SPRENGER & LANG

A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

WRITER'S ADDRESS:

MICHAEL D. LIEDER
WASHINGTON, DC OFFICE
E-Mail: mlieder@sprengerlang.com
Website: www.Sprengerlang.com

1614 TWENTIETH STREET, N.W.
WASHINGTON, D.C. 20009-1001
(202) 265-8010
FAX (202) 332-6652

325 RIDGEWOOD AVENUE
MINNEAPOLIS, MINNESOTA 55403
(612) 871-8910
FAX (612) 871-9270

December 6, 2007

VIA EMAIL AND OVERNIGHT DELIVERY

Peter W. Tredick, Esq.
Chair, Presidential Emergency Board 242
c/o National Mediation Board Office of Mediation
1301 K St. NW, Suite 250 East
Washington, DC 20005-7011

Re: Presidential Emergency Board 242

Dear Mr. Tredick:

I represent a class composed of Amtrak's African American members of the Brotherhood of Maintenance of Way Employes ("BMWE") in the Northeast Corridor, as well as the Pennsylvania Federation of the BMWE (the "Federation"), in a race discrimination class action lawsuit captioned *Thornton et al. v. National Railroad Passenger Corp.*, in the United States District Court for the District of Columbia (Docket No. 98CV0890). I write to ask this Presidential Emergency Board ("Board") not to make any recommendations concerning certain work rules that Amtrak has asked the Board to address, at least without Amtrak first substantially modifying those proposed rules. Those proposed rules may harm the interests of the class members to be free of racial discrimination in the workplace and subvert a federal Court Order that establishes a process for protecting those interests that any recommendations issued by the Board.

INTRODUCTION

Amtrak's proposed revisions to work rules set out in paragraphs 3, 5, 6, 15 and 16 are encompassed within the scope of the injunctive relief to which Amtrak agreed as part of the Consent Decree that resolved the *Thornton* case. The injunctive relief is designed to reduce or eliminate the pattern or racial discrimination against black track workers that gave rise to the lawsuit. (When I refer to "track workers," I include employees working in bridges and buildings and electric traction as well.) The relief has been a tremendous success over the past 7 1/2 years, virtually eliminating allegations of racial discrimination in assignments, training, and testing.

Pursuant to Court Order, the parties are required to engage in mediated negotiations between November 2007 and February 2008 over the extent to which the injunctive terms should be incorporated in the collective bargaining agreement between Amtrak and the Federation. If the parties are unable to reach agreement, the judge will decide the issue.

To date, the required negotiations have not commenced, as Amtrak stated that it was unavailable until January. Yesterday, Amtrak's counsel informed me that Amtrak intends to indicate to the Board that the terms of that agreement are acceptable to Amtrak as a modification to the work rules outlined in the CBA. Amtrak's counsel also stated that the company did not intend for any of its proposed work rule modifications to conflict with the injunctive terms and that, to the extent that any conflicts existed, it was willing to resolve any such conflicts in the final drafting of the overall CBA. I believe that five of the proposed modifications do conflict with the injunctive terms. The Board should not make recommendations that create a conflict and then hope that the parties can resolve them through negotiations. To do so would give Amtrak leverage over plaintiffs in the Court-mandated mediation, and might help convince Congress or an arbitrator to impose terms on the Federation at odds with the injunctive terms applicable to the class. The Board should leave these provisions, which affect the rights of black track workers, to the stipulated process for resolving them, and if the parties cannot agree, to the Court to resolve.

THE CONSENT DECREE

Ten African American track workers in Amtrak's Northeast Corridor, a black rejected applicant for a track worker position, and the Federation filed *Thornton* on April 8, 1998. They claimed that Amtrak had engaged in a pattern or practice of racial discrimination against the approximately 1/4 of Northeast Corridor track workers who are black for a number of years. The individual plaintiffs brought the lawsuit, not only on their own behalf, but also on behalf of a class of similarly situated current and former employees and rejected applicants. Although the Federation could not by law be a representative of a class of individual employees, it was suing on behalf of its black members.

