



NATIONAL MEDIATION BOARD

1301 K St NW, Suite 250E
Washington, DC, 20005

In the Matter of the
Application of the

**BROTHERHOOD OF LOCOMOTIVE
TRAINMEN AND ENGINEERS**

alleging a representation dispute
pursuant to Section 2, Ninth, of
the Railway Labor Act, as amended

involving employees of

NORTH COUNTY TRANSIT DISTRICT

51 NMB No. 16

CASE NO. R-7630
NMB File No. CR-7250

**FINDINGS UPON INVESTIGATION –
AUTHORIZATION OF ELECTION**

June 11, 2024

This determination addresses the application filed by the Brotherhood of Locomotive Trainmen and Engineers (BLET or Organization) alleging a representation dispute pursuant to the Railway Labor Act (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth),¹ among the Train and Engine Service Employees, employees of North County Transit District (NCTD or Carrier). These employees are currently represented by the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) through a voluntary recognition.

The BLET's application raises the question of Railway Labor Act (RLA) jurisdiction. For the reasons set forth below, the National Mediation Board (NMB) finds that NCTD is a carrier subject to RLA jurisdiction. The NMB further finds that a representation dispute exists among NCTD's Train and Engine Service Employees and authorizes an election using April 27, 2024 as the voter eligibility cut-off date.

¹ 45 U.S.C. §151, *et seq.*

PROCEDURAL BACKGROUND

On April 30, 2024, BLET filed an application, along with authorization cards, alleging a representation dispute involving Train and Engine Service Employees at NCTD. The application was designated NMB File No. CR-7250 and assigned to Investigator Angela I. Heverling.

On May 15, 2024, NCTD and SMART filed position statements. SMART confirmed that it represented the applied-for craft or class and argued that NCTD is subject to RLA jurisdiction. The NCTD did not express a position regarding jurisdiction. The NCTD acknowledged that it voluntarily recognized SMART as the representative of the applied-for employees but seeks clarification about the employee's current choice of representative.

ISSUE

Is NCTD subject to the jurisdiction of the RLA?

STATEMENT OF FACTS

The NCTD is a public transit district established under the North County Transit District Act, California Public Utilities Code (PUC) § 125000, *et seq.* It provides public transportation services in San Diego County, California, including COASTER commuter rail service.

In 1992 and 1993, NCTD purchased two rail lines from Atchison, Topeka & Santa Fe Railroad Company (AT&SF). The tracks on which the COASTER operates continue to be used by freight carriers, the National Railroad Passenger Corporation (Amtrak), and Metrolink.

From 1994 through 2006, the Train and Engine Service Employees on the COASTER were employed by Amtrak and represented by the United Transportation Union (UTU) (which later became SMART).² In 2006, Transit America Services took over the operations until 2016, when it was replaced by Bombardier Transportation, Inc. (now Alstom). Also in 2016, the National Labor Relations Board (NLRB) certified SMART as the representative of the Train and Engine Service Employees.

In 2020, NCTD decided to partially end its contract with Alstom and eventually hired most of Alstom's employees. The operating employees on the COASTER became NCTD employees on June 26, 2022. The NCTD did not adopt the collective bargaining agreement (CBA) between SMART and Alstom but

² UTU became SMART following its merger with the Sheet Metal Worker's International Association (SMWIA) in 2008.

voluntarily recognized SMART as the bargaining representative of the employees. As of May 15, 2024, SMART and NCTD have not yet negotiated a new CBA.

In early 2023, one of the former Alstom employees, now employed by NCTD, filed a petition to decertify SMART with the California State Mediation and Conciliation Service (SMCS). The SMCS held that under the National Labor Relations Act (NLRA) and California law, a “successor bar” prevented it from accepting a decertification petition until October 17, 2023. Following a subsequent petition, SMCS conducted a mail ballot election in January of 2024 and the votes were scheduled to be counted on January 29, 2024.

