

# **REPORT**

**to**

**THE PRESIDENT**

**by**

**EMERGENCY BOARD**

**NO. 245**

SUBMITTED PURSUANT TO

EXECUTIVE ORDER DATED MARCH 20, 2014 ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN LONG ISLAND RAIL ROAD COMPANY AND BROTHERHOOD OF RAILROAD SIGNALMEN; INDEPENDENT RAILWAY SUPERVISORS ASSOCIATION INTERNATIONAL; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; NATIONAL CONFERENCE OF FIREMEN & OILERS/SERVICE EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; AND INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS

AND SECTION 9a OF THE RAILWAY LABOR ACT, AS AMENDED

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(National Mediation Board Case Nos. A-13577, A-13578, A-13579, A-13583, A-13584, A-13613, A-13614, A-13615, A-13616, A-13621, A-13622, A-13623, A-13624, A-13625, A-13701)

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**WASHINGTON, D.C.**

**May 20, 2014**

Washington, D.C.  
May 20, 2014

The Honorable Barack Obama  
President of the United States  
The White House  
Washington, D.C. 20500

Dear Mr. President:

Pursuant to Section 9a of the Railway Labor Act, as amended, and by Executive Order dated March 20, 2014, you established an Emergency Board, effective 12:01 a.m., Eastern Daylight Time, March 22, 2014, to investigate a dispute between the Long Island Rail Road Company, and certain of its employees represented by certain labor organizations (collectively, the Organizations): Brotherhood of Railroad Signalmen; Independent Railway Supervisors Association International, International Association of Machinists and Aerospace Workers; National Conference of Firemen & Oilers/Service Employees International Union; International Brotherhood of Electrical Workers; Transportation Communications International Union; and International Association of Sheet Metal, Air, Rail and Transportation Workers.

Following its investigation of the issues in dispute, including both hearings and meetings with the parties, the Board now has the honor to submit its Report and selection of final offer for settlement of the dispute.

The Board acknowledges with thanks the assistance of Maria-Kate Dowling, Esq. and Norman L. Graber, Esq. of the National Mediation Board, who rendered invaluable counsel and aid to the Board throughout the proceedings.

Respectfully submitted,

  
Joshua M. Javits, Chairman

  
M. David Vaughn, Member

  
Elizabeth C. Wesman, Member

TABLE OF CONTENTS

I. CREATION OF THE EMERGENCY BOARD ..... 1

II. PARTIES TO THE DISPUTE..... 1

III. HISTORY OF THE DISPUTE..... 3

IV. ACTIVITIES OF THE EMERGENCY BOARD..... 4

V. THE FINAL OFFERS..... 5

    A. Final Offer Submitted by the Labor Organizations..... 5

    B. Final Offer Submitted by LIRR..... 6

VI. DISCUSSION..... 9

VII. CONCLUSION.....19

APPENDIX A – EXECUTIVE ORDER.....20

## **I. CREATION OF THE EMERGENCY BOARD**

Presidential Emergency Board No. 245 (“PEB” or “Board”) was established by the President pursuant to Section 9a of the Railway Labor Act (“RLA”), as amended, 45 U.S.C. §151 *et seq.* including §159a, and by Executive Order dated March 20, 2014. The Board was created to investigate and report its findings and recommendations regarding a dispute between the Long Island Rail Road Company (“LIRR”) and certain of its employees represented by certain unions. A copy of the Executive Order is attached as Appendix A.

The President appointed Joshua M. Javits, of Washington, District of Columbia, as Chairman of the Board, and M. David Vaughn, of Clarksville, Maryland, and Elizabeth C. Wesman, of Camas, Washington, as Members. The National Mediation Board (“NMB”) appointed Maria-Kate Dowling, Esq. and Norman L. Graber, Esq., as Special Counsel to the Board.