The claimed discrimination occurred in training and assignments, testing for qualifications, overtime opportunities, and discipline. Plaintiffs claimed that managers and supervisors, who were overwhelmingly white, favored white employees in the training and assignments necessary to develop the qualifications to operate the equipment and machinery and to serve as foremen; discriminated against black employees in the promptness with which they tested them when they sought to prove their qualifications and evaluated them more harshly when they finally were tested; steered overtime opportunities to white employees instead of more senior black employees; and filed charges for alleged rules violations for which white employees were not charged, found them guilty when white employees would not be, and imposed harsher discipline than imposed on white employees for similar offenses.

The parties commenced settlement negotiations in 1999 under the mediation of Linda Singer, a private mediator of international repute. They spent many months negotiating over the terms of injunctive relief before arriving at a complete agreement. The Consent Decree setting forth those terms received final approval from Judge Emmet Sullivan of the United States District Court for the District of Columbia on June 21, 2000, and under the terms of the Consent Decree, went into effect on July 1, 2000.

The injunctive relief terms are set out in Part IV of the Consent Decree, a copy of which is attached as Exhibit A. They are designed to reduce the discretion of Amtrak's managers and supervisors in the areas of training and assignments, testing for qualifications, overtime opportunities, and discipline so as to reduce the opportunities for racial discrimination, while still allowing Amtrak to operate its Engineering Department efficiently.

The Consent Decree had a four-year term. However, it also provided, as set out in Part V, that toward the end of the term the parties would engage in mediated negotiations over the extent, if any, that the terms should be included in the CBA between Amtrak and the Federation, and that, if the parties were unable to reach agreement, the dispute would be presented to the Court for decision. (The Consent Decree also applied to the Corporate Agreement, which governed as to Amtrak employees working on the Boston-area MTA. I understand that Amtrak no longer employs persons working on the MTA, so I do not address that aspect of the Consent Decree.)

As required under the Consent Decree, the parties entered negotiations mediated by Ms. Singer concerning possible incorporation. After first agreeing to a one-year extension, the parties finally reached agreement on two issues. First, the terms of the Consent Decree were somewhat modified and memorialized in an Interim Agreement, a copy of which is attached as Exhibit B, under which the parties would continue to operate until July 31, 2008. Second, the parties agreed to a Stipulation and Proposed Order that provided that the parties would engage in mediated negotiations during the period from November 2007 through February 2008 over the extent, if any, that the terms of the Consent Decree would be incorporated into the CBA, and that, if they could not reach resolution, the issue would be presented to the Court. Judge Sullivan signed the Order, a copy of which is attached as Exhibit C, on March 15, 2005. The parties also further refined the Interim Agreement by negotiating two side agreements.

Thus, for over 7 1/2 years, the parties have operated under the injunctive terms of the Consent Decree and the Interim Agreement, as modified by the side agreement. These terms are designed to reduce the likelihood of race discrimination, not to advance the interests of one party or the other in a labor dispute between Amtrak and the Federation, or the BMWE more broadly. The parties are required under a federal Court Order to be negotiating now over the incorporation of the terms into the CBA through the services of a private mediator, not presenting their respective positions to this Board.

THE SUCCESS OF THE INJUNCTIVE TERMS IN REDUCING RACE DISCRIMINATION AT AMTRAK

As best as I can judge, the Consent Decree and Interim Agreement have been a tremendous success in reducing if not eliminating race discrimination against black track workers at Amtrak, perhaps more effective than the terms of any other consent decree resolving a class action lawsuit of which I am aware. I have three reasons for this belief.

First and most important, I have received very few complaints of ongoing racial discrimination except as to the disciplinary process. This is highly unusual.

The great majority (probably about 90%) of the billable hours worked by attorneys and legal assistants at my firm, Sprenger & Lang, have been devoted to employment discrimination class action lawsuits since I began work for the firm in 1991. During that time, we have settled or litigated to judgment about 20 such lawsuits. In all but perhaps three of them, the resolution has included injunctive relief designed to try to reduce the occurrence of the types of discrimination that led to the lawsuit in the first place.