On January 22, 2024 SMART filed a motion to dismiss the decertification application, arguing for the first time that the employees were subject to RLA jurisdiction. After additional litigation before the SMCS, SMART’s motion was denied. On March 18, 2024, SMART appealed the ruling to the California Public Employment Relations Board (PERB) and asked it to stay the counting of ballots in the mail ballot election. On March 20, 2024, SMART also asked the California Court of Appeals to stay the counting of the ballots and determine that the employees are subject to RLA jurisdiction. The PERB granted SMART’s stay request and the jurisdiction issue is currently pending before it. The issue is also pending before the California Court of Appeals which has issued an order requiring the PERB to show cause why SMART’s request for relief should not be granted. That court has also requested briefing on the jurisdiction issue from the parties with deadlines in June 2024.

DISCUSSION

An entity is a “carrier” subject to RLA jurisdiction if it is a “railroad subject to the jurisdiction of the Surface Transportation Board” (STB). 45 U.S.C. § 151, First. STB jurisdiction, in turn, is defined in the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. § 10101 *et seq.*

According to ICCTA Section 10501(a), the STB has jurisdiction over certain types of “transportation.” 49 U.S.C. § 10501(a). The term “transportation” includes physical assets “related to” the movement by rail of passengers, property, or both, “regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9)(A). A physical asset may be “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind.” *Id.* The term “transportation” also includes “services related to” the movement by rail of passengers, property, or both, “including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10102(9)(B).

The STB, and before it the Interstate Commerce Commission (ICC), have exercised jurisdiction over the NCTD. The issue first arose in 1994 following the

NCTD's initial purchase of the two rail lines from AT&SF. The ICC issued a decision concluding that, through the transaction, NCTD had acquired sufficient power over AT&SF's operations on the lines to require a finding that it controlled the rail freight operations and had become a common carrier by railroad subject to the jurisdiction of the ICC. *See The Atchison, Topeka & Santa Fe Ry.*, 10 ICC2d 78, 90 (1994). The STB has continued to exercise jurisdiction over NCTD, including in 2002 when it held that "NCTD owns and operates an interstate rail line and is obligated to maintain the line for both interstate and intrastate rail traffic. Although NCTD also conducts commuter rail service, that authority does not affect its rights and obligations under the ICCTA." *North San Diego County Transit Dev. Bd.* Finance Docket No. 34111, 2002 WL 1924265, at *4 (S.T.B. Aug. 19, 2002).

The NCTD's status as a public transit agency does not preclude STB coverage. A federal court rejected that argument holding that "NCTD is both a commuter rail operator and a 'rail carrier' owning and operating an interstate rail line. Defendant has provided numerous decisions issued by the STB, as well as informal letters, confirming that NCTD is a rail carrier subject to STB jurisdiction." *City of Encinitas v. N. San Diego County Transit Dev. Bd.*, No. 01-CV-1734-J AJB, 2002 WL 34681621, at *4 (S.D. Cal. Jan. 14, 2002).

The NCTD's status as a public employer also does not preclude RLA jurisdiction. In recognizing RLA jurisdiction over Long Island Railroad in 1982, for example, the Supreme Court noted that passenger railroads coming under state control did not prevent federal regulation of those railroads. The Court stated that

[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state. (emphasis in original)

United Transp. Union v. Long Island R.R., 455 U.S. 678, 686 (1982).

The fact that the NLRB has previously asserted jurisdiction over NCTC is also not determinative. *See Bombardier Trans. System Corp.*, 32 NMB 131 (2005); *Inter-Rail Transport of Jacksonville, LLC*, 31 NMB 478, 483 (2004).

CONCLUSION

Based on the above, the NMB finds that the NCTD and its Train and Engine Service Employees are subject to RLA jurisdiction.³ Based on the authorization cards submitted by BLET, the Board finds that a dispute exists regarding the representation of the Train and Engine Service Employees craft or class.

