

PUBLIC LAW BOARD NO. 7196

PARTIES) **AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, TCU**
TO)
DISPUTE) **NATIONAL RAILROAD PASSENGER CORPORATION**

STATEMENT OF CLAIM

1. The Carrier violated Rules 1, 2, 12, as well as other Rules of the Agreement when on June 15, 2006, Amtrak announced the appointment of twenty two [22] applicants to the Manager Service Quality positions at various locations to perform the work of ARASA Supervisor positions.
2. Carrier shall now be required to re-bulletin in the Manager Service Quality positions as ARASA positions and return the disputed work to positions under the ARASA Agreement.
3. Carrier shall also be required to pay the 22 senior available ARASA Supervisors the difference in the rate of pay between their current rate of pay and the rate of the Manager Service Quality positions until the positions are re-bulletined as ARASA Agreement covered positions and the work is returned to positions under the ARASA Agreement.

System Docket No.: ARASA-OBS-387-C

OPINION OF BOARD

On February 22, 2006, the Carrier posted the following non-Agreement position for Manager Service Quality ("MSQ", "Customer Service Manager", "CSM" or "MSQ/CSM"):¹

* * *

The projected locations of the position are: Boston, New York, Washington DC, Miami, Atlanta, Los Angeles, Oakland, Seattle, New Orleans and Chicago, however, these locations are subject to change depending on the service needs.

¹ The job posting refers to the posted position as "Manager Service Quality". Organization Exh. 8. The Carrier also refers to the position as "Customer Service Manager". Carrier Submission at 3; Carrier Exhs. I, L. Both references and their abbreviations ("MSQ/CSM") will be used in this award.

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Summary of Duties:

Responsible to ensure that the services delivered to customers on trains and in stations meets the standards established by Amtrak. Will observe service delivery and provide coaching and redirection to on-train and station employees as necessary to assure service standards are met. Responsible to: deliver recurrent training to employees as required by the annual department training plan; develop travel schedules for station observations and train riding programs to observe service and coach/redirect employees relative to compliance with the published service standards and other appropriate policies/procedures. Provide redirection, coaching and counseling when observed performance does not meet the standards. Assess, evaluate, and troubleshoot potential problems enroute and in stations and provide leadership in feedback in their resolution.

Education:

Must have a high school education or equivalent. Prefer Bachelors degree in Transportation, Business Management or related field or equivalent work experience.

Work Experience:

Must have substantial experience and passenger/customer service or equivalent. Knowledge of revenue and accounting procedures. Proven excellent leadership and motivational skills. Prefer extensive supervisory experience. Knowledge of the Amtrak system, policies, procedures and service standards for stations and on-train employees as well as training development and delivery experience preferred.

Other Requirements:

Demonstrated proficiency in computer skills and Microsoft Office applications. Documented record of follow-through with employee behavior performance problems. Demonstrated conflict resolution skills. Required to lift and position training materials, audiovisual equipment, etc., when assigned as recurrent training resource; demonstrated excellent prior work performance, including attendance.

Communication and Interpersonal Skills:

Must have excellent oral and written communication skills.

Supervisory Responsibilities:

25 to 50 on-train and/or station personnel on a direct and/or indirect basis.

By memo dated June 15, 2006, the Carrier announced the selection of 22 individuals to the MSQ/CSM positions, further stating:²

* * *

In their new role, each of these managers will be primarily focused on improving the consistency and quality of service that our customers experience both on the train and in stations as well. Their responsibilities include:

- Implementing an entirely new system of customer service measurement, which will give Amtrak (for the first time) detailed and timely information on every aspect of the on-train service experience.
- Evaluating the service performance levels for all employees that work directly with our customers.
- Recognizing service excellence among our many exceptional employees working in customer service and transportation department.
- When necessary, addressing employee performance problems.

² Organization Exh. 1.

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- Identifying ways in which food service revenue can be increased, for both dining and lounge cars.
- Conversing on a regular basis with our customers, and soliciting their feedback and knowledge, to help us determine where we are being successful and where we need to seek improvement.
- Supporting service changes as they occur on any of the long-distance routes.
- Actively pursuing opportunities and recommendations from everyone on how to improve the quality of service for our customers.

According to the Organization, over 100 ARASA positions have been discontinued over the five year period prior to 2006 and there are approximately 65 furloughed ARASA Supervisors nationwide as a result of discontinued jobs.³

This claim was filed by the Organization with the contention that the Carrier's establishment of the non-Agreement MSQ/CSM positions violated Rules 1, 2, and 12 of the Agreement and that the MSQ/CSM positions performed the work of abolished ARASA Supervisor positions.

