

PATTERN BARGAINING AND THE ABILITY TO PAY: WHAT DO EMERGENCY
BOARDS SAY?
at
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I am going to address three areas: "ability to pay," "pattern bargaining" and what
Emergency Boards have said about these.

"Ability to Pay"

The first, ability to pay, following up on what Jerry Hannas has said about sources of
commuter railroad funding, I will take a look at how emergency boards treat the issue of
resources that commuters and passenger railroads have available to them to pay for
collective bargaining agreement costs. This is generally called the "ability to pay" issue.
Typically, a carrier will raise the issue of its financial constraints both at the bargaining
table and before emergency boards. The organizations generally reject the employer's
argument on three bases: 1). Government funding changes and thus sources of
funding are uncertain at best; 2) The carrier should pay for the value of the labor it
receives regardless of funding; 3) Since commuter railroads only cover approximately
50 percent of their costs at the fare box anyhow, any absolute budgetary ceiling is a
fiction. Thus the ability to pay is a moving target depending on the level of public

funding, as well as fare rates, passenger volume, other costs, future plans and other factors.

The organizations also argue that there is a legitimate warranted level of pay and benefits in the labor market that they are entitled to regardless of the particular financial status of the commuter railroad. The unions make this argument based on the level of pay and benefits of other comparable workers, such as those at the other commuter railroads, the freight railroads and sometimes the comparable workers at other non-railroad employers. The argument runs as follows: an electrician coming to your house has a given rate of pay, say \$50.00 or \$75.00 an hour, regardless of the ability of the particular homeowner to pay that rate. The services officered have a certain value, and the Organizations have a right to obtain that value in compensation. If the electrical worker at the Long Island Railroad were able to sell his skills for more elsewhere he would be able to but since he's locked in to the job at the Long Island Railroad he is entitled to that rate there.

Pattern Bargaining

Let us turn to pattern bargaining for a moment. What are the Organizations and managements positions on pattern bargaining. Here are their differences in the form of a debate:

Management would say: Pattern bargaining is necessary because where you have 13 unions representing 25 class and different contracts for each one which union will agree to be the first to agree if they know that subsequent crafts could unions will achieve better agreements. It's politically untenable.

Union might respond: How about using a "me too" clause. That way a first union will come in, secure that subsequent unions will not undermine it by obtaining better agreements.

Management would in turn respond: An "agreement" is not an agreement if it can change depending on what happens with other groups. The Carrier cannot control what happens in the future, for instance if an emergency board decides in favor of a higher rate of pay. Also we would insist that the union may be subject to a lower settlement with subsequent unions if one is reached, if it agrees to a "me too" provision. Unions just won't do that.

Union response: The management's logic leads to a situation where it picks off the weakest union to make the first agreement thus establishing a so called "pattern", which it will not vary from in subsequent negotiations with other unions. That puts unions at a disadvantage. Also it is not good faith bargaining because if the pattern is the Holy Grail, then in subsequent negotiations between the carrier and a union there is no real

bargaining in good faith because pay, benefits and rules are all previously set in the first pattern. It makes trade-offs irrelevant.

Management: There still is bargaining, but within a pattern. There may be deviations. For instance there may be work rule changes in each agreement but which particular work rule changes differs between unions. Also there may be differences in benefits and even compensation. The concern of the carrier is cost equality as between unions and that is a broad definition of “pattern”. An exact replication of agreements is not the kind of pattern we are talking about.

Union: Cost equality is still a pre-condition for negotiations. It’s a “take it or leave it.”

Management: But that is the same as in any negotiations. Management only agrees to labor costs it can live with. Management makes this determination in light of its revenues, funding sources, operating and capital cost, etc.

Union: Management’s inflexibility in this is why some unions have turned to coalition bargaining. This is so management cannot pick off the weakest union and establish a pattern. If there is to be a “pattern,” crammed down the throats of all unions, it is better that it be the best agreement possible. Thus the strength of all unions negotiating together has led to coalition bargaining.

