

Employee Service Determination – Decision on Reconsideration

DJH

MH

TN

BR

AGT

This is the decision, on remand, by the Railroad Retirement Board of its determinations B.C.D. 06-24 and 06-39, 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 (45 U.S.C. §351 et seq.) (RUIA). On February 6, 2008, the United States Court of Appeals for the Second Circuit issued an order vacating these two decisions of the Board which denied the claims of these five individuals and remanded the case to the Board. The decision of the Board on remand finds that the individuals whose service is at issue were providing professional services to the LIRR and were directly integrated into the management and operation of the railroad employer and were rendering, on the property of the employer's operations, personal services and were subject to LIRR supervision. As such their service for LIRR was employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. Accordingly, the Board concludes that the service and compensation of the above-listed individuals is creditable for the period beginning January 1, 1998 when they were transferred to MTA.

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 Rail Road 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 Rail Road 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 Rail Road and/or the Metro-North Commuter Railroad Company were no longer covered under the RRA and the RUIA.¹

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, 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. A request for reconsideration followed in a letter dated January 11, 2006. In a decision dated June 6, 2006, the Board rendered a decision on reconsideration finding that the service performed by DJH, MH, BR, LCS, and AGT was not creditable to the Long Island Rail Road for the purpose of determining benefit entitlement under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Board Coverage Decision 06-24. Additionally, in a decision dated September 11, 2006, the Board reached the same conclusion on the claim of TN. See Board Coverage Decision 06-39. DJH, M H, BR, AGT, and TN filed a petition for review in the United States Court of Appeals for the Second Circuit. It should be noted that LCS did not request further review, and the decision of the Board regarding his claim is therefore final. In a decision dated February 6, 2008, the Court of Appeals vacated the decisions of

¹ 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.

the Board in B.C.D. 06-24 and B.C.D. 06-39, and remanded to the Board the claims of the five petitioners for service. The Court found that the Board erred as a matter of law in failing to consider in its decisions paragraphs (B) and (C) of section 1(d)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(d)(1)(i) and similar language in section 1(e) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(e)), which addresses the status of individuals rendering technical, professional, and personal services for employers covered by the Acts. To focus on the activities of these specific claimants, on June 17, 2008, the Board requested each of the individuals, and also MTA, provide additional information regarding the work performed by these five individuals by completing a supplemental questionnaire. Responses to the Board's supplemental questionnaire concerning each individual were received as follows: DJH's response was received on September 24, 2008; TN's response was received on November 3, 2008; BR's response was received on August 25, 2008; and AGT's response was received on August 26, 2008. No response was received from MH. MTA's response concerning the five individuals was received on October 5, 2009.

Information Provided In Connection with Request

The above-listed individuals have submitted additional information based on the Board's supplemental questionnaire. In connection with their original requests for service credit, they provided information set out in the following discussion.

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.

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, MH 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.

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.

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.

In response to the Board’s supplemental questionnaire, DJH provided the following information:

DJH advised that East New York Station is in the Atlantic Avenue LIRR tunnel and consists of eastbound and westbound platforms (A & B) and a connecting underpass tunnel beneath the tracks. He stated that there is no parking lot, drop off area or yard. DJH stated that he patrolled in the LIRR tunnel east and west of the station on foot. He advised that he patrolled the underpass and platforms A & B on foot searching for homeless people, larceny of copper wires, graffiti or trespassers at the station. He assisted and responded to emergency calls for incidents onboard LIRR trains that stopped at the station. At this station, he reported that he also handled homicide, rape, robbery and assault situations.

DJH reported that he received direct requests to assist LIRR trainmen and conductors at LIRR East New York station in arresting fare violators and disorderly passengers involved in crimes occurring on the train which ran between Jamaica and Flatbush Avenue, Brooklyn. He stated that very often police assistance calls for service came from LIRR Communications Movement Bureau. No other LIRR employees were permanently assigned to East New York Station during the night shift (3 P.M. to 11 P.M.) because it was a high crime area, according to DJH. DJH stated that LIRR signalmen, trackmen and janitor crews would require police presence and surveillance to protect them when they worked in and around the station and in the tunnel.