A. The Rules Of The Agreement

The relevant rules of the Agreement provide:⁴

RULE 1 - SCOPE

The rules contained herein constitute in their entirety an Agreement between the National Railroad Passenger Corporation and the American Railway and Airway Supervisors Association, governing rules and working conditions of employees, hereinafter referred to as Supervisors, and will supersede all previous practices. The term "Supervisor" as used in this Agreement refers only to positions covered within the Scope Rule, as follows:

On-Board Service Inspector - (Formerly known as Passenger Service Agent, Traveling Inspector, Supervisor On-Board Service, and other similar titles.)

Supervisor, On-Board Operations - (Formally known as Supervisor Dining and Lounge Cars, Ramp Supervisor, Train and Yard Supervisor, Supervisor Key Control, and other similar titles.)

Supervisor Crew Base-Supervisor, Planning and Scheduling - (Formerly known as Supervisor On-Board Service, and other similar titles.)

Chief, On-Board Services

Product Line Supervisor

³ Organization Submission at 3; Organization Exh. 2 at 2.

⁴ Carrier Exh. J at 7-11.

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Work not traditionally associated with the above classifications may be required of employees qualified to perform such work. This rule recognizes that a certain ebb and flow of on-board services work has existed and will continue to exist and nothing in this agreement grants employees covered by this agreement the right to all on-train work to the exclusion of employees of other crafts who are assigned to perform duties on the train. The application of the change in this rule will not result in the furlough of employees covered by this agreement. It is the purpose of this rule to promote a concept of team work on-board the trains that will provide quality service to passengers.

* * *

RULE 2 - SENIORITY

* * *

(b) Supervisors' positions shall be filled by the appointment of the best qualified individual, based on ability, merit, fitness and seniority.

* * *

(e) When forces are increased, laid off or demoted Supervisors will, subject to the provisions of Rule 2(b), be first restored to Supervisors' positions.

* * *

RULE 12 - CHANGE OF TITLES

Established positions will not be discontinued and new ones created under a different title covering work of similar character and responsibility for the purpose of reducing the rate of pay or evading the application of these Rules.

B. Jurisdiction Of This Board

The Carrier initially argues that this Board lacks jurisdiction in that "... this claim falls outside the scope of ... [the] Agreement" because the dispute is a representation issue to be handled by the National Mediation Board and that because this is a representation dispute, this Board lacks remedial authority.⁵ We disagree with the Carrier's arguments that this Board lacks jurisdiction.

The Carrier's argument is one of substantive arbitrability — *i.e.*, that the dispute in this case does not fall under the terms of the grievance and arbitra-

⁵ Carrier Submission at 8-10.

tion provisions of the Agreement.⁶ With respect to the Carrier's arbitrability argument, "... it has long been held that disputes arising under Collective Bar-

⁶ The Organization argues that the Carrier's jurisdictional/arbitrability arguments are new arguments not previously raised in the handling of the claim and this Board therefore should not consider the argument. We disagree with the Organization's position.

This Board does not have the authority to confer jurisdiction upon itself where no jurisdiction exists. Therefore, assertions that a claim is not substantively arbitrable can be raised at any time. See *Third Division Award 37760* where the substantive arbitrability argument was raised for the first time with the filing of the carrier's dissent to a related award (*Third Division Award 37227*) and the Third Division [with this neutral member sitting with the Board] determined in *Third Division Award 37760* that the carrier's substantive arbitrability argument nevertheless had to be addressed [emphasis in original]:

First, in this case (and even though it was not raised on the property in the handling of the dispute between the parties as the matter was progressed to this Board), for the first time, the Carrier now raises its jurisdictional argument to the Board. Indeed, in the Dissent to *Third Division Award 37227* and the related cases, the Carrier Members conceded that "... the participants did not raise this threshold jurisdictional issue" The Carrier's failure to raise its jurisdictional argument on the property prevented the parties from having the opportunity to make their record and arguments for the Board's consideration. Further, the Carrier's failure to raise that argument on the property prevented the parties from considering the strength or weakness of their positions on the issue as a catalyst for potential settlement of the dispute by the parties. Even more significant is that the Carrier's jurisdictional argument was not previously raised before the Board in the presentation of the prior cases over the long period of time these disputes have existed. The advocates before the Board in the cases in which Awards issued on October 27, 2004, therefore, did not even have the opportunity to address the Carrier's jurisdictional argument. Finally, the Carrier came to the Board with these cases not as the Respondent, but rather as the Petitioner and now belatedly asserts that the Board lacks jurisdiction to decide them.

