IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH CAMPBELL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**1:99-cv-02979 (EGS)**
NATIONAL RAILROAD PASSENGER CORPORATION,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The Plaintiffs, by and through the undersigned attorneys, hereby move the Court for certification of the following classes, and/or subclasses, if appropriate, and class representatives pursuant to Rule 23 of the Federal Rules of Civil Procedure:

(1) All Black employees of AMTRAK who are represented for purposes of collective bargaining by any labor union (except those who have worked only in the Northeast Corridor and are represented for purposes of collective bargaining by the Pennsylvania Federation of the Brotherhood of Maintenance of Way Employes) (herein "Black CBA employees") who, since April 4, 1996, have been discriminated against because of their race or color in regard to competitive promotion selections ("the Black CBA Employees Promotions Class"); and/or in the alternative,

a. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Shop Crafts who raise such promotion selection claims (the "Shop Crafts Promotion Subclass");

b. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Engineering Crafts who raise such promotion selection claims (the "Engineering Crafts Promotion Subclass");

c. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Operating and Police Crafts who raise such promotion selection claims (the "Operating and Police Crafts Promotion Subclass");

d. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Clerical and On-Board Services Crafts who raise such promotion selection claims (the "Clerical and On-Board Services

Crafts Promotion Subclass");

(2) All Black CBA employees of AMTRAK who, since at least April 4, 1996, have been exposed to a racially hostile work environment, as embodied in racial harassment and/or racial discrimination in regard to training, job assignments, work assignments, non-competitive transfers, scheduling, and other terms and conditions of employment ("the Black CBA Employees HWE Class"); and/or in the alternative,

a. a subclass of all such Black CBA employees who, since at least April 4, 1996, have worked for Amtrak in any of the Shop Crafts and have been exposed to such racially hostile work environment (the "Shop Crafts HWE Subclass");

b. a subclass of all such Black CBA employees who, since at least April 4, 1996, have worked for Amtrak in any of the Engineering Crafts and have been exposed to such racially hostile work environment (the "Engineering Crafts HWE Subclass");

c. a subclass of all such Black CBA employees who, since at least April 4, 1996, have worked in the Operating and Police Crafts and have been exposed to such racially hostile work environment (the "Operating and Police Crafts HWE Subclass");

d. a subclass of all African-American CBA employees who, since at least April 4, 1996, have worked in the Clerical and On-Board Services Crafts and have been exposed to such racially hostile work environment (the "Clerical and On-Board Services Crafts HWE Subclass");

(3) All Black CBA employees of AMTRAK who, since April 4, 1996, have been discriminated against in regard to discipline or termination ("the Black CBA Employee Discipline Subclass"); and/or in the alternative,

a. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Shop Crafts and have been discriminated against in regard to discipline or termination (the "Shop Crafts Discipline Subclass");

b. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Engineering Crafts and have been discriminated against in regard to discipline or termination (the "Engineering Crafts Discipline Subclass");

c. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Operating and Police Crafts and have been discriminated against in regard to discipline or termination

(the "Operating and Police Crafts Discipline Subclass");

d. a subclass of all such Black CBA employees who, since April 4, 1996, have worked for Amtrak in any of the Shop Crafts and have been discriminated against in regard to discipline or termination (the "Clerical and On-Board Services Crafts Discipline Subclass");

(4) All Black persons who have applied to work for AMTRAK for any position(s) that would be represented for purposes of collective bargaining by any labor union since April 4, 1996, and been denied employment because of their race ("the Black Applicant Class"); and

(5) As Class Representatives of the above-defined Classes and/or Subclasses, those Plaintiffs listed in Plaintiffs' Exhibit 9 to this Motion and the accompanying Memorandum, to represent, respectively, those Classes and/or Subclasses to which they would belong.

Respectfully submitted this 21st day of February, 2012,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION

On November 9, 1999, 22 African-Americans filed this lawsuit against the National Railroad Passenger Corporation ("AMTRAK"), alleging class-wide race discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 28 U.S.C. §2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981. They were joined by 49 additional Plaintiffs through a series of Amended Complaints. All of the individual Plaintiffs are Black incumbent or former employees, or applicants for employment, of Defendant AMTRAK.

I. STATEMENT OF FACTS

AMTRAK is a single service company, providing passenger rail service at more than 500 facilities; its trains run on routes covering 21,000 miles through 46 states in the continental U.S. and the District of Columbia. Ex. 1, Report of Drs. Edwin L. Bradley and Liesl M. Fox at 2. AMTRAK's organization has undergone revisions from time to time, yet its basic structure, with one exception, has been stable. Highly centralized since its inception in 1971, Ex. 46, L. Miller Tr.

72-73, the company was re-organized under president Thomas Downs into three Strategic Business Units ("SBUs") – a Northeast Corridor ("NEC"), Intercity ("IC"), and West – in 1996,[1] with all of the SBUs reporting to AMTRAK's corporate headquarters in Washington, D.C. By late 1999, however, AMTRAK began to revert to a centralized structure, *id.* 74-77, Ex. 25, Green Tr. 91-93, and by October 1, 2002, discarded the SBU structure altogether, Ex. 61, Hall Tr. (Vol I) 75, in significant part because the SBUs did not work for human resources purposes.[2] At that time, AMTRAK returned to a traditional railroad organizational structure – by functional department managed at the corporate level and by operating division at the field level. Ex. 54, Walker Tr. 109-113. AMTRAK has five organizational departments with 97% of the unionized workforce – Mechanical, Engineering, Transportation, Customer Service, and Police. Ex. 2, Report of Thomas Roth, ¶¶15-20. Three service centers all report to D.C. headquarters. Ex. 46, Miller Tr. 88-90.

Craft Structure. Labor unions represent 95% of AMTRAK's workforce. Ex. 46, L. Miller Tr. 91; *See also* Ex. 2, Roth Report, ¶¶15-20. AMTRAK's Yellow Book, an internal directory, categories these workers, for labor relations purposes, into four "crafts" groups that mirror the company's main departments. Ex.58; Ex. 46, L. Miller Tr. 74-76, 78-81; Ex. 2, Roth Report ¶¶9-20; Ex. 1, Bradley-Fox Report at 5. (1) Shop Crafts: Mechanical and electrical workers

[1] The NEC comprised Washington, D.C. to Boston. The West comprised the territory from San Diego to Seattle. The InterCity encompassed the rest of the nation, ranging from Washington, D.C. to Miami, across the Midwest, the South, the Southwest.

[2] Two previous class action employment discrimination cases, *Thornton, et al. v. National Railroad Passenger Corp.*, No. 98-00890 (D.D.C. filed April 8, 1998), and *McLaurin, et al. v. National Railroad Passenger Corp.*, No. 98-02019 (D.D.C. filed August 20, 1998), caused Amtrak to realize that HR functions should not be subject to the SBU presidents but instead should rigorously follow the "policies and procedures or the corporate guidelines" from AMTRAK's national headquarters. Ex. 25, Green Tr. 78-79; 92-93, Ex. 28, Green Tr. Ex. 3.

engaged in locomotive and train car maintenance and repair; concentrated in AMTRAK's engine houses and repair shops; represented by IAM (mechanics), IBEW (electricians), JCC (carmen), NCFO (firemen and oilers), SMWIA (sheet metal workers), IBBB (boilermen and blacksmiths), and ARASA-ME Division (Maintenance and Equipment) (supervisors who are hourly wage workers); (2) Engineering Crafts: Maintain, inspect, and repair the railroad rights-of-way, tracks, and out-buildings; represented by BMWE (track workers), BRS (signalmen), and ARASA-MW Division (Maintenance of Way) (supervisors who are hourly wage workers); (3) Operating and Police Crafts: Responsible for operating the trains and for train security; represented by UTU (conductors), BLET (locomotive engineers), ATDA (formerly part of BLET) (train dispatchers), and FOP (police); (4) Clerical and On-Board Services Crafts: Provide customer services both in the stations and on board the trains; represented by ASWC (service workers), and ARASA-OBS (On-Board Services Division) (supervisors who are hourly wage workers). "[T[hose are the craft distinctions that we've always had." Ex. 46, L. Miller Tr. 79; *see* 74-81. The proposed class representative Plaintiffs come from all of these crafts and unions and all parts of the AMTRAK system, including 24 from the former NEC, 25 from the InterCity, and 23 from the West.[3]

[3] The Plaintiffs have all worked at AMTRAK during the liability period, other than the 8 who were denied employment at AMTRAK. The Plaintiffs reside in 19 different states and work in, or have worked in, each of AMTRAK's major facilities. They have been represented by all of the labor unions at AMTRAK and have held 80 different types of CBA-covered positions. The Plaintiffs have personally suffered race discrimination due to each of the challenged practices – in selection decisions (promotions and hiring), discipline, and exposure to a racially hostile work environment, including harassment and other disparate treatment such as denial of transfers, disparate testing, denial of training, and disparate work assignments and working conditions. *See* Ex. 9, Chart of Plaintiff Class Representatives. There is complete overlap among the claims sought to be certified for the Class and Subclasses and the claims of the Plaintiffs. *See* Ex. 6, Declaration Summary Chart; Ex. 7, Declaration Excerpts Illustrating Commonality and Typicality; Ex. 8, Declarations;

As explained by transportation labor expert Thomas Roth, the four crafts groups are traditional breakdowns of work in the railroad industry, dating from World War I. Ex. 2, Roth Report ¶¶4-14. These four craft groups have typified the workforce structure of all U.S. railroads since the industry's genesis, and AMTRAK inherited this structure when it was created by Congress in 1970 (and incorporated in D.C. in 1971). *Id.* ¶¶4-8. Thus, in Amtrak's union contracts, as in railroads generally, the provisions of union contracts covering workers in each of the crafts groups have been similar to one another. The reason is that, for a railroad to run efficiently there must be a continuity and consistency of employment rules governing the workers within each crafts group. The work activities within each crafts group are closely related. For example, the Shop Crafts keep the trains functioning and in good repair; naturally, they work in close physical, and functional, proximity to one another. The same principles apply to the other crafts groups. *Id.* ¶¶9-24. *See also* Ex. 46, L. Miller Tr. 92-99.