## **II. PARTIES TO THE DISPUTE**

### **LIRR**

The LIRR is the largest commuter railroad and the oldest railroad in the country. In 1966, the State of New York acquired all capital stock of the LIRR from the Pennsylvania Railroad. In 1980, the Metropolitan Transportation Authority (“MTA”) converted the LIRR to a public benefit subsidiary pursuant to the New York State Public Authorities Law. The LIRR provides commuter rail service in Nassau and Suffolk counties and in New York City. Each weekday, the LIRR carries more than 285,000 passengers on 1,165 trains. The LIRR operates 594 miles of track covering 11 rail lines and 124 rail stations. The LIRR serves three main New York City terminals at Pennsylvania Station (Manhattan), Flatbush Avenue (Brooklyn), and Hunterspoint (Long Island City), through a major hub at Jamaica (Queens) to the easternmost tip of Long Island.

In addition to the LIRR, the subsidiary and affiliate agencies governed by and funded through MTA are as follows: Metro-North Commuter Railroad Company, New York City Transit, Triborough Bridge and Tunnel Authority, MTA Bus Company, Staten Island Rapid Transit Operating Authority, and MTA Capital Construction Company. Approximately half of MTA's operating revenues come from customer fares. The other half comes from taxes and fees.

The LIRR's 2013 total operating budget was \$1.7 billion with a total ridership of over 83 million passengers. The LIRR employs approximately 6,400 employees, approximately 5,850 of whom are union-represented.

### **The Labor Organizations**

Brotherhood of Railroad Signalmen ("BRS") represents Signal and Communication Workers; Independent Railway Supervisors Association International ("IRSA") represents Gang Foremen; International Association of Machinists & Aerospace Workers ("IAMAW") represents Machinists; International Brotherhood of Electrical Workers ("IBEW") represents Electrical Workers; National Conference of Firemen & Oilers/Service Employees International Union ("NCFO") represents Laborers; Transportation Communications International Union ("TCU") represents Clerks, Dispatchers, Block Operators, and "Exception 5" Employees; and International Association of Sheet Metal, Air, Rail, and Transportation Workers ("SMART") represents Trainmen, Maintenance of Way Employees, Maintenance of Way Supervisors, Carmen, Special Service Attendants, and Sheet Metal Workers.<sup>1</sup>

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<sup>1</sup> SMART is the organization that resulted from the merger between the United Transportation Union ("UTU") and the Sheet Metal Workers' International Association ("SMWIA"). On March 5, 2013, SMART notified the NMB that the effective date of the merger had been amended according to the terms of the SMWIA-UTU Merger Agreement. The amended effective date is January 1, 2013. UTU filed applications for mediation covering five crafts or classes before the effective date of the merger and SMART filed an application for mediation covering one craft or class after the effective date of the merger. Based on the merger, the NMB addressed its releases from mediation for all six crafts or classes to SMART.

Since the outset of bargaining, BRS, IRSA, IAMAW, and IBEW have bargained as a coalition known as the LIRR Bargaining Coalition. More recently, NCFO, TCU, and SMART also formed a coalition. All seven Organizations will be referred to collectively hereinafter as the “Organizations” or “Unions.” The Organizations presented a unified case to the PEB. The Organizations represent approximately 5,500 LIRR employees.

### **III. HISTORY OF THE DISPUTE**

On May 28, 2010, pursuant to Section 6 of the RLA, the LIRR served on the Organizations formal notices for changes in current rates of pay, rules, and working conditions. The parties were unable to resolve the issues in dispute in direct negotiations. Applications seeking mediation were filed with the NMB by the BRS, IRSA, IAM, NCFO, and IBEW in September and October 2010, by TCU and UTU in August and September 2011, and by SMART in March 2013.

Following the applications for mediation, representatives of all parties worked with the NMB mediators and with Board Members of the NMB in an effort to reach agreements. Various proposals for settlement were discussed, considered, and rejected. On October 18, 2013, the NMB, in accordance with Section 5, First, of the RLA, urged the LIRR and the Organizations to enter into agreements to submit their collective bargaining disputes to arbitration as provided in Section 8 of the RLA (“proffer of arbitration”). On October 18, 21, and 22, 2013, the Organizations individually declined the NMB’s proffer of arbitration, and on October 22, 2013, the LIRR also declined the NMB’s proffer of arbitration.