DJH stated that his supervision had direct contact with LIRR branch line managers. On occasion he would have contact with branch managers who attended police training meetings, perhaps two times a year.

DJH stated that he had daily direct contact with LIRR passengers at the LIRR East New York Station and platforms. According to DJH, he provided police presence and security in a high crime area station. He provided emergency first aid when required. He gave directions and train information to LIRR passengers at East New York Station, according to DJH. DJH stated that he answered questions regarding delays and was available to assist the passengers to safety in the event of fire, crime, train accident or terrorist attack. DJH reported that no other LIRR employees were present at the East New York Station during his shift (3 pm to 11 pm).

DJH stated that he was assigned to East New York LIRR Station permanent fixed foot post. He reported that he never departed the post and that he worked the shift, Monday through Friday, 3pm to 11pm.

In response to the Board's supplemental questionnaire, MTA provided the following information regarding DJH:

DJH worked as a uniformed Police Officer in the East New York station from 1989 to 1999. This East New York station is on the Atlantic Branch in a high crime urban area. There are two main tracks, two platforms and a ticket office located in the underground passageway connecting the two platforms. The passageway goes under the tracks, and rapid New York City Transit trains operate above the Long Island Rail Road. The right of way at this East New York station is owned by the City of New York and leased to the Long Island Rail Road. From 1989 to 1999, the duties of a Police Officer at this station were to ensure the safety and security of all Metropolitan Transportation Authority and Long Island Rail Road customers, employees and property. This assignment was not stationary, but rather part of a patrol of other locations. This post would respond to other locations for emergencies. Two Police Officers were assigned to duty at this station during the relevant time period.

In response to the Board's supplemental questionnaire, MH did not provide any information.

In response to the Board's supplemental questionnaire, MTA provided the following information regarding MH:

MH worked in Operational Support at the Hillside Motor Pool in 1998. The Hillside Motor Pool was the primary Long Island Railroad maintenance facility located approximately two miles east of the Long Island Rail Road, Jamaica New York Headquarters, and also contained various Maintenance of Equipment (M of E) rail car repair shops, M of E offices, and Engineering Departments. The MTA Police Department also had facilities at Hillside Motor Pool and many Police patrols began and ended tours from this location. Long Island Rail Road employees worked at Hillside Motor Pool, and train and engine service crews went on and off duty at this location. In 1998 and earlier, the Hillside Motor Pool facility was owned by the Long Island Rail Road.

Regarding MH who worked in Operational Support at 341 Madison Avenue, New York in 1999, the Operational Support function included administrative duties required for Police Department Operations. MH participated in this operation by accepting, reviewing and routing purchase order requests from members of service. No Long Island Rail Road employee worked at this location in 1997. Operational Support at 341 Madison Avenue did not work with, or perform repairs on equipment used by the Long Island Rail Road. In 1999 Operational Support at 341 Madison Avenue was the procurement office for equipment used on Long Island Rail Road property for commuter service.

Regarding MH who worked in the Radio Motor Pool position at Ronkonkoma's headquarters on Long Island in 2000, the function included administrative duties. MH participated in this operation by scheduling radio motor patrols for repairs, answering calls from vendors and filling of documents related to fleet maintenance. In 2000, Long Island Rail Road employees were assigned to Ronkonkoma Station and the Yard. These employees sold tickets, cleaned, inspected, and repaired rail cars. Several train and engine service crews went on and off duty at Ronkonkoma - it was a major terminal for electrically powered trains on the Main Line. Diesel hauled trains operated east of this location to serve Main Line stations to Greenport, New York. Operational Support at Ronkonkoma did work with and perform repairs on equipment used by Long Island Rail Road. The repair of Police Department radio motor patrols was scheduled from Ronkonkoma. Radio motor patrols were used on Long Island Rail Road property by Police Officers to provide service to the Long Island Railroad. Procurement was not conducted from the Ronkonkoma location.