Thus, at first look and as far as this case is concerned, the Carrier's argument that the Board lacks jurisdiction is "new argument" and should not be considered. See *Third Division Award 29909*:

... Thus, it is new argument which, under our Rules, cannot be considered. This Board has long subscribed to the premise that matters that have not been dealt with on the property cannot be advanced for the first time before this Board"

However, notwithstanding the Carrier's failure to raise the jurisdictional argument on the property or before the Board in the past and our inclination to not even consider the Carrier's argument because it is new argument coupled with basic principles of estoppel, we are nevertheless obligated to now consider the Carrier's jurisdictional argument. See *Third Division Award 29909, supra*, concerning new argument:

... However, an exception to this general proposition is in place. And that exception concerns challenges to jurisdiction. Jurisdictional challenges, as opposed to procedural challenges, may be raised at any time. A failure to raise jurisdictional challenges on the property does not foreclose their consideration after the matter is placed before the Board. In this regard see *Third Division Award 27575*, wherein the Board stated:

The Organization's contention that the jurisdictional issue cannot be considered because it is new argument raised for the first time before this Board is not well-founded. This Board has over the years held that jurisdictional issues can be raised at any time. See *Third Division Awards 8886, 9189, 10956, 16786, 19527, 20165 and 20832*.

[footnote continued]

gaining Agreements are presumptively arbitrable and should not be dismissed unless it can be said 'with positive assurance' that the dispute is not covered under the grievance/arbitration provisions of the parties' Collective Bargaining Agreement."⁷ The burden is therefore on the Carrier to rebut the presumption of arbitrability. The Carrier has not met that burden.

Rule 20(c) of the Agreement generally provides that "... [a] claim or grievance that is disallowed ... may be referred to a tribunal established under the

[continuation of footnote]

In short, if we do not have jurisdiction over the subject matter of a dispute (as opposed to a procedural jurisdictional argument) the Board cannot confer jurisdiction upon itself where no jurisdiction exists. If a substantive jurisdictional argument is raised - even if raised in this case after so many years and after so many Awards - we are still obligated to consider that argument

The Organization's argument that we should not consider the Carrier's substantive arbitrability argument must therefore be rejected.

⁷ See *Third Division Award 37760, supra*:

... [I]t has long been held that disputes arising under Collective Bargaining Agreements are presumptively arbitrable and should not be dismissed unless it can be said "with positive assurance" that the dispute is not covered under the grievance/arbitration provisions of the parties' Collective Bargaining Agreement. See *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960):

... [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

See also, *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 377 (1974) ("In the *Steelworkers* trilogy, this Court enunciated the now well-known presumption of arbitrability of labor disputes"); *Wright v. Universal Maritime Service Corp., et al.*, 525 U.S. 70, 77 (1998) (referring to "the presumption of arbitrability this Court has found") and (*id.* at 78):

In collective bargaining agreements, we have said, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Technologies Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) (quoting *Warrior & Gulf, supra* at 582-583).

Because claims are presumptively arbitrable, the burden is on the Carrier to rebut that presumption. Here, that means that the Carrier must show "with positive assurance" that the work assignment disputes at issue do not arise from the parties' Collective Bargaining Agreements which TCIU can bring to the Board for resolution.

provisions of the Railway Labor Act”⁸ The Organization contends that the establishment of the MSQ/CSM positions as non-Agreement positions violates Rules 1, 2 and 12 of the Agreement — *i.e.*, that the duties of the MSQ/CSM positions fall under scope of the Agreement as defined in Rule 1; that laid off ARASA Supervisors or other ARASA Supervisors covered by the Agreement should have been called to fill those positions as required by Rule 2(e); and that by establishing the MSQ/CSM positions and considering those positions not covered by the Agreement, the Carrier “[e]stablished positions will not be discontinued and new ones created under a different title covering work of similar character and responsibility for the purpose of reducing the rate of pay or evading the application of these Rules.”

Whether the Organization is correct in those assertions is not relevant to the arbitrability question. The merits of the Organization’s contentions are discussed *infra* at C(1). The question for discussion here is whether “... it can be said ‘with positive assurance’ that the dispute is not covered under the grievance/arbitration provisions of the parties’ Collective Bargaining Agreement.”⁹

Keeping in mind that “[d]oubts should be resolved in favor of coverage”, we cannot say with “positive assurance” that the Organization’s claim that Rules 1, 2(e) and 12 were violated by the Carrier’s establishment of the MSQ/CSM positions is a claim which is not covered by the grievance and arbitration provisions of the Agreement.¹⁰ We are required by this case to look closely at the duties of the MSQ/CSM positions and determine whether those jobs which were created were ones “... covering work of similar character and

⁸ Carrier Exh. J at 12.

⁹ *Third Division Award 37760, supra*, and cases cited therein. See note 7, *supra*.

¹⁰ See note 7, *supra*.

responsibility ..." as ARASA Supervisor jobs covered by the Agreement. From reading the Agreement alone, we cannot tell. Fact finding must be made for the determination. If there are any doubts, the dispute is arbitrable. We cannot say that no doubts exist. Nor can we say that the Carrier is correct that the dispute is not covered by the grievance and arbitration provisions of the Agreement. This dispute is therefore arbitrable and properly before this Board.