Management: Coalition bargaining is contrary to the RLA's Act and NMB Certification of each separate craft or class to represent at its members. The RLA requires the carrier to bargain with each union as a representative of that particular craft or class.

Agreement terms depend on the particular craft or class. Thus we deprive employees of their rightful representation at the bargaining table if they are not represented by their own union's representative. Representatives of other unions may have different interests than that particular craft or class, yet represent them at the table in coalition bargaining.

In addition it is impractical. Having a large group of unions coordinate on contracts means that virtually no individual concern of a union will be heard either on management side or the union side. It will lead to innocuous negotiation dealing with only the biggest issues and no others.

Union: You can have a big group negotiating on pattern issues that are not different as between unions like compensation and benefits but have subgroups negotiating over rules reflecting the issues of the different crafts or classes.

Management: It's still too unwieldy. Also there are differences in terms of how contracts handle even compensation and benefits. There is no existing generic contract. All these negotiations start from different existing agreements, which are not uniform as between crafts or classes. Coalition bargaining will lead to greater difficulties because of jealousies and resentments because of the base from which each craft or class is

negotiating. It will lead to more instability. Also, we are concerned about the ability of unions to “opt out” of the coalition. If they can opt out at any time does that mean we have to restart negotiations with that group? Also how does ratification happen – with all unions voting together or with each individually? If some ratify and some don’t what happens then?

Union: We can work out those problems. National freight handling does this

Management: Multi- employer bargaining exists at the freight not multi-union bargaining. The employer side in the freights guarantees that each carrier will pay since they are obliged to agree to what is resolved in collective bargaining. But with the commuter carriers each governmental entity that funds the commuter is not beholden or obliged to pay what is agreed to. Also there is not history of multi-union bargaining. In any case, do we want the situation that we have on the freights where very few issues are decided at all at the national level? In any case they have local negotiations for those local issues.

Union: Coalition bargaining has been successful at other carriers. The Organizations have the right to choose who represents them at the bargaining table without interference from management. Coalition bargaining is not precluded by the RLA. It should remain an option.

Emergency Boards on “Ability to Pay” and Pattern Bargaining:

With that brief introduction, I will turn to what have emergency boards for commuter and passenger railroads have said about the Carrier's "ability to pay" argument and about pattern bargaining?

In general, as to ability to pay, emergency boards have recognized that the resources of a Carrier may or may not allow it to pay for collective bargaining agreement increases. Emergency Boards recognize that publically owned and operated passenger and commuter railroads are different than entities in the private sector where the ability to pay is more subject to calculation and hard analysis. This is because only 50 percent of their revenues come from the fare box. A private sector entity would be obviously out of business in such a scenario. The difference is that the government subsidy is unpredictable and subject of political wrangling. EBs have recognized this lack of certainty.

With regard to patterns, EBs have recognized their central importance in bargaining between the parties and thus as a basis of its recommendations. But the question nearly always is: what pattern should be used?

Let's look at some of the emergency boards in the commuter and passenger railroad area in the last 15 years or so.

PEB No. 231 between SEPTA (Southeastern Pennsylvania Transportation Authority) and the BLE (Brotherhood of Locomotive Engineers) was a first emergency board and issued its recommendations on August 16, 1996. It should be noted, that there had not been any strikes at SEPTA since its 1983 108-day strike. The 1983 bargaining round took place after the transfer of commuter operations from Conrail to SEPTA and led to the 108-day strike following Emergency Board 196's report.

First there was a controversy in that board over the issue of whether issues that had not arisen at the table could be a part of the emergency board recommendations. Emergency Board 231 in SEPTA BLE was confronted with the same issue because the organizations sought a six-year agreement since negotiations had taken so long already that a three year agreement, noted in the Section 6 notices, would have been virtually retroactive. (The members of the EB 231 were Robert Peterson, Gladys Gershenfeld and Scott Buchheit). SEPTA also made a six year wage proposal. But the issue was the authority of the Board. The emergency board said it did have authority to issue a six-year recommendation for wages, broadly interpreting its authority.