Just as the workers[4] want or need similar terms and conditions of employment, so does the employer: management is more efficient if the work rules and the terms and conditions of employment within a functional area are consistent. The common interest in labor relations stability within work groups led to pattern bargaining and the development of similar terms and conditions of employment within the craft groups. *Id.* ¶25-26.[5] Indeed, all of Amtrak's union

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and Ex. 9, Chart of Plaintiff Class Representatives.

[4] Included are the first-line supervisors who oversee the work, not the workers. They do not make personnel decisions; those decisions are made by managers. *Id.* ¶24.

[5] The railroad police group is a partial exception. Mr. Roth explains that their labor agreements utilize a compensation structure akin to the New York Police Department. *Id.* ¶27. However, pay is not an issue in this case. AMTRAK itself aligns the police function with the Operating crafts because the police provide security for the trains and also in order to balance the Labor Relations

contracts are "fairly uniform." Ex. 46, L. Miller Tr. 99.

Centralized Employment Policies. AMTRAK's employment policies, practices, and procedures for employment decisions affecting collective bargaining agreement ("CBA") employees – including hiring, initial job assignments, promotions, transfers, training, work assignments, terms and conditions of employment, and discipline and termination,[6] and for the maintenance of a racially neutral and harassment-free work environment – are all uniform and centrally controlled throughout all of AMTRAK's workplaces nationwide. Those policies, practices, and procedures all emanate from the Washington, D.C. corporate office of AMTRAK where the Human Resources ("HR") and Labor Relations ("LR") functions have been centralized and controlled. These policies are all applicable to each of AMTRAK's four organizational departments – Mechanical, Engineering, Transportation, and Customer Service – in each and every one of AMTRAK's facilities, wherever located, during the entire liability period in this case – since before 1996 and continuing to the present.[7]

Department workload. Ex. 46, L. Miller Tr. 80-81.

[6] Disciplinary procedure is subject to the collective bargaining agreements, but these provisions are all similar – virtually identical within Craft groups and very similar overall – and apply nationwide within the craft. They are so alike that LR created a one-page flow chart depicting the AMTRAK discipline process. Ex. 46, L. Miller Tr. 92-99, 151-57; *see* Ex. 48, L. Miller Dep. Ex. 6.

[7] These uniformly applicable employment policies are set forth in AMTRAK's "Red Book," which has been in use since the railroad was started in 1971. Ex. 25, Green Tr. at 120-23; 138-39. Among them: hiring and promotion policy, Ex. 33, Green Dep. Ex. 19; Rules of Conduct," and "Standards of Excellence," defining expectations of behavior for disciplinary purposes, Ex. 34-35, Green Tr. Ex. 20a, 20b, 21; and many other policies pertaining to employment. *See* Ex. 25, Green Tr. at 26-31, 78-79, 84-85, 92-94, 134-39, 140-43, 146-55, 160-61, 165-68, 173-74, 179, 182, 184-85, 187-91, 194, 199-203, 209-10, 235-45, 261-63, 274-79, 284-87, 290-97, 299-01, 305-07, 316-17, 318-20, 322-25, 329-30, 332-34, 339-42, 349; Ex. 18, Bullock Tr., pp. 32-34, 41-42, 63-64, 130-31, 139, 149-50, 154-59, 162-64, 185-93; Ex. 54, Walker Tr. at 119-21, 128; Ex. 12, Bagley Tr. at 46-50, 129-30.

Hiring and Promotions. Plaintiffs challenge AMTRAK's hiring and promotion policy on both disparate treatment and disparate impact theories. AMTRAK has a pattern-or-practice of treating Black applicants and Black incumbents differently from Whites. Also, AMTRAK's interviewing and selection process has a disparate impact on Black Hiring and Promotion Class (and Craft Subclass) members, and such process is not justified by business necessity.

The purpose of AMTRAK's selection policy "is to provide guidelines to AMTRAK supervision on how jobs are filled through employment, promotion, and transfer of employees . . . and no supervisor has the right to make any promise at variance with this policy." Ex. 25, Green Tr. Ex. 18, 19 (AMK08961). The same policy and process is used for selections[8] to fill all CBA-covered job vacancies, both for those who seek the jobs via promotion[9] or by hire from the outside; this process has been the same since January 1, 1989. Ex. 25, Green Tr. at 165-67, 234-37; Ex. 31-33, Green Tr. Ex. 17, 18, 19. These are actually not "guidelines," but rather "principles": every supervisor must make selection decisions consistent with PERS-4. Ex. 25, Green Tr. at 153-55. AMTRAK's uniform policy provides that "AMTRAK will seek to fill vacancies with the best qualified candidates."[10] Ex. 33, Green Dep. Ex. 19 at AMK08961; Ex. 25, Green Tr. at 158-59.

All CBA-covered job vacancies at AMTRAK are supposed to be publicly posted. Although

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[8] The selection decisions at issue are those filled pursuant to the policy that requires an exercise in judgment for the selection to fill a CBA-covered position. These may be promotions or new hires. Because external candidates generally compete directly with CBA employees for these jobs, there is, in reality, only one system at issue for hires and promotions. Ex. 55, Walls Tr. at 24-25; Ex. 51, Reuter Tr. at 28-29; Ex. 11, Allan Tr. at 35-36.

[9] Promotions which occur as a function of employee seniority, *i.e.* years worked in a certain position or obtained through the bid-and-bump system set forth in the CBAs are not at issue.

[10] Even when the policy read "well-qualified candidates," Ex. 32, Green Tr. Ex. 18, the understanding was that this meant "best-qualified." Ex. 25, Green Tr. at 158-59.

postings are generally mandated by the collective bargaining agreements, the details of how jobs are posted are governed by AMTRAK corporate procedure. Ex. 25, Green Tr. at 237-39. The selection process for CBA-covered positions is: (1) HR screens applications and conducts any pre-screening tests; (2) HR determines who will be interviewed; (3) Interviews (which are supposed to be done using a standard "interview guide") are conducted by line management and often (but not always) an HR representative, sometimes on multi-interviewer panels; (4) Ratings are made, generally on a scale of 1-5; rating forms are used; the guides, and any logs and notes are then collected and retained in a job folder; (5) Selection recommendations and decisions are made, sometimes by a line manager, other times by an amorphous panel "consensus." *See* Ex. 60 (HR Operation Procedure; AMK0000222420). Only HR can formally extend an offer to a selectee. While there are a number of sign-offs of approval of the final decision, the ultimate decision to select an employee or new hire for any CBA-covered position has rested exclusively with one officer: the CEO of AMTRAK (from 1996 to 2002, the SBU president or his designee). Ex. 54, Walker Tr. at 110-111, 113-115, 137-138.

AMTRAK's promotion and hiring selection process has both objective and subjective components. *Id.*; Ex. 11, Allen Tr. 73-78. Depositions of scores of AMTRAK managers reflected that the standard selection process was followed throughout the country across all crafts; however, they also revealed numerous variations which allowed for the infusion of subjective qualities. *See* Ex. 63 ("Selection Roulette"). The testimony of Sheila Davidson, Amtrak's top HR manager in the NEC, demonstrates the selection process' vulnerability to discriminatory bias. The ratings, rank-orderings, and selections are all done without any structure or criteria at all. *Id.* 115-16, 123.

Interviewers' evaluations of answers are based on their own notions of "business practice, ... how one would assess one doing one's job the way anyone is assessed on the job. .... Is what the person's representing adequate for performance in that position." *Id.* 125. Also, the interviewer(s) may seek input – uncontrolled, unstructured, undocumented, and unreviewable – from other persons outside the process which easily permits the infusion of bias by either the manager consulted or the manager interpreting the input. *Id.* 116-17; 126-29. The panel may deny any candidate, even one who meets all job qualifications, solely because s/he did not appear or sound in the interview to be as competent as his qualifications suggested on paper. *Id.* 121-22. Finally, candidates can be disqualified by an instance of discipline, an attendance problem, or a safety violation on his/her record. *Id.* 130-144. This is based on the portion of Amtrak's selection policy that states that "Present employees applying for vacant positions must have a favorable work record." Ex. 33; Ex. _, Broadwater Tr. _ (to be supplied after 2/6/12 transcript has been read and signed); *see also* Ex. 22, Davidson Tr. 90, 93-94, 100, 129-31, 134-35. Some discipline is wiped off an employee's record by the passage of time, but some is not. Yet how such disqualifiers actually work in practice could not be accounted for by the head of HR for the NEC: "... there are no absolutes. .... Nothing is that clear-cut .... [T]hese are decisions that are made based upon lots of different variables ...." Ex. 22, Davidson Tr. 142.

Human resources expert Dr. Jay Finkelman analyzed these practices as to whether the selection process, varied as it was, was consistent with good human resources practice and whether the process permitted the influence of discriminatory bias in the selection decisions. Dr. Finkelman concluded that "[t] here is a disturbing and pervasive randomness" to Amtrak's selection

procedure, and "few if any controls against intentional or inadvertent bias or discrimination. The process appears to be highly subjective and unstructured. It is certainly not consistent with generally accepted Human Resource Management practices nor with the professional requirements of Industrial-Organizational Psychology." Ex. 3, Dr. Jay Finkelman Report at 24.