Therefore, NMB File No. CR-7250 is converted to NMB Case No. R-xxxx and an election is authorized with a voter eligibility cut-off date of April 27, 2024. BLET and SMART will appear on the ballot. Pursuant to Manual Section 12.1, the Carrier is hereby required to furnish within five calendar days, 1 X 2 5/8", peel-off labels bearing the alphabetized names and current addresses of those employees on the List of Potential Eligible Voters. The Carrier must print the same sequence number from the List of Potential Eligible Voters beside each voter's name on the address label. The Carrier must also provide to the Board the name and sequence number of those potential eligible voters on military leave who are serving in foreign countries or who reside outside of the United States.

The Carrier must use the most expeditious method possible, such as overnight mail, to ensure that the Board receives the labels within five calendar days.

By direction of the NATIONAL MEDIATION BOARD.



Marie-Kate Dowling
General Counsel

Board Member Sweatt, concurring

I agree with the decision of the Board; however, I write separately to emphasize two important points. First, secret ballot elections under the Board's jurisdiction protect the right of active duty reservists to vote in organizing elections. For some inexplicable reason, the NLRB has not been able to provide this fundamental right for men and women in uniform, defending the very principal of voting. Second, I write to emphasize the importance of the NLRB

³ The Board makes its representation determinations on a case-by-case basis. This determination is limited to the applied-for craft or class and the Board makes no determination regarding any other NCTD employees.

consistently refer cases of questionable jurisdiction to the NMB for an advisory opinion.

As noted in the authorization of election in the Board's decision, the NMB's election procedures protect the rights of employees who serve in the military to vote in representation elections. At a time when our Nation relies on its part-time National Guard and Reserve more than ever, it is important that they do not lose any rights associated with their civilian employment, including the right to participate in the important choice regarding representation. In 2020, the NLRB issued a Notice of Proposed Rulemaking which would have provided a process for absentee ballots for employees on military leave but no further action seems to have been taken on this issue. Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave, 85 Fed. Reg. 45553 (proposed July 29, 2020). At present, the NLRB does not protect the right to vote of employees who are on military leave and unable to appear in person at a polling place.

Regarding the jurisdiction issue, Section 2(2) of the National Labor Relations Act (NLRA) excludes from its definition of employer "any person subject to the Railway Labor Act." Similarly, Section 2(3) of the NLRA excludes from its definition of employee "any individual employed by an employer subject to the Railway Labor Act." When faced with an application covering railroad employees, the NLRB should have referred the case to the NMB for an advisory opinion. Although the parties may not have raised the issue at the NLRB, the clear operation of this rail entity made it imperative for the NMB to weigh in regarding jurisdiction.

With the enactment of the RLA, Congress established a statutory scheme to maintain the flow of rail traffic without interruptions based on work stoppages or other labor actions. The STB's jurisdiction (initially determined by the ICC) over NCTS's lines on which the COASTER runs is based on NCTS's control over freight shippers. As the STB has stated, "NCTD owns and operates an interstate rail line and is obligated to maintain the line for both interstate and intrastate rail traffic." *North San Diego County Transit Dev. Bd. above* at *13. The RLA was established to prevent interruptions to this very rail traffic. The NCTD and the organizations representing its railroad employees should be subject to the procedures preventing a strike until the mediation process outlined in the RLA is exhausted.

In recent years, the NLRB has moved away from its practice of referring cases of questionable jurisdiction to the NMB even when the parties clearly raise the issue before it. This is problematic. The NMB has expertise in the covered industries and in determining the appropriate craft or class for railroad and airline employees. System-wide representation and the statutory mediation

process are fundamental to ensuring labor peace in these industries. These are not available under the NLRA.

Had this case been referred to the NMB in 2016, we would have asserted jurisdiction. Had SMART been certified under the RLA at that time, the recent decertification attempt by NCTS employees would have not been delayed by over a year, preventing these employees from exercising their right to choose whether or not to have union representation. The NMB's clear process for decertification should be available to all railroad employees in a timely manner.