B.C.D. 05-48

NOV 0 8 2005

Employee Service Determination
DJH
MH
TN
BR
LCS
AGT

This is the decision of the Railroad Retirement Board regarding whether the services performed by the above-listed retired police officers formerly employed by the Metropolitan Transportation Authority (MTA) constituted employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The MTA is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. It operates through a number of subsidiary agencies, two of which are covered employers under the Acts: Long Island Rail Road Company (LIRR) (B.A. No. 1311) and Metro-North Commuter Railroad (B.A. No. 3345). In 1997, legislation was enacted providing for the creation of a MTA police department and the establishment of a traditional police pension for the MTA police officers. Police employees of Long Island Rail Road and Metro-North were hired by the new MTA Police Department. On May 21, 1998, the Railroad Retirement Board ruled that the police officers transferred to the MTA Police Department were not covered under the Acts.

The above-listed individuals have submitted information to the effect that after they were transferred from the railroad for which they worked to the MTA, their duties and job location generally did not change.

The individuals provided the following information, however, which a majority of the Board believes to be determinative of the ultimate issue in this case.

DJH states that he was "Assigned by MTA Police supervisors to patrol LIRR East New York Station" and that he was "Supervised by MTA Police supervisors and managers who in turn serviced the police and security needs as determined by LIRR officials."

MH stated that "At Ronkonkoma Headquarters, police officers were dispatched by MTA superiors to various locations. When they arrive at that location, LIRR managers would tell us what they need * * *."

TN stated that he "was assigned the same work every day as an Operational Support Sergeant by my MTA managers who coordinated with LIRR for their police needs" and that after he "became a MTA Police Office, [he] worked [only] at 341 Madison Avenue which was not a LIRR location."

BR stated that "As a MTA police officer my work was assigned by my supervisor. My work location was determined by my seniority. The LIRR did not assign or approve police officer work" and "As a MTA police officer, I was supervised by a MTA

police supervisor while performing work on LIRR property. I was not supervised/directed in any [way] by an LIRR manager."

LCS stated that his "work as an MTA Police Officer was assigned by my superiors in the department who made the assignments based on LIRR needs" and that he "was directly supervised in [his] daily work by a higher ranking [sic] of my police department, whether it was LIRR Police Department or MTA Police Department. * * *"

AGT stated that he was supervised by certain named individuals who apparently were transferred to MTA. He states that he received his assignments from these individuals "who were carrying out the LIRR Police needs as determined at meetings between police brass and LIRR managers."

As mentioned above, the Board previously determined that the employees who were transferred from Metro-North Railroad and the Long Island Rail Road to the MTA Police Department were no longer employees under the Railroad Retirement and Railroad Unemployment Insurance Acts. Any individuals supervised by MTA employees would themselves be employees of the MTA and their service would not be creditable under the Acts. The evidence quoted above supports the conclusion that the individuals whose service is at issue were supervised by MTA personnel. Although that evidence is not entirely unambiguous in all the cases, it is clear that the MTA had the right in all the cases to assign the individuals to the duty stations.

Accordingly, a majority of the Board concludes that the service and compensation of the above-listed individuals is not creditable for the period beginning January 1, 1998, when they were transferred to the MTA.

Michael S. Schwartz

V. M. Speakman, Jr. (Dissenting Opinion Attached)

Jerome F. Kever

Attachment

DISSENT OF
V. M. SPEAKMAN, JR.
EMPLOYEE SERVICE DETERMINATION
MTA POLICE DEPARTMENT

I must respectfully dissent from the Majority's decision in this case.

All employees involved in this determination were former police officers with the Long Island Railroad (LIRR), (BA Number 7311), part of the Metropolitan Transportation Authority (MTA) (not an employer under our statutes). After the formation of the Metropolitan Transportation Police Department (MTAPD) in 1997, police officers of the LIRR and Metro North (BA Number 3345) were transferred to that entity. In B.O. 98-92, MTAPD was held **not** to be a covered employer.