On October 22, 2013, the NMB served notices that its services had been terminated under the provisions of Section 5, First, of the RLA. Accordingly, self-help – strikes, lockouts or

unilateral implementation - became available at 12:01 a.m., Eastern Standard Time, on Friday, November 22, 2013.

On November 18, 2013, in accordance with Section 9a of the RLA, the LIRR requested that the President establish an Emergency Board to investigate and issue a report and recommendations regarding the dispute. Section 9a(c)(1) of the RLA, in setting forth special procedures for commuter service, provides that any party to a dispute that is not adjusted under the other procedures of the RLA, or Governor of the State through which the service that is subject to dispute is operated, may request the President to establish an Emergency Board. Thereafter, on November 21, 2013, the President created an Emergency Board, effective November 22, 2013.

On December 21, 2013, PEB 244 issued its Report and Recommendations to the President. When the recommendations of PEB 244 did not result in a prompt resolution of the disputes, the NMB conducted a public hearing on January 15, 2014, at which the Organizations stated their willingness to accept the recommendations of PEB 244 and LIRR discussed its reasons for not accepting the recommendations of PEB 244. The dispute remained unresolved.

On March 5, 2014, LIRR requested that the President create a second Emergency Board pursuant to Section 9a(e) of the RLA regarding its disputes with the Organizations. The President created this Board, effective March 22, 2014, to recommend adoption of a final offer from those submitted by the Parties.

#### **IV. ACTIVITIES OF THE EMERGENCY BOARD**

Following a series of organizational meetings by conference call, the Board issued an organizational letter on March 25, 2014, in which the ground rules for the Board's procedures were set forth. This letter also incorporated the record before PEB 244 into the record in this

matter. The ground rules set a deadline of March 28, 2014 for the parties to submit briefs to the Board. Pursuant to the schedule set in the organizational letter, the Board met informally with the parties, both jointly and separately, on April 11, 2014, in Washington, D.C.

As directed by the Board, the parties filed final offers for settlement on April 20, 2014. Hearings on the final offers were held on April 21, 22, and 23, 2014, in New York, New York. All parties were represented by counsel and were afforded a full and fair opportunity to present oral and documentary evidence and argument.

On April 24, 2014, the Chairman met informally with the parties, in New York, New York, in an attempt to facilitate a settlement of the disputes. The Organizations and the LIRR submitted post-hearing briefs to the Board on May 2, 2014.

The Board met in a series of telephonic Executive Sessions to reach consensus regarding our Recommendations and to finalize this Report.

## **V. FINAL OFFERS**

### **A. Final Offer of the Labor Organizations**

In accordance with Section 9a(f) of the Railway Labor Act, 45 U.S.C. § 159a(f), the above-captioned Unions submit the following final offer for settlement of the dispute, which is identical to the recommendations for settlement contained in the Report of Presidential Emergency Board 244. *See* PEB 244 Report, at 42-43 (Dec. 21, 2013).

#### **General Wage Increases:**

December 16, 2010: 2.0%  
June 16, 2011: 1.5%  
December 16, 2011: 1.5%  
June 16, 2012: 1.5%  
December 16, 2012: 1.5%  
June 16, 2013: 1.5%  
December 16, 2013: 1.5%

June 16, 2014: 1.5%  
December 16, 2014: 1.5%  
June 16, 2015: 1.5%  
December 16, 2015: 1.5%

The Parties are to meet and agree upon appropriate procedures for the calculation and payment of back pay.

**Certification Pay:**

Effective June 16, 2014, the Carrier is to pay \$10 per full shift worked to conductors upon attainment of FRA certification.

**Health Insurance Contributions for Active Employees:**

June 16, 2010: 1.0% of straight time pay for 40 hours per week  
June 16, 2011: 1.25% of straight time pay for 40 hours per week  
June 16, 2012: 1.50% of straight time pay for 40 hours per week  
June 16, 2013: 1.75% of straight time pay for 40 hours per week  
June 16, 2014: 2.00% of straight time pay for 40 hours per week  
June 16, 2015: 2.25% of straight time pay for 40 hours per week

**Pensions and Work Rules:**

No changes in contributions for retiree health coverage, for pension benefits, or in any work rules.