One major issue before EB 231 was in 1996 between SEPTA and BLE, was a certification allowance for engineers. The BLE was looking for \$12.00 per day. SEPTA proposed no certification allowance. On compensation, SEPTA argued that there was a

historic practice of following the TWU represented bus drivers. SEPTA argued that any argument for an external parity with other commuter carriers was irrelevant. SEPTA cited Emergency Board 196's finding that wages should be based on "local conditions."

The Board recommended that wages be increased in accordance with the internal pattern of settlement based on the TWU bus agreement and that were followed by all the unions on SEPTA's property during this round of negotiations.

With regard to retroactivity the Board noted that in previous rounds SEPTA did not provide retroactivity. The Board did not recommend retroactivity.

However the Board did recommend a certification allowance in the amount of \$4.00 for each day of the engineers' service. The Board noted that after a change in the law in 1988 which subjected engineers to fines of up to \$20,000.00 personally for willful violations of regulations. The Board also noted that other properties had provided for certification allowances including \$15.00 per day at the Southern Pacific and Grand Trunk Railroads, \$4.00 a day at a short-line railroad, \$5.00 per day at New Jersey Transit and \$10.00 per day at Long Island Railroad and Metro North Commuter Railroad.

Thus the emergency board looked at external patterns with regard to the certification allowance and looked at internal patterns with regard to wages. The Board explained each based on independent rationales. Since there was no prior pattern on the property as to the certification allowance, the external pattern was used, by

necessity for the certification allowance. But when it came to compensation, the EB maintained the precedent on the property of applying the internal, local, pattern.

There was no settlement as a result of the first emergency board on SEPTA in 1996 so a second emergency board, No. 232, was created and issued its report in February 1997. The members of this emergency board were Arnold Zack, Roberta Golick, and Shyam Das. EB 232 did not have to select the final offer of either party because there was an agreement reached. The parties went back into negotiations at the urging of the second emergency board, under the auspices of NMB Mediator Jack Bavis, and reached an agreement. Extensions of the emergency board were granted to afford the parties time to ratify the agreement, which they did.

Emergency Board 237 was created between SEPTA and UTU in 2004. The members of the emergency board were Richard Kasher as chairman, Robert Peterson and David Twomey, members. In that case the UTU accepted the NMB's proffer of arbitration and SEPTA advised the NMB that it would "conditionally accept" the NMB's proffer of arbitration. The NMB subsequently requested that SEPTA provide an "unconditional acceptance or rejection of the proffer and stated that if " accepted" it would be without any limitation on the arbitrator's authority. SEPTA failed to give an unconditional response to the proffer and the NMB interpreted that to be a rejection of the proffer. Just before self-help, SEPTA requested that the President establish an emergency board.

Agreements on the SEPTA property had been reached by all other organizations. SEPTA's position was that there was a pattern on the property that should be accepted by the Board and applied to the UTU. UTU proposed the longevity pay that the engineers had been receiving, asserting that that provision would provide parity in accord with the historic relationship between the UTU and the BLE. Thus the issue of what was the "pattern" was squarely on the table.

On the question of parity as between UTU and BLE, the Board said it recognized the historical wage and working relationship between the engineers and conductors as operating employees having "intertwining duties." The Board recognized that the certification allowance given to the engineers was unique. However in light of the historic relationship between the two operating groups, the Board recommended a 92-cent-per-hour longevity pay payment to the conductors which brought them close to the engineers' \$1.00-per-hour longevity pay. The Board also noted that the UTU had a "me too" letter from the Carrier as part of its 2000 negotiations and that that committed the Carrier to continue the wage relationship between UTU and BLE. The Board noted that the "internal pattern" that was endorsed by Emergency Board 196 was very important and it noted that its recommendation for parity between the operating crafts is only a minor deviation from that internal pattern, justified by the historic relationship between the two crafts.

The Board also refused to give retroactive payments base on SEPTA's refusal to provide retroactivity in the past and its argument that the absence of

retroactivity encourages resolution of disputes, and discourages unions from "holding out for more favorable treatment."

Thus, local precedent was accepted as to retroactivity.