The employees involved in this determination contend that after their merger with the MTAPD they continued to perform the same work, often the exact same job, as they did for LIRR, and in most cases on LIRR property. Although they reported to an MTAPD superior, day-to-day duties were determined by the needs of the LIRR.

Section 1(d) of the Railroad Retirement Act and its companion Section 1(e) of the Railroad Unemployment Insurance Act provide:

> (d)(1) An individual is in the service of an employer whether his service is rendered within or without the United States if –
>
> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations.

Thus, the authority to direct the manner of rendition of services is not the only indicia of employee service; the performance of services on the property of an employer or integration into the staff or operations of an employer also are elements of employee service. The Majority opinion does not sufficiently analyze the facts in the context of Section 1(d).

Affidavits filed by the employees in question, and information gathered by our division of audit and compliance, indicate that, for the most part, after the merger there was little change, if any, in the employees relationship with the LIRR.

Specifically:

DJH

At the time of the merger, Officer DJH had 220 months of service with the LIRR police department. He worked as a patrolman in LIRR's East New York Station. After the merger he worked 21 more months before retiring. He continued to work out of the East New York Station with his duties unchanged.

MH

At the time of the transfer to MTAPD, Officer MH worked in the LIRR motor pool in Hillside NY; he continued in this function under the MTAPD moniker after the merger. From January 1999 to February 2000, he worked at MTAPD offices doing operational support for LIRR and Metro-North, another covered employer. After a short period of being off work he returned to LIRR police support from September 2000 until June 21, 2001, when he was injured. He retired in November 2002.

TN

At the time of the merger, TN was a detective with the LIRR. After the merger he was transferred from LIRR property to MTAPD's 341 Madison facility. His duties included administrative work exclusively for the LIRR and the Metro-North. Although he reported to an MTAPD employee after the merger, his work continued to involve assigning police officers to LIRR and Metro-North. He retired March 2, 2005.

BR

At the time of the merger, BR was a patrol officer for the LIRR at Penn Station. After the merger his duties remained the same until he was promoted to Captain, and, thus, the commanding officer at Penn Station. His whole career, until his retirement in June 2001, was on property controlled by the LIRR. His duties required constant interaction with LIRR personnel. His schedule and priorities were set by LIRR needs.

LCS

At the time of the merger, Captain LCS was a Captain in the LIRR police. He retained that rank after the merger. After the merger he continued to work out of the LIRR Hillside maintenance facility and Jamaica Station through 2000. He then worked out of LIRR's facilities in Hicksville and Penn station until he was injured in December 2001. He retired effective July 16, 2004.

AGT

At the time of the merger, Officer AGT was a patrolman for the LIRR. After the merger his duties remained unchanged and he continued to patrol LIRR property until his retirement in April 2002.

MTAPD has always maintained that upon its formation former railroad police officers would now report to MTAPD superiors. This is undoubtedly true but, as pointed out

above, that in addition to supervision, there are two other tests for employee service under our statutes. Secondly, MTAPD has maintained that after the merger railroad police officers were assigned non-railroad duties. Although this may have been true for many former railroad police officers, in the case before us we must focus solely on the situations of the officers who have made claims for service.

Finally, the case of Greene v. Long Island Railroad Company, 280 F.3d (2nd Cir.2002) is informative. In that case, an MTAPD police officer brought a claim under the Federal Employer's Liability Act (FELA) against the LIRR. In determining that the officer's claim was FELA covered, the court stressed how railroad related the officer's work was. Although not dispositive, since our statutes were not considered by the court, the case does demonstrate that an MTAPD police officer's job can be so railroad dominated as to be indistinguishable from that of a former LIRR police officer's position.

In conclusion, I would find the police officers' work in question to be employee service under our statutes, and that service under our statutes be credited consistent with Section 9 of the RRA.

Wm Speakman, Jr.
V. M. Speakman, Jr.
Labor Member