Each Organization agrees to negotiate with the Carrier over any mutually identified rule changes, provided that the respective Organization(s) receive appropriate value for any agreed-upon changes.

**Term:**

Six (6) years, with the new Agreements amendable as of June 16, 2016.

**B. Final Offer of the Carrier**

MTA LIRR Final Offer (All Crafts)

Term: 72 months (6 years)

**GWI:** First Day of First Year: 3%  
First Day of Second Year: 1%  
First Day of Third Year: 1%  
First Day of Fourth Year: 2%  
First Day of Fifth Year: 2%  
First Day of Sixth Year: 2%

**Benefits:**

Effective upon full and final ratification, each employee shall contribute, on a pre-tax basis, 2% of wages (up to 40 hours) towards the cost of their health insurance.

The LIRR will provide a line of duty death benefit of \$150,000.

The LIRR shall increase the Active Service Member Death Benefit current benefit by \$20,000, for employees who die while in active service (other than line-of-duty).

In addition to any and all other leave entitlements, including, without limitation, FMLA and/or sick/vacation leave, employees shall, upon the birth of a child, be entitled to two (2) weeks fully paid Maternity/Paternity Leave, which shall be utilized prior to utilizing any other paid leave benefits.

**Wage Progression:**

Effective upon full and final ratification, a new wage progression shall be implemented for all employees hired or promoted on or after that date. The new progression is attached hereto as Attachment A and provides, generally, for the addition of two annual steps to the existing progression for entry and promotional titles.

**Local Conditions Fund:**

Each craft or class shall be entitled to additional annual funding pursuant to this agreement in an amount of .67% of payroll. Distribution of such funding shall be by mutual agreement. Any disagreements will be resolved by the Chair of PEB 245 or, in the event he declines to serve, an impartial arbitrator selected jointly by the parties.

**Pensions:**

Effective upon full and final ratification, each newly hired employee shall be enrolled in a new chapter of the MTA Defined Benefit Pension Plan which will differ from the Plan currently in effect for new employees in the following respects:

\*employee contribution at 5.2 % for all active service.

\*FAS formula increased from 3 years to 5 years

\*Vesting at ten years

\*Service retirement age increased to 63.

\*Retirement formulas changed to match State NYSLERS (i.e. Payable at Retirement Age of 63:

If less than 20 years of service = 1.67% x FAS (5 yr) x years. If at least 20 years of service = 35% x FAS (5 yr) plus years in excess of 20, 2.0% x FAS)

\*Buy-back rules (military, etc.) changed to State NYSLERS rates (from 3% to 6% actuarial)



## VI. DISCUSSION

This second Emergency Board is required to submit a report to the President “setting forth its selection for the most reasonable offer,” in accord with 45 USC § 159a(g). This report is made at the end of a long four-year process involving direct negotiations, then mediation with the National Mediation Board, and a first Emergency Board (EB 244) all designed to assist and guide the parties towards a voluntary agreement and to avoid a shutdown of the railroad. The emergency board process can take up to 270 days. At each phase, the parties are encouraged to resolve the dispute. Absent such voluntary agreement, the parties may use self-help – strike, lockout or unilateral implementation - 60 days after the issuance of this report. It is the Board’s hope that the parties will use the final 60-day period to find common ground, to resolve their disputes and avoid potential serious harm to the public.

This second Emergency Board, which chooses the most reasonable final offer presented, might be expected to have before it narrowed differences in light of the time already spent and the multiple dispute resolution approaches previously deployed to assist the parties. However this is not the case. There remains significant distance between the parties on all matters of significance. Nonetheless, while the parties are significantly apart in their final offers, the history of their negotiations and the engagement of two Emergency Boards produced useful discussion and points of reference that we have hope will lead the parties towards a fair and reasonable agreement. This Board anticipates that the parties will use this history, including this report, as a basis for reaching a voluntary agreement without resort to self-help. Any shutdown of the Carrier would damage both parties and, more importantly, create havoc with the New York metropolitan area transportation system.