In every other one of the lawsuits, our firm has received at least some communications from class members, either during the period of the decree, after the decree has expired, or both, complaining that the discrimination is ongoing. I fully expected to receive such communications in this case for two reasons. First, we had a very involved class. Prior to agreeing to the settlement, we had declarations from scores of black employees. Persons involved in litigation tend to remain involved after a case is resolved. Second, I had been in regular contact with the general chairman and vice chairmen of the Federation, and they could relay to me concerns of racial discrimination or encourage members to call me directly.

Surprisingly, in the seven years since then, I have received communications from only about five persons concerning incidents of perceived discrimination. There has been only one communication concerning racial discrimination in training and assignments, testing for qualifications, and overtime opportunities, and we were able to get that straightened out because a manager had clearly violated the terms of the Interim Agreement. All of the others have concerned perceived discrimination in the disciplinary process, the area in which we were least able to limit managerial and supervisory discretion. The relative lack of complaints, and the ease of resolving the one complaint, is probably the strongest evidence of the effectiveness of the provisions.

Second, after the Consent Decree had been effect for over a year, I was involved in interviewing applicants for a position created by the Decree called a “qualified equipment examiner.” I asked the applicants how they thought the Decree was working. Every one was positive. Most striking were comments from two of the white applicants. They both said that they had been dubious when the Decree was first announced because they feared that it was

designed just to benefit black employees and would harm them. Instead, they found that the Decree had made decisions fairer for all employees.

Finally, I have reason to believe that the lack of complaints does not arise from broad changes throughout Amtrak. During the past seven years, my firm has received at least ten communications from employees in unionized positions outside the class. A proposed class action, *Campbell v. Amtrak*, which has been pending for about eight years, claims that Amtrak has engaged in a pattern or practice of racial discrimination as to those employees. We have referred those calls to the attorneys handling that lawsuit. Similarly, Sprenger & Lang represented black management employees in a race discrimination class action lawsuit against Amtrak called *McLaurin v. Amtrak*. We settled that case a few months before *Thornton* was settled. Our firm has received considerably more communications about alleged racial discrimination from persons within the scope of the *McLaurin* class than of the *Thornton* class, even though far more persons within the scope of the *Thornton* class had been actively involved in support of the litigation prior to the settlement than had been involved in *McLaurin*.

I have received no information from anyone, including representatives of Amtrak, that the provisions of the Consent Decree and Interim Agreement have been ineffective in reducing the perception and/or the reality of racial discrimination against black track workers at Amtrak.

CONFLICTS BETWEEN AMTRAK'S WORK TERM PROPOSALS AND THE CONSENT DECREE

To the extent that Amtrak proposes work terms within the scope of the injunctive relief that the parties negotiated, Amtrak would change both the substantive standard and the process by which it will be determined how the CBA will be altered, if at all.

Substantively, the Consent Decree provides that if the parties are unable to reach agreement about incorporation of injunctive terms into the CBA, the Court should consider

> any admissible evidence that the Parties present at the evidentiary hearing described below concerning the cost to Amtrak to incorporate such provisions into the CBA … and to continue application of such provisions after the term of the Consent Decree, the experience of Amtrak and the Plaintiffs and Class Members in applying the provisions during the term of the Consent Decree and prior to the Consent Decree, the results obtained by the provisions, the workability of the provisions, the interests of all Parties, and the public interest.

Obviously, that is not the standard that this Board is charged with following in making recommendations. Controls on racial discrimination are not part of the Board's calculus. And, Amtrak undoubtedly hopes, if this Board adopts Amtrak's position concerning the work rules without considering the effectiveness of the Interim Agreement in reducing or eliminating racial discrimination, either Congress or an arbitrator will adopt those recommendations.

Procedurally, Amtrak agreed to, and the federal Court adopted, a process involving direct negotiations with the assistance of a mediator who over the years has become very familiar with the issues, and if those negotiations were unsuccessful, decision by a Court used to deciding claims involving allegations of racial discrimination. Now it wants to inject this Board's recommendations into the process. If the Board adopts Amtrak's current proposals, Amtrak almost certainly will use those recommendations, and the threat of Congressional action or an arbitrator's ruling, as leverage in the negotiations during January in which Amtrak is willing to engage. Obviously, this would distort the process.