After Emergency Board 237's report failed to bring about an agreement, a second emergency board was created in the fall of 2004 composed of Robert O. Harris as chairman, Donna McLean and Peter Tredick as members. Again, after an organizational meeting between the parties, SEPTA, UTU and the Board, the parties returned to the bargaining table and reached an agreement which was subsequently ratified. Extensions were given to allow for ratification which went through at an 8-to-1 margin.

Emergency Board 240 between Metro North Railroad and several of its unions was created by the President in late 2006 and the report provided in 2007. This was a first emergency board under Section 9(a). In this round of bargaining, there were to "coalitions" of unions which bargained with Metro North. One coalition involved ACRE representing 6 crafts or classes which had successfully reached an agreement earlier. The other coalition represented 12 of the crafts and classes on MN out of a total of 17 crafts or classes. The 12 crafts or classes represented 3,500 of the total Metro North complement of 5,840 employees.

The coalition declined the NMB proffer of arbitration and Metro North accepted the proffer of arbitration. Since both parties must agree to a proffer of arbitration to establish an arbitration board no board was established. Instead, Metro North asked that the President establish an emergency board which was established. The Board received an extension of time to issue its report in this case.

The coalition asked for parity with the Long Island Railroad wage rates. Long Island Railroad wage rates, depending on the union, averaged about 15 percent higher than the wage rates of Metro North. With regard to the question of pay the emergency board noted that the budgetary constraints of SEPTA and said "the Board understands these financial constraints" such as the unpredictability of appropriations and subsidies from the state, counties and federal government.

There was a controversy as to whether the coalition had reached an agreement with the Carrier which mirrored the ACRE agreement. The coalition said that when it brought the "term sheet" to the attention of its members it was opposed as a basis for settlement and thus it never went out for ratification. The coalition urged that that term sheet be disregarded by the emergency board.

The emergency board noted that "collective bargaining agreements between Metro North and the 17 bargaining units represented by 9 unions that represent its employees in various crafts and classes of service have been based over the years on the principle of pattern bargaining and settlements. In accordance with this principle, changes in established rates of pay are made so that the timing and amount of wage

adjustments are alike over the term of agreement for each separate bargaining unit, craft or class.

On this basis, the emergency board rejected the coalition's request for wage parity with employees of Long Island Railroad. It also cited Emergency Board 226 which previously dealt with the issue of parity. Emergency Board 226 noted that although Long Island Railroad wages were higher, and Metro North employees performed comparable work that Long Island Railroad's rates were nonetheless not necessarily the "appropriate standard for Metro North pay levels."

It noted that comparisons elsewhere also make sense, namely the other MTA agencies such as the New York City Transit Authority as well as New Jersey Transit, SEPTA, Conrail and Amtrak. PEB 226 noted that in all four instances wage levels were considerably lower than at Metro North, even though Long Island Railroad wages were higher.

In conclusion, EB 226 stated that "in sum, the Board recognizes the perceptions of inequality and unfairness set forth by the Organizations but does not necessarily accept the view that LIRR wage rates are the 'right' ones. In addition there is no reason not to include other railroads, such as those mentioned above, in making comparisons." On this basis the Board recommended that the pattern of wage increases proposed by Metro North be adopted. In doing so, the Board noted that there was a historic pattern of wage adjustments between all the separate MTA entities, New York City Transit

Authority, Long Island Railroad and Metro North. It essentially adapted that pattern which had been agreed to by ACRE.

Again and again we see EBs applying the pattern which had been historically used by both parties and which it concluded was the strongest pattern on the property.

The Emergency Board 240 between MN and its unions in 2007 also iterated this principle of "pattern bargaining." It said "Finally, in the interests of promoting stability of labor relations that attach to pattern bargaining, and to avoid the destabilizing effect of whipsaw or leapfrog bargaining the Board urges the parties to continue to adhere to traditional principles of pattern bargaining relative to increases in rates of pay and other cost-of-agreement issues." Emergency Board 240 found that the Long Island pattern which had not been adapted at Metro North in its history was not an appropriate pattern. Rather, it found that the other MTA properties were the proper pattern, as they had been applied in the past. This is an example of the traditional emergency board approach, which look at the bargaining history of the parties and adopt it for the dispute that is before them.

