's recommendations should not be based on a hindsight view of how the parties conducted their bargaining in this round.

Instead, the Board's recommendation on the issue of retroactive pay should be based on the issues of internal and external patterns, ability to pay, and the likelihood of moving the parties towards settlement. Moreover, the recommendations of this PEB should be based on the political and financial reality that exists today. That reality is one of declining operating subsidies, meaning fewer available dollars to pay for the Unions' demand for retroactive pay. That reality also involves operating losses that are expected

⁷ The only legal proceedings during this round were the 2003 litigation to prevent a one day "political strike" (*see* Transcript Vol. I (Dec. 11, 2007) at 166; *National R.R. Passenger Corp. v. Transport Workers Union*, 373 F.3d 121 (D.C. Cir. 2004)) and the recent Amtrak complaint challenging the ratification procedures contained in the PRLBC agreement (*see National R.R. Passenger Corp. v. Brotherhood of Maintenance of Way Employees, et al.*, Civil Action No. 1:07-cv-01888 (HHK) (D.D.C. filed Oct. 19, 2007)), which has been stayed pending these proceedings. Neither litigation challenged the parties' substantive positions at the bargaining table.

to grow from \$475 million to \$572 million over the next three years, largely due to the almost \$700 million cost of the prospective wage increases under Amtrak's proposal. *See* Carrier Ex. 4 (Statement of William H. Campbell), at Ex. 18 & Carrier Ex. 12 (Campbell Demonstrative), at 20. That reality further requires that Amtrak meet aggressive revenue targets in order to avoid even greater operating losses. Meeting these aggressive revenue targets requires substantial improvements in productivity and efficiencies generated by work rule reform.

Again, these realities all can be distilled down to the one essential point of this brief: Amtrak does not have the ability to pay for the Unions' demand for retroactive pay. No matter how this Board balances the equities of this dispute, to the extent the Board determines that to be a productive exercise, Amtrak's ability to pay will remain the same. To ignore this fundamental point is to risk repeating the mistake of PEB No. 234 and, ultimately, to put the future of Amtrak and its 18,500 employees at risk.

CONCLUSION

Amtrak is committed to moving forward in 2008 with a continuing sense of commitment to providing reliable and efficient rail service. Part of that commitment is repairing the schism between management and labor resulting from this prolonged bargaining round through giving its employees substantial increases toward freight rates. Without these workers, Amtrak cannot continue to build and sustain this fundamental public service of intercity passenger rail which has been threatened repeatedly over the last thirty-seven years. Amtrak recognizes its employees' skill and value and, for that reason, is prepared to fund generous prospective pay increases of more than 30%.

There are limits to Amtrak's ability to pay, however. In order to maintain Amtrak as a viable public service provider over the long term, Amtrak must stay within those financial limits. As Amtrak's CEO, Alex Kummant, testified, his fiduciary duty to the corporation precludes him from signing an agreement that Amtrak cannot afford.

For these reasons, Amtrak urges the Board not to recommend the Unions' demand for retroactive pay.

Respectfully submitted,



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Dated: December 20, 2007

INDEX OF EXHIBITS

1. H.R. Rep. No. 110-497 (2007) (relevant provisions only)
2. Report of the Special Board (102-29) (Southern Pacific)
3. Memorandum of Agreement between Southern Pacific Transportation Co. and BMWE, dated October 1, 1991
4. Interest Arbitration Award in the matter of United States Postal Service and the National Rural Letter Carriers' Association, dated December 3, 2007