C. The Merits

1. The Organization's Showing

While in the arbitrability discussion *supra* at (B), the burden was on the Carrier to demonstrate that the dispute was not arbitrable, with respect to the merits, the burden is now on the Organization to show that the Carrier violated the Agreement. The Organization has met that burden.

The key to the merits of this case is Rule 12 ("[e]stablished positions will not be discontinued and new ones created under a different title covering work of similar character and responsibility for the purpose of reducing the rate of pay or evading the application of these Rules").

The Organization argues that "[t]he Carrier violated the Agreement ... when it awarded the disputed positions to other than ARASA covered employees despite the fact that the Manager Service Quality positions have the same duties as the abolished ARASA positions."¹¹ We agree that the MSQ/CSM positions constitute "... work of similar character and responsibility ..." as the ARASA Supervisor positions as specified in Rule 12. The record sufficiently supports that assertion.

¹¹ Organization Submission at 5.

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Looking at the February 22, 2006 posting's "Summary of Duties" for the MSQ/CSM positions along with other duties asserted which are performed by the MSQ/CSM (e.g., those set forth in the June 15, 2006 memo awarding the positions) and comparing those functions with various ARASA Supervisor bulletins provided by the Organization makes the point:¹²

MSQ/CSM Duties	Chief On-Board Services Albany	Chief OBS Advisory Positions Updated 4/12/01	Product Line Supv. Pacific Surfliner 5/8/01	Operations Supv. Los Angeles 10/7/02	Operations Supv. Cascades 10/25/02
Customer Service	X	X	X	X	X
Coaching Employees	X	X	X	X	X
Training/Retraining-Developing/Implementing			X	X	X
Employee Reviews/Audits			X	X	X
Schedule Station/Train Observations		X	X	X	X
Troubleshoot/Problem Solving	X		X	X	X
Knowledge of Systems/Policies	X	X	X	X	X
Computer Skills	X		X	X	X
Conflict Resolution Skills	X	X			
Oral/Written Communication Skills	X			X	X
Discipline				X	
Fill in for Manager			X	X	X

¹² Organization Exhs. 2, 8-19, 35. The Carrier did not specifically contest the contents of the Organization's summary charts. Comparison of those summary charts to the source documents (the ARASA Supervisor job descriptions — Organization Exhs. 10-19) supports the Organization's conclusions concerning the comparison of duties.

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MSQ/CSM Duties	Operations Supv. El Paso TX 10/15/02	Operations Supv. Wash. DC 6/4/04	Operations Supv. CA Zephyr 8/5/05	Operations Supv. Chi- cago Re- lief 6/28/05	Operations Supv. Shelby 7/26/05	Operations Supv. Crew Base 6/7/06
Customer Service	X	X	X	X	X	X
Coaching Employees	X	X	X	X		X
Training/Retraining- Developing/Implementing	X	X	X	X	X	X
Employee Re- views/Audits	X	X	X	X	X	X
Schedule Station/Train Observations	X		X		X	X
Troubleshoot/Problem Solving	X	X	X	X	X	X
Knowledge of Sys- tems/Policies	X	X	X	X	X	X
Computer Skills	X	X	X		X	X
Conflict Resolution Skills	X	X	X		X	X
Oral/Written Communi- cation Skills		X	X		X	
Discipline		X	X	X		
Fill in for Manager	X		X		X	X

While there are certainly individual differences depending upon location and job, when the various job descriptions of the ARASA Supervisors are examined and compared to the duties of the MSQ/CSM positions, the only conclusion that can be drawn is that they are for all purposes, "... work of similar character and responsibility ..." as provided in Rule 12. Given the abolishment of ARASA Supervisor jobs and the furloughs of ARASA Supervisors, by establishing the MSQ/CSM positions as non-Agreement positions, the Carrier violated Rule 12's requirement that "[e]stablished positions will not be discontinued and new ones created under a different title covering work of similar character and responsibility for the purpose of reducing the rate of pay or evading the application of these Rules."

The claim therefore has merit.

2. The Carrier's Arguments

The Carrier's well-framed arguments do not change the result.

First, the Carrier is correct that nothing in the Agreement "... prohibits the Carrier from creating new job classifications within minimal overlapping work outside the CBA."¹³ But as discussed *supra* at (C)(1), the creation of the MSQ/CSM positions did not result in "minimal overlapping work". Instead, as provided in Rule 12, the MSQ/CSM positions perform "... work of similar character and responsibility ..." as the covered ARASA Supervisor positions.