The Unions' final offer adopts in their entirety the terms recommended in the prior Emergency Board 244. The Carrier's final offer reflects the agreement it reached recently on April 17, 2014, with TWU Local 100,<sup>2</sup> which represents 36,000 Transit Authority employees who work on the New York City subways and buses. The central question facing this Board is whether to base its selection of "the most reasonable final offer" on the Emergency Board 244 findings, as the Organizations urge, or on the MTA's recent agreement with Local 100 of the TWU, as the Carrier urges.

The first Emergency Board between the parties to this dispute, Emergency Board 244, issued its report on December 21, 2013, based on a voluminous and comprehensive record. Its essential recommendations were for wage increases totaling 17 percent over six years (2.83 percent per year) (compounded 18.37 percent and 2.85 percent) and health care insurance contributions from employees totaling between 1 percent beginning in 2010 and rising to 2.25 percent in 2015 (an average monthly contribution of \$152.02 by 2015). LIRR employees had not been contributing at all into their healthcare insurance and thus the recommendation is a significant change. It will mean that employees' contribution will cover approximately 10 percent of the total premium contribution in the 2014-16 period. This healthcare insurance contribution will offset the recommended wage increases by approximately .5 percent so that the average compounded wage increases would be 2.47 percent each year over the six-year term.

The Board drew its wage recommendations in part from the Transit Authority arbitrated award (Zuccotti award), which, in part, provided for a 4 percent increase in 2010 (2% in April 2010 and 2% in October 2010) and a 3 percent increase in 2011. Emergency Board 244 recommended a 2% raise in 2010 because the LIRR's amendable date, July 16, 2010, was in the

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<sup>2</sup> The Carrier informed the Board on May 19, 2014 that it was advised by Local 100 counsel that the Local 100 membership approved the tentative agreement.

middle of the two 2% increases provided by the Zuccotti Award. Emergency Board 244 recommended the full 3% in the Zuccotti Award for 2011.

Since there was no Transit Authority agreement past 2011, and thus no pattern or comparator within the other MTA subsidiary entities, Emergency Board 244 examined railroad agreements, especially commuter railroad agreements, covering the 2012-16 period (including SEPTA, Chicago Metra, MBCR, AMTRAK and the freight railroads) giving more weight to the commuter rail carriers and recommending wage increases at the “low” end of those averages.

Emergency Board 244 recommended certification pay of \$10.00 per shift for conductors, in line with virtually all other rail carriers, based on the FRA’s new training, monitoring and performance requirements for conductors effective June 16, 2014.

Emergency Board 244 did not recommend Carrier-proposed changes to retiree health coverage, pension contributions, changes in offsets for disability retirement benefits or work rule changes, finding them to be unjustified by the Carrier.

Emergency Board 244 rejected the Carrier’s proposal for a “net zero” increase (0%-0%-0%-2%-2%) over a five-year term, which the Carrier had based on New York State settlements with state employee unions, since settlements with state employees had not been used in the past by the parties as comparators. In addition, there was an absence of any threatened reductions in force at the LIRR, unlike the New York State position which had threatened mass furloughs of state employees absent the state unions’ acceding to its bargaining demands.

The Transit Authority’s agreement with Local 100 is a five-year agreement, 2012-17, providing for wage increases of 1%--1%--2%--2%--2%, a total of 8%. Healthcare contributions would increase from 1.5 percent to 2 percent. An extended wage progression delaying normal increases for new employees was also introduced. Additional benefits include two weeks of paid

maternity leave, dental and optical benefit improvements, enhanced death benefits for retirees, surviving spouse health coverage until Medicare-eligible, and a commutation pass (Transit Authority employees may commute to their jobs on Metro North and LIRR for free, a significant benefit). The Transit Authority-Local 100 agreement appears to have been ratified by the Local 100 membership.

The LIRR's final offer to its unions reflects these general terms. The 6-year term would cover 2010-16. In addition to the 8% in general wage increases for the 2012-16, matching the Transit Authority-Local 100 agreement, it provides for an additional 3 percent at the outset matching the 2011 increase provided by the Zuccotti Award to Transit Authority employees. The LIRR seeks to increase in employees' healthcare contributions from 0% percent to 2 percent; introduces a new wage progression; subjects LIRR to pension changes which mimic New York State law changes that are applicable to Transit Authority employees including a 5.2 percent employee contribution and include a new final average earnings formula increased from three to five years; 10-year vesting (from five), a new retirement formula; and new buyback rules. All of these pension changes disadvantage employees.

