STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Impasse

Between

New York City Transit Authority and Manhattan And Bronx Surface Transit Operating Authority

- and -

Transport Workers Union of America, and Local 100, Transport Workers Union of America, AFL-CIO

(PERB Case No. TIA2005-045)

OPINION AND AWARD

The Public Arbitration Panel
George Nicolau, Chairman
Basil A. Paterson, Union
Gary Dellaverson, Employer

APPEARANCES:

For Local 100:
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At the request of the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority (hereinafter generally referred to as the "Authority"), the New York State Public Employment Relations Board, upon finding that the Authority and Transport Workers Union of America and Local 100, Transport Workers Union of America (hereinafter referred to as the "Union") could not voluntarily reach agreement on a collective bargaining contract, declared a bargaining impasse. Thereafter, on May 23, 2006, the agency, popularly known as PERB, designated the aforesaid Public Arbitration Panel for the purpose of making a just and reasonable determination of the dispute pursuant to Section 209.5 of the Civil Service Law.[1]

Following its designation, the Panel held hearings on August 4, 7, 8, 9, 10 and 11, September 5, 6 and 25 and October 3, 2006, at which time the Parties were afforded full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. Twenty-three witnesses gave sworn testimony, 172 exhibits were received in evidence and a transcript of 1742 pages was taken. Thereafter, the Parties submitted post-hearing briefs, with the Record closed on November 17, 2006, the date they were received.

[1] Under the impasse procedures of the statute, usually referred to as the Taylor Law, the Employer and the Union designate their respective Panel members. They, in turn, are offered an opportunity to select the Public Member and Chair. The mutual selection procedure was followed in this case.

The Applicable Standards

In arriving at a just and reasonable determination of the dispute, Section 209.5(d) of the statute requires that the Panel specify the basis for its findings and take into consideration, in addition to any other relevant factors, the following:

> (i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities;
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> (ii) the overall compensation paid to the employees direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received:
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> (iii) the impact of the panel's award on the financial ability of the public employer to pay, on the present fares and on the continued provision of services to the public:
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> (iv) changes in the average consumer prices for goods and services, commonly known as the cost of living:
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> (v) the interest and welfare of the public; and
>
> (vi) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits and other working conditions in collective negotiations or impasse panel proceedings.

The Background

All must agree that this is an unusual impasse dispute. In the ordinary case, an impasse is declared because the Parties, try as they might, cannot reach a voluntary resolution of their differences. Here

however, agreement was reached. That 45-page Memorandum of Understanding (Joint Exhibit 3), which was subject to subsequent ratification and approval, was executed by duly constituted representatives on December 27, 2005.

The events preceding and following that tentative agreement have been widely reported, but are worth summarizing as a prelude to any determination.

Negotiations for a new contract continued past the December 15, 2005 expiration of the existing agreement. Then, in the early morning of December 20, after negotiations had broken down, the Union struck the Authority's operations. That strike was in violation of a court issued injunction and a violation of the Taylor Law's Section 210, which provided for substantial penalties against the employees and their Union should such a stoppage occur. The strike ended on December 22nd and the Parties, with the assistance of State-appointed mediators, returned to the bargaining table. A Memorandum of Understanding was thereafter executed on December 27, 2005.

On January 20, 2006, that Memorandum of Understanding (the "MOU") was rejected by seven votes out of some 22,400 cast. Five days later, the Authority, which had previously filed a Declaration of Impasse Petition, filed a petition for the designation of a Public Arbitration Panel. In that petition (Joint Exhibit 4), the Authority submitted a number of proposals it had abandoned when it had executed the December 27, 2005

MOU. There followed two responses to the petition in which the TWU, like the Authority, submitted proposals it had abandoned. Also filed were improper practice charges in which both sides contended that many of the proposals submitted by the other were, for various reasons, beyond the scope of bargaining and were thus not within the Panel's authority.

At the hearings held by the Panel, the Authority and the Union submitted testimony and evidence in support of the proposals they had advanced, understanding, however, that many were subject to scope of bargaining rulings. On September 5, 2006, at the urging of the Chairman, the Authority and the Union wrote separately to the Chairman of PERB asking that it permit the withdrawal of the scope charges so they could place any remaining scope issues before the Panel. Shortly thereafter, PERB approved those requests.