Using the Joint Database, Drs. Bradley and Fox analyzed the competitive hires, promotions, and disciplines received by CBA employees at AMTRAK during the period from April 4, 1996 through December 31, 2008. They found that Blacks were hired and promoted for vacant positions at rates far lower than their non-Black counterparts. Drs. Bradley and Fox showed that over 3,000 *fewer* Blacks were selected for hire and promotion at Amtrak than one would expect in a race-neutral environment, a result statistically significant at more than 27 standard deviations. Ex. 1, Bradley-Fox Report, n. 23.[11] For the Shop Crafts, the combined disparity was 828 *fewer* Black selections than expected, a result statistically significant at more than 15 standard deviations of difference. *Id.* For the Engineering Crafts, the combined disparity was 262 *fewer* Black selections than expected, a result statistically significant at more than 9 standard deviations. *Id.* For the Operating and Police Crafts, the combined disparity was 1,391 *fewer* Black selections than expected, a result statistically significant at more than 27 standard deviations. *Id.* For the Clerical and On-Board Services Crafts, the combined disparity was 573 *fewer* Black selections than expected, a result statistically significant at more than 7 standard deviations of difference. *Id.*

[11] Consultant Annie Blackwell sent two letters to Kevin Marshall, AMTRAK's Director of Diversity, in 2004 and 2005, communicating that her analysis of AMTRAK's hiring, promotion, and termination transactions from October 1, 2002 through September 30, 2004, showed a high degree of adverse impact in race and gender across a large majority of AMTRAK "AAP districts." She recommended that "actions be taken to seek the reasoning behind the selection activity that had an adverse impact ...." Exs. 15-16. There is no evidence that any actions were taken by AMTRAK.

Discipline. The discipline process at AMTRAK is covered by the various CBAs, but it is common to a substantial degree within each of the four Crafts groups and so similar overall that LR summarized it in a one-page flow chart. Ex. 2, Roth Report ¶¶31-32; Ex. 46, L. Miller Tr. 92-99; 149-57; Ex. 46, L. Miller Dep. Ex. 6. AMTRAK's Rules of Conduct, Exs. 34 and 35, apply to all employees "from the president on down," Ex. 48, AMK35770, and its Standards of Excellence, Ex. 36, and other policies that provide the bases for disciplinary action, are uniform across the entirety of AMTRAK. *See* n. 5, *supra*; Ex. 18, Bullock Tr. 139, 141-142. The Labor Relations function deals with the unions and their members on disciplinary matters and is highly centralized in Washington. Ex. 46, L. Miller Tr. 72-73, 128-30, 142-43, 222-225. SBU presidents approved all terminations of CBA employees during the SBU period, and they discussed and received got approval from Labor Relations before doing so. Ex. 18, Bullock Tr., pp. 141-144, 146-147. Post-SBU, all decisions to terminate a CBA-covered employee have rested exclusively with one officer: the Vice President of Human Resources at AMTRAK. Ex. 54, Walker Tr. 110-111.

Drs. Bradley and Fox found that Black CBA-covered employees are disciplined at rates disproportionately higher than Whites. Ex. 1 at 15-16. From April 4, 1996 through December 31, 2008, Black CBA employees at AMTRAK were issued disciplinary charges 40% more often than were the non-African American CBA employees. Ex. 1, Bradley-Fox Report, p. 15. More than 1,727 charges were issued against Black CBA employees in excess of what would be expected in a race-neutral workplace, a result statistically significant at more than 24 standard deviations and an adverse impact ratio of 70+%. *Id.*, Table 5.

As the Discipline Subclass Member declarations illustrate, Blacks are disciplined for

infractions that, when committed by Whites, are ignored, and Blacks bear an unfair burden of unjustified and unduly harsh discipline. *See* Exs. 7-8, Declarations (Discipline). While the initial discipline meted out is sometimes revoked or lessened when challenged, such discipline nevertheless results in harm to Subclass members, including lost pay for time out of service, emotional distress, and missed opportunities. Because disciplinary records can disqualify one for promotion, the effect of discriminatory discipline is multiplied. This disqualification is applied to Blacks, but not to all Whites. *See e.g.*, Ex. 8 at 316, Decl. of CM C. Clipper; *id.* at 39, Decl. of CM Y. Dixon; *see also* Ex. 22, Davidson Tr. 90, 93-94, 100, 129-31, 134-35.

Hostile Work Environment. As shown in the declarations, Plaintiffs and Class Members have been subjected to a racially hostile work environment throughout Amtrak, in all locations, jobs, and crafts. The racial harassment complaint ranged from the most overt (*e.g.*, racial epithets, nooses, a bullwhip used to threaten Black workers, physically threatening racial messages, and depictions of, or references to, Blacks as "monkeys") to the more subtle (*e.g.*, assigning Blacks the most menial and degrading job assignments, and generally providing them unfavorable terms and conditions of employment). *See* Exs. 6-8. The huge number of complaints[12] about discrimination and harassment were not adequately investigated or addressed; moreover, upper management's non-support of the new Diversity Department sent the signal to all managers that it was acceptable to resist her investigations and remedial recommendations. During discovery, Plaintiffs received over 300,000 of pages of race discrimination complaints and related material. *See* Ex. 4, Partial

[12] Amtrak produced over 300,000 pages of race discrimination complaints made at Amtrak during the class liability period -- far too many to attach or discuss here. *See* Exs. 4-5. Ex. 4 indexes a sampling; Ex. 5 includes several examples.

Index of Race Discrimination Complaint Files.[13] By and large, the complaints went unanswered, or at best, a superficial investigation resulted in a slap on the wrist for the harasser.

Amtrak management was highly resistant to investigations and recommendations for remedial actions. Wanda Hightower, Amtrak's Vice President for Diversity (a new Business Diversity Department was created as a result of the *McLaurin* consent decree, testified, that from April 1999 to February 2001, she and her staff attempted to aggressively investigate a burgeoning number of race discrimination complaints that caused the understaffed Hightower to add additional investigators. Their efforts to investigate were stymied, as witnesses avoided interviews,[14] and managers resisted and often refused outright to implement her department's recommendations while lobbying upper management for support. After a white manager brought a bullwhip to the Riverside Call Center and threatened to beat two Black workers, Dawn Marcelle (in charge of investigations) and Hightower recommended termination of the manager and a 30-day suspension for the call center's director. A fierce campaign in opposition to Hightower's enforcement efforts emerged, including a letter-writing campaign and lobbying members of president George Warrington's management committee. Although Hightower convinced Warrington not to stop the two disciplinary actions, the terminated manager's bid to return to the bargaining unit was upheld, and the resistance campaign stiffened. Thereafter, Hightower could

[13] AMTRAK maintained a list of EEO complaints from about March 2000 to December 2002, including EEOC charges and internal complaints by persons with an attorney, but not of internal complaints by unrepresented persons. Ex. 19, T. Campbell Tr. (Vol. I), 34-36, 41. Despite charting such complaints, no one ever used the information to assess frequency of complaints as a whole or as coming from any particular sector of the company. Ex. 21, T. Campbell (Vol. II) 255-56.

[14] The investigations were taking, on average, 110 to 120 days, and some took almost a year. Ex. 61, Hall Tr. (Vol I) 40.

not get her agenda items addressed at Warrington's management committee meetings, and members of that committee shunned her and criticized her initiatives. Warrington then told Hightower that "you don't have to hit a home run, just kind of slow the pace down, ... move a little slower," and "just because you are right and God is on your side, that is not enough." Soon, Warrington assigned Hightower an "executive coach" who told Hightower to "pace herself" and "[go] along with the pace of the company." Other top executives echoed that advice. But Hightower would not slow down; instead, she continued to do her job to pursue diversity initiatives and investigate discrimination complaints as best she could in the face of continuing obdurate managerial resistance. Suddenly, without notice, on February 26, 2001, Hightower was fired by Warrington. Ex. 59, Hightower Tr. 9-10, 17, 28-35, 37, 41-46, 52-57, 59, 61-62, 66-67, 69-71, 75, 82-83, 95-96, 101-02, 113-17, 120-24, 128, 138,-39, 148-51, 160-61, 163-64, 203-11; *see also* Ex. 61, Hall Tr. (Vol I) 9, 73, 103-05; Ex. 62, Hall Tr. (Vol. II) 129.

Plaintiffs submit the declarations of 101 Plaintiffs, proposed Class/Subclass members (regarding promotions and hostile work environment), proposed Discipline Subclass members, and proposed Applicant Class members, who have held, or sought, employment at AMTRAK from across the nation and across all Crafts. Exs. 6-8. These declarations are summarized, charted, and organized by class grouping and issue. *Id.* They comprise extensive anecdotal evidence of commonality of factual issues regarding the challenged discriminatory practices and, regarding promotion, hiring, and discipline, they bring the "cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339.

II. LEGAL ARGUMENT

"Title VII of the Civil Rights Act of 1964 proclaims one of this nation's most fundamental, if yet unrealized, principles: a person shall not be denied full equality of employment opportunity on account of race, color, religion, sex, or national origin." *Segar v. Smith*, 738 F.2d 1249,1258 (D.C. Cir. 1984). For four decades, class actions in the federal courts have been a principal means for remedying employment discrimination pursuant to the mandate of Congress. *See e.g., Franks v. Bowman Trans. Co., Inc.* 424 U.S. 747, 763 (1976); *Johnson v. Georgia Hwy Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Robinson v. Lorillard Corporation*, 444 F.2d 791, 801-02 (4th Cir. 1971); *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 244, 256-58 (5th Cir.1974).

Class certification is governed by Fed. R. Civ. P. Rule 23, which serves two principal purposes: (1) to promote efficiency and economy of litigation through the avoidance of a multiplicity of suits and the introduction of cumulative evidence; and (2) to protect the right of aggrieved persons who might not take the affirmative step of presenting claims on an individual basis. *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 471-73, *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986). To effectuate these goals, the district courts have broad discretion to decide whether to certify a class, *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir.), *cert. denied*, 510 U.S. 991 (1993), as well as "broad discretion to redefine and reshape the proposed class to the point that it qualifies for certification under Rule 23." *Wagner v. Taylor*, 836 F.2d 578, 589-90 (D.C. Cir. 1987). The Court may certify a class under any, or a combination, of the types of class actions delineated in Rule 23(b). *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 2 (D.D.C. 2002) (citing *Pigford v. Glickman*, 182 F.R.D. 341, 345 (D.D.C. 1998)).