The final emergency board on the commuter side that I want to talk about is Emergency Board No. 241, which was the second emergency board in the Metro North case but involves only one of the unions in the coalition, the Teamsters. That emergency board issued its decision in May 2007 and was composed of Peter Tredick, Chairman, Ira Jaffe and Annette Sandberg as members. After the rest of the unions in

the coalition made agreements with the Carrier following the first emergency board report, the IBT withdrew and was the only union before the second emergency board. That second emergency board took final offers from the parties. The Carrier's offer was the same agreement as the one that the remainder of the coalition members had already reached and ratified.

The IBT position before the second "final offer" emergency board was to again seek parity with Long Island Railroad. That was again rejected by the second emergency board following the same finding as the first. The second board essentially repeated the arguments of the first emergency board in rejecting the parity argument. In addition to the historically applied MTA pattern argument, it relied on the fact that the rest of the coalition had agreed to terms similar to the MTA pattern.

Because this is a conference for passenger as well as for commuter railroads, I think it's appropriate to discuss Emergency Board 242 created by President Obama on December 1, 2007. The Board issued a 62-page decision between Amtrak and its labor organizations on December 30, 2007. The members of that emergency board were Peter Tredick, chairman, Ira Jaffe, Joshua Javits (yours truly), Annette Sandberg, and Helen Witt. There were two coalitions bargaining on behalf of the rail union. The first -- the Passenger Rail Labor Bargaining Coalition representing BMWEBRS, ATDA and NCFO -- was created in August 2007. In May 2006, a previous coalition had formed that included IAM, IBEW and JCC. Both coalitions as well as the individual unions that were not in coalitions presented their arguments before the Board.

The history of the dispute was that in late 1999 the unions had filed Section 6 notices. Between 2000 and April 2006 the national unions had filed for mediation with the board. Most of the unions were in mediation for about seven years before the emergency board was created.

There was an agreement between TCU and Amtrak in the 2003/2004 period and there was also an agreement that was reached with BLE, which was defeated in ratification. The issues in dispute involved pay, benefits and work rules. However, with regard to pay, the parties were in virtual agreement as to the percentage of pay increases that were appropriate and they both tracked the freight rail increases extremely closely. Historically Amtrak and freight rail rates had moved in lockstep as to pay rates.

The key difference in the compensation area was the issues of retroactivity. There, Amtrak believed because of its financial deficit (particularly in the 2004/2007 period) that it should not pay full retroactive pay. Amtrak also said Congress did not appropriate for it. The Organizations countered that the retroactive pay is fair and equitable. They predicted that Congress would support a Board recommendation for full retroactive pay and that, in any case, predicting Congressional action is beyond the scope of board authority.

The emergency board cited Emergency Board 234 which analyzed a request by BMW for retroactive pay on Amtrak in light of the Amtrak position that congress would not appropriate such funds. Board 234 concluded as follows

“Our obligation is to recommend a fair and equitable package of compensation for maintenance of way employees, and then leave to the funding authorities the issue of whether or not they wish to fund that package. We cannot, in good conscious, shirk that responsibility to the parties and to the collective bargaining process by surrendering to what might be characterized as political expediency.”

Board 234 issued its report to the President in 1997. Emergency Board 242 noted that language and said that it must consider traditional factors relevant in collective bargaining and

“cannot tailor those recommendations to a prediction of congressional action.

We are cognizant of the political and financial constraints facing Amtrak and have recommended adoption of contractual terms that are reflective, in part, of that reality. But we agree with PEB 234 that congress should be informed of the “true cost” of Amtrak’s service. It is then for congress to determine whether to provide the funding necessary for passenger rail service.” The 242 emergency board report went on to discuss “the ability to pay.”