Second, quoting *Third Division Award 20339*, the Carrier is also correct "... that it has the unilateral right to establish or abolish such positions as well as to determine rate of pay and working conditions for such positions without the participation of the Organization."¹⁴ But the Board further noted in that case that "[a]lthough many Organizations in this industry provide for promotion from seniority rosters ... such understandings do not place exempt supervisory positions under the Agreement." That is not this case. Rule 12 in this case provides that "[e]stablished positions will not be discontinued and new ones created under a different title covering work of similar character and responsibility for the purpose of reducing the rate of pay or evading the application of these Rules." And that is what happened here. Given Rule 12, the language in *Third Division Award 20339* is not applicable and therefore does not change the result.

Third, the Carrier argues:¹⁵

The Organization maintains that the awarded twenty-two (22) CSM positions perform the same job functions as those under the ARASA-OBS CBA. This is categorically false. Even the CSMs themselves, state that their positions are 'true' managerial positions, as opposed to a supervisory position. Mr. Ken Fiske, a prior On-Board Chief, Crew Base Super-

¹³ Carrier Submission at 1-2.

¹⁴ Carrier Submission at 2.

¹⁵ Carrier Submission at 11 [footnotes omitted].

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visor and Ramp Supervisor within the ARASA Organization states the differences between the two jobs are very different and distinct with the CSM performing managerial functions, while the ARASA Supervisors do not. While ARASA Supervisors have general supervision over on-board operations, the CSMs have supervision over on-board employees, including conductors and clerical staff that support these functions. CSMs are customer focused, not crew focused as are the ARASA Supervisors. Not only do they observe and coach On-Board employees in best practices for customer service, but they are also Charging Officers, participate in hiring and termination decisions, develop, implement and track progress of customer service changes, develop training and training materials for On-Board crews including conductors, perform a myriad of administrative tasks, and maintain statistics on food service, among other duties. These positions work in conjunction with the Directors of Customer Service to develop travel schedules for station observations and train riding for the CSM positions. They work closely with the Directors of Customer Services in responding to passenger matters. Employee discipline, employee recognition, deadlines, etc. A key distinction between the ARASA Supervisors and the Service Quality Managers is the amount of discretion they must exercise, without immediate supervision.

But those "distinctions" are not what are set forth in the job descriptions charted *supra* at C(1) so as to avoid the language found in Rule 12 which prohibits the Carrier from establishing positions "... covering work of similar character and responsibility ..." and making the MSQ/CSM positions non-covered positions.¹⁶ For example, aside from the summary charts of the functions of the ARASA Supervisors, consider the following taken directly from the ARASA Supervisor job descriptions and compare them to the above-quoted distinguishing characteristics cited by the Carrier:

Operations Supervisor - Shelby:¹⁷

... Coordinate and supervise all aspects, services and employees related to Empire Builder on-board operations. Monitor crew performance and proactively ensure they are in compliance with standards and policies set forth. Coordinate Service Disruptions. Perform and document Audits and Tests as required ... Address station issues when required. ... Extensive travel required. ...

¹⁶ Organization Exhs. 8-19, 35.

¹⁷ Organization Exh. 9.

Product Line Supervisor:¹⁸

The incumbent will report directly to the Service Manager(s), and be responsible for all aspects of on-board service and train & engine operations. The incumbent is expected to assist management in achieving designated goals in areas of revenue, cost diversity, guest and employee satisfaction, safety, training, daily operations, and crisis management. ... Key objectives will be to develop and support all members of the Crew Base and to develop positive and productive working relationships with counterparts as well as other internal and external support groups in supervising day-to-day operations. The incumbent will be expected to travel on the train to support special operations and to monitor crew performance. ...

Operations Supervisor - Cascade:¹⁹

... [R]esponsible for the coordination of all aspects of services related to on-board operations including supporting managers during vacations and other absences. This person may be expected to travel on the train to support special operations and to monitor crew performance. ... Responsible for ensuring that all trains are properly staffed and ensuring that crews report on time and are in compliance with standards set forth; Responsible for providing crews with Daily Safety Briefing, information regarding all new policy and procedural changes and any and all announcements from the Company. Responsible for ensuring crews are provided necessary tools and supplies for their trip, including boarding diagram, timetables, route guides etc.; inspects cleanliness of trains and takes necessary steps to correct deviations. ... Develop positive and productive working relationship with counterparts, OBS Crews, T&E Crews, GGI, CMC, Ready Crew and other support departments with the goal to provide exemplary passenger service. Responsible for the proactive and immediate resolution of noncompliance of standards and policies by OBS staff

Operations Supervisor - Los Angeles:²⁰

... [R]esponsible for the coordination of all aspects of services related to a on-board operations including supporting managers during vacations and other absences. This person may be expected to travel on the train to support special operations and to monitor crew performance. The incumbent is expected to assist management in achieving designated goals in the areas of revenue, cost, diversity, training, passenger and employee satisfaction, safety, daily operations and crisis management. The incumbent must be adaptable and flexible to fluctuate between various functions and trains; Available adaptable, and responsive to crisis management situations; Develop positive and productive working