A. Plaintiffs Meet the Requirements of Rule 23(a) for Class Certification

On June 20, 2011, the U.S. Supreme Court decided *Wal-Mart, v. Dukes, et al.*, 131 S. Ct. 2541, 564 U.S. __, 180 L. Ed. 2d 374 (2011). Despite some commentators hastily ringing a death knell for employment class actions, *Wal-Mart* did not change the federal courts' approach to Rule 23 class certification in any fundamental way. It merely reiterated the established requirements for class actions and discussed how those requirements, particularly commonality, were not met by the plaintiffs in "one of the most expansive class actions ever." *Wal-Mart*, 131 S. Ct. at 2541.

Wal-Mart is significant not for the huge size of the class involved (1.5 million members), but rather for cases, of any size, where the employer leaves employment decision making to the unfettered subjective discretion of managers at a local level: "[t]he only corporate policy [at issue] is Wal-Mart's 'policy of allowing discretion by local supervisors over employment matters,'" which the Court equated with "a policy *against having* uniform employment practices." *Wal-Mart* 131 S.Ct. at 2554. *Campbell* is precisely the opposite, where all of AMTRAK's employment policies are entirely uniform nationwide, but are poorly implemented. Discretion plays no part in it at all.

Wal-Mart does not preclude class certification based on subjectivity in decision making because the Court recognized that "'in appropriate cases', giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate impact theory – since an 'employer's undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination.'" *Id.* (quoting *Watson v. Fort Worth Bank &Trust*, 487 U.S. 977, 990 (1988)). The *Wal-Mart* plaintiffs failed to bring themselves within such a *Watson*-based challenge to subjectivity because "[o]ther than the bare existence of delegated discretion, [the plaintiffs] have identified no other 'specific employment

practices' – much less one that ties all their 1.5 million claims together." *Wal-Mart* at 2555-56.

Further, *Wal-Mart* leaves undisturbed the Supreme Court's prior decisions setting forth the manner in which discriminatory employment practices have been challenged in the federal courts for decades, including *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147 (1982), and *Int'l B'hood of Teamsters v. United States*, 431 U.S. 324 (1977). *Wal-Mart* and *Falcon* earmark two ways in which class certification is appropriate.

First, *Wal-Mart* makes clear that a disparate impact challenge to non-subjective criteria or standards remains appropriate for class certification under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Falcon, supra*. Where the employer "'uses a biased testing procedure to evaluate both applicants and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).'" *Wal-Mart* at 2553, quoting *Falcon*, 457 U.S. at 159, n. 15. A *Griggs* challenge, of course, is not limited to paper-and-pencil tests; any identifiable criteria can be challenged on disparate impact grounds if it perpetuates past societal discrimination: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 430-31. *Wal-Mart* held that such practices that operate as "built-in headwinds" for minority groups, *Griggs*, 401 U.S. at 432, "clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Wal-Mart*, 131 S. Ct. at 2553. The *Wal-Mart* plaintiffs asserted no such specific criteria. Here, Plaintiffs challenge the selection interview process, ratings, rank-orderings, input from other managers, amorphous decision making, and the disqualifying discipline criterion as having an adverse impact on Black

employees, without business necessity.

Second, *Wal-Mart* reiterates that pattern-or-practice claims remain viable for class certification with proper evidence. The legal standards have not been changed for thirty-five years since the landmark decision in *Int'l B'hood of Teamsters v. United States*, 431 U.S. 324 (1977). Like this case, *Teamsters* involved a unionized common carrier with nationwide operations. *Teamsters* held that the plaintiffs' initial burden, when a system-wide pattern or practice of discrimination is alleged, is to demonstrate "that racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Id.* at 336. Yet, at the initial "liability" stage, the plaintiffs need not offer evidence that each class member was a victim of the employer's discriminatory policy. The plaintiffs' burden is only to establish a *prima facie* case that such a policy existed. The burden then shifts to the employer to defeat the *prima facie* showing of a pattern or practice by demonstrating that plaintiffs' proof is either inaccurate or insignificant. If the employer fails to rebut the inference that arises from the *prima facie* case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. *Id.* at 360-61.

Unlike *Wal-Mart*, Plaintiffs here show the pattern or practice by demonstrating that AMTRAK's centrally-imposed policies, practices, and procedures were in place and implemented throughout AMTRAK's system, that AMTRAK headquarters mandated that the policies be used company-wide, and that variations in practice open the process up to the influences of bias, Ex. 3, Finkelman Report, and, through Plaintiffs' anecdotal evidence, that the discriminatory promotions practice actually occurred over the length and breadth of the AMTRAK system. Exs. 6-8. Plaintiffs also show that Amtrak uses practices, such as considering disciplinary status in determining

eligibility for promotions, that operate as "built-in headwinds" for Blacks trying to advance. Further, Plaintiffs' statistical expert examined the selection decisions as recorded in the Joint Database and found statistically significant disparities in promotions. Ex. 1, Bradley-Fox Report.

1. The Class And Subclass Are Too Numerous To Make Joinder Practicable

"'[T]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.'" *Bullock v. Board of Education of Montgomery Cty.*, 210 F.R.D. 556, 558 (D. Md. 2002) (quoting *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980)).

The classes and subclasses proposed here are far too numerous to make joinder practical. AMTRAK employed more than 6,300 Blacks in CBA-covered positions in every year from 1996 through 2008. Ex. 1, Bradley-Fox Report, Fig.1. Broken down into the proposed Craft group subclasses, AMTRAK employed, in each year from 1996 through 2008: more than 1,900 Blacks in Shop Crafts jobs (*id.* Fig. 2a); more than 180 Blacks in Engineering Crafts jobs (*id.* Fig. 2b); more than 500 Blacks in Operating and Police Crafts jobs (*id.* Fig. 2c); more than 3,200 Blacks in Clerical and On-Board Services Crafts jobs (*id.* Fig. 2d). The Applicant Class size cannot be determined exactly, as Amtrak has not maintained applicant records, but it numbers at least 7,300. *Id.* at 16. The Black Discipline Subclass also is far too numerous to make joinder practical. There were 10,651 disciplinary charges filed against 4,175 different Black CBA-covered employees at AMTRAK in the period from 1996 through 2008. Ex. 1, Bradley-Fox Report at 15 and Table 5.

2. There Are Questions And Law Or Fact Common To The Class

The commonality inquiry is not whether all questions are common to every class member, but rather, whether there is at least one factual or legal issue, the resolution of which will affect all

or a significant number of the class members. *Garcia v. Johanns*, 444 F. 3d 625, 631 (D.C. Cir. 2006); *Taylor v. District of Columbia Water & Sewer Authority*, 241 F.R.D. 33, 37 (D.D.C. 2007); *see also Wal-Mart,* 131 S. Ct. 2541 at 2551(commonality is established when there is a "common contention" that is "capable of class-wide resolution"). "'[F]actual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members.'" *Moore v. Napolitano*, 269 F.R.D. 21, 28 (D.D.C. 2010) quoting *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 8 (D.D.C. 2010)). "Because the commonality requirement may be satisfied by a single common issue, courts have noted that it is 'often easily met.'" *Taylor*, 241 F.R.D. at 37 (citation omitted).

Plaintiffs satisfy the commonality requirement by "bridg[ing] the gap" between their own individual claims of discrimination and "the existence of a class of persons who have suffered the same injury" as they did and for the same reasons. *Moore*, 269 F.R.D. at 29 (citing *Taylor*, 241 F.R.D. at 37-38; *Falcon*, 457 U.S. at 158). For disparate treatment discrimination claims, plaintiffs may show a "factor that permits the court to infer that members of the class suffered from a common policy of discrimination." *Id.* at 38 (quoting *Love v. Johanns*, 439 F.3d 723, 728 (D.C. Cir. 2006)); *see also Wal-Mart,* 131 S. Ct. at 2553; *Hartman v. Duffey*, 19 F.3d 1459, 1470 (D.C. Cir. 1994). For disparate impact discrimination claims, plaintiffs "must make a showing 'sufficient to permit the court to infer that members of the class experienced discrimination as a result of the disparate effect of a facially neutral policy.'" *Moore*, 269 F.R.D. at 29 (citing *Garcia v. Johanns*, 444 F.3d at 632). Thus, commonality may be established by putting forth statistical evidence or a combination of statistical and anecdotal evidence to support an inference that the employer's

policies and procedures are subjective, are susceptible to race discrimination, and have a common impact upon class members. *Id.* (citing *Taylor*, 241 F.R.D. at 40-44); *see also Jarvaise,* 212 F.R.D. at 3(plaintiffs' statistical evidence of sex discrimination established commonality); *McReynolds v. Sodexho Marriott Services, Inc.*, 208 F.R.D. 428, 441 (D.D.C. 2002) (commonality established through statistical and anecdotal evidence).

The Supreme Court's rejection of the *Wal-Mart* plaintiffs' proffered statistical and anecdotal evidence (it found neither to be convincing evidence of commonality) resulted, perforce, in a conclusion that there was no "glue" holding the class together:

> [i]n this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination. That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision." . . . . Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

Wal-Mart, 131 S. Ct. at 2552 (italics in original) (citation omitted).

Plaintiffs present strong evidence of such "glue." Wanda Hightower's compelling testimony that lower level management sought – and received – signals from top management that they did not have to submit to investigations of discrimination and harassment or implement recommendations for remedial action provides the "glue" tying all of the class claims of discrimination together. Hightower attempted to investigate a burgeoning number of complaints and she tried to enforce remedial actions where she found discrimination. In the face of a fierce campaign of resistance to Hightower's investigations, and lobbying by lower management, Amtrak's top management, including the company president and many of his direct reports, failed

to support Hightower, told her she was the problem, and president Warrington himself told her to "slow down the pace," and not try to "hit a home run." When Hightower persisted in her aggressive investigations, Warrington abruptly fired her. These facts help to explain every discrimination claim: if top management sends signals that it is acceptable to resist investigations, to refuse to implement remedies, then it must also be acceptable to discriminate. When the company president fires the top diversity official who refused to "[go] along with the pace of the company," lower management understands that the company tacitly approves race discrimination.