In response to the Board's supplemental questionnaire, TN provided the following information:

TN stated that in January 1998 the LIRR & Metro North RR Police Departments merged and became the MTA Police Department. TN reported that he was a sergeant working in the Operations Support Unit for the LIRRPD at the Hillside Support Facility, Queens, New York. TN stated that, post merger, he was reassigned to 341 Madison Avenue and that although his location changed, his immediate supervisors remained the same and his work assignment was not altered. He stated that, to his knowledge, the Firearms Unit, Police Payroll Department and a Detective office were located in the building. According to TN, he did not know if any LIRR employees worked in the building since he worked in only one office.

TN reported that although the majority of his work was confined to the Operation Support Unit, he was also assigned to work as a uniform police sergeant at LIRR locations such as Penn Station, Jamaica Station and other LIRR properties on special occasions which included, overtime, emergency conditions such as the NYC Blackout, terrorist related situations, New Years Eve Details, etc.

Relative to the assignment of officers, TN reported his duties were to provide police personnel for overtime situations on both the Long Island Rail Road & Metro-North Railroad. Overtime needed for projects/conditions/emergencies was at least 50% to 60% attributable to the Long Island Rail Road, according to TN.

TN stated that he dealt almost exclusively with police assigned to the commuter railroads, and that only a very small percentage worked on communication and security for MTA HQ.

TN reported that some of his General Administration activities conducted at 341 Madison Avenue as a sergeant were 1)Supervising the proper maintenance of court ordered "Sealed Records;" 2)Supervising the proper storage/logging/maintenance of summonses; 3)Generating/writing department orders (Personnel, Operational, Circular, Interim, etc.) which were disseminated to all police personnel throughout Long Island Rail Road & Metro-North locations where the officers worked; and 4) Maintain separate seniority for the Long Island Rail Road & Metro-North Police Officers, Detectives, Sergeants and Lieutenants.

TN noted for background information that when a department within the Long Island Rail Road such as the Track Department or Signal Department requests police personnel to provide security for a specific project, the LIRR department supervisor would provide a "Project Number" to him. After management approval, he stated that he would write an order relative to this LIRR department request for police personnel and provide the necessary manpower via the contractual overtime polling rules. TN stated that this order would state 'the names of the police personnel assigned, their hours of work, their duties relative to the project and the specific LIRR department Project Number. TN noted that when the officer's time sheets were filed with the MTA Police Payroll Department, the Payroll Department would seek reimbursement for the work performed via the LIRR department requesting the police personnel. He stated that their project would have set aside money within the project for police/security concerns. TN stated that he would submit Operational Support Unit personnel timesheets to the MTA Police Payroll Department on a weekly basis with the "LIRR Project Number" on the payroll sheet coinciding with our overtime for that project.

TN stated that the duties of his job were not specified by MTA but existed before MTA police creation. TN reported that the duties of his job just stayed the same after the merger in a new location.

During the course of the business day, TN stated that he would receive requests via phone from various Long Island Rail Road department employees (Signal, Track, Safety, Bridge & Buildings, Transportation) indicating their need for police personnel to assist them in the furtherance of a RR project or safety condition. TN listed some examples as follows: traffic safety control for scheduled roadbed repair work at a RR crossing where malfunctioning gates will require police personnel, officers needed for crowd control at the US Tennis Open Tournament or US Golf Open or other public events where LIRR stations and right-of-way are impacted. Additionally, he stated that police personnel are requested to assist LIRR departments during track repair situations where bussing becomes necessary due to service disruptions. The LIRR Transportation Department will request police personnel due to customer safety and revenue protection concerns because of overcrowding at certain LIRR stations during Memorial Day Weekend, July 4th, Labor Day or a Yankee-Met baseball series in which additional train service has to be provided due to passenger volume, TN noted. For all the examples indicated, TN stated that his obligation would be to provide sufficient police personnel necessary to ensure that the LIRR departments' security needs were met.