“Ability to pay” is one criterion traditionally considered in collective bargaining and interest arbitrations when attempting to determine appropriate compensation and working conditions. We have given that criterion its appropriate weight. We can neither assume that Congress will decline to appropriate the funds needed to adequately fund a settlement that may result based upon the recommendations set forth in this Report, nor may we ignore Amtrak’s present economic situation

based upon a contrary assumption that whatever is recommended or may be agreed to will be fully funded. Our task, is as noted in prior PEB Reports, must be to recommend an appropriate solution to the issues in dispute, based upon the record developed in this matter, and in light of all the relevant factors.

Appropriate consideration must be given to historical patterns and relationships, both within the carrier and within the industry, to the fiscal realities facing Amtrak, to Amtrak's dependence upon congressional operating and capital subsidies, to the labor market generally and competitive pressures on Amtrak, to the increases in productivity by the employees in this proceeding, and to the equities surrounding the lengthy period of time that has elapsed since the last agreements and last general wage increases (during which time real wages have fallen for employees in this case, both comparative to traditional comparator groups and in inflation-adjusted dollars)."

As noted previously the Organization's wage proposals track the freight agreements. Amtrak proposal also tracks the freight rail increases. The most significant area in dispute was on retroactivity. The organization sought retroactivity in an amount which would fully compensate employees for what their rates of pay would have been under successive freight agreements. This would have amounted to approximately \$13,000.00. Amtrak by contrast offered no retroactivity but rather a lump-sum bonus of \$4,500.00. Both parties would apply the employee contributions towards health insurance in the amount of 15 percent negotiated as part of the freight agreements and do it retroactively, for the whole prior 8 years.

In the context of retroactivity, the board then examined what it called “pattern considerations”. The board noted that Amtrak had been unprofitable for its entire existence and relied on a federal operating subsidy to continue operations. It noted that despite the fact that Amtrak’s passenger rail operations were unprofitable and the freight had been profitable that freight agreements have served over the years as the historic pattern referenced for the establishment of wages, benefits and working conditions at Amtrak. It noted that pattern was used both by the parties and by presidential emergency boards that have written reports in connection with Amtrak and its unions and treated all freight agreements as the pattern against which fair and reasonable agreements may be measured.

The board noted the importance of pattern bargaining in the railroad industry and gave five reasons for it. First, it noted that absent changed circumstances which would be sufficient to break a pattern that patterns provide an objective indicator of the terms that would result from good faith bargaining between the parties in the same industry with similar working conditions and similar jobs at the same points in time. Second it noted that pattern bargaining promotes stability at a carrier and in the industry by “utilizing referents that the parties themselves used in prior round of bargaining”. Third pattern bargaining provide benchmarks enhancing the likelihood of voluntary settlements. Fourth, the absence of a pattern would lead to much more uncertain and chaotic negotiations, “encouraging groups that one carrier to attempt to outdo others, creating an undesirable and disruptive cycle.” It noted that this was critical in terms of the economic repercussions of labor disruptions and the stability as the goal was even

more important in the railroad industry as reflected in the law. Fifth and finally it noted that patterns assist in the maintenance of well-recognized parity relationships among the wages paid to employees in different crafts or classes or at different carriers.

The emergency board noted that both carriers and organizations generally embrace these concepts but that it is their application where positions may diverge. In the instant case, the organizations sought retroactivity for the entire period from 1999 to 2008. The carrier points to its differences in operations from the freights and sought to have the “internal pattern” of several agreements reached in 2003 and 2004 establish the internal pattern. Those agreements did not provide for retroactivity, but Amtrak nonetheless offered a lump sum retroactive payment.

In addition there were two tentative agreements reached one for ATDA in 2004 and one for the BLE in 2007 which were both defeated in ratification. The BLE agreement was defeated by 70 percent. The board rejected these patterns. It found that the historic pattern is that of the freight agreements. It noted that both parties themselves mirrored the freight pattern and that in fact both the Organizations and the Carrier tracked the freight benefits, including health contributions of the freight pattern. The board noted that the training, skills, and necessary certifications were all parallel between Amtrak and the freight carriers. The board rejected Amtrak’s observations that the freights are very profitable enterprises, and not dependent on governmental subsidies and provide no passenger railroad transport as a basis for rejecting the freight agreements as the appropriate pattern. The board noted that those differences have been true since the inception of Amtrak and despite those differences both the carriers

and the organizations and prior emergency boards have relied on the freight patterns. The board further noted that if it were to find that the freight patterns were inapplicable the result would not necessarily be that there is no pattern but rather one that the emergency board would be compelled to look towards other potential patterns such as those on the commuter rail and urban transit industries in which wages and benefits are significantly higher.

Importantly, however the board noted that “the finding of pattern does not mean that deviations may not be recommended or bargained when appropriate. That brings the board to the central issues in this dispute whether the particular deviation sought by Amtrak (and in a very few respect by the organizations) relative to wage rates, retroactive pay, health and other welfare benefits, and work rules should be recommended notwithstanding their deviation from the freight pattern. The board noted that the caveat that it’s finding that the freight agreements provide the most appropriate pattern is based on historical considerations and note that this “should not be construed as opining on whether in the future some pattern other than the Freight Agreement might be fair and appropriate.” The board noted that a deviation from the freight pattern places a burden on those challenging it.

With regard to “ability to pay”, the board went on to state that “as it relates to “ability to pay” there was no showing that the general wage increase proposals of the organizations are so much more costly than the general wage increase proposals the carrier that they are beyond the ability of Amtrak to provide them under its present

funding even ignoring the trend of increasing ridership and passenger revenues...for reasons previously noted, the claim of an “internal pattern” that would trump the freight pattern relative to wages is unpersuasive in this case and cannot provide a basis for a recommendation that the parties depart from the freight pattern on the issue of general wages. With regard to the primary issues separating the parties, that of retroactive pay the board noted several issues including the fairness that is the lack of cost of living allowance for eight years, the lack of bargaining and delays attributed mostly to Amtrak as justifying full retroactivity. The board interestingly noted that if it did not provide retroactivity, that there would be more power given to patterns as kind of absolute power in that the organizations would be effectively forced to accept the precise pattern of the initial organization that agreed with the carrier regardless of what agreement was reached with that first carrier. By providing retroactivity it allowed parties to continue bargaining with other organizations and thus allows for some deviations from a pattern if shown to be warranted.

The board noted especially the fact that Amtrak seemed to be primarily responsible for inordinately prolonging the negotiations. It noted that as early as 2002, Amtrak announced that one of its “principles” was that it would not agree to retroactive pay of any agreement. The board said “that unilateral statement, however does not mean that a recommendation that rewards the carrier and punishes employees for failure to have earlier reached a settlement is fair or equitable or appropriate in this case. While this is not a “refusal to bargain” proceeding, and the procedures applicable to presentation of evidence to PEDs are not fully analogous to adversarial proceedings

attempting to gauge whether a particular pattern of behavior constitute bad faith bargaining, the evidence paints a fairly clear picture that places much greater responsibility on Amtrak for the failure to ink a deal over the prolonged period since December 31, 1999 than on the organizations.

The evidence indicates that, 1) Amtrak resisted applications of the obvious pay pattern without reasons given for that position; 2) Amtrak insisted throughout the limited negotiations that the Organizations agree to far reaching work rules changes that are unprecedented in the industry and would seriously undermine their standing and the security of their members in continued employment; and Amtrak never proceed past general proposals to allow virtually unlimited contracting out, obliteration of craft or class lines, changes in work schedule, and the like, and when asked for justification of these positions and/or cost analysis, declined to provide that information; 3) the pattern over the years in the industry including the internal so-called pattern Amtrak reached with TCU and the other unions and without significant work rule changes; it was inconceivable that the Organizations to this dispute could ever agree to the revisions of work rules demanded by Amtrak with Amtrak declined to discuss in detail in bargaining.” The board went on to say that without complete capitulation in several areas in which capitulation could not be reasonably expected there wouldn’t be agreement. Based on this, and the fact that providing retroactivity was consistent with industry patterns over the years, the board found that retroactivity was fair and equitable and appropriate based on the employees’ lost wages and

inability to obtain a successor agreement over an unprecedented eight-year period that the employees worked without a new agreement. The Board noted that a recommendation of full retroactivity will result in Amtrak's having had the benefit of an interest free "loan" of the pay that would of granted on the basis of the freight or other applicable pattern.