Furthermore, Plaintiffs here, in contrast to *Wal-Mart*, present convincing statistical, documentary, testimonial, anecdotal and other expert evidence demonstrating the existence of: (1) centralized, uniform policies for promotions, discipline, hiring, and preventing (and/or responding to complaints of) discrimination, and expert testimony regarding these practices' vulnerability to bias; (2) common questions regarding gross statistical disparities in selection and discipline rates of Black versus non-Black employees based on a Joint Database, and (3) the inadequacies in Amtrak's EEO and Diversity investigation practices, which failed to correct a racially hostile work environment. The common answer to these questions is that discrimination has been Amtrak's regular operating procedure and not an isolated occurrence.

These common fact issues include for the subclasses, whether AMTRAK has uniform selection procedures for making promotion decisions, and what are they? Are commonly applicable procedures followed uniformly, or were there deviations or variations permitting the influx of racially discriminatory bias? Does Plaintiffs' anecdotal evidence raise an inference of racial bias? Are there statistically significant disparities in promotion selection rates of Black, as

compared to White, CBA employees of AMTRAK that create an inference of discrimination? What is the employer's "business necessity" for using the common selection system that has adverse impact? Are there other available procedures that would not have such adverse impact? The same common questions apply to the proposed Black Applicant Class.

With regard to the hostile work environment claims, common questions include: Were a large number of Black employees subjected to severe or pervasive race harassment? Does the anecdotal evidence lead to an inference that the harassment was based on race? Was the harassment severe or pervasive? Did upper management know about the Black employees' complaints? Were AMTRAK's complaint investigations inadequate? The many declarations submitted show the use of racial epithets, threats, references to the Ku Klux Klan, and other overtly racial acts that have been held to be *de facto* evidence of racial harassment. *See Mintz v. Dist.of Columbia,* No, 00-0539, 2006 U.S. Dist. LEXIS 34446 *8-9 (D.D.C. May 30, 2006) ("courts have found the use of the word 'nigger' to be so offensive that it need not happen often to create a hostile work environment"); *see also Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668, 675 (7th Cir. 1993). The Hightower testimony shows that top management knew of the scores of discrimination complaints, discouraged her aggressive investigations and tough remedies, and instead told her to "slow the pace down" to "go along with the pace of the company."

For the Discipline Subclass, common questions include: Are AMTRAK's procedures for discipline and termination decisions applicable to all Black CBA employees? Are those commonly applicable procedures applied uniformly, or are Blacks dealt with differently than Whites? Are Black CBA employees charged with disciplinary infractions at statistically significant

disproportionate rates, as compared to White CBA employees? Does the Plaintiffs' anecdotal and statistical evidence raise an inference of race discrimination in discipline? This district court, and other courts, have certified classes and subclasses with discipline and termination claims. *In Re Pepco Employment Litigation*, Civ. No. 86-0603, 1992 WL 442759 (D.D.C. Dec. 4, 1992); *Adams v. R.R. Donnelley & Sons*, No. 98 C 4025, 96 C 7717, 2001 WL336830 (N.D. Ill, April 6, 2001); *Binion v. Metropolitan Pier and Exposition Authority*, 163 F.R.D. 517 (N.D. Ill 1995).

3. The Class Representatives' Claims Are Typical Of The Claims Of The Class

To establish typicality under Rule 23(a)(3), the plaintiffs who are class representatives must have suffered injuries "in the same general fashion as class members. *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251, 260 (D.D.C. 2002); *Thomas v. Albright*, 139 F.3d 227, 238 (D.C. Cir. 1998). Stated another way, they must "possess the same interest" as the class members, and their injuries must "arise from the same course of conduct that gives rise to the other class members' claims." *See Falcon*, 457 U.S. at 156 (citations omitted); *Moore*, 269 F.R.D. at 32 (*quoting Encinas*, 265 F.R.D at 9); *see also Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987). However, "[a] plaintiff's claims can be typical of those in the class even if there is some factual variation between them." *Id.* "The facts and claims of each class member do not have to be identical to support a finding of typicality." *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 115 (D.D.C. 2007) (citing *Thomas v Albright*, 139 F.3d at 238).

The typicality element often overlaps with the commonality element because both examine the practicality of proceeding as a class and both inquire into whether the claims of the plaintiffs and class members are sufficiently interrelated that absent class members' interests are

protected. *See Moore,* 269 F.R.D. at 32; *Taylor,* 241 F.R.D. at 44-45. Accordingly, where plaintiffs establish a policy of discrimination sufficient to satisfy commonality, that showing is generally equally sufficient to establish typicality. *See McReynolds*, 208 F.R.D. at 445 (plaintiffs' "showing of a common policy of discriminatory treatment" constituted "a sufficient demonstration that the claims of the class representatives are largely typical of those of the class").

The proposed classes satisfy Rule 23(a)(3)'s typicality requirement. The Plaintiff class representatives come from all divisions, crafts, and cities across the Amtrak system, and they and the class and subclass members were all subjected to the same discriminatory policies regarding promotion, discipline, hiring, and the same failure to prevent, correct, or remedy the racially hostile work environment at AMTRAK. Plaintiffs' experiences of discrimination and harassment closely resemble those of the class member declarants. *See* Exs. 9, 6-8. Variations in the precise factual scenarios are inevitable, yet insignificant.

4. The Class Representatives Will Fairly And Adequately Protect The Interests Of The Class

Adequacy is established where: (a) the representatives' interests do not conflict with the class's interests and (b) the representatives are able to vigorously prosecute the interests of the class through qualified counsel. *See Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997). "The burden is on the defendants to demonstrate that the representation will be inadequate." *Johns v. Rozet*, 141 F.R.D. 211, 217 (D.D.C. 1992) (citations omitted).

Both components of Rule 23(a)(4)'s adequacy requirement are established here. The Plaintiffs and the Class (and Subclass) members have the exact same interests. Plaintiffs and Class members alike (within each of the defined classes and subclasses) seek to prove the existence of a

pattern or practice of discrimination with respect to the challenged AMTRAK policies, practices, and procedures and, for promotion and hiring, to establish that such policies and practices have a disparate impact on class members. Both Plaintiffs and all Class (and Subclass) members likewise seek appropriate relief for their resulting injuries, including class-wide injunctive and declaratory relief designed to address AMTRAK's unlawful employment practices and to order the systemic changes needed to achieve a nondiscriminatory and fair workplace.

The second component of adequacy – vigorous representation through adequate counsel – is likewise satisfied. Plaintiffs' prosecution of this case on behalf of the defined classes and subclasses for more than a decade demonstrates that they are certainly willing and able to advocate for the class's interests. *See, e.g., Jarvaise.*, 212 F.R.D. at 3-4 ("the interest and persistence of the named plaintiffs cannot be questioned in light of their prolonged prosecution of this case"). Counsel for Plaintiffs are amply qualified to litigate this case on behalf of the class. Plaintiffs' counsel are experienced Title VII and class action attorneys who have vigorously litigated this case, and other class actions, for many years. *See* Ex. 10, Declaration of Timothy B. Fleming. Lead counsel has litigated numerous other class and collective actions in this Court, and other federal courts, including, *inter alia*, *In Re Pepco Employment Litigation*, Civ. No. 86-0603, 1992 WL 442759 (D.D.C. Dec. 4, 1992), *Hyman v. First Union Corp.*, 982 F. Supp. 1, 5-6 (D.D.C. 1997), and *Jarvaise v. Rand Corp. supra. Id.*

B. Plaintiffs Meet the Requirements of Rule 23(b) for Class Certification

Having met the four requirements of Rule 23(a), Plaintiffs need satisfy only one of the three components of Rule 23(b) in order to satisfy all prerequisites for class certification. Plaintiffs

satisfy the requirements of both Rule 23(b)(2) and (b)(3). The proposed classes and subclasses may be certified under either Rule 23(b)(3) alone, or under a combination of (b)(2) and (b)(3).

1. Plaintiffs Meet the Requirements of Rule 23(b)(2) for Class Certification

Under Rule 23(b)(2), a class action may be maintained where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Under Rule 23(b)(2), "two elements must exist: (1) the defendant's action or refusal to act must be generally applicable to the class; and (2) plaintiff must seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth.*, 239 F.R.D. 9, 28 (D.D.C. 2006).

Rule 23(b)(2) has for decades been a primary mechanism for effectuating – through declaratory, injunctive, and equitable backpay relief – the most basic purposes of the Civil Rights Act of 1964, "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin," dating from class certifications in the earliest civil rights cases. *See e.g.*, *Franks v. Bowman Transportation, Co., Inc.* 424 U.S. 747, 763 (1976); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Robinson v. Lorillard Corporation*, 444 F.2d 791, 801-02 (4th Cir. 1971); *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 244, 256-58 (5th Cir.1974).

Employment discrimination class actions commonly seek injunctive relief to correct systemic discrimination against a class. *See Teamsters,* 431 U.S. at 361. "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2)

class certifications. *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997). "Lawsuits alleging class-wide discrimination are particularly well suited for Rule 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976)); *see also Stewart v. Rubin,* 948 F. Supp. 1077, 1092 (D.D.C. 1996). The Rule 23(b)(2) class action "is intended for cases where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147, 162 (2001).

Campbell is precisely such a case. Apart from the prayer for relief requesting compensatory damages, *see* Section II.B.2, *infra*, there is little question that the Plaintiffs meet the requirements of Rule 23(b)(2). Plaintiffs seek class certification first and foremost to obtain an order declaring the challenged employment practices of AMTRAK, which are applied generally to the members of the proposed Classes and Subclasses, to be in violation of Title VII, and imposing injunctive relief to remedy those violations of law, and for other equitable relief.

2. Plaintiffs Meet the Requirements of Rule 23(b)(3) for Class Certification

A class may be certified under Rule 23(b)(3) where: "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The twin requirements of Rule 23(b)(3) are commonly referred to as predominance and superiority. *See In re Hydrogen Peroxide Antitrust Litigation,* 522 F.3d 305, 310 (3rd Cir. 2008).