The Carrier contends that the Board should adopt its "MTA pattern" for the following reasons:

1. The Transit Authority represents 35,000 employees under the MTA, whereas the LIRR has only about 6,000 employees.
2. The MTA's subsidiary organizations, including the Transit Authority, Metro North, LIRR, as well as the Triborough Bridge and Tunnel Authority constitute an integrated, coordinated transportation system.

3. Funding sources, including taxes and fares, are directed towards the MTA, which must allocate its limited funds and resources appropriately and stay within budget.

4. The MTA constitutes the dominant historic pattern followed by its constituent Commuter Railroads, Metro North and the LIRR.

The Unions argue, on the other hand, that many if not most of the issues contained in Carrier's final proposal, are new and were not even discussed in bargaining. Far from narrowing the issues, these matters increase the differences between the parties without benefit of examination, costing analysis, or exchange of ideas and positions. The Unions assert that reliance on such proposals is inappropriate as a matter of policy under the Act and may not even be within this Board's legal jurisdiction. For example, the Carrier's final proposal extends the wage progressions for new hires, paid maternity and paternity leave, enhanced death benefits, and introduces a "Local Conditions" fund, none of which are found in the Carrier's Section 6 proposals nor were they even discussed in negotiations.<sup>3</sup>

The Unions contend that the pension changes sought by the Carrier are a result of New York State legislative changes, which were neither negotiated with Local 100, since they were the result of legislation, nor bargained about with the LIRR Unions. The Carrier contends that these pension concessions are necessary to pay for the increases provided in its final offer and which Local 100 received. The Unions assert that no specific "value" of such concessions was communicated to it and no examination or negotiations took place concerning them. The Unions also assert that the pension contribution sought by the Carrier would exceed what new hires could expect in benefits at retirement.

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<sup>3</sup> Prior to the apparent ratification, the Unions further argued that the Transit Authority-Local 100 tentative agreement was not yet ratified and thus did not warrant acknowledgment as a pattern or even as a worthy comparator.

The Unions contend that considerably more “value” was provided in the Local 100 agreement than is found in the Carrier’s final offer. Specifically, they assert the following:

1. The General Wage Increases provide for no increases for July 16, 2010 through December 31, 2010, while applying the Zuccotti Award only to the extent of providing 3 percent, presumably for the year 2011 or covering an 18-month period, contrary to the Zuccotti Award. Thus, neither of the Zuccotti Award's 2 percent increases in April and October 2010 are contained in the LIRR final offer, even though the LIRR amendable date of July 16, 2010 falls in the middle of those two 2 percent increases.

2. While the Local 100 increase in employee health insurance contributions rose from 1.5 percent to 2 percent, a .5 percent increase, the LIRR final offer provides for an increase that jumps from 0 percent to 2 percent, an increase of 2 percent. The Unions further note that in the last round of LIRR negotiations the parties agreed to the employees’ paying increased pension contributions in exchange for maintaining no health care contributions.

3. The pension changes now sought by the LIRR, as applied to the LIRR unions, would nearly double employees' contributions, since LIRR employees already pay significantly into the railroad retirement system, and the increased pension payments sought by the Carrier would adversely impact its employees to a far greater extent than the legislative changes would affect Local 100 employees.

4. The death benefits and maternity/paternity leave benefits are items dearly sought by Local 100 and not sought or even discussed by the LIRR/Union parties. The extended wage progression for Local 100 new employees is significantly different and less regressive than the wage progression for new employees sought by LIRR. Moreover the impact is different depending on the specific LIRR union and even among contract groups within a union, which

would inevitably lead to resentment and distrust among the LIRR unions. For instance, the average rate of wage change for BRS-represented employees would be 5.6% whereas the rate for IAM represented employees is 2.5%. Moreover, the whole "B-scale" approach would inevitably lead to infighting and leap frogging in future bargaining rounds and thus to unstable labor relations in the future.