In response to the Board's supplemental questionnaire, MTA provided the following information regarding TN:

Regarding TN who worked as a Police Sergeant at 341 Madison Avenue, New York from 1998 through 2005, the Police Sergeant function included preparation of departmental orders, maintaining the department roster, polling for overtime to ensure proper staffing, and other administrative functions. TN participated in this operation by supervising the staff and ensuring that tasks were completed in a timely manner.

In response to the Board's supplemental questionnaire, BR provided the following information:

BR reported that he was a Lieutenant assigned to Penn Station in January 1998 and remained in Penn Station until his promotion to Captain in 2000. BR reported that Penn Station has various police jurisdictions: Amtrak, New Jersey Transit and Long Island Rail Road. He stated that he worked only the Long Island Rail Road portion of Penn Station and that his duties at New York-Penn Station (LIRR) encompassed 1)the training and supervision of officers and sergeants for service on LIRR; 2)the assignment of officer posts within the LIRR portion of New York-Penn Station; 3)the supervision of arrests on LIRR; 4)the reviewing of all police

reports emanating from LIRR New York-Penn Station; and 5) the performance of all duties required as a police lieutenant.

BR reported that the Long Island RR provided an office for him in his position as a sergeant and later as a Lieutenant. According to BR, the police officers' locker rooms were used exclusively by MTA LIRR police officers only and that at New York-Penn Station every craft has their own locker room, adding that engineers are separate from conductors, signal from track, etc. BR reported that the police locker room, the sergeants/lieutenants' locker rooms and the Captain's office were located in the same portion of the building adjacent to the LIRR Transportation Offices and that the offices and locker rooms were not utilized by any other MTA police officers that were not assigned to LIRR.

BR reported that bi-weekly meeting with LIRR department managers were held once every two weeks unless otherwise scheduled. According to BR, these meetings were attended by all LIRR department heads assigned to New York-Penn Station. The purpose was the coordination of all LIRR departments relative to the safe and orderly operation of the station. Additionally, BR stated that the New York-Penn Station Emergency Action Plans for LIRR were discussed and formulated at these meetings. BR reported that attendance at these meeting was mandatory.

According to BR, the New York-Penn Station LIRR Transportation Manager chaired the meetings with the following LIRR Department heads: Transportation Dept., Customer Service Dept., occasionally Public Relations Dept., Capital Improvement Representative, Maintenance Dept., Station Master and Police Dept. BR stated that he occasionally attended these meetings as a Lieutenant at the Captain's request, citing for example that certain events required joint action by all departments, such as Thanksgiving Day Parade, Christmas, New Year's Eve, hockey, basketball playoffs, concerts, St. Patrick's Day, etc.

BR reported that the police officers he supervised varied, averaging approximately twenty-five police officers, five sergeants and one lieutenant. All officers worked entirely on the LIRR portion of New York-Penn Station premises with the exception of two officers per shift that reported on and off duty at two Broadway (MTA Headquarters), according to BR. BR reported that these officers were supervised by Penn Station supervisors and that he did not supervise any non-badged employee.

BR stated that his duties as a Captain remained the same relative to the example of a train/pedestrian accident. He reported that the coordination at

the scene of an accident required him to directly contact LIRR employees at the scene and that he did not work through a LIRR or MTA liaison employee. BR stated that any transportation requests were directly given to the LIRR Transportation Manager at the scene.

In response to the Board's supplemental questionnaire, MTA provided the following information:

BR worked as a Police Officer from 1998 to 2000 and as a Captain at New York Penn Station from 2000 to 2001. BR's duties as a Captain were planning, leading and directing the patrol functions and officers assigned to Penn Station. At that time, Penn Station was a reporting location for approximately 75 Police Officers. The officers would remain at the location, except for emergency situations. Generally, during 2000-2001 Police Officers at Penn Station were assigned to patrol. Not all officers at Penn Station reported to the Captain. Although the Captain did not directly supervise the detectives, the Captain was ultimately responsible for all crime investigations within the command. Penn Station had both uniform and plain clothes personnel.