After the Civil Rights Act of 1991 added the remedy of compensatory damages to Title

VII, the federal courts began to grapple with application of Rule 23(b) in employment discrimination class actions where this congressionally-bestowed remedy of monetary damages at law was sought in cases along with the previously available equitable remedies of backpay and injunctive relief. Specifically, the federal courts were conflicted over the application of Rule 23(b)(2) – long the preferred mechanism for class certification in Title VII cases – in particular, whether compensatory damages were incidental to non-monetary equitable remedies or were necessarily predominate. *Cf. Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147 (2001), and *Allison v. Citgo Petroleum Corp.*, 151 F. 3d 403 (5th Cir. 1998),

Wal-Mart appears now to have answered the question in favor of the latter, even with respect to backpay claims which cannot be certified under Rule 23(b)(2) "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief." *Wal-Mart,* 131 S. Ct. at 2557.[15] Plaintiffs here submit that their claims for backpay and compensatory damages are consistent with Rule 23(b)(3) certification.

Class certification of each of the proposed Classes and Subclasses is appropriate under Rule 23(b)(3). The common questions of law and fact regarding the discriminatory effect and application of each of the challenged AMTRAK policies predominate over any individual issues. Similarly, class certification is the superior mechanism of adjudication because it allows for the resolution of these common issues in a single action using common statistical and other expert evidence, and common anecdotal evidence; certification thereby avoids the inefficiency, waste of judicial resources, and potential for inconsistent rulings associated with repeatedly litigating the

[15] Four justices dissented from this holding on grounds that, *inter alia*, the Court need not even have reached any Rule 23(b)(3) questions. *Wal-Mart, supra,* at 2551-68, Ginzburg, J., dissenting.

same issues in a multitude of individual lawsuits. Should this Court not certify the Classes and/or the Subclasses, dozens, if not hundreds, of lawsuits will flood this Court and other federal courts around the country, as the multitudes of aggrieved Black AMTRAK Agreement-covered workers and applicants who have been supporting, observing, and relying upon this case will file individual lawsuits to vindicate their federal employment civil rights.

a. Common Questions Predominate Over Individual Issues

Rule 23(b)(3) requires that common factual and legal issues predominate over any issues affecting only individual class members. The predominance requirement often overlaps with the commonality element because predominance examines whether the common issues, such as those identified under Rule 23(a)(2), predominate over individual questions. *See Aliotta v. Gruenberg*, 237 F.R.D. 4, 12 (D.D.C. 2006). However, to establish predominance, "common issues must only predominate; they need not be dispositive of the litigation." *Jarvaise,* 212 F.R.D. at 4; *In re Lorazepam & Clorazepate Antitrust Litigation,* 202 F.R.D. 12, 29 (D.D.C. 2001).

There are no bright line tests for determining whether common questions predominate. "[I]n general a claim will suffice when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis." *Jarvaise*, 212 F.R.D. at 4 (quoting *In re Lorazepam*, 202 F.R.D at 29). Common questions regarding the meaning and significance of statistical evidence offered to establish that a challenged policy is discriminatory are *alone* sufficient to satisfy the predominance prong of Rule 23(b)(3). *See Jarvaise*, 212 F.R.D. at 4.

Other common issues in this case will also predominate over any individualized issues. First, the Hightower testimony raises a key common issue regarding top management's signals to

the company that discrimination and harassment will not be allowed to be aggressively investigated or remedied. Additional predominate common issues will include: [for promotion and hiring] the scope and meaning of AMTRAK's nationally applicable promotion and hiring policy; the manner in which AMTRAK's corporate management and centralized HR function directed that the policy be followed, and the degree of, and reasons for, variants of that process; the effects and significance of variants of the uniform selection procedure, as illuminated by expert testimony; and the tasks and skills pertinent within Craft groupings; [for HWE] the scope and meaning of AMTRAK's nationwide policies, practices, and procedures affecting the terms and conditions of employment, the violations of which contribute to the existence of a racially hostile work environment; the manner in which AMTRAK's corporate management and centralized HR and EEO/Diversity functions directed that those policies be followed; the inferences to be drawn from Plaintiffs' anecdotal evidence of a racially hostile work environment; [for discipline] the policies, practices, and procedures that affect how discipline is meted out at AMTRAK; and the manner in which AMTRAK's corporate management and centralized labor relations function directed that those disciplinary proceedings be conducted in light of the similarity of the discipline-related provisions in CBAs and the similar work environs within Craft groupings; the degree to which standards and precedents were followed; the degree of inconsistency in results; whether Blacks and Whites were charged, processed, and punished in comparable ways. In any trial of any claim of the Classes and Subclasses proposed here, evidence regarding these issues would have to be presented to a jury, and such questions would predominate over any individualized issues.

"[W]hen one or more of the central issues in the action are common to the class and can be

said to predominate, the action will be considered proper under Rule 23(b)(3) even though important matters will have to be tried separately." *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 39 (D.D.C. 2003) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE §1778 (2d ed. 1986)). The *Teamsters* bifurcation framework followed in pattern or practice cases supports certification under Rule 23(b)(3) and eliminates any predominance concerns associated with individualized issues or defenses. In employment discrimination pattern or practice class actions (unlike other types of class actions), individualized class-member-specific facts or defenses are addressed in stage two *Teamsters* mini-hearings specifically designed for that purpose. *See Wal-Mart*, 131 S. Ct. at 2561.

Pattern-or-practice class actions thus proceed in two phases. The first phase is a class-wide liability trial, wherein the Court tries the class issues regarding the existence of a pattern or practice of discrimination. *See e.g., Teamsters*, 431 U.S. at 361-62; *Hartman v. Duffey*, 88 F.3d 1232, 1235 n.2 (D.C. Cir. 1996); *Hartman v. Duffey*, 973 F. Supp. 189, 192-194 (D.D.C. 1997). If a finding of a pattern or practice of discrimination results, the case proceeds to a second phase of abbreviated mini-hearings, in which the claims of each individual class member are presented and determined. *Id.*; *see* n. 5, *supra*.[16] The *Teamsters* framework remains the paradigm for determining individual class member relief in pattern or practice class actions certified under Rule 23(b)(3). *See*

[16] In this second phase, each class member benefits from a presumption that he or she was a victim of discrimination due to the inference provided by the finding of a pattern or practice of discrimination found in stage one. *Teamsters, supra,* at 361-62. The stage two *Teamsters* mini-hearings provide the employer with an opportunity to present individualized defenses to each class member's claim in an effort to rebut the presumption that the employer discriminated against that class member. *Id.*; *see also Wal-Mart*, 131 S. Ct at 2561. Likewise, *Teamsters* mini-hearings provide an opportunity for each class member to present individualized damages evidence.

Wal-Mart, 131 S. Ct. at 2558, 2561 ("individualized monetary claims belong instead in Rule 23(b)(3)" classes and identifying *Teamsters* as the "established" procedure for determining class member relief in pattern or practices cases). Indeed, the Supreme Court expressly found fault with the efforts of the *Wal-Mart* plaintiffs to depart from *Teamsters*. *See id.* at 2561.

As the "established procedure" in pattern-or-practice cases certified under Rule 23(b)(3), the resolution of individualized issues or defenses in post-trial *Teamsters* hearings is fully consistent with a finding of predominance. *See id.* The potential for individualized relief "does not preclude a finding that common questions of law and fact predominate over individualized questions." *See Aliotta*, 237 F.R.D. at 12; *see also McCarthy v. Kleindienst,* 741 F.2d 1406, 1415 (D.C. Cir. 1984) ("mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification"); *Bynum*, 214 F.R.D. at 39 (individual determinations of class members' entitlement to monetary and/or equitable relief did not defeat predominance or preclude certification under Rule 23(b)(3)); *Jarvaise*, 212 F.R.D. at 1 (certifying class of female employees seeking backpay for Title VII violations under Rule 23(b)(3)); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 313 (D.D.C. 2007) (certifying class under Rule 23(b)(3) and recognizing the fact that individual damages may "run high" does not defeat predominance or superiority).

Applying these standards, Plaintiffs have satisfied the predominance requirement. The Hightower evidence will be of great importance to any trial. Further, due to the central importance of Plaintiffs' statistical evidence of the discriminatory application or impact of AMTRAK's promotion, hiring, and discipline policies, and the commonality of Plaintiff's policy, practice, and

procedure evidence, including Dr. Finkelman's expert opinions regarding their vulnerability to racial bias, common issues will predominate the Class and Subclass trial(s). Plaintiffs' common statistical evidence of discrimination in the operation of AMTRAK's promotion policy is sufficient *alone* to establish a pattern or practice of discrimination. *See McReynolds,* 349 F. Supp. 2d at 7. This statistical showing is likewise the basis for establishing disparate impact. *Id.* at 28. The same is true for the Black Applicant Class' and for the Discipline Subclass' claims. Plaintiffs thus proffer "generalized evidence" in the form of common statistical evidence that can simultaneously establish on a class-wide basis a presumption that all class members were victims of AMTRAK's discrimination. *See Teamsters*, 431 U.S. at 361-62; *Hartman,* 973 F. Supp. at 193.

Because Plaintiffs' claims of pattern or practice disparate treatment and disparate impact may hinge upon the merits of Plaintiffs' statistical evidence, the common questions surrounding the statistical analysis necessarily predominate over individual issues. *See Jarvaise*, 212 F.R.D at 4 (granting certification under Rule 23(b)(3) in a Title VII employment discrimination case and holding that predominance is established where "common questions regarding the validity and adequacy of plaintiffs' statistical analysis to support their sex discrimination claim strongly predominates over any individual issues"); *see also Aliotta*, 237 F.R.D. at 12-13 ("individualized nature of the potential damages" does not preclude a finding of predominance; common question whether plaintiffs were discriminatorily terminated predominates where "evidence used will be common among the plaintiffs and potential class members"); *Bynum*, 214 F.R.D. at 39 (existence of common questions meets predominance despite need for individual damages determinations).