5. The "Local Conditions" Fund appears vastly undervalued. The fund purports to be a monetized equivalent of several specific benefits that flowed to Local 100 employees but are not applicable to the LIRR contracts. These benefits include enhanced dental and optical coverage (dearly sought by Local 100, but not at all by the LIRR unions), spousal healthcare benefits prior to Medicare, release time for union work, and a commutation pass. No costing or quantitative detail has been provided to the Unions on these items, which the Carrier has unilaterally determined to represent a value of .67 percent. The Unions note that the MTA values the Fund at \$16.1 million whereas Local 100 has put a \$51.5 million valuation on the total of each element. Thus even the parties to that agreement disagree regarding its value by more than 300%.

6. Certain other payments to Local 100 are not even accounted for in the Carrier's final offer; namely a \$6 million payment to Local 100's trust fund and forgiveness of \$2.6 million in prior healthcare premium payments of Local 100 employees. Although the Carrier asserts that these are in settlement of past grievances or disagreements, they are included in a side letter which was part of the Local 100 contract but which was not provided to the LIRR unions when the Carrier allegedly provided the unions with the Transit Authority-Local 100 agreement.

The Board recognizes that the timing of a negotiated agreement is not necessarily within the Carrier's full control. Nonetheless, the lack of notice and bargaining on substantial issues in the Carrier's final offer is of significant concern. As noted by Emergency Board 217 "The

Railway Labor Act envisions an orderly process in which disputes are refined through the stages of direct negotiation, mediation, possible arbitration and emergency boards ... [t]hat it is not appropriate to allow issues to leapfrog the prior stages of the Act and to surface, without prior notice or consideration in the final offer.”

Further, it appears that the Carrier’s final offer is not the Transit Authority-Local 100 agreement, but something significantly different, both in particulars, in value to the employees and in cost to the MTA/LIRR. The distinctions noted by the Unions and referred to above are telling.

On the other hand, Emergency Board 244 made findings that were, for wages, a combination of the MTA wages (Zuccotti Award) for the 2010-11 period and commuter rail average wages for the 2012-16 period; the parties had negotiated over the terms contained in Emergency Board 244’s recommendations; and, finally, Emergency Board 244 offered a reasonable compromise that could form a basis for an agreement between the parties.

A central role of a second Emergency Board, the final offer process, at the end of the process, is to help enable the parties to move to terms that both sides could live with. This Board is secular with regard to whether MTA patterns or commuter rail patterns have prevailed in past negotiations. It is evident that both sides have used MTA and commuter rail settlements interchangeably and have sometimes embraced, and sometimes denied, the existence of patterns in efforts to persuade each other and to persuade emergency boards to accept their positions. In fact, even during this round of bargaining, both parties have cited MTA and commuter settlements in support of their respective positions at different times. Thus the Carrier's proposal, based on the recent Transit Authority-Local 100 agreement, is not without valid basis just because it may have criticized the Zuccotti Award and did not wish to see it extended to the

LIRR. Rather, this Board's concern with the Carrier proposal is that there was little if any bargaining or exchange of information on central features of its proposal; and perhaps most significantly, the Carrier's proposal fails to bring with it the components and especially the same value as the Transit Authority- Local 100 agreement. Instead MTA's final offer follows the form but not the substance of the deal it entered into with Local 100. In addition, the cost to the MTA of its Local 100 agreement and its final proposal to the LIRR unions appear to be significantly different.

Moreover, the Board notes that the LIRR final proposal, like the Transit Authority-Local 100 agreement, is structured on a slightly enhanced version of the New York State employees' agreements. Broadly, wage and pension proposals are quite similar. As Emergency Board 244 noted, State employee agreements have virtually never constituted valid comparator or patterns for commuter railroads. The labor markets, skills, history, and operations are completely different. In addition, many of the other provisions of the Transit Authority-Local 100 agreement specifically address Local 100 members' particular concerns during this round of negotiations (e.g., dental benefit enhancements, spousal healthcare benefits prior to Medicare), about which the LIRR employees had absolutely no interest.