In response to the Board's supplemental questionnaire, AGT provided the following information:

AGT reported that, depending on the security needs of the Long Island Railroad, sometimes he was assigned to foot patrol either riding trains, walking station platforms or maintenance facilities. Other times, he reported that he was given a squad car to patrol Long Island Rail Road parking lots and stations, generally with one assignment per day. In a typical day, AGT stated that he would report to the Ronkonkoma Headquarters, receive his assignment and dispatch to the location. If he had train patrol, he would board a train in Ronkonkoma and ride various trains to Jamaica and/or Pennsylvania Station, New York. Generally, he could cover five to six trains on a shift, according to AGT. If he had motor patrol, AGT reported that he would drive to a Long Island Rail Road station, park, walk the station, check the platform, assist passengers and crews, check with ticket agent and/or cleaning crews and if everything was secure, he would drive to the next station and do the same, basically working in one direction until he got a radio call to respond to some emergency.

AGT stated that if he was assigned trains, it would generally be all day. There were some days when he was ordered to drive a patrol car to a specific station and ride the train from that station. AGT reported that his time between 1998 and 2002 was evenly split between patrol car and train work. On occasion,

depending on the security needs of the Long Island Rail Road, he was told to ride a specific train for a specific reason such as disruptive passengers, crowd control, fare beaters, loiterers, medical assistance, special events, like Belmont, Met games, etc. In every case, he would check in with the conductor and crew to let them know that he was on board and ask if there was anything he needed to concern himself with first. Then, as the conductor or brakemen passed through the cars, AGT reported that he would check with them again.

AGT stated that his job was to provide professional law enforcement specifically, and for the most part exclusively, to the Long Island Rail Road and its employees. He reported that he regularly interacted with conductors, provided police presence on trains and platforms, responded to requests from conductors to confront and remove fare beaters, disruptive or drunk passengers, provided crowd control on station platforms or on board trains, and medical assistance to passengers. AGT reported that he responded to any employee or passenger to confront and control disruptive and drunk passengers on station platforms or to investigate suspicious activity reported at the station.

AGT reported that during gate failures, he worked with signalmen, their foreman and crews providing assistance in traffic control, establishing perimeters and safety highway protection at gate crossings. Track repair crews needed crossing protection, traffic control and right of way security protection of personnel and equipment, especially at night according to AGT. He reported that vendors, ticket agents, janitors asked for assistance with homeless, loiterers, vandalisms and theft. AGT stated that he responded directly to their request and obtained back-up or further police, if necessary.

According to AGT, Long Island Rail Road personnel from every level had direct contact with him and approached him with various problems, requests, inquiries or suggestions all the time. Although he did not always know the name of the managers or supervisors, he reported that they wore Long Island Railroad ID's and as such he was responsible for providing them with service. AGT reported that if they required action beyond the scope of his immediate assignment, he would call in to his supervisor to get new orders, if necessary, to assist them. AGT stated that the contact varied depending on the assignment and what was happening on the Long Island Rail Road.

AGT reported that when he was assigned train patrol duties, he had constant contact with passengers who needed assistance with directions, information on trains, subways, connections to other trains, assistance to the elderly, single parents with multiple children, passengers who take ill on the platform, persons

dropping or losing items of personal property, those needing to report crimes, accidents or incidents, or most importantly, other suspicious activity which could be terrorist connected. AGT reported that no one else working for the Long Island Rail Road provided these services on the platforms and not all stations have ticket agents (all have ticket vending machines). He stated that even the stations that had ticket agents were only for the AM rush. At Jamaica Station, AGT reported that the ticket agents are down stairs in the Headquarters, far away from the platforms and an info desk on one of the five platforms in the complex. On the trains, AGT reported that he shared the responsibility of passenger contact with conductors and brakemen.

In response to the Board's supplemental questionnaire, MTA provided the following information regarding AGT:

Regarding AGT who worked as a uniformed Police Officer from 1998 through 2002, the work locations listed are various stations on Long Island Rail Road branches: Pennsylvania Station was leased by Long Island Rail Road from Amtrak; Jamaica Station was owned by Long Island Rail Road; East New York right of way was leased to Long Island Rail Road from New York City; Flatbush Avenue was owned by Long Island Rail Road; Ronkonkoma Station was owned by Long Island Rail Road. These locations are stops on a regularly assigned patrol area performed in a radio motor patrol car. There are some locations where officers would receive a stationary assignment, but AGT could be assigned to ride trains for an entire day.