Then, on October 3, 2006, the last day of hearing in this proceeding, the Parties agreed upon a stipulation, which was read into the Record by Authority counsel. That stipulation is:

> To the extent that the Panel determines based on statutory criteria of the Taylor Law that it otherwise would include a provision contained in the December 27, 2005 MOU, but for objections of the parties as to scope, the Union and the Transit Authority agree to waive that objection. The foregoing does not apply to the following: the 25/55 AMC refund [Joint Exhibit 3, §3 "Pension"]; the AMC refund side letter..., and provisions dealing with pre-65 retiree health benefits.(Tr.1735) [2]

2.The understanding of the Parties and the Panel is that the Parties may argue as to both the scope and the merits of the three specifically mentioned items, but that as to any other provisions of the December 27, 2005 MOU the Panel considers consistent with the statutory criteria and thus appropriate for inclusion in its Award, scope arguments will not be advanced.

The three items, the second of which is a December 27, 2005, Side Letter between Local 100 President Roger Toussaint and MTA Director of Labor Relations Gary Dellaverson, are:

> **3. PENSION**
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> The MTA and the TWU will support legislation to provide for the refund of the additional member contributions, with interest, made to the New York City Employees' Retirement System by participants of the Transit Operating 25 Year/AGE 55 Retirement Program (RSSL § 604-b). The parties agree to make every effort to have such legislation enacted by the first week of July 2006.
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> Upon enactment of the above legislation, the MABSTOA Pension Plan shall be amended and action shall be taken to provide the same refund.
>
> **December 27, 2005 Side Letter**
>
> This will confirm our recent discussions regarding the proposed legislation referenced in paragraph 3 of the MOU. If such legislation is not enacted by July 2006, the Union may elect a one time conversion of its claim. In such an event, the MTA will place the sum of $131.7 million dollars into a fund. Any TWU member may elect to receive from that fund the same amount as would have been available had such legislation been enacted, provided such member signs an irrevocable waiver, in a form approved by NYCERS, waiving any claim in the future to such contributions still held by either NYCERS or the MaBSTOA Pension Fund, and an agreement with the employer to repay the amount received from the MTA Fund if such employee receives a refund from NYCERS or the MaBSTOA Pension Fund. The parties recognize that distributions from this employer sponsored fund would be taxable unless otherwise transferred pursuant to the Internal Revenue Code Sections authorizing tax sheltered treatment.
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> **4. HEALTH CARE**
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> Effective upon full and final ratification of this Agreement, the current plan of benefits shall be amended to provide that pre-Medicare retirees receive the same benefits (i.e., hospital, CBP medical, Type D-3 medical, EMB, vision benefits) as active members except that the EMB 1987 schedule will be replaced by the 2005 Ingenix profile at the 80th percentile.

Discussion

The Parties spent considerable time arguing the merits of various proposals they had advanced in this proceeding. Many of these arguments were quite persuasive. However, the Chairman is of the opinion, based on the circumstances of this case, that those arguments need not be addressed. The reason is that when they signed the December 27, 2005 MOU the Parties decided that agreement on the provisions contained in that MOU was more important than agreement on matters it did not contain. They decided, in other words, that the matters contained in that 45-page memorandum were fully sufficient to meet their interests. Further, the composition of a Taylor Law impasse panel containing arbitrators directly designated by the Parties contemplates that those "interested arbitrators" assist the Chairman in his deliberation. Considering all the above factors and the unique circumstances of this case, the Chairman reached the conclusion that the statutory criteria were best met by finding a resolution that yielded the concurrence of both of my colleagues. Not surprisingly, finding that concurrence has been difficult.

The Chairman has carefully reviewed each provision of the MOU and finds that each one is consistent with the statutory criteria. The wages, hours and working conditions on which the Parties agreed, as reflected in the MOU, are comparable to those of employees engaged in

similar work, are within the financial ability of the Authority to pay, and in the interest and welfare of the public.[3]

With the exception of the three aforesaid items and certain adjustments needed due to the passage of time between the execution of the MOU and the date of this Award, all of which will be discussed below, the provisions of the MOU are therefore adopted as the Parties had agreed to them. Other than the three specific items and the needed adjustments, those provisions, which include the six page MOU, its Attachment A, and various attachments and Side Letters applicable to particular departments, classifications and subjects as well as the terms of the 2002-2005 Agreement unaffected by the MOU, are incorporated by reference in this Award and shall be effective for a term ending January 15, 2009.

The December 16, 2005 wage increase of 3% set forth in Section 2 of the MOU shall be retroactive to that date. Contributions of the Authority to the Training and Upgrading Fund and payments to particular classifications as well as the extension and payment of benefits, such as Line of Duty Death Benefits, Surviving Spouse Health Benefits, and benefits of a similar nature, which had agreed-upon effective dates prior to the date of this Award, shall similarly be retroactive. Since the Parties contemplated that the addition of Martin Luther King, Jr. Day to the list of observed holidays was to commence

[3] It should be noted that the wage increases advanced by the Authority in this proceeding are identical to those set forth in the MOU.

following full ratification and approval of the MOU, dates clearly beyond January 16, 2006, the holiday shall be added as of 2007.

