

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6988**

**AWARD NO. 25 (Case No. 25)**

**TRANSPORTATION COMMUNICATIONS UNION/IAM**

**vs.**

**MTA LONG ISLAND RAIL ROAD**

**Michael Capone, Chair and Neutral Member**

**Arthur Maratea, Employee Member**

**Marilyn Kustoff, Carrier Member**

**Hearing Date: September 9, 2015**

**STATEMENT OF CLAIM**

1. Claim is made on behalf of all present and former TCU employees of the Long Island Rail Road, to be determined by a joint check of Carrier's records.
2. The Carrier violated Past Practice when it changed the handling of the Retiree and Retiree spousal passes by placing an expiration date of two years on the lifetime passes and requiring former employees every two years to come and make an appointment for a new picture without the concurrence of the Union.
3. The Carrier shall return to the mutually understood practice in its handling of the passes as well as repay each retired member who lives greater than (30) miles all monies spent needed to travel to the pass office for the new pass until the violation is corrected.

**STATEMENT OF FACTS**

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Transportation Communications Union/IAM (hereinafter referred to as the "Organization") and the Long Island Rail Road (hereinafter referred to as the "Carrier").

On February 21, 2013, the Organization submitted a claim "on behalf of all present and former TCU employees of the Long Island Rail Road" (hereinafter referred to as the "Claimants") alleging that the Carrier violated a past practice and a Letter

Agreement between the parties dated October 19, 1999 (hereinafter referred to as the "Letter Agreement"). The Organization alleges that the Carrier unilaterally revised the administration of the lifetime retiree transportation pass, initiating a procedural change; specifically requiring its renewal every two years.

The on-property record of the Carrier's denial of the claim and subsequent appeals by the Organization indicates that the final decision by the Carrier was on July 30, 2013. The Organization appealed the denial and submitted the matter for adjudication by this Board.

#### **POSITION OF THE PARTIES**

The Organization maintains that the Carrier violated a well established and binding past practice when it unilaterally changed the "Lifetime" transportation pass issued to retirees and their spouse by requiring a renewal every two years with associated fees. It argues that this change modifies a benefit established by a past practice and memorialized by the Letter Agreement, without concurrence from the Organization, and therefore, the Carrier must revert to the "Lifetime" pass policy previously in place for the Claimants.

The Organization argues that the unilateral action by the Carrier violates the Letter Agreement, which it claims clearly documents the mutual assent of the parties to provide retirees with a "Lifetime" pass. The Organization contends that the Letter Agreement establishes that the "Lifetime" pass was in exchange for its agreement to waive the "headquarters" rule and permitted the Carrier to assign Pass Office employees to outlying posts for the administration of the transportation passes for all employees.

Further, asserts the Organization, the past practice of providing retirees with the "Lifetime" pass is well documented and the Carrier cannot unilaterally change the benefit "as a matter of corporate policy". It argues that a binding past practice must be negotiated before it can be discontinued, modified or otherwise changed.

The Carrier asserts that the Organization has not met its burden of proof that it is prohibited by the Agreement or a past practice from implementing a new transportation pass policy for retirees. The Carrier argues that the transportation pass does not emanate from the Agreement and, therefore, is not governed by any of its terms and conditions. The Carrier contends that the Corporate Policy and Procedure - Rail Transportation Pass - applies to all employees and retirees, whether represented by an organization or as a management employee, and can be amended at any time without the need to obtain agreement from the Organization. The Carrier points to other corporate policies that apply to represented employees, which are not limited by an applicable collective bargaining agreement.

The "Lifetime" pass, maintains the Carrier, is not created by a past practice exclusive to employees represented by the Organization. The benefit is for all employees by virtue of its policy. Further, argues the Carrier, the Letter Agreement does not guarantee a lifetime pass as alleged by the Organization. A plain reading of the document, asserts the Carrier, reveals that it was solely an agreement with the Organization to address certain functions of the Pass Office employees and that there is no express language that provides a lifetime pass benefit to retirees.

**FINDINGS OF THE BOARD**

After hearing upon the whole and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimants were ably represented by the Organization.

The record confirms the existence of an established past practice between the parties of a "Lifetime" transportation pass issued to retirees and their spouses. Such a pass was provided over a substantial period of time and manifested the mutual assent between the parties to the practice. A past practice, where no contract language exists, can have the effect of a written agreement.

The facts here also establish that the practice was mirrored by an equally longstanding corporate policy that provided the same benefit to all employees. The policy, which can be modified and is not limited by any contract provision, provides the Carrier with the ability to withdraw from the scope of the past practice since it is not reserved solely for the Claimants by any express language in the Agreement but applies to all employees. Applicable to the instant matter are the findings in the National Railroad Adjustment Board Third Division Award No. 37348, wherein pertinent part states:

Regarding the Organization's past practice contention, it is always necessary for the evidence of alleged past practice to sufficiently distinguish between a practice which becomes binding as an unwritten term of the Agreement and a practice which is merely an exercise of the employer's discretion and which can be changed, in the employer's discretion, upon proper notice.

There is no evidence that the "Lifetime" pass was established solely for the Claimants. The Letter Agreement does not clearly provide such a benefit and is ambiguous as to a singular precise meaning. The transportation pass for the Claimants, as well as for all employees, is not a benefit guaranteed by an agreement but is a gratuity manifested by a practice and corporate policy. Therefore, following the precedent provided by the Third Division, we find the Carrier exercised its discretion when it provided notice that it was amending the practice of issuing "Lifetime" retiree passes.

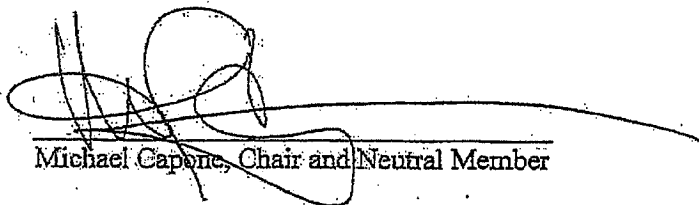
The Board finds that based on the foregoing, the Carrier provided proper notice on May 8, 2013 that a new transportation pass policy would be in effect. We also find that the Letter Agreement defines the past practice of providing a "Lifetime" pass and therefore, such pass must be made available to those Claimants who retired before May 8, 2013. The Carrier shall provide those retirees and their spouses with a transportation pass that is not subject to the new renewal provisions contained in the revised policy. No other compensation is awarded to those Claimants referenced herein. The revised Corporate Policy and Procedure - Rail Transportation Pass, shall cover all of the Claimants who retired after May 8, 2013, subject to the renewal provisions set forth therein as well as any future modifications by the Carrier.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in the Findings. We find that the Organization has provided sufficient evidence that the Carrier violated a binding past practice which was discontinued with due notice effective May 8, 2013.

**AWARD**

Claim sustained, in part, in accordance with the Findings above.

Dated: December 4, 2013

  
Michael Capone, Chair and Neutral Member

  
Arthur Maratea, Employee Member

  
Marilyn Kustoff, Carrier Member