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 MTA BUS COMPANY

Public Employer,

-versus-

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 100,

Employee Organization

(PERB Case No. TIA2008-021)
(PERB Case No. TIA2008-022)

OPINION AND AWARD

The Public Arbitration Panel
John E. Zuccotti, Chairman
Roger Toussaint, Union
Dall W. Forsythe, Employer

APPEARANCES:

For Local 100:
Gladstein, Reif & Meginnis, LLP
By: Walter M. Meginniss, Jr., Esq.

For TA/OA and MTA Bus:
Littler Mendelson, LLP
By: Reed Ellis, Esq.
David M. Wirtz, Esq.
Bertrand B. Pogrebin, Esq.
Bruce R. Millman, Esq.

BACKGROUND

Pursuant to the provisions contained in Section 209.5 of the Civil Service Law ("Taylor Law"), the New York State Public Employment Relations Board ("PERB") designated the Chairman, the Employee Organization and Public Employer Panel Members to make a just and reasonable determination setting the terms and conditions of employment between the New York City Transit Authority and Manhattan And Bronx Surface Transit Operating Authority ("TA/OA," "MTA," "Agency," "Employer" or "Management") and Transport Workers Union of America, Local 100 ("TWU" or "Union") for a three year contract period[1] covering January 16, 2009 through January 15, 2012.[2]

Beginning in the spring of 2008, the Employer and Union commenced negotiations for a successor agreement to the 2005-2009 TA/OA Collective Bargaining Agreement ("TA/OA 2005-2009 CBA"), which was set to expire on January 15, 2009. In mid-October 2008, the Union drafted a Memorandum of Understanding ("MOU") that included, *inter alia*, wage increases of 4 percent (2009), 4 percent (2010) and 3.5 percent (2011), a cap on the employee health contribution limited to 1.5 percent of wages[3] and the implementation of One Person

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[1] This contract term was based upon the parties' tradition of bargaining for three year contracts.

[2] By letter dated January 8, 2009, Richard A. Curreri, PERB's Office of Conciliation Director, acknowledged receipt of the parties' filings and confirmed the agreed upon issues to be submitted to the properly designated panel. By letter dated January 20, 2009, the Union notified the Office of Conciliation that the parties had agreed to the appointment of John E. Zuccotti to serve as the neutral member of the panel. Subsequently, the Union designated Roger Toussaint on January 24, 2009, and the Employer designated Dall W. Forsythe on January 28, 2009.

[3] The TA/OA 2005-2009 CBA contains a provision requiring all active employees to contribute 1.5 percent of their bi-weekly gross wages for health benefits. This provision also requires annual increases in the contribution rate: "In future years, the 1.5% contribution rate shall be increased by the extent to which the rate of increase in the cost of health benefits exceeds general wage increases" (Union June 22, 2009 Written Submission). The current rate of contribution is 1.5307 percent. In this arbitration, the Union seeks to cap the employee health contribution to the originally agreed 1.5 percent rate, calculated based upon a maximum 40 hour workweek rather than a gross wage calculation that includes overtime.

Train Operation ("OPTO") on the "L" and "7" lines. The draft MOU has been submitted in this arbitration as Union Exhibit 1 ("Proposed Language Submission").[4] However, the Language Submission was never signed by the parties, and negotiations continued. The MTA offered the Union annual wage increases of 3.25 percent over a three year contract period.[5] Then, on December 26, 2008, the MTA retracted its original wage offer and replaced it with a 1.47 percent wage increase for 2009.[6] Unable to come to an agreement, the parties submitted the contract in dispute for arbitration.

In order to accommodate the MTA's retention of new counsel in the TA/OA matter, a scheduling conference between all parties and the Panel was delayed until March 19, 2009. The MTA requested additional delays which the Panel accommodated. The Panel determined that the TA/OA interest arbitration proceedings would begin on May 5, 2009. The TA/OA interest arbitration hearings were held on May 5, 6, 22, 26 and 28 and June 1, 3, 4, 5 and 10, 2009 in New York City at the offices of Weil, Gotshal & Manges LLP. The parties first presented their cases concerning comparability, overall compensation and cost of living and then proceeded on the issues of ability to pay and the interest and welfare of the public. Both parties were represented by counsel and introduced evidence, presented testimony, examined and cross-examined witnesses and otherwise supported their respective positions on the outstanding issues before the Panel.