The Union suggests that it is impractical to make certain benefits retroactive and that the value of those assertedly lost items should be made up by other means. In addition to the extension of benefits to pre-Medicare retirees, to be discussed below, the benefits of which the Union speaks are temporary disability insurance (MOU Section 7), assault pay (MOU Section 8) and surviving spouse health benefits (MOU, Attachment A, Paragraph 3).

The Chairman disagrees that it would not be possible to make these retroactive adjustments. Those employees entitled to such benefits can be identified and be made whole. For example, those who would have been entitled to the benefits of the temporary disability insurance policy effective May 1, 2006 pursuant to the MOU's Section 7 can receive the cash benefits provided by such a policy upon proof satisfactory to the Authority that they meet the qualifying criteria and the application of the bargaining unit's share of the premium retroactive to the same May 1, 2006 date. The same can be said for those employees who would have been entitled to assault pay or any surviving spouses who would have been entitled to health benefits during 2006

pursuant to Section 3 of the MOU's Attachment A. In each instance, such proof is to be submitted no later than June 15, 2007[4]

I turn now to the three items subject to the scope of bargaining challenge, namely pre-Medicare retiree health benefits and the two items related to pensions.

Pre-Medicare Retiree Health Benefits

As previously stated, the Authority initially argued that this provision, the first paragraph of the MOU's Section 4, was beyond the scope of bargaining. Consistent with the foregoing discussion and at the Chairman's urging, the Authority subsequently agreed, under the unique circumstances of this case, to waive that objection. On the merits, the single question that remains, I find that the provision should be included in the Award and that it should be applicable, as the Parties agreed in the MOU, to those pre-Medicare retirees who retired prior to December 16, 2005 as well as those who retired on that date or thereafter.

In the MOU's Section 4, the Union agreed for the first time that active members would contribute a portion of their bi-weekly gross wages to the cost of health care. However, in that same Section the 1.5% contribution was specifically agreed upon in order "to offset the cost of retiree health benefits." Thus, the contribution and the cost of pre-

[4] In accordance with the Union's request the slots that would have been made available for the Step Program are to be added to the 40 slots that will be available in 2007.

Medicare retiree health benefits were explicitly linked. One was being made so the other could be achieved. Thus, both must be approved.

Pursuant to the MOU, the 1.5% contribution was to begin on December 16, 2005 upon payment of the mutually contemplated first general wage increase. Since the Award directs that the first wage increase is to begin as of that date, the 1.5% contributions must similarly begin as of December 16, 2005.

In this regard, it has been pointed out that "upon full and final ratification" of the MOU, benefits were to be improved pursuant to Section 4 for those pre-Medicare retirees enrolled in a particular plan. Because of the circumstances previously described, those improvements were obviously not put in place. Thus, those pre-Medicare retirees who would have been eligible for coverage and payments pursuant to those improved benefits did not receive them.

As a stand-in for that ratification date, the Chairman has determined that March 1, 2006, the effective date of the same provisions in the Agreements between the Authority and Locals 726 and 1056 of the Amalgamated Transit Union, is the appropriate date to make those benefit changes effective. Accordingly, any pre-Medicare retiree who would have been eligible for and did not receive such improved benefits subsequent to March 1, 2006, is entitled to the equivalent of said benefits upon proof satisfactory to the Authority that payments that would have been payable pursuant to the improved benefits had been made. Such proof is to be submitted no later than June 15, 2007. The

Parties shall jointly communicate this benefit change to affected retirees at their earliest convenience so that they will be made aware of this ruling.

The Pension Issue

The Authority contends that this matter, consisting of Section 3 of the MOU and the December 27, 2005 Side Letter, is beyond the scope of the Panel's authority. The basis of that contention is Section 201.4 of the Taylor Law, which reads:

> **§ 201. Definitions**
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> 4. The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment, provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to the article, and any benefits so negotiated shall be void.

As can be seen from the previously cited December 27, 2005 provisions, the Parties agreed to jointly support legislation to provide for the refund, with interest, of certain contributions made to the New York City Employees' Retirement System by participants in the 25 Year/Age 55 Retirement Program. They also agreed in the accompanying Side letter that if said legislation were not enacted by July 2006, the Authority would place $131.7 million dollars into a fund and that 25/55 participants entitled to a refund of said contributions could elect, subject to certain conditions, to receive the

same amount from that fund as would have been available to them had such legislation been enacted.

A similar agreement was made by the Authority and ATU Locals 726 and 1056, the representatives of bus drivers in the Boroughs of Staten Island and Queens. Those Locals also went on strike in December 2005, with the aforesaid agreement subsequently reached, ratified and approved. Thereafter, the legislation jointly supported by the Authority and the ATU pursuant to their agreement was passed by the Legislature and signed by the Governor. That legislation (Laws of 2006, Ch. 734), which amended Section 604-b,(c),10 of the Retirement and Social Security Law as of June 6, 2006, provided that upon appropriate application ATU participants in the 25/55 plan who had accumulated a balance of additional member contributions as of December 28, 2005, would be entitled to a refund of those balances together with interest of 5% per annum.

It is evident from the scope of bargaining case law that this Panel cannot direct the Parties in this proceeding to jointly support the legislation they had agreed to support in the December 27, 2005 MOU. It can, however, direct the MTA to make a lump sum payment to those TWU member participants with accumulated member contributions, as it promised in the December 27, 2005 Side Letter in the event the legislation the Parties contemplated was not adopted. Even though that lump sum payment is measured by the amount of each participant's accumulated member contributions, it is not a pension benefit as

defined in the aforementioned Section 201.4; it is a lump sum payment equal to accumulated contributions to which the participants would be entitled. The Panel, acting within its authority, can also stay and subsequently not require such payments directly from the MTA if the legislation the Parties jointly contemplated is in fact adopted. The adoption of such legislation mirroring that applicable to the ATU (Laws of 2006, Ch. 734) would represent a significant savings to the MTA and TWU members. Additionally, passage of the legislation, rather than direct payments by the MTA, would represent tax savings to both the Authority and those qualifying participants who had accumulated balances on December 16, 2005. Thus, the incentive of both the Union and the MTA to support such legislation and to use all efforts in a joint attempt to see that it is adopted is substantial.

The lump sum payment prospectively required to be made pursuant to this Award shall include 5% interest after July 31, 2006, but shall only be paid if the aforesaid legislation is not adopted by July 2007.

The Panel is of the opinion that an Award of the above described nature will effectively restore the agreement the representatives of the Parties previously made and may also serve as a means of repairing the relationship unfavorably affected by the events of the winter of 2005-2006.

The Undersigned, having duly heard the proofs and allegations of the Parties, therefore render the following

AWARD

1. With the needed adjustments set forth in the foregoing Opinion and those listed below, including Paragraph 5 herein, the terms of the December 27, 2005 Memorandum of Agreement shall be effective for a term ending January 15, 2009, with the terms of the 2002-2005 Agreement unaffected thereby also to be effective for a term ending January 15, 2009.

2. The December 16, 2005 wage increase of 3% and the 1.5% health contribution set forth in the MOU shall be retroactive to that date. Authority contributions to the Training and Upgrading Fund and payments to particular classifications as well as the extension and payment of benefits set forth in the MOU shall similarly be retroactive, with adjustments to be made with respect to entitlement to particular benefits as set forth in the foregoing Opinion.

3. The Martin Luther King, Jr. holiday shall be effective beginning 2007.

4. The provisions of Section 4 of the MOU, Health Care, shall be effective as provided therein, with any pre-Medicare retiree who would have been eligible to receive any of the specified improved benefits subsequent to March 1, 2006 to be provided the equivalent to said benefit or benefits upon proof satisfactory to the Authority of such entitlement. As set forth in the foregoing Opinion, such proof is to be submitted no later than June 15, 2007.

5. In the event the legislation referred to in the foregoing Opinion is not jointly supported and adopted by July 2007, the Authority shall pay to any 25/55 participant who so elects and thereafter signs the referenced irrevocable waiver an equivalent of the amount that would have been available to said participant if said

legislation had been adopted. Said payment shall include interest of 5% as of July 31, 2006.

6. The Panel shall retain jurisdiction to resolve any disagreements as to the meaning, interpretation or application of this Award. The Panel also retains jurisdiction to resolve any questions regarding effective dates of any provisions of the MOU that the Parties cannot resolve. Either Party may invoke that jurisdiction upon written notice to the members of the Panel.

Dated: December 15, 2006

George Nicolau, Chairman

Basil A. Paterson, TWU

Gary Dellaverson, MTA

ACKNOWLEDGMENT

On this 15th day of December, 2006, I, George Nicolau, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing as my Opinion and Award in the above matter.

George Nicolau