For HWE claims not susceptible of statistical analysis, including racial harassment, and

other terms and conditions of employment issues (*e.g.*, training, job assignments, work assignments, scheduling, and other terms and conditions), common issues also will predominate at trial over individualized issues. Again, the Hightower evidence of management's impeding investigations, ignoring remedial recommendations, and telling Hightower to slow down, then firing her when she did not, will be of predominate importance to a HWE trial. Further, the focus of a trial will be not on individual employees' experiences but on whether they amount to a severe or pervasive hostile environment that alters the workplace, as well as on the centralized, uniform work policies, and how AMTRAK management implements them.

Variations in specific class members' factual circumstances do not defeat predominance. Rule 23(b)(3) by its terms *presumes the existence of individual questions* and poses the question of whether the common issues or individual issues would predominate at trial. Here, the predominate question is whether "racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Teamsters, supra,* at 336; *see Johnson v. Dist. of Columbia*, 248 F.R.D. 46, 57 (D.D.C. 2008) (rejecting argument that whether class members were unconstitutionally searched is necessarily individualized inquiry; predominance requirement is satisfied because plaintiffs challenged defendant's overall search policies and practices).

Regarding discipline, too, class issues would predominate over individualized issues. First, the statistical evidence is of great, and common, importance. The statistics provide the evidence needed for the determination of a vital or controlling question "in one stroke." The vitally important statistic is that Blacks are *charged* with code and rule infractions at a statistically significant higher rate than are White employees. *See* Ex. 1, Bradley-Fox Report. This, in itself, is

very substantial evidence of race discrimination in disciplinary matters at Amtrak.[17] Further, Amtrak's disciplinary procedure is applicable to all CBA-covered employees, and the standards for imposition of discipline is equal throughout the CBA's within the Craft groupings and, indeed, across Craft groups. The Amtrak Rules of Conduct, Standards of Excellence, and other behavior rules and policies are also universally applicable to all employees. In a jury trial of an individual discipline claim, each of these common features would have to be understood by a jury, in whole or significant part. Whether adjudicating one or scores of discriminatory discipline claims, a jury should learn about these necessary set pieces, and how they act in concert. A subclass trial permits the juror to hear the statistical evidence, to understand fully how the process is supposed to work, what the role players should do, and why, and what inferences to draw from variations from the procedure, from patterns of behavior by role players, and from inconsistent application of the "just cause" standard. Having heard statistical and anecdotal evidence, tested by questioning from both sides, such a jury can decide whether the discipline process worked for Black employees on the whole as it should have, and, if it did not, whether racial bias was the motive. To adjudicate the number of discipline claims at issue here, this is better done once, by a Discipline Subclass jury, not only for the obvious (though compelling) reason of judicial efficiency, but also because it can

[17] A disciplinary charge, of itself, causes damage because the consequences of going through a disciplinary proceeding – regardless of the result – are serious, the disciplinary process is long, stressful, and economically damaging. The disciplinary charge places the employee's means of earning a living and providing for his or her family in serious jeopardy. Because many employees under disciplinary proceedings are suspended for days, weeks, months, even years, while awaiting the grievance and arbitration processes to play out, and during that time the employee is frequently earning nothing, the economic loss and damage is real, serious, and lasting. Ex. 6 (Declarations summary). Even if the employee avoids termination and endures throughout a suspension, he may have a stain on his employment record that will prevent him from attaining promotion, training, and better work assignment. *See id.*

better appreciate all the common evidence that a jury hearing a single claim.

The particular fact scenarios underlying individualized disciplinary episodes of Blacks (or White comparators) are subordinate: they supply the context for appreciating the common evidence, both the statistical "big picture" and the anecdotal and expert evidence showing that, in disciplinary matters, racial discrimination was the company's "standard operating procedure – the regular rather than the unusual practice." *Teamsters, supra,* at 336.

For similar reasons, common issues would predominate a HWE trial, particularly where the Hightower evidence provides a compelling overlay to the evidence regarding the tremendous volume of complaints of discrimination that were lodged by Black employees of AMTRAK.

The Court might conclude, either now or before trial based on further development of the record, that the workplace differences between the four Craft groupings militate toward four separate trials of Discipline Subclasses or HWE Subclasses, divided into the four Crafts groupings: Shop, Engineering, Operating, and Clerical/On-Board Services. This could particularly be true where the anecdotal evidence (previewed in the context of a motion for summary judgment or a trial plan), suggests focusing a jury on a particular Crafts grouping, *e.g.*, the Shop Crafts, because understanding those particular workplace environs, tasks, equipment, or special work rules would facilitate an understanding of the discipline at issue, or the hostile work environment. This would be another edition of common fact to Subclass members within each of the four Crafts groupings that would predominate over individualized fact issues at trial. Thus, the Court could order four separate trials of the Discipline and/or HWE Subclasses, by Crafts grouping. Still, four trials is far preferable to 40 trials or 200 trials, and a Crafts subclass trial is more likely to yield an

efficient result than a passel of individual trials of discriminatory discipline claims, which, due to the multiplicity of proceedings, would be unlikely to achieve consistent, let alone efficient, results.

Individual trials are the least efficient method of trying discipline or HWE claims: a multiplicity of trials, each admitting the same documentary evidence, each examining many of the same witnesses, each a process of educating a jury on the mechanics of the disciplinary process, the roles of the various players, the meaning of Amtrak's behavioral rules (or at least portions of them), and then, after all of that, focusing on the particular facts of the plaintiff's claim.

For promotion selection claims too, common issues would predominate a class-wide trial. Again, the statistical analysis is of paramount importance. Additionally, the selection process, the documentary requirements, the roles to be played by management and HR, and the criteria for selection – all common – must all be understood by a jury at trial. These set pieces provide the necessary backdrop for assessing each and every promotion claim; indeed, the measure of variation or deviation from regular procedure (*see* Ex. 63, "Selection Roulette"), or how and why such variations occurred, may be pertinent evidence of discrimination in action. In every case, it is necessary to understand how the selection process is supposed to work because that process provides the context for assessing whether the selection was made via a decision that was fair or a decision that was discriminatory. In other words, those issues cannot be decided by a jury in a vacuum. These factual issues, then, are the "glue" that holds the Class/Subclass promotion selection claims together. *See* commonality discussion, *supra*. They supply the context for demonstrating the pattern or practice: they are the forest that is the setting for the individual trees. Thus, a pattern-or-practice and disparate impact trial focuses on common issues, which include the

policy and the expert critique of it, and the statistical analysis – upon that slate, the anecdotal evidence of discrimination is written, to be understood as a whole by a well-informed jury.

b. Class Litigation is the Superior Method of Fairly Adjudicating Class Member Claims

The second requirement of Rule 23(b)(3) is that the class action be superior to other available methods of adjudicating the controversy. "Class actions are the superior method when they serve the purpose of efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications." *Aliotta*, 237 F.R.D. at 13. The superiority requirement is met where common questions of law or fact are shared between class members such that certification allows for the efficient, consolidated resolution of these common questions in a single action. *See, e.g., Meijer*, 246 F.R.D. at 313-14; *Johnson*, 248 F.R.D. at 57. Courts often consider the efficiency of a class action compared to individual adjudications, the possibility of inconsistent judgments associated with multiple individual actions, and the likelihood that class members would possess the means or motivation to pursue their claims individually. *See, e.g., Aliotta*, 237 F.R.D. at 13; *In re Lorazepam,* 202 F.R.D. at 31; *Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 12-13 (D.D.C. 2002).

The superiority requirement is easily met here and the reasons apply equally to each of the Class and Subclasses. The common questions of law and fact identified herein can be resolved most efficiently through a class action, which would be a superior use of judicial resources, rather than relitigating the same issues in separate lawsuits by class members. *See Aliotta*, 237 F.R.D. at 13 (superiority met where resolution through individual actions would result in "repetitious litigation"); *Meijer*, 246 F.R.D. at 314 (superiority was satisfied where "class certification

provides the opportunity for an efficient resolution of ... substantial issues for the entire class in a single forum"); *Barnes v. Dist. of Columbia*, 242 F.R.D. 113, 123 (D.D.C. 2007) (class action is superior mechanism where it allow a court to consolidate actions into a single efficient unit).

Resolution of these common issues at one trial also avoids the risk of inconsistent and competing judgments regarding the discriminatory nature AMTRAK's policies. *See, e.g., Jarvaise*, 212 F.R.D. at 4 (superiority established where without class certification, there could be "a significant number of individual lawsuits wasting judicial resources and resulting in inconsistent adjudications"); *In re Lorazepam*, 202 F.R.D. at 31 (superiority requirement was met where proceeding without a class could result in a "significant number of individual lawsuits," which "raises the specter of inconsistent adjudications"); *Aliotta*, 237 F.R.D. at 13 (possibility of inconsistent judgments in individual actions supports finding of superiority); *Meijer*, 246 F.R.D. at 314 (superiority established where class action avoids the "specter of inconsistent adjudications"). Based on the number of plaintiffs, class members who have executed declarations, and the number of class members who are interested in, and who have been following this case, *see* Ex. 6-9, a denial of class certification will create a legal remedy vacuum which will be filled by dozens, if not hundreds, of Black current and former employees and applicants who will file lawsuits.

On the other hand, in light of the substantial attorney and expert costs associated with proving the discriminatory impact and application of the challenged policies, it is also likely that many other class members would not have the means to pursue their claims in separate lawsuits. Therefore, the class action model provides the most fair and efficient mechanism for adjudicating class member claims. *See Jarvaise*, 212 F.R.D. at 4 (superiority established where, without class

certification, there could be "a significant number of individuals deprived of their day in court because they are otherwise unable to afford independent representation"); *In re Lorazepam*, 202 F.R.D. at 31 (superiority met where "class action would also provide inclusion of those members who would otherwise be unable to afford independent representation").