Discussion and Conclusion

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 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 service 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; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

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. A majority of the Board found that 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 payroll did not mean that they were performing employee service for the LIRR. A majority of the Board determined that 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. On reconsideration, a majority of the Board found that the evidence as a whole clearly supported 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, a majority of the Board determined that their service for MTA was not employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Considering the new evidence submitted by the individual's and the MTA, the Board now finds that, based on the evidence as a whole, these individuals were "rendering professional or technical services and [were] integrated into the staff of the employer" as specified in paragraph (B) and were "rendering, on the property used in the employer's operations, personal services" as is specified in paragraph (C), the rendition of which services were performed on the premises and under the supervision of LIRR. The description of the services performed by these five individual's shows that they are clearly professional services. The individuals at issue in this case provide services to the LIRR, and those services are directly integrated into the management and operation of the railroad employer. Therefore, the Board finds that these five individual's are integrated into the employer's staff or operations, as is specified in paragraph (B) and (C).

It should be noted that DJH claims service for 1998 and 1999; MH claims service for 1998 through 2001; TN claims service for 1998 through 2005; BR claims service for 1998 through 2005; and AGT claims service for 1998 through 2002. By his letter dated March 1, 2005, Attorney Michael Flynn first presented affidavits claiming service by DJH, BR and AGT. Attorney Flynn submitted TN's affidavit by letter dated May 5, 2005. The Board notes that if the 2005 letters are taken as the date the employee's first raised the issue of unreported service, pursuant to section 9 of the Railroad Retirement Act and section 211.16 of the regulations,

claimed service for years prior to 2002 would be precluded unless subject to 211.16(b)(2).

Retroactive credit for service is limited to four years pursuant to section 9 of the Railroad Retirement Act which requires railroad employers to file annual reports of compensation and service with the Railroad Retirement Board. Section 9 provides that the Board's records of reported compensation and service become final unless the error in a report of compensation or the failure to report compensation is called to the attention of the Board within four years after the date on which the report of compensation was required to be made. Section 209.8 of the Board's regulations (20 CFR 209.8) requires that on or before the last day of February, each railroad employer must report the compensation and service of the employer's employees for the previous calendar year. Section 211.16 of the Board's regulations (20 CFR 211.16) provides that as a general rule the Board's record of compensation and service may not be corrected after four years in the absence of fraud.

Attorney Flynn had written a letter to the Secretary to the Board dated March 1, 2004, which stated he represented "MH, et al, who are all retired MTA Police Officers." The 2004 letter requested that the Board re-open B.C.D. 98-92, which had determined the MTA Police Department was not a covered employer. Even earlier, Mr. Flynn had first raised the issue of the status of the Police Department itself a covered employer in a letter dated February 13, 2002, within days of the decision by the Second Circuit in *Greene v. Long Island Rail Road Company*, 280 F. 3d 224 (2002). At the time of Mr. Flynn's February 2002 letter, years dating back to 1998 remained open for correction under section 9 of the RRA. Implicitly, the Board's prior decision assumed that the claims for service in 1998, 1999, 2000 and 2001 by the employees were first raised on their behalf by attorney Flynn in 2002. Accordingly, the Board notes on remand, that it is considering the claims for service dating to those years in this case.

Accordingly, the Board reverses on remand its decision of June 6, 2006, and concludes that the service and compensation of the above-listed individuals is employee service and is creditable consistent with Section 9 of the RRA for the period beginning January 1, 1998, when they were transferred to the MTA .

Finally, the Board notes that its decision in this case is based upon the unique facts, as presented by the employees in question and the MTA. The Board's decision should not be read as a modification or reversal of B.C.D. 98-92, which

held that the police officers transferred to the MTA Police Department were no longer covered under the RRA and RUIA.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever