

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Impasse

Between

MTA BUS COMPANY

Public Employer,

-and-

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 100,

Employee Organization

(PERB Case No. TIA2008-022)

OPINION
AND
AWARD

NYS PUBLIC EMPLOYMENT RELATIONS BOARD
RECEIVED

JUN 12 2009

CONCILIATION

The Public Arbitration Panel

John Zuccotti, Chairman
Roger Toussaint, Union
Dall Forsythe, Employer

APPEARANCES:

For Local 100:

Gladstein, Reif & Meginnis, LLP
By: Walter M. Meginniss, Jr., Esq.
Kent Hirozawa, Esq.

For MTA Bus:

Proskauer Rose, LLP
By: M. David Zumdorfer, Esq.
Neil H. Abramson, Esq.
Daniel Altchek, Esq.

BACKGROUND

Pursuant to the provisions contained in Section 209.5 of the Civil Service Law (commonly referred to as the Taylor Law), the New York State Public Employment Relations Board ("PERB") designated the Chairperson, the Public Employer and Employee Organization Panel Members to make a just and reasonable determination of the outstanding issues in the dispute between MTA Bus Company ("MTA Bus" or "Employer") and Transport Workers Union of America, Local 100 ("Union"). (See January 8, 2009 Correspondence from Richard A. Curreri, PERB's Office of Conciliation Director, acknowledging receipt of the parties' filings and confirming the agreed upon issues to be submitted to the properly designated panel.¹)

MTA Bus is a subsidiary of the MTA created after the MTA began taking over seven private bus lines in 2005 pursuant to an agreement with City of New York ("the City"). The employees of five of the private companies – Liberty Lines, New York Bus, Jamaica, Triborough and Queens Surface – were represented by Local 100, and the MTA agreed to assume the existing contracts, the last of which expired in the spring of 2003.

In 2005, when the MTA began its takeover of the private bus lines, the Employer and the Union began negotiations with respect to successor agreements, and on December 22, 2005, the parties negotiated a Term Sheet (Union Exhibit 14) setting forth various terms and conditions of employment for both TA/OA and MTA Bus. However, no final agreement was reached.

¹ In this January 8, 2009 letter, Mr. Curreri noted the parties' joint petition with respect to the dispute between the Transit Authority/MABSTOA ("TA/OA") and the Union (PERB Case No. TIA2008-021). Mr. Curreri set forth that the same panel designated for the MTA Bus matter would make a just and reasonable determination of the outstanding issues in the TA/OA matter. Thus, the Panel will issue a separate decision in regard to the TA/OA matter.

Continuing negotiations with respect to the terms and conditions of the TA/OA 2005-2009 Collective Bargaining Agreement (“TA/OA 2005-2009 CBA”) resulted in a signed Memorandum of Understanding (“MOU”), dated December 27, 2005 (Union Exhibit 2). However, on January 20, 2006, TA/OA’s Union-represented employees voted against ratification of the December 27, 2005 MOU. Subsequently, in August 2006, TA/OA and Local 100 commenced interest arbitration hearings before Chairman George Nicolau, Union Panel Member Basil A. Paterson and Employer Panel Member Gary Dellaverson. On December 16, 2006, the Nicolau Panel issued an award (Union Exhibit 3) incorporating the terms of the December 27, 2005 MOU, effective for a term ending January 15, 2009.

The Nicolau decision set the pattern for the 2006-2009 contract between MTA Bus and the Union. After the Nicolau award was issued, MTA Bus and the Union continued negotiations with the express understanding that the MTA Bus agreement would have parallel economic terms to those set forth in the TA/OA 2005-2009 CBA. Nevertheless, the parties remained unable to reach any specific agreement establishing the terms and conditions of employment for the 2006-2009 period. After entering into several “cooling off” letter agreements in 2006 and 2007 (MTA Bus Exhibits 2-5), by late 2008, the parties had reached an understanding as to most of the terms and conditions of employment to be contained in a successor agreement. However, the parties could not agree on the valuation (referred to by the parties as “costing”) of the terms and conditions of employment to be set forth in their tentative successor agreement. Accordingly, the tentatively agreed terms and conditions of employment were never implemented. Those terms, as set forth in a November 2008 MOU (MTA Bus

Exhibit 20), were restated, in material part, and submitted to the Panel on the first day of the hearing as Union Exhibit 1 (the "Language Submission").²

Subsequently, on January 6, 2009, the parties filed a Declaration of Impasse and Request for Interest Arbitration with PERB. After a scheduling conference held on March 19, 2009, the Panel determined that it would begin the interest arbitration proceedings by first setting the terms and conditions of employment for MTA Bus employees for the period April 1, 2006 through January 15, 2009 or March 31, 2009, and that such proceeding would be designated as "MTA Bus I." The parties agreed that the terms and conditions of employment for MTA Bus employees with respect to the period January 16, 2009 (or April 1, 2009) through January 15, 2012 would be designated as "MTA Bus II." They further agreed that the terms of the MTA Bus II contract would, in part, be determined by the TA/OA award issued by the Panel (PERB Case No. TIA2008-021). Finally, the parties agreed that the net economic value of improvements in the MTA Bus II contract will be equal to the net economic value of the TA/OA award. (See May 4, 2009 email to Panel from Walter M. Meginniss, Jr.).

Thus, this interest arbitration was limited in scope to determining the cost of the changes in terms and conditions set forth in the TA/OA 2005-2009 CBA and whether the parties' previously agreed changes in terms and conditions of employment fell within the costing pattern established by the TA/OA 2005-2009 CBA. The three primary areas of contention between the Union and the Employer were: (i) the amortization period(s) to be used in costing certain pension benefit improvement(s); (ii) whether the Union should receive a

² The Language Submission did not contain a provision for the previously agreed percentage wage increases set forth in the November 2008 MOU. Further, the Language Submission did not contain a contract termination date. The Panel's Opinion and Award with respect to the previously agreed percentage wage increases and the contract termination date is set forth below.

0.7% credit for the creation of a new Facility Maintainer position; and (iii) whether a terminal date of January 15, 2009 rather than March 31, 2009 would result in a 0.7% cost to the Employer. In addition, due to the passage of time since the drafting of the MOUs upon which the Language Submission is based, the effective dates of certain provisions contained in the Language Submission will be addressed by the Panel as set forth herein below.

The interest arbitration hearings pertaining to MTA Bus I were held on April 14, 16 and 23 and May 7 and 8, 2009 in New York City at the offices of Weil, Gotshal & Manges LLP. Both parties were represented by counsel and introduced evidence, presented testimony, summoned witnesses, examined and cross-examined witnesses and otherwise supported their respective positions on the outstanding issues before the Panel. The parties submitted post-hearing briefs, and the Record closed on June 1, 2009, the date the post-hearing briefs were received.

Thereafter, the Panel fully reviewed all data, evidence, argument and issues submitted by the parties. After meeting in executive sessions and deliberating on each of the outstanding issues, the Panel reached unanimous agreement on the terms of this Interest Arbitration Award ("Award").

The positions taken by both parties are adequately specified in their pre-hearing and post-hearing written submissions and numerous hearing exhibits, which are all incorporated by reference into this Award. Such positions merely will be summarized for the purposes of this Opinion and Award.

Accordingly, set out herein is the Panel's Award as to what constitutes a just and reasonable determination of the parties' arbitration eligible terms and conditions of employment for the period April 1, 2006 through March 31, 2009.

In arriving at such determination, the Panel has specifically reviewed and considered the following factors, as detailed in Section 209.5 of the Civil Service Law:

- (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;
- (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;
- (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;
- (iv) changes in the average consumer prices for goods and services, commonly known as the cost of living;
- (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.

Both parties have agreed that an award for MTA Bus employees that grants economic value equivalent to that of the TA/OA 2005-2009 CBA will, in fact, meet the statutory standards.

The economic value of this Award for MTA Bus employees is equivalent to that of the TA/OA 2005-2009 CBA.

DISCUSSION

For the reasons set forth below, the Panel has determined that the MTA Bus I contract shall cover a period from April 1, 2006 through March 31, 2009. The Panel has determined that the Union's proposed costings with respect to pension improvements falls within the 2005-2009 TA/OA cost pattern of 10.07%. The Panel declines to rule on the Facility Maintainer

issue, finding the issue moot with respect to the April 1, 2006 through March 31, 2009 period covered by MTA Bus I.

The other material terms set forth in the Language Submission were not in dispute and will be incorporated by reference in the Panel's Opinion and Award, subject to certain modifications, and only to the extent they are consistent with the Panel's determinations contained in this Opinion and Award.

COST ASSESSMENT OF THE 2005-2009 TA/OA CBA

PANEL DETERMINATION:

The Panel has determined that the cost of the TA/OA 2005-2009 CBA is 10.07%. (See MTA Exhibit 1). In 2006, the Nicolau Interest Arbitration Panel set the terms and conditions for the TA/OA 2005-2009 CBA (Union Exhibit 3) based on the parties' December 27, 2005 Memorandum of Agreement (Union Exhibit 2). Since that time, two ATU locals and other bargaining units have settled their contracts in accordance with this pattern. (See Union Exhibits 5 and 6).

THE PREVIOUSLY AGREED UPON BENEFITS

PENSION BENEFIT IMPROVEMENTS

The parties previously agreed to pension benefit improvements for several categories of personnel: active employees; post-takeover retirees (those employed by MTA Bus after the MTA took over the private bus operations but who have since retired); and pre-takeover retirees.

For active employees and post-takeover retirees, the parties agreed to a pension benefit improvement of \$105 per month per year of service for all who have 20 years of service and retire at age 57 or older, with the benefit improvement taking effect October 1, 2008. For those

employees who retired prior to the MTA Bus takeover of the private bus lines, the parties agreed to two different types of pension benefit improvements. For those who were participants in the former TWU Plan (i.e., retirees of Queens Surface, Jamaica and Triborough Bus), who were employed between August 1, 2002 and the date of the MTA takeover and who retired with at least 20 years of service, the parties agreed to an improvement of their pension benefit to \$105 per month per year of service. For all other pre-takeover retirees who previously participated in the TWU Plan and for pre-takeover retirees of New York Bus, the parties agreed to improve their benefit by 5% (referred to by the parties as a 5% Cost of Living Adjustment or "COLA").

The parties' primary costing dispute centered around the amortization period to be ascribed to these various pension benefit improvements. The Employer noted that the MTA's Defined Benefit Plan ("MTA DB Plan"), the pension fund that is now the source of the pension benefits for MTA Bus employees, utilized the "Frozen Initial Liability Method" in valuing plan liabilities (MTA Exhibit 16). Under the Frozen Initial Liability Method, a plan's total liabilities are split into two pieces – liability attributed to future service and liability attributed to past service. The Employer's expert, Robert LaMontagne, testified that the future service liability is treated in a manner similar to the aggregate funding method, with an average future working life amortization period (generally spanning 10 to 15 years) while the past service liability is amortized over a fixed number of years. (Tr. 774-75). Mr. LaMontagne then recommended a 5-year amortization period for the group of existing retirees who would be immediately eligible to receive the improved benefit. However, Mr. LaMontagne acknowledged that it also would be reasonable to use a 10-year amortization period for such immediately payable benefits. (Tr. 816, Union Exhibit 43).

The Union, noting the flexibility available to public sector employers in setting amortization standards as such employers are unconstrained by ERISA's rules and regulations, argued for either a 21-year or 30-year amortization period for pension benefit improvements to be provided to active employees upon retirement based on similar valuations ascribed to pension benefit improvements made in other MTA bargaining units. Further, the Union expressed a willingness to accept a 10-year amortization period for retiree pension improvements.

PANEL DETERMINATION:

The Panel has considered the parties' respective arguments and has determined that a 21-year amortization period will be used to assess the costs of the pension improvements for active employees. Actuarial Valuation Reports for the MTA DB Plan show that the Plan sponsor chose a 21-year amortization period for a pension improvement for participants of the MetroNorth Plan and the LIRR Plan that was strikingly similar to the improvement at issue here. (*See* Union Exhibit 42).

The Panel has further determined that a 10-year amortization period will be used to assess the immediately payable costs of the pension improvement for current retirees. While the Employer advocated for a 5-year amortization period during the interest arbitration, the Employer's own expert, Mr. LaMontagne, acknowledged that a 10-year amortization period was reasonable (Tr. 816; Union Exhibit 43), and both the Employer and the Union used a 10-year amortization period during pre-impasse negotiations. (Tr. 320; 487-88).

Union Group	Amortization Period	Annual Cost	% of Base Labor Cost³
Actives	21 years	\$2,293,000	1.86%
Post-takeover retirees	10 years	\$850,000	0.69%
<i>Subtotal: Actives and post-takeover retirees</i>			2.55%
\$105/month/year of service for TWU Plan retirees retired between 8-1-02 and takeover	10 years	\$1,080,000	0.88%
COLA for TWU Plan retirees retired prior to 8-1-02	10 years	\$680,000	0.55%
COLA for pre-takeover retirees from New York Bus	10 years	\$53,000	0.04%
<i>Subtotal: Pre-takeover retirees</i>			1.47%
TOTAL		\$4,956,000	4.02%

FACILITY MAINTAINER POSITION

MTA Bus sought to establish a new bargaining unit position under the title of Facility Maintainer. Current Union-represented employees would be eligible for the new position in which they would conduct previously contracted-out major repairs and construction. Both the Union and the Employer agreed that the Union would receive a benefit in bringing this contracted-out work in-house but disagreed over whether the Union should be credited with the 0.7% of savings to the MTA generated by this position. The Employer did not dispute the

³ The percentage of base labor costs is calculated using the 1% figure agreed upon by the parties in negotiations of \$1,233,710.00. (Union Exhibit 25). Further, the parties have advised the Panel that they have agreed to modify the Language Submission so that the effective dates for each of the benefit improvements described in the table above shall be October 1, 2008.

savings valuation of 0.7% but instead asserted that no credit should be provided given the Employer's unilateral authority to establish the position. The Union disputed this assertion, arguing that the Employer did not in fact have the right to unilaterally establish the position because the new position would necessarily affect the terms and conditions of employment of Union-represented building maintenance personnel, a mandatory subject of collective bargaining.

PANEL DETERMINATION:

The Panel has determined that it need not reach the issue of whether the Union should receive its proposed 0.7% credit for the Employer's establishment of the Facility Maintainer position. The Panel's determination in MTA Bus I is limited to the 2006-2009 bargaining period. During the period covered by this Award, the MTA did not, in fact, proceed with the establishment of the Facility Maintainer position. Accordingly, the Panel considers this issue moot.

Should the Employer establish the Facility Maintainer position, the Panel strongly encourages the parties to meet and confer in order to resolve their disputes related to the establishment of such a position.

COTERMINOUS CONTRACT EXPIRATION DATE

In this proceeding, the Union sought a termination date of January 15, 2009 for the MTA Bus I contract, a date coterminous with the TA/OA contract. The Union based its argument on the Term Sheet (Union Ex. 14), which provided that MTA Bus employees were entitled to a full share of the economic terms of the 2005-2009 TA/OA contract.

The Employer noted that a termination date of January 15, 2009 rather than March 31, 2009 would result in a contract of 33.5 months rather than 36 months. This shorter contract

term would result in an extra cost of 0.7% to the Employer due to earlier implementation of the successor contract's anticipated increased labor costs. (See MTA Bus Exhibit 18, pgs. 15-16).

PANEL DETERMINATION:

The Panel has determined that the MTA Bus I contract will terminate on March 31, 2009 rather than January 15, 2009. The Panel's determination is based upon its conclusion that the acceleration of the contract termination date cannot be awarded without incurring a 0.7% cost, thereby exceeding the already established aggregate 10.07% cost of contract improvements.

Of course, the parties are free to address this issue in MTA Bus II.

TRAINING AND UPGRADING FUND AND CHILD CARE FUND

The Union sought to have MTA Bus contribute to the pre-established New York City Transit Authority/Local 100 Training and Upgrading Fund and the New York City Transit Authority/Local 100 Child Care Fund.

PANEL DETERMINATION:

The Panel has determined that the provision contained in the Language Submission providing for the Employer's contribution to the Training and Upgrading Fund and the Child Care Fund should be deleted. MTA Bus employees were not permitted to participate in the Training and Upgrading Program or the Child Care Program during the period April 1, 2006 through March 31, 2009 applicable to MTA Bus I. Accordingly, the Panel finds the contributions to the above-identified funds unnecessary.

The parties are free to address the issue in MTA Bus II.

MISCELLANEOUS EFFECTIVE DATE ISSUES

The Language Submission, which is based upon the parties' previously drafted MOUs, raises issues with respect to the effective dates of certain provisions due to the passage of time and other changed circumstances.

PANEL DETERMINATION:

A. Wage Parity

The Language Submission provides for a January 15, 2009 effective date for implementation of the Wage Parity provisions contained in Appendix A thereto. The Employer contends that this provision was intended to go into effect on the last day of the agreement, which the Panel has now determined is March 31, 2009. The Union contends that the parties bargained for a January 15, 2009 effective date. The Union argues further that the effectiveness of this provision should not change regardless of the Panel's determination concerning the terminal date of the contract.

The Panel finds that, at the time the MOUs serving as the basis of the Language Submission were drafted, the parties anticipated a January 15 contract termination date and intended the Wage Parity provisions to become effective at that time. Now, as a result of the Panel's determination to leave the contract termination date at March 31, the Panel finds that the Wage Parity provisions shall become effective on March 31, 2009.

B. Bi-Weekly Payroll

The Language Submission provides that all existing on-site check cashing services made available to employees at various MTA Bus locations would end "upon ratification." Because the parties' final contract will be resolved by this Opinion and Award, no ratification

will take place. Accordingly, the foregoing provision shall become effective upon issuance of this Opinion and Award.

Further, the Panel determines that the Union must notify the Employer, on or before October 1, 2009, as to whether the Employer must provide advance payment to every employee in connection with the transition week in its conversion to bi-weekly payroll.

C. Holidays and Personal Days

The Panel determines that the Holiday and Personal Days provisions of the Language Submission shall become effective in the calendar year 2010, rather than 2009, due to the passage of time since the preparation of the MOUs upon which the Language Submission is based. The third paragraph of the Holiday and Personal Days provision contained in Section 12 of Appendix B of the Language Submission pertaining to personal days for new employees during their first year of service shall become effective upon issuance of this Award rather than “upon full and final ratification” as provided therein.

D. Picks

The Language Submission, like the October and November 2008 MOUs, contains provisions describing the procedures under which “picks” by employees for assignments and vacations will be made. However, unlike the October and November 2008 MOUs, the Language Submission does not contain an effective date for the implementation of these provisions. The October and November 2008 MOUs both provided that such employee picks would be implemented for 2009, “not later than the first Sunday in February.” For subsequent years, the MOUs provided the picks would occur in January. The first Sunday in February 2009 has now passed, and the Panel takes notice that we are now rapidly approaching the summer vacation season. Accordingly, rather than disrupt scheduled vacation plans based

upon existing vacation and personal day schedules, the Panel determines that the Pick provisions contained in Sections 13 and 14 of Appendix B pertaining to vacation and personal days shall become effective for the calendar year 2010. However, because certain cost savings associated with the parties' previously agreed work rule changes cannot be realized unless and until new assignment picks are conducted, the Panel determines that assignment picks for 2009 shall be conducted as soon as reasonably practicable, but not earlier than September 14, 2009.

AWARD

On the questions that were before the Panel, the Panel determines as follows:

1. The cost of the TA/OA 2005-2009 CBA is 10.07%.
2. The cost of the parties' previously agreed pension benefit improvements is 4.02%. This valuation utilizes a 21-year amortization period for pension benefit improvements to be received by active employees upon retirement and a 10-year amortization period for pension benefit improvements immediately payable to current retirees. The cost for pension benefit improvements for active employees and post-takeover retirees is 2.55%, and the cost for pension benefit improvements for pre-takeover retirees is 1.47%. Each of the foregoing pension improvements shall become effective October 1, 2008.
3. The Panel declines to rule upon the Facility Maintainer issue because it is moot with respect to the April 1, 2006 through March 31, 2009 period covered by MTA Bus I.
4. The MTA Bus I contract will cover the period April 1, 2006 through March 31, 2009.
5. The provision in the Language Submission requiring the Employer's contribution to the Training and Upgrading Fund and the Child Care Fund shall be deleted.
6. The parties' previously agreed wage increases shall be granted as follows: 3.0% effective April 1, 2006; 4.0% effective April 1, 2007; and 3.5% effective April 1, 2008. The wage increases shall be compounded and applicable to wage progression levels.
7. The Panel finds that the effective dates for the provisions of the Language Submission referred to below shall be as follows:

A. Wage Parity:

Wage Parity shall become effective on March 31, 2009.

B. Bi-Weekly Payroll:

1. On-site check cashing services provided at MTA Bus facilities shall end upon issuance of this Opinion and Award.
2. On or before October 1, 2009, the Union must notify the Employer as to whether the Employer must provide advance payment to every employee in connection with the transition week in its conversion to bi-weekly payroll.

C. Holidays and Personal Days:

1. The new holiday schedule set forth in the Language Submission, Appendix B, Section 12, shall become effective in the calendar year 2010.
2. The provision concerning personal days for new employees during their first year of service set forth in the Language Submission, Appendix B, Section 12, third paragraph, shall become effective upon issuance of this Opinion and Award.

D. Picks:


The Pick provisions contained in the Language Submission, Appendix B, Sections 13 and 14, pertaining to vacation and personal day picks, shall become effective in the calendar year 2010. Assignment picks shall be conducted as soon as reasonably practicable, but not earlier than September 14, 2009.

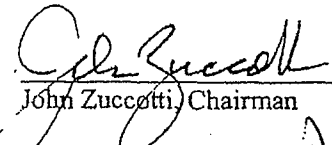
8. The other material terms of the MTA Bus I contract shall be as provided in the Language Submission, but only to the extent consistent with this Opinion and Award.


This Award culminates MTA Bus I and requires the Employer to make retroactive payment of wages without unreasonable delay.

The Panel shall retain jurisdiction to resolve any disagreements as to the meaning, interpretation or application of this Award. Either party may invoke that jurisdiction upon written notice to the Panel members.

Dated: June 9, 2009

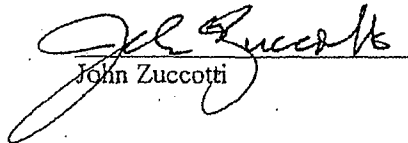

Roger Toussaint, TWU


John Zuccotti, Chairman


Dall Forsythe, MTA

ACKNOWLEDGEMENT

On this 9th day of June 2009, I, John Zuccotti, 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.


John Zuccotti

APPENDIX

	<u>Provision</u>	<u>Increase In Base Labor Cost</u>
1)	Wage increases 4-1-06: 3% 4-1-07: 4% 4-1-08: 3.5%	10.87%
2)	Pension improvement A. Post-takeover employees and retirees (2.55%) B. Pre-takeover retirees (1.47%)	4.02%
3)	Cost advantage related to non-escalation of pension benefit from wage increase	-0.66%
4)	"Net additions to health"	0.15%
5)	Wage rate parity	2.87%
6)	Work rule changes	-3.94%
7)	Integration of five depots	-1.46%
8)	Employee health contribution	-1.78%
	TOTAL	10.07%