18 Organization Exh. 10.

19 Organization Exh. 11.

20 Organization Exh. 12.

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relationships with counterparts, OBS Crews, T&E Crews, GGI, CMC, Redi Crew and other support departments with the goal to provide exemplary passenger service; Responsible for ensuring that all Los Angeles-based trains are properly staffed and ensuring that crews report on time and are in compliance with standards set forth; ... Responsible for ensuring crews are provided necessary tools and supplies for their trip, including boarding diagram timetables route guides etc.; inspects cleanliness of trains and takes necessary steps to correct deviations. ... Responsible for proactive and immediate resolution of non-compliance of standards and policies by OBS staff; responsible for providing the initial steps of progressive discipline including and up to formal charges; responsible for ensuring that remittance and debit policies are adhered to

Operations Supervisor - Relief Chicago:²¹

... The incumbent will have direct oversight of the crew base clerical staff ...

Incumbent will be responsible for being proactive in dealing with employee tardiness, absenteeism, non-compliance with company policies, etc. in support of the crew base manager. This will include written documented informal counseling for employee violations.

Will also be involved in handling letters of intent to impose discipline.

Operations Supervisor - Washington DC:²²

The Position is responsible for the direct supervision of the debriefing office functions, revenue collection, LSA revenue audits, and staff training. ... Assist Management in achieving revenue, cost, customer & employee satisfaction, safety, training, daily operational goals. ... Responsible for scheduling the TPMS staff, monitors absenteeism, tardiness and proactively deal with these issues. ...

Operations Supervisor - El Paso:²³

... The incumbent is expected to assist management in achieving designated goals and areas of revenue, cost, diversity, passenger and employee satisfaction, safety, training, daily operations, and crisis management. ... The incumbent will assist the Road Foreman in assuring that Job Briefings are conducted, and that safety/operating rules are complied with. ...

²¹ Organization Exh. 13.

²² Organization Exh. 14.

²³ Organization Exh. 15.

Chief, On-Board Services Albany:²⁴

... The incumbent will be responsible for directing and coordinating all phases of On-Board Services and for overseeing the performance of all On-Board Service Crews in the proper discharge of their duties in order to provide optimum customer service on the Empire Product Line....

Chief OBS Positions:²⁵

... Product Line Supervisors will provide a broad range of supervisory support for front line employees that will include acting as liaisons with terminal, mechanical and commissary departments to ensure right and ready trains and acting as coaches and support resources for on-board personnel.

Product Line Supervisors will be stationed at strategic locations throughout the Amtrak system, including train originating and terminating points as well as enroute points to maximize effectiveness and provide consistent support to a on-board personnel. They will spend between 40% and 80% of their time riding trains, depending on their location and schedule. ...

Operations Supervisor - Crew Base:²⁶

The incumbent will report directly to the Manager Crew Base and be responsible for all aspects of the on-board service and train & engine operations. ... Administer absenteeism, debits and credits, error notices, and oversee the clerical support staff. ... Incumbent will support Manager Crew Base during vacations and other absences and will respond to service disruptions. Key objectives will be to develop and support all members of the Crew Base and to develop positive and productive working relationships with counterparts as well as other internal and external support groups and supervising day-to-day operations. The incumbent may be expected to travel on the train to support special operations and to monitor crew performance. ...

Operations Supervisor - California Zephyr:²⁷

... Assist management in achieving designated goals in areas of revenue, cost, diversity, guest and employee satisfaction, safety training, daily operations, and crisis management. ... Is also required to address both positive and negative employee performance and shall develop and teach those who are in need. ... Will be involved in letter of intent process and is expected to counsel up to the early stages of discipline as it pertains to the discipline process as a whole. Will be involved in some periodic training.

²⁴ Organization Exh. 16.

²⁵ Organization Exh. 17.

²⁶ Organization Exh. 18.

²⁷ Organization Exh. 19.

For the sake of discussion, we will assume that the MSQ/CSM positions have some additional responsibilities than do the ARASA Supervisor positions. But under Rule 12, that is not the determinative factor. As quoted from the ARASA Supervisor job descriptions and the charted similarities, the evidence shows that the MSQ/CSM positions are positions "... covering work of *similar* character and responsibility ..." as the ARASA Supervisor positions [emphasis added]. The duties and responsibilities of the MSQ/CSM and ARASA Supervisor positions need not be "equal", but only need to be "similar." Therefore under Rule 12, the MSQ/CSM positions could not be created to avoid application of the Agreement.

Fourth, the Carrier argues that "[t]he majority of the work done by the CSMs is new work ..." ²⁸ For the reasons set forth above, that does not appear to be the case. As discussed *supra*, under Rule 12, the majority of the work of the MSQ/CSM positions is "... of similar character and responsibility ..." as the ARASA Supervisor positions.

