

**Employee Service Determination – Decision on Reconsideration**

DJH  
MH  
BR  
LCS  
AGT

This is the decision on reconsideration by the Railroad Retirement Board of its determination dated November 8, 2005 (B.C.D. 05-48)<sup>1</sup>, finding that the services performed by the above-listed retired police officers formerly employed by the Metropolitan Transportation Authority (MTA) did not constitute employee service under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act<sup>2</sup> (45 U.S.C. §351 et seq.) (RUIA).

**Procedural and Background Information**

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: the Long Island Railroad Company (LIRR) (B.A. No. 1311) and Metro-North Commuter Railroad (B.A. No. 3345). In 1997, legislation was enacted by the State of New York 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 Railroad and Metro-North were hired by the new MTA Police Department. On May 21, 1998, the Railroad Retirement Board ruled (in B.C.D. No. 98-92) that the police officers transferred to the MTA Police Department from the Long Island Railroad and/or the Metro-North Commuter Railroad Company were no longer covered under the RRA and the RUIA.<sup>3</sup>

A subsequent review of MTA operations concluded in 2004 indicated that the MTA Police Department had become a larger organization with more varied duties than it was at the time of the Board's 1998 decision. For example, it had increased its staff from 435 to 727 with the participation in the following additional entities and/or activities: the Highway & Bridge Safety Unit, the K-9 Unit, the Emergency Services Unit,

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<sup>1</sup> The Labor Member dissented from the decision of the majority in B.C.D. 05-48.

<sup>2</sup> It is noted that the Board decision also concerned TN. However, counsel for these individuals has not requested reconsideration of the decision as it pertains to TN.

<sup>3</sup> It should be noted that in 2002, the U.S. Court of Appeals for the Second Circuit found that an employee of the MTA Police Department who performed services for the LIRR was subject to the Federal Employers Liability Act (FELA). Green v. MTA, 280 F.3d 224 (2d Cir. 2002). In an opinion dated June 6, 2003, the Board's General Counsel advised that the Court's decision in Greene has no effect on the Board's 1998 coverage decision.

and the Interagency Counterterrorism Taskforce. In addition, the MTA Police Department provides patrol and/or security details at MTA headquarters and other MTA buildings and provides a detail for protection of the MTA Chairman. MTA officers are assigned to various counter-terrorism task forces. Some MTA officers perform no services for the LIRR or Metro-North Commuter Railroad; others perform services for all MTA agencies. None of the new information obtained supported a conclusion that MTA or its Police Department should be held to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

By letter dated March 1, 2005, counsel for the five individuals who are the subject of this decision on reconsideration requested the Board to credit each of these individuals with covered service for work they performed for MTA and the LIRR. In B.C.D. 05-48, issued November 8, 2005, a majority of the Board denied that request. This request for reconsideration followed in a letter dated January 11, 2006.

### **Information Provided In Connection with Request**

The above-listed individuals have submitted no additional information with their request for reconsideration. In connection with their original requests for service credit, they provided information set out in the following discussion.

#### **1. DJH**

DJH worked as a uniformed police officer first for the LIRR and subsequently for the MTA. He was assigned to patrol LIRR train stations, tunnels, right-of way and property. As a LIRR police officer, he worked at New York Penn Station from 1979 to 1989 and at the LIRR East New York Station in Brooklyn from 1989 to 1998. As a MTA police officer, he continued to work, performing the same services, at the LIRR East New York Station in Brooklyn from January 1, 1999 to September 25, 1999. DJH advised that while he worked on the MTA payroll, he was supervised by MTA police supervisors and managers who in turn serviced the police and security needs as determined by LIRR officials.

#### **2. MH**

MH advised that he began to work for the LIRR police department on March 12, 1981. He continued to do the exact same work after the LIRR police department merged into the MTA police department. Beginning April 27, 1998, MH worked in operational support at the LIRR Hillside Motor Pool, where his job consisted of supplying vehicles with all necessary police equipment and physically bringing cars in for service at Bass Service in Seaford, Long Island. MH advised that at least 95% of the cars that he worked with and equipped were being used in police support of the LIRR. From January 1999 to February 28, 2000, Mr. Hurney worked at Operational Support at 347 Madison Avenue, New York, New York. MH explained that Operational Support provides equipment for police officers working on both the LIRR and Metro – North Commuter Railroad. Between February 28, 2000 and September 3, 2000, MH was

out of work for a non-occupational condition. When he returned on September 3, 2000, he worked a radio motor pool job in Ronkonkoma's headquarters on Long Island; this work was exclusively in police support of the LIRR. MH was injured while working on June 12, 2001 and ultimately retired on November 27, 2002 due to his on the job injury. MH advised that prior to his retirement, assignments "originated from discussions between the LIRR Management and the management of the MTA Police Department." He also stated that those assignments were handed down through the MTA Police Department chain of command to the individual police officers.