The Unions' final offer, on the other hand, represents a reasonable balance addressing the priorities of both parties. The wage recommendations are a compromise between the wage increases at the MTA (2010-11) and the commuter railroad averages (2012-16). It is noteworthy that the Unions' assertion that real wage increases for LIRR employees, absent inflation, have not increased at all since 1991, was not challenged by the Carrier.

The Unions' final offer also provides for significant changes in healthcare contributions in fact exceeding even the Carrier's final offer (an ultimate contribution of 2.25% was

recommended in Emergency Board 244 and is contained in the Unions' final offer versus the 2.0 in the Carrier's final offer) progressing from 0% to 2.25% (a 2.25% increase) unlike the level of Local 100 health care increases which will rise from 1.5 to 2%, (a .5% increase).

In addition, the Unions' final offer includes a provision for conductor certification pay, which has been implemented at virtually all railroad carriers including freight, intercity (Amtrak) and commuter railroads, as a result of the 2010 changes in Federal Railroad Administration regulations (effective 2012) which placed additional training, obligations and liabilities on conductors.

Based on the above and upon the record as a whole, the Board finds that the Unions' final offer is the most reasonable.

## VII. CONCLUSION

In closing, the Board gratefully acknowledges the counsel and professional assistance rendered by Maria-Kate Dowling, Esq., and Norman L. Graber, Esq. of the National Mediation Board throughout this process.

Respectfully submitted,

  
Joshua M. Javits, Chairman

  
M. David Vaughn, Member

  
Elizabeth C. Wesman, Member

## **APPENDIX A**

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# Presidential Documents

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Title 3—

Executive Order 13663 of March 20, 2014

The President

## Establishing an Emergency Board to Investigate Disputes Between the Long Island Rail Road Company and Certain of Its Employees Represented by Certain Labor Organizations

Disputes exist between the Long Island Rail Road Company and certain of its employees represented by certain labor organizations. The labor organizations involved in these disputes are designated on the attached list, which is made part of this order.

The disputes heretofore have not been adjusted under the provisions of the Railway Labor Act, as amended, 45 U.S.C. 151–188 (RLA).

A first emergency board to investigate and report on the disputes was established on November 22, 2013, by Executive Order 13654 of November 21, 2013. The emergency board terminated upon issuance of its report. Subsequently, its recommendations were not accepted by the parties.

A party empowered by the RLA has requested that the President establish a second emergency board pursuant to section 9A of the RLA (45 U.S.C. 159a).

Section 9A(e) of the RLA provides that the President, upon such request, shall appoint a second emergency board to investigate and report on the disputes.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States, including section 9A of the RLA, it is hereby ordered as follows:

**Section 1. *Establishment of Emergency Board (Board).*** There is established, effective 12:01 a.m. eastern daylight time on March 22, 2014, a Board of three members to be appointed by the President to investigate and report on these disputes. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier. The Board shall perform its functions subject to the availability of funds.

**Sec. 2. *Report.*** Within 30 days after the creation of the Board, the parties to the disputes shall submit to the Board final offers for settlement of the disputes. Within 30 days after the submission of final offers for settlement of the disputes, the Board shall submit a report to the President setting forth its selection of the most reasonable offer.

**Sec. 3. *Maintaining Conditions.*** As provided by section 9A(h) of the RLA, from the time a request to establish a second emergency board is made until 60 days after the Board submits its report to the President, no change in the conditions out of which the disputes arose shall be made by the parties to the controversy, except by agreement of the parties.

**Sec. 4. *Records Maintenance.*** The records and files of the Board are records of the Office of the President and upon the Board's termination shall be maintained in the physical custody of the National Mediation Board.

**Sec. 5. *Expiration.*** The Board shall terminate upon the submission of the report provided for in section 2 of this order.



THE WHITE HOUSE,  
March 20, 2014.

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LABOR ORGANIZATIONS

Brotherhood of Railroad Signalmen  
Independent Railway Supervisors Association International  
International Association of Machinists & Aerospace Workers  
National Conference of Firemen & Oilers/Service Employees  
International Union  
International Brotherhood of Electrical Workers  
Transportation Communications International Union  
International Association of Sheet Metal, Air, Rail and  
Transportation Workers