Fifth, the Carrier points to the disciplinary authority of the MSQ/CSMs and asserts that they have much more authority in that area than do the ARASA supervisors and the Carrier further asserts that, from anecdotal information, ARASA Supervisors simply will not discipline employees. ²⁹ According to the Carrier, at best, ARASA Supervisors only counsel other employees. ³⁰

²⁸ Carrier Submission at 13.

²⁹ Carrier Submission at 14-16. *See also*, the affidavit of Assistant Vice President Labor Relations C. E. Woodcock, III ("... ARASA represented supervisors do not and will not participate in the discipline process, other than being witnesses."). Carrier's Exh. O at 3.

³⁰ Carrier Submission at 15.

But, as an example, see the job description for the Operations Supervisor Los Angeles:³¹

... Responsible for providing the initial steps of progressive discipline including and up to formal charges

The short answer is that expanded disciplinary authority asserted by the Carrier is not clear and, even so, discipline is only one aspect of the MSQ/CSMs job duties. Again, under Rule 12, the test is whether the work is "... of similar character and responsibility ..." to the ARASA Supervisor's job — and, with respect to the totality of the work, the MSQ/CSMs and ARASA Supervisors' job descriptions answer that question in the Organization's favor. The totality of the work must be looked at — not just one aspect. And if an ARASA Supervisor is unwilling to take on an expanded role in any area as an MSQ/CSM (e.g., discipline), the Carrier need not consider that employee for an MSQ/CSM position. Any employee unwilling to perform certain aspects of the MSQ/CSM position, in effect, will have then disqualified him or herself from consideration for the position. Further, if an employee is in the MSQ/CSM position and is unwilling to perform the duties of the position, the employee can be treated accordingly through disciplinary or other actions by the Carrier. But the bottom line is that the totality of the MSQ/CSM duties remain "... of similar character and responsibility ..." as those performed by the ARASA Supervisors.³²

³¹ Organization Exh. 12.

³² Citing the National Mediation Board's Representation Manual, the Carrier asserts (Carrier Submission at 14, 16):

In ten specific instances, in the short time since the creation of their position, CSM's have removed employees from service aboard the trains for reasons such as drug and alcohol violations, insubordination and misconduct. ARASA Supervisors do not hold this type of disciplinary authority. If they did, according to the definition of Management Official promulgated by the NMB, they would not qualify for union inclusion and would find themselves amongst the members of non-contract employees. ...

[footnote continued]

Sixth, the Carrier seeks to distinguish the duties of the MSQ/CSMs by asserting that they have authority which is "not tied to one division, but rather, is national in scope ... [and t]hey are responsible for all on-board employees on the train including the conductor for purposes of customer service ... [and ARASA Supervisors] always remain subordinate to the conductor."³³

Scope of assignments is the Carrier's managerial prerogative subject to terms of the Agreement. The Organization has not asserted in this case that the Carrier cannot make the kinds of assignments it made consistent with the MSQ/CSM positions. The question is whether those assignments should have been given to a position which is covered by the Agreement. But again, turning to the job descriptions, with respect to the Carrier's argument concerning ARASA Supervisors being responsible for all on-board employees including the conductor, *see e.g.*, the job descriptions for the various ARASA Supervisor positions which consistently show responsibility for all on-board operations for purposes of customer service. Indeed, the Operations Supervisor - Crew Base ARASA Supervisor job description specifically provides that "[t]he incumbent will ... be responsible for all aspects of on-board service and train & engine operations."³⁴ Further, if the Carrier deems it necessary to assign specific authority to them to be over the conductors, the Carrier is free to do so. And, with respect to contentions that much on-board travel is involved for the

[continuation of footnote]

At argument, the Organization disputed the assertion that ARASA Supervisors have not removed employees from trains and asserted that ARASA Supervisors take employees out of service for drug and alcohol issues and discipline employees. We need not resolve this factual dispute concerning the removing of employees from trains. It is not our function under the Agreement to apply the NMB's Representation Manual. Our function is to apply the terms of the Agreement — *i.e.*, Rule 12.

³³ Carrier Submission at 16.

³⁴ Organization Exh. 18.

MSQ/CSM positions, the ARASA Supervisors already spend a great deal of time traveling on the trains.³⁵

Seventh, the Carrier also seeks to distinguish the MSQ/CSM positions from the ARASA Supervisors making arguments concerning authority to issue overtime, establish/transfer assignments, create Carrier policy on the trains, committing Carrier funds, and training requirements.³⁶ Again, returning to the MSQ/CSM job posting and going through the ARASA Supervisor job descriptions as discussed in detail *supra* shows that the MSQ/CSMs perform "... work of similar character and responsibility ..." as the covered ARASA Supervisor positions.