### **3. BR**

BR worked as a police officer for the LIRR and subsequently for the MTA. He advised that he performed the same services for both entities. As a LIRR police officer, he worked at a number of different locations, with the last one being at Penn Station in Manhattan. BR advised that the duties he performed as a MTA police officer were "the same in every way as the duties [he] performed as a LIRR Police Officer." BR indicated that as a MTA police officer (in Penn Station), he worked for the same supervisor he had worked for as a LIRR police officer in Penn Station until his promotion to Captain in 2000. He also stated that he reported to Chief Kathleen Finneran and Chief John Lynch at MTA Police Headquarters and did not report to any LIRR supervisor or manager. BR worked for MTA until he retired effective June 14, 2001.

### **4. LCS**

LCS worked for the LIRR from July 10, 1981 through December 31, 1998 and for the MTA from January 1, 1999 until July 16, 2004. LCS advised that from 1996 until he retired in 2004, he performed the same duties, first as a LIRR police officer and subsequently as a MTA police officer at the following LIRR properties: Jamaica Terminal in Queens, New York; Hillside Support Facility, Queens, New York; Hicksville LIRR Yard; and Pennsylvania Station, New York. LCS stated that he was one of four Captains of the LIRR Police Department from September 19, 1996 to the time of the merger with MTA in 1998 and was then one of twelve Captains with the MTA. LCS stated that all his activities as a police officer were performed in connection with LIRR's needs and that his presence was scheduled so that he was on railroad property during the maximum number of scheduled commuter arrivals and departures and during the time that his peers at the LIRR operations department were working. His work as a MTA police officer was assigned by his superiors in the MTA police department who made the assignments based on LIRR needs. He stated that his work as a LIRR police officer and as a MTA police officer was approved by a superior in his department.

### **5. AGT**

AGT began to work for the LIRR on June 14, 1978 as an electrician; he transferred to the police department on July 5, 1985. He stated that the duties of a MTA Police Officer were exactly the same as the duties of a LIRR Police Officer, working at the same

locations for the same supervisors or managers, enforcing the laws of the State of New York. AGT stated that his superiors varied from day to day but during the time that all police officers were brought under the MTA, he had the following supervisors who were the same from when he was a LIRR police officer: Captain Gieterie, Lt. Pucillo, Lt. Miller, Lt. Zaino, and Sgt. Coyle.

### **Discussion and Conclusion**

The single most significant factor noted in the Board's initial decision was that the Metropolitan Transportation Authority had the right to assign each of these individuals to a duty station. As noted earlier in this discussion, no new evidence was submitted in connection with the request for reconsideration. The majority's review and reconsideration of the evidence leads us to the same conclusion. The fact that these individuals may have continued to work at the same location performing the same services for the LIRR after they were transferred to the MTA pay roll does not mean that they were performing employee service for the LIRR. After they became a part of MTA, the MTA, and not the LIRR, had the sole right to direct what services they would perform and where and how they would perform those services. The evidence as a whole clearly supports the Board's initial decision that the individuals whose service is at issue were subject to MTA supervision and were thus MTA employees. As such, their service for MTA was not employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Accordingly, a majority of the Board affirms on reconsideration its decision of November 8, 2005, and concludes that the service and compensation of the above-listed individuals was not creditable for the period beginning January 1, 1998, when they were transferred to the MTA.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.  
*(Dissenting opinion attached)*

Jerome F. Kever

Attachment

**DISSENT OF  
V. M. SPEAKMAN, JR.  
EMPLOYEE SERVICE DETERMINATION ON  
RECONSIDERATION  
(DJH  
MH  
BR  
LCS  
AGT )**

As I stated in my dissent in B.C.D. 05-48, the Majority ignores paragraphs (B) and (C) of section 1(d)(1)(i) of the Railroad Retirement Act and its companion section 1(e) of the Railroad Unemployment Insurance Act. The Majority's decision on reconsideration is based solely on the fact that the employees in question are subject to the supervision of the MTA Police Department, an employer not covered under our statutes.

Although this is significant, as I stated in B.C.D. 05-48, section 1(d)(i) has a broader scope and would cover individuals as railroad employees who, although supervised by a non-carrier, are performing services on railroad property and integrated into the railroad's operations or are performing technical or professional services for the carrier and integrated into the carrier's operations.

In the cases before us we are dealing with railroad police officers who were transferred to a non-covered employer, but whose duties remained essentially unchanged or continued to be railroad dominated. Thus, they fall squarely within the statutory employee provision discussed above.

Original signed by:

V. M. Speakman, Jr.  
Labor Member