The Panel directed the parties to make written submissions of proof to the Panel by June 22, 2009 concerning the disputed non-wage issues contained in the Proposed Language

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[4] A modified version of the Proposed Language Submission, reflecting the Panel's Award, is attached hereto as Appendix C ("Modified Language Submission").

[5] This offer was made on October 11, 2008 and was reflected in the MTA's adoption of its "Doomsday Budget."

[6] Union Ex. 34.

Submission, including, *inter alia*, the cap on employee health contribution, OPTO and the provision pertaining to the women's locker rooms. On June 19, 2009, after the hearings were concluded, the MTA withdrew its proposal regarding the implementation of OPTO – whereby trains on the "L" and "7" lines would run solely with one operator and no conductor, and for which the MTA had already invested in cars capable of safe OPTO operation. The Union costed savings to the Employer from OPTO at 0.55 percent;[7] the Employer costed the savings at 0.466 percent.[8] While OPTO and the employee health contribution cap were separate matters during the original negotiations, both parties proceeded under the premise that the cost of the health contribution cap would be roughly offset by the savings generated from OPTO and the creation of a new Station Maintainer Helper title.[9] Apparently, the MTA believed that by withdrawing its OPTO proposal, it would preclude the Panel's consideration of the Union's proposal to cap employee health contributions: "[T]he rationale underlying the OPTO proposal in the context of this proceeding – that savings generated by OPTO could fund a reduction in the amount employees must contribute for health care – is not tenable."[10] While the MTA's unilateral action may have constituted a last-minute change to the previously negotiated understanding between the parties, the withdrawal did not take the employee health contribution issue off the table for the Panel's consideration. No evidence was presented at the hearing that the MTA's OPTO proposal had been a *quid pro quo* for the Union's proposed cap

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[7] Union Ex. 31; Watt Tr. at 258-59

[8] MTA Ex. 118

[9] OPTO and the creation of a Station Maintainer Helper position were Management proposals. In accordance with Proposed Language Submission, Attachment A, Paragraph 13, the new Station Maintainer Helpers shall be "[a]ssigned to stations to clean the station, work with Structure and Lighting Maintainers to make repairs of the station" and "will be promotional opportunities for incumbent Cleaners." Both the Union and Employer agreed that the creation of this position would result in a savings to the Employer of 0.219 percent.

[10] MTA June 19, 2009 Written Submission.

on health contributions. The Union made it clear in its post-hearing written submission to the Panel that, regardless of the MTA's withdrawal of its OPTO proposal, the Union had not withdrawn its proposal to cap employee health contributions and urged the Panel to consider it. The Panel determined that the issue of the cap on employee health contributions remained before it and undertook consideration of the matter.

The Panel was also charged with the responsibility of determining the terms and conditions of employment for MTA Bus employees during the period April 1, 2009 through January 15, 2012 in PERB Case No. TIA2008-022 ("MTA Bus II").[11] The parties agreed that the MTA Bus II Award would be determined, in part, by the TA/OA Award issued by this Panel, with the net economic value of improvements in the MTA Bus II contract equaling the net economic value of the TA/OA Award.[12]

On July 1, 2009, the parties submitted post-hearing briefs with respect to both TA/OA and MTA Bus II.[13] The Union argued for a three-year contract term, as set forth in the Proposed Language Submission, and wage increases of 4 percent (2009), 4 percent (2010) and 3.5 percent (2011). The MTA, despite having budgeted for a three year contract[14] and having offered a labor cost increase of 1.47 percent for 2009 as late as December 26, 2008,[15] now

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[11] On June 9, 2009, in its MTA Bus I Opinion and Award, this Panel set the terms and conditions of employment for MTA Bus employees during the period covering April 1, 2006 through March 31, 2009.

[12] *See* Joint Ex. 1.

[13] The original deadline for submission of post-hearing briefs was June 24, 2009. However, the MTA requested an initial extension until June 29 and then a further extension until July 1, both of which were granted by the Panel.

[14] *See* MTA Ex. 131 (modifying Union Ex. 60 with respect to certain items but not with respect to the amounts budgeted for labor increases (Line 38) of $120 million (2009), $199 million (2010) and $296 million (2011)).

[15] Union Ex. 34.

argued for a zero percent wage increase in 2009 and a reopener for 2010 and 2011.[16] The Union also requested, *inter alia*: (1) a cap on the employee health contribution limited to 1.5 percent of wages, calculated using a maximum of 40 hours per week times the base hourly rate, retroactively effective to January 16, 2009,[17] costed at 0.71 percent by both parties (Union Ex. 30); (2) a dental health improvement (costed at 0.10 percent); (3) an improvement of the sick leave cash-out at retirement from 60 percent to 70 percent (costed at 0.019 percent); and (4) a 3-day leave for train operators witnessing 12-9s, where a train strikes an individual (costed at 0.003 percent). The parties directed the Panel to their respective June 2009 written submissions for detailed analysis of the non-wage issues contained in the Proposed Language Submission.

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 a decision on the terms of the TA/OA Interest Arbitration Award and the MTA Bus II Interest Arbitration Award (hereinafter collectively "Award").

The positions taken by both parties are adequately specified in their pre-hearing and post-hearing written submissions and exhibits, which are all incorporated by reference into this Award. Such positions 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 covering January 16, 2009 through January 15, 2012 for TA/OA

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[16] The Panel notes that, since the filing of its post-hearing brief, on July 19, 2009, the MTA adopted a new budget for the fiscal year setting aside a labor reserve of 1.47 percent (2009), 1.87 percent (2010) and 2.23 percent (2011). MTA 2010 Preliminary Budget – July Financial Plan 2010-2013.

[17] *See also* Union June 22, 2009 Written Submission.

employees and for the period covering April 1, 2009 through January 15, 2012 for MTA Bus employees.

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;
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> (ii) the overall compensation paid to the employees involved in the impasse proceeding, including 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
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> (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.

DISCUSSION

For the reasons set forth below, the Panel has determined that the TA/OA contract covering the period from January 16, 2009 through January 15, 2012 shall include wage increases as follows:

> 2009: 2 percent (effective April 16, 2009, retroactive), 2 percent (effective October 16, 2009);
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> 2010: 2 percent (effective April 16, 2010), 2 percent (effective October 16, 2010);
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> 2011: 3 percent (effective January 16, 2011).

All wage increases shall be added to the applicable wage progressions. The 2010 total wage increase shall be compounded on the wage rate in effect on February 1, 2010. The 2011 wage increase shall also be compounded on the wage rate in effect on February 1, 2010. The total increase in base labor costs of these wage increases is 11.28 percent.

The Panel has determined as follows concerning the non-wage provisions at issue in the Language Submission: (1) effective August 15, 2009, the employees' health contribution shall be reduced to 1.5 percent of wages, measured as a maximum of 40 hours per week times the base hourly rate; (2) the dental health improvement[18] shall not be awarded; (3) the OPTO provision[19] was withdrawn by the Employer and is therefore not included in this Award (*see* MTA June 19, 2009 Written Submission); (4) a new Station Maintainer Helper position shall be created, subject to the conditions set forth in Modified Language Submission, Attachment A, Paragraph 12; (5) the improvement of a sick leave cash-out at retirement from 60 percent to 70 percent[20] shall not be awarded; (6) the 3-day leave for train operators witnessing 12-9s, where a train strikes an individual,[21] shall not be awarded; (7) Modified Language Submission, Attachment A, Paragraph 11(e) shall read as follows: "Where the point of report for a female employee has a locker room or restroom for male employees but does not have a locker room or restroom for female employees, the female employee shall be entitled, without loss of pay, to report to the nearest reporting facility with a women's restroom or locker room"; and (8) Modified Language Submission, Attachment A shall be supplemented with Paragraph 13,

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[18] Proposed Language Submission, Item 3.