Finally, the Carrier argues:³⁷

The Carrier wanted a broader approach to customer service than what was previously provided by on-board staff. Management created the CSM position in order to have a national work force in place to address customer service issues as well as develop new strategies, products and services for the Carriers customers. Amtrak has been inconsistent in delivering customer service throughout its history and needed a solution to address and fix this problem. As a Corporation that serves the public, we are nothing without our customers. Amtrak needed to develop a customer service solution that deals with the public in order to keep its current customers, in addition to expanding its client base. Especially in these tough economic times, where ridership has increased eleven (11) percent due to rising gas prices, these CSMs are even more important to Amtrak's continuing success as its trains continue to move more and more people, and we strive to be the preeminent provider of passenger rail service.

Nothing in the Agreement prevents the Carrier from achieving that goal. The only problem the Carrier had with respect to achieving that goal was its determination that the MSQ/CSM positions were not covered by the Agreement

³⁵ See *e.g.*, Operations Supervisor Shelby ("[e]xtensive travel required"); Operations Supervisor El Paso ("[t]ravel [r]equirement: [u]p to 75%"); Chief On Board Services ("[t]hey will spend between 40% and 80% of their time riding trains."). Organization Exhs. 9, 15, 17.

³⁶ Carrier Submission at 17-20.

³⁷ Carrier Submission at 21 [footnote omitted].

— a decision which was in conflict with Rule 12. The bottom line remains that the MSQ/CSM positions as created by the Carrier perform "... work of similar character and responsibility ..." as the covered ARASA Supervisor positions. The Agreement has been violated.

C. The Remedy

As a remedy, the claim seeks that the Carrier be required to re-bulletin in the MSQ/CSM positions as ARASA positions and return the disputed work to positions under the ARASA Agreement and that the Carrier shall also be required to pay the 22 senior available ARASA Supervisors the difference in the rate of pay between their current rate of pay and the rate of the MSQ/CSM positions until the positions are re-bulletined as ARASA Agreement covered positions and the work is returned to positions under the ARASA Agreement.

This Board "... has broad discretion with respect to the formulation of remedies."³⁸ Obviously, this is no small case. The potential impact on the

³⁸ *Third Division Award 36831*. See also, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960):

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

Further see, *Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc.*, 514 F.2d 1235, 1237, *reh. denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 and cases cited therein:

In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.

Additionally, see *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62, 67 (2000) [citations omitted]:

... [C]ourts will set aside the arbitrator's interpretation of what their agreement means only in rare instances.

* * *

... [B]oth employer and union have agreed to entrust this remedial decision to an arbitrator.

Finally, see Hill and Sinicropi, *Remedies in Arbitration* (BNA, 2nd ed.), 62 ("... [M]ost arbitrators take the view that broad remedy power is implied").

Carrier, the Organization and the involved employees is significant. To state that the formulation of the remedy in this case is a complicated task would be an understatement. We note that, according to the Organization, over 100 ARASA positions have been discontinued during the five year period prior to 2006 and there are approximately 65 furloughed ARASA Supervisors nationwide as a result of discontinued jobs.³⁹ We also note that, according to the Carrier, there were 400 internal applicants for the MSQ/CSM positions and “[o]ut of the applicant pool, five (5) ARASA Supervisors were selected, of which four (4) were hired [and t]he majority of the CSMs came out of the Amtrak Service Workers Council”⁴⁰ We further note that, again, according to the Carrier, some applicants expressed reservations in the performance of certain aspects of the MSQ/CSM position.⁴¹

To simply hit the Carrier with an immediate remedial sledge hammer by requiring it to now re-bulletin the positions and make the 22 senior ARASA employees whole as requested by the Organization without allowing the parties, in the first instance, to attempt to formulate a remedy would, in our opinion, be an inappropriate exercise of our considerable remedial discretion. Therefore, at this time, we shall remand this matter to the parties for a period of 60 days (or longer, if agreed) to attempt to formulate an agreed-upon remedy in this case. Absent agreement on a remedy, either party shall be free to return the dispute to this Board for final determination of the remedy. We shall therefore retain jurisdiction for any disputes which may arise under the provisions of this award.

³⁹ Organization Submission at 3; Organization Exh. 2 at 2.

⁴⁰ Carrier Submission at 5.

⁴¹ Carrier Submission at 5.

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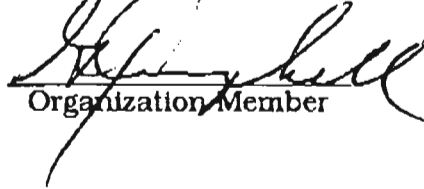
AWARD

Claim sustained in accord with the Opinion.



Edwin H. Benn
Neutral Member

Carrier Member



Organization Member

Chicago, Illinois

Dated: June 10-2009