These attempts to subvert the standards applicable to incorporation of the Consent Decree provisions into the CBA and the process established for incorporation are dangerous because of the conflicts between Amtrak's proposed work rules and the Consent Decree provisions:

Proposed Work Rules	**Consent Decree Provisions**
3. "Establish a General Training/Examination Rule under which training shall be provided at such times and locations as deemed appropriate by Amtrak."	Amtrak has not provided enough details to know what changes it envisions in its "General Training/ Examination Rule," but Part IV.C of the Consent Decree, encompassing more than twenty double-spaced pages, addresses training and testing in great detail and establishes procedures that greatly reduce the opportunity for managers and supervisors to discriminate against black employees.
5. "Provide that employees filling temporary vacancies will be considered automatic bidders for such assignment, and limit the application of the rule to stabilize the workforce."	This proposal goes beyond one of the means by which Amtrak managers and supervisors historically has advanced favored white employees: assign them a position based on the supposed needs of the gang and thereby give them the opportunity to acquire training and certification. Under Amtrak's current proposal, the employee would be treated as bidding on the assignment. Amtrak does not propose any means of controlling the possibility that assignments will not be made based on racial biases.
6. "… Amend the Training Agreement to expand the periods in which employees can be assigned to improve the return on training investments."	This issue was negotiated at some lengths in connection with the Consent Decree and the Interim Agreement. To the extent that black employees were discriminatorily denied such training prior to the Consent Decree, they may be disproportionately benefiting from such training now. This would lock them in for longer periods and make the training less attractive.
15. "Investigations will be eliminated for violations of Rule G waivers … [and] for	Part IV.D of the Consent Decree deals with discipline. It provides, admittedly not fully

absenteeism violations. …" Although not quoted in its entirety, all of proposed Work Rule change 15 is problematic.	adequate, controls over the hearing process to try to reduce the opportunity for racial bias to infect the outcome. By eliminating the investigation and hearing process, those controls will be lost for alleged Rule G and absenteeism violations.
16. "Modify existing rules to eliminate payments to employees while withheld from service pending investigation when the employee's retention could endanger the company or employee(s)."	During the period prior to the Consent Decree, black employees were disproportionately placed into the discipline process, to a statistically significant extent. From conversations with Federation officers, I believe (although I do not have access to data) that still to be the case. This will open black employees to a greater chance of elimination of payments during investigation than white employees. Moreover, Amtrak seeks to have discretion in deciding when "the employee's retention could endanger the company or employee(s)." It may use this discretion in a biased manner against black employees.

The class and the Federation should not have to negotiate terms by which Amtrak's proposed work rules may be reconciled with the terms of the Interim Agreement, which Amtrak says are acceptable to it. I do not doubt Amtrak's good faith in believing that the terms can be reconciled. However, negotiations over that reconciliation inevitably will result either in watered down protections or an impasse and the need to go to the Court over supposedly acceptable terms.

CONCLUSION

The Board should not address Amtrak's proposed alterations 3, 5, 15 and 16, and the last sentence of proposed alteration 6, to the work rules. Instead, the Board should not interfere with the Court-ordered process for protecting the rights of the black employees in BMWE-covered positions in Amtrak's Northeast Corridor.

Sincerely,

Michael D. Lieder

cc: Ira F. Jaffe (via email and overnight delivery)
Joshua M. Javits (via email and overnight delivery)
Annette M. Sandberg (via email and overnight delivery)
Helen Mercer Witt (via email and overnight delivery)
Norman Graber, Esq. (via email and overnight delivery)

Eileen Hennessey, Esq. (via email and overnight delivery)
Thomas E. Reinert, Esq. (via email and overnight delivery)
William Herrmann, Esq. (via email and overnight delivery)
Roland Wilder, Jr., Esq. (via email and overnight delivery)
Jed Dodd (via email)