With regard to the "ability to pay" defense, the board noted that even the organizations were amenable to negotiating the timing of retroactive payments. On that basis the Board spread out the estimated \$62 million in retroactive pay into two periods 40 percent of retroactivity to be paid in FY 2008 and the remaining 60 percent a year later in FY 2009. Thus the board recognized Amtrak's ability to pay concerns and left appropriate time for retroactivity to be adequately funded from whatever source: Congress, the fair box, or other sources. The board recommended that no interest be added to those payments. As noted previously, Amtrak and the organizations adopted the 15 percent employee contributions to healthcare even though Amtrak and the freights have different healthcare plans. In accord with Nick Zumas' arbitration decision in 1990 Amtrak created its own program but it must generally reflect the cost and benefits of the freight healthcare program.

Amtrak in addition asked for a \$50.00 monthly premium contribution from retirees that were not part of the freight pattern. In this regard, the board noted, "We recognize that a pattern is not inviolate. Deviations may be made by the bargaining parties

themselves and by interest arbitrators and PEBs, where shown to be warranted. No such showing was made in this case.

With regard to work rules the board rejected Amtrak's extreme demands. It noted that first some of the work rules proposals are also made by the freights and were abandoned in bargaining. Second it noted that none of the proposals were shown to have been subject of intensive bargaining with the effect of organizations and that after almost eight years virtually no detailed discussion or showings were made on the need for the work rule changes and nor were trade-offs or quid pro quos discussed. Third, it noted that the work rule proposals go to the very core of craft and class job security concerns. Fourth, it noted that there was no compelling operational need for any of the proposed work rule changes demonstrated. Fifth, it noted that a recommendation of an emergency board ought to reflect mutually acceptable basis for agreement that would have resulted from good faith, arms length collective bargaining. Finally, it noted that any one of those concerns would have led the board to recommend against adoption of Amtrak's proposed work rule changes but together they require the board to recommend against adoption of the proposed work rule changes.

The Amtrak EB noted: although internal patterns are often the strongest pattern used by emergency boards as witnessed by the Metro North and SEPTA cases that where there is an even stronger pattern shown here, in the case of Amtrak and the freights, over a 30-year period deviating very little, that that stronger pattern will be applied. On the other hand, the internal pattern of Amtrak was weak, rejected by two

unions in ratification and only held by a minority of employees and also the issue of retroactivity was essentially a new one and influenced heavily by the issue of good-faith bargaining.

Conclusions:

Patterns

Thus, EBs look for the strongest, historically used pattern on a property. At SEPTA, that was the TWU bus drivers. At MN, that was the MTA pattern, and not parity with the LIRR. As between BLE and UTU on SEPTA, that pattern relationship is even stronger and thus trumps the usual internal SEPTA pattern. At Amtrak it was the freight pattern.

The reason that the strongest pattern is adopted is that it is predictable, acceptable and promotes stability. Neutrals try to mimic in their recommendations where bargaining would have led the parties if they had been successful in negotiations. The pull of the strongest pattern is that end point, the most likely outcome of negotiations and thus the recommendation most likely to form the basis of an agreement by the parties.

With regard to the ability to pay, neutrals tip their hats to it, but are not controlled by it. Governmental funding is too unpredictable as is financial prognostication. Patterns are the more reliable guide.

On the issue of ability to pay, Emergency Board 242 came down clearly on the side of Emergency Boards 222 and 234, which held that appropriate fair and warranted issues of compensation would be decided on their merits alone without being influenced by the vicissitudes of congressional funding. In a sense, the Board rejected the carrier's insistence that the cart was Amtrak and the horse was Congress, and instead said that appropriate wages should be recommended and congress could either fund them or not at its discretion. Nonetheless, the Amtrak Board did show deference to congressional funding by allocating retroactive payments over a period of two fiscal years, one of which was in the future, allowing congress to take action if it so chose.