

# COPY

## DISSENT TO PORTIONS OF THE AWARD IN AMTRAK - COALITION OF RAIL BROTHERHOODS LABOR PROTECTION PROVISION ARBITRATION

By Joshua M. Javits, Partisan Neutral

Based upon the primary objective of the Award in this matter, "finding an LPP package which will help Amtrak realize its goal of [operating] self-sufficiency while at the same time providing employees with a reasonable level of job protection", I concur with the portions of the Award that recognize and facilitate the operational imperatives Amtrak faces in achieving operational self-sufficiency by the end of FY 2002 and setting reasonable levels of benefits. However, I must dissent from those portions of Section V (Transaction Triggers) and Section VI (Scope of LPP Benefits) that constrain Amtrak's ability to act consistent with its Congressional mandate, that award excessively lengthy periods of labor protection when triggering events occur, that award benefit levels in excess of the Coalition's proposal and that require Amtrak to undertake additional isolated negotiations and possibly additional briefing to protect it from serious financial implications of funding and service decisions which are outside of its control.

1. **State, Regional and Local Agreements and Projects Should be Exempt from LPP Coverage.**

A growing portion of Amtrak's inter-city rail passenger service is dependent on financial assistance from the states, as well as regional and local entities. This assistance is expressly authorized by the Rail Passenger Service Act and is indispensable to Amtrak's capacity to continue the operation of routes, trains or service on portions of Amtrak's inter-city system. This segment of Amtrak's work, performed by Amtrak employees represented by the Coalition, fundamentally contrasts with the service performed by freight railroads. Amtrak's continued ability to do the work and to provide these jobs is effectively outside its control.

# COPY

In the increasing number of situations where inter-city rail passenger service is supported by the states or other government entities, Amtrak has been requiring these entities to cover (or nearly cover) the operating cost of the service. In these situations, political decisions may be made to withdraw the support. Amtrak must then discontinue the service as well as the jobs that are associated with it. This situation is analogous to a "force majeure." The loss of employment or displacement is caused by reasons beyond Amtrak's control. Indeed, former C-2 (and Shopcraft Rule 11) did not envision that Amtrak would be responsible for labor protection when employees were adversely affected by events or decisions outside of Amtrak's control. Thus, under the former protection scheme, labor protection benefits were only available where Amtrak itself "contemplated" the transaction.

Historically, labor protective benefits have been used as a quid pro quo for restructurings that permit a railroad to improve its profitability. This has been true since the Depression-era consolidations that were associated with the Washington Job Protection Agreement of 1936. In situations involving discontinued state or governmental assistance, Amtrak suffers a setback--it does not achieve a benefit. Thus, there is no basis to soften the impact on affected employees through the imposition of LPPs. Adding LPPs only compounds the economic blow of the loss of state or governmental assistance. When service is discontinued or jobs lost because of decisions by third parties that are beyond Amtrak's control, LPPs are inappropriate. In addition, the prospect of LPPs will make it more difficult for Amtrak to develop this growing segment of its business since the LPPs will create an added cost that must be built into the contract or service-support agreement.

A period of negotiations for the parties to negotiate over this issue distorts the process called for by Congress and the parties, delays implementation and leaves the parties with

# COPY

truncated and partial subject-matter negotiations making it extremely unlikely to reach agreement.

## 2. The Maximum Duration of LPP Benefits Should be 24 Months.

The reasons stated for the award of LPP benefits for a maximum duration of 60 months are not supported by the record. First, Amtrak did not "anticipate[] that its LPP costs would continue to be essentially what they have always been." On the contrary, Amtrak's CFO testified that unless Amtrak can reduce costs and/or increase revenues to achieve a \$60 million improvement to the bottom line, it cannot achieve operational self-sufficiency by the end of FY 2002. Amtrak proposed changes to former C-2 protection that would reduce its LPP costs below the historical average annual cost of \$1.5 million. Second, although Amtrak's witnesses testified that its current plan is to expand, rather than contract, its route structure, they also emphasized the preliminary status of the market-based network analysis and the need for flexibility throughout the remainder of the strategic business plan cycle. It was precisely because the former C-2 undermined Amtrak's ability to run its operations in a business-like fashion that Congress altered the statutory labor protection scheme. Finally, any speculation concerning the number and cost of triggering events is just that -- speculation. Only experience will determine whether the imposition of up to 5 years of LPP coverage will be "troublesome" as Amtrak works to achieve operational self-sufficiency.

The Award places Coalition members at a markedly higher level of protection than the vast majority of American workers. Fewer than 4% of the 418 private companies, Coopers & Lybrand surveyed in 1997 offered severance payments for 24 months to nonexempt employees and no employer outside the rail industry offered severance payments for more than 24 months. A 1995 study of 400 labor contracts conducted by the Bureau of National Affairs

# COPY

revealed that only 39% provided any form of severance payments and of that percentage, 44% provided 10 weeks or less of severance. There is simply no justification for providing up to 5 years of severance payments to Amtrak employees who are displaced or dismissed as a result of triggering events.

### 3. The Level of Dismissal Benefits Should Not Exceed the Proposals of Both Parties.

The Award provides dismissal benefits that exceed even the levels proposed by the Coalition. The compensation factor in the formula proposed by the Coalition would be set at 60%. Unaccountably, the Award raises the compensation factor to 100%. The net effect is to significantly increase the level of benefits to the affected employees and the cost burden to Amtrak whenever there is a triggering event. The following chart highlights those instances where the Award enhances benefits beyond those proposed by the Coalition.

Service	Coalition Proposal	Arbitrator's Award	Increased Benefit
2 years	60% pay for 6 months	100% pay for 6 months	+2.4 months of pay
5 years	60% pay for 18 months	100% pay for 12 months	+1.2 months of pay
20+ years	60% pay for 60 months	100% pay for 48 months	+12 months of pay
25+ years	60% pay for 60 months	100% pay for 60 months	+ 24 months of pay

Simply extending the minimum years of service for increased benefits will not significantly lessen Amtrak's economic costs because more than 40% of the employees covered by C-2 and Shopcraft Rule 11 have more than 20 years of service. Additionally, in many instances their point or craft seniority will not permit them to bump to other jobs. The Award, as structured, provides significantly greater benefits than the Coalition ever bargained for in

# COPY

negotiations or sought in the arbitration. It imposes costs that are inconsistent with the acknowledged goal of achieving operating self-sufficiency.

4. **The Trigger for LPP Benefits Should Be Complete Discontinuance of Service on an Inter-City Passenger Route.**

Under the former Rail Passenger Service Act, the LPP coverage trigger for discontinuance of inter-city passenger rail services was set at "less than three times per week." There was no reason at that time, and there is no reason today, to find that reduction of service from 7 times per week to 3 times per week is any less significant to an employee than reduction from 3 times per week to 2 times per week. Yet, employees in the former situation would not be covered while employees in the latter situation could receive up to five years of benefits. Amtrak must have the maximum flexibility to adjust the frequency of inter-city rail passenger service, short of complete discontinuance, without incurring labor protection costs. The absence of LPP payments for partial service discontinuance will not strip Coalition members of the protection of the seniority provisions of the various collective bargaining agreements currently in effect. However the current trigger will constrain Amtrak's ability to plan a route system that meets the needs and demands of its customers without incurring costs that defeat the business decisions driven by the market-based network analysis.