Four specific factors referenced in Rule 23(b)(3) as relevant to the predominance and superiority requisites of mentioned above, all militate in favor of certification in this case.

"(A) the class members' interests in individually controlling the prosecution or defense of separate actions": The *Campbell* class members have little or no interest in individually controlling the prosecution of separate actions. If they had wished to do so, they likely would already have prosecuted their own actions. Counsel for Plaintiffs has constructed an internet webpage for the dissemination of information and status updates that is available to all class members, and have sent letters to hundreds of class members who have expressed interest in the case, inviting communications, questions, and comments. Counsel for Plaintiffs receives, almost every business day, telephone calls from class members seeking updates on the litigation, asking questions, and relating information. Yet, counsel for Plaintiffs is aware of only one class member who has told counsel that he wanted to file his own lawsuit. (Other class members probably have done so, but counsel is unaware of specifics. No other class members have indicated to counsel that they want to control the prosecution of their own claims in separate actions. Some have spoken to counsel about the subject, but none, other than the one mentioned above, have expressed to counsel any such decision or continuing desire. On the contrary, the class members overwhelmingly support the litigation. *See* Ex.10, Decl. of Timothy B. Fleming.

"(B) the extent and nature of any litigation concerning the controversy already begun by or against class members": The *Campbell* case is already more than twelve years old, and it follows two prior class actions against AMTRAK involving classes (Black managers nationwide in *McLaurin*; Black maintenance of way employees in the NEC in *Thornton*). *Campbell* has involved scores of motions, briefings, and related proceedings, more than 100 depositions, tens of thousands of documents discovered, and thousands of attorney hours expended. Counsel for Plaintiffs have traveled across the country and back again to hold meetings with class members and to take discovery. This Court has held numerous hearings and status conferences over the years. Discovery issues have been litigated and orders entered. Dispositive motions were briefed and decided by the Court in 2002; apparently, more are planned for the months to come. The parties agreed upon a Joint Database, a major endeavor. Experts have been retained and have done a great deal of work on class-related issues. A detailed scheduling order for the remainder of the case, covering the instant motion, dispositive motions, related briefings, depositions to be taken during the class certification briefings, and mediation, has been entered and adjusted several times. The class members are cohesive and overwhelmingly support the litigation. All of these facts strongly urge that this is the litigation that should decide the civil rights issues surrounding the employment of Black employees of AMTRAK that the Plaintiffs have initiated and seen through to this point.

"(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum": The reasons described above for both factors (A) and (B) also apply to this factor. Implicit as well is the fact that this Court is eminently familiar with the claims, facts, legal issues, parties, and counsel involved in this case. AMTRAK is headquartered in Washington, D.C.

Every fact and consideration supports the desirability of concentrating the litigation of the civil rights claims of AMTRAK's Black CBA-covered employees and applicants in this forum.

"(D) the likely difficulties in managing a class action": There are some difficulties in managing any large class action. However, this Court has well demonstrated its mastery of the facts and legal issues, its patience with the litigants (and their lawyers), and its ability to deal with the management of a class action, including long and complex discovery issues.

The instant motion for class certification gives the Court several options for certification and for managing the case. It may decide to certify of Black CBA-covered employees, and then subdivide it into the four Craft-group Subclasses: Shop, Engineering, Operating, and Clerical/On-Board Services raising promotion selection claims;[18] one to four such Craft-group Subclasses raising hostile work environment claims;[19] and one to four such Craft-groups Subclasses raising discipline claims;[20] as well as one Black Applicant Class.[21] Thus, the Court

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[18] Within these Craft-group Subclasses, for promotion claims, the candidate screening by HR takes into account similar considerations, and the interviewing panels use similar questions because they are seeking similar qualities in the workers. The selection decisions are made by fewer managers with similar backgrounds and experience, and are supposed to be based upon similar considerations, for similar types of jobs in similar environs. The statistical analysis and other expert evidence related to each Craft Subclass grouping would predominate over individualized fact issues at trial. At the same time, the Craft groupings of promotion selection claims would focus a jury's attention on the common policy in the particular context of the skills, abilities, work environment, tasks, equipment, *etc.*, pertinent to the particular Crafts grouping.

[19] If subclassed, a trial would focus on harassment and disparate treatment suffered by Subclass members within a Craft-group, actions of the specific managers in that Craft-group, and responses of HR, the DRO, and management to the complaints by Black workers in that Craft-group.

[20] If subclassed, a trial would focus on the disciplinary proceedings in the particular Craft-group, the actions of a finite set of managers over that Craft-group in bringing charges, the LR specialist assigned to that Craft-group, and the particular work rules applicable to the Craft-group.

[21] There would be less reason to break down the Black Applicant Class into subclasses because the applicants are similarly situated outside the company's workplace and generally are seeking any

could adjudicate all the claims in this case via one, two, four, five, or a maximum of thirteen trials. Thus, the Court could order one or four trials of the promotion claims of the Black Employee Class, or by Crafts grouping. Again, four trials for promotion selection[22] is far preferable to the vast multitude of trials that would be necessary in the absence of certification which would surely result in inconsistent and/or inefficient results.

Additionally, the Court has the option of consolidating all or some of the Classes or Subclasses for purposes of discovery, pretrial issues, and/or trial. Plaintiffs suggest there is little reason not to consolidate them for purposes of discovery. For trial, the Court also has options, including class and/or subclass trials, or consolidated trials for limited purposes, such as questions common to certain classes or subclasses (*e.g.*, whether the Black Employee Class and the Black Applicant Class were discriminated against by operation of the singular Amtrak promotion selection and hiring policy), and referrals to magistrates or special masters to hear discovery disputes, evidentiary issues, or even trial of certain issues, notably, the *Teamsters* mini-hearings. The Court could decide to consolidate Black Employee Class promotion claims with the HWE claims; to consolidate Craft Subclass promotion claims with Craft Subclass Discipline and/or Craft Subclass HWE claims; or to consolidate trial of the Black Employee Class promotion claims with the Black Applicant Class hiring claims. Most important is the fact that a few class and/or subclass trials are far more manageable than the legions of individual full-blown trials that would

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job. Although AMTRAK's selection policy for hiring external candidates is exactly the same policy as governs promotion, still, since *Falcon*, promotion and hiring claimants have generally been treated separately for reasons of typicality under Rule 23(a)(3).

[22] If necessary, certification could be by craft (union); Plaintiffs suggest such a breakdown is not necessary due to the similarities within each Craft grouping. *See* Ex. 2, Roth Report ¶¶9-14, 21-34.

doubtless result from a denial of certification.

3. The Court Should Grant A Hybrid Rule 23(b)(2)-(b)(3) Certification In This Case

Even before *Wal-Mart*, the District of Columbia Circuit had held that a district court had discretion to adopt a "hybrid" approach to class certification by utilizing Rule 23(b)(2) to certify a class as to claims for declaratory and injunctive relief and Rule 23(b)(3) to certify a class as to claims for monetary relief. *Eubanks v. Billington*, 110 F.3 87, 96 (D.C. Cir. 1997). Since *Wal-Mart* was decided, the District Court for D.C. has again expressly adopted this hybrid approach to certify a 23(b)(2)-(b)(3) class. . In *DL, et al. v. District of Columbia*, 237 F.R.D. 38 (D.D.C. Nov. 16, 2011) (Lamberth, C.J.), the Court re-certified claims (that it had previously certified under Rule 23(b)(2)), holding expressly that such certification was "appropriate in light of the Supreme Court's decision in *Wal-Mart* and in the interests of facilitating the fair and efficient conduct of the litigation." *Id.* at 47. Chief Judge Lamberth held that "the common question of whether defendants' education system denied large numbers of disabled children their statutory right to a [free appropriate public education] predominates over any questions affecting only individual class members, such as the extent of the individual monetary injuries flowing from defendant's violation of the law" and that "varying impacts" "on individual class members does not prevent the common questions regarding defendants' inadequate policies and practices to predominate." *Id.* (citation omitted). The Court further held that the superiority requirement of Rule 23(b)(3) was met where "individual class members . . . , absent class certification, would almost certainly be unable to devote the resources necessary to vindicate their rights and secure an appropriate remedy," and, additionally, cited "the extent of the litigation already begun on behalf of the class

... where the "case has grown quite long in the tooth, having been filed in 2005." *Id.* at 47-48. The Court noted that "the benefits of concentrating the litigation of the class members' claims in this forum far outweigh any difficulties accompanying the management of a class action." *Id.* at 48.

The exact same considerations that Chief Judge Lamberth found important in *DL v. District of Columbia* are present here. The common questions will predominate in any trial, especially because awards of money damages to class members (and, for that matter, equitable backpay awards) would be determined in stage two *Teamsters* min-hearings, not at a class-wide liability trial. Further, as in the *DL* case, the central questions for each Class or Subclass, discussed at length above, would predominate over any questions affecting only individual class members, such as the extent of the individual monetary injuries flowing from defendant's violation of law. As in *DL*, "varying impacts" on individual class members do not prevent the common questions regarding defendants' inadequate policies and practices from predominating a trial. Further, many class members, absent certification, "would almost certainly be unable to devote the resources necessary to vindicate their rights and secure an appropriate remedy." *Id.* As explained above, "the benefits of concentrating the litigation of the class members' claims in this forum far outweigh any difficulties accompanying the management of a class action." *Id.* Finally, the extent of the *Campbell* litigation already begun on behalf of the class – and certainly this case "has grown quite long in the tooth, having been filed in" 1999 – supports class certification. Because this case meets the criteria of Rule 23(b)(2) with respect to its declaratory and injunctive relief aspects, and Rule 23(b)(3) with respect to backpay and damages ultimately awardable to individual class members, this Court should follow *DL* and certify a hybrid class action.

Respectfully submitted this 21st day of February, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of February, 2012, I filed electronically the foregoing motion and memorandum with the Clerk of the Court, using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Timothy B. Fleming
Timothy B. Fleming