[19] Proposed Language Submission, Item 6.

[20] Proposed Language Submission, Attachment A, Paragraph 4.

[21] Proposed Language Submission, Attachment A, Paragraph 7.

which shall read as follows: "The Authority agrees to include 40 restricted duty jobs for Conductors on the pick."[22]

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

The Public Employer Panel Member's Dissent ("Dissent") with respect to the TA/OA Award is attached hereto as Appendix D.

[22] The Panel includes this supplemental provision in its Award pursuant to the MTA's June 24, 2009 Written Submission Attachment at page 7.

	Provision	Increase In Base Labor Cost
1)	Wage increases 2009 April 16, 2009: 2% retroactive October 16, 2009: 2% 2010 April 16, 2010: 2% October 16, 2010: 2% 2011* January 16, 2011: 3%	11.28% * The 2011 wage increase shall be compounded on the wage rate in effect on February 1, 2010.
2)	Limitation on healthcare contribution (1.5% without escalation, on 40 hours)	0.71%
3)	Station Maintainer Helper	(0.219%)
	TOTAL	**11.771%**

THE PANEL'S ANALYSIS UNDER THE TAYLOR LAW

Pursuant to Section 209.5 of the Taylor Law, the Panel considered six factors in making its determination. While each of these factors is discussed in turn below, it should be noted that many of these considerations overlapped one another.

(i) Comparability

One factor the Panel considered in its determination was the "comparison of the wages, hours, fringe benefits, conditions and characteristics of employment" with those of "other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities."

During the course of the arbitration, both parties agreed that the MTA and its bargaining unit are unparalleled both in size and scope.[23] The MTA is the largest regional transportation network in the country,[24] and the only public transportation system that operates 24 hours per day, 7 days per week.[25] The TWU bargaining unit consists of more than 33,000 employees in more than 93 different job titles falling into the general categories of transportation, maintenance and clerical.[26]

Due to the size and hours of operation, there is no true basis for comparison to other employees performing similar work – both within New York City and in other metropolitan communities. Thus, the Panel finds that comparisons to other public transportation workers are not particularly relevant or persuasive.

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[23] *See e.g.*, Employer Counsel Pogrebrin Tr. at 644-45 ("I think both parties agree that there are no real comparable transit jobs to be taken into account in the New York labor market.").

[24] Union Ex. 4; Roth Tr. at 54-56.

[25] Roth Tr. at 61.

[26] Union Ex. 3; Roth Tr. at 51-21.

The Panel also considered other public employees' employment terms and conditions in New York City and other comparable communities based upon the evidence presented. In particular, the Panel notes the pattern of 4 percent wage increases that New York City public employees have received. The Panel discusses this pattern further under factor (vi), *infra*.

(ii) Overall Compensation

Another factor the Panel considered in reaching its determination was the overall compensation paid to employees, including "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."

The Panel recognizes the significant overall compensation of Union-represented employees and the supplemental benefits they receive. However, the cash compensation for bargaining unit employees, which averaged $64,226 in 2008, includes special premiums for overtime, night shift differentials, swing pay and spread pay. These premium payments, arising out of the demanding and unique nature of employment with the MTA, help sustain an extensive system that covers a large area and operates 24 hours per day, 7 days per week.[27]

(iii) Ability To Pay

In considering "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," this Panel points to the State's financial assistance package that was passed on May 7, 2009. This package includes a payroll mobility tax that is expected to generate approximately $1.5

[27] For example, the MTA utilizes swing pay and spread pay in order to meet rush hour service demands where other transit systems use part-time employees. In addition, the MTA utilizes night shift differentials to cover its 24 hour operation.

billion in each of the next two fiscal years[28] as well as other taxes and fees expected to generate $83 million in 2009 and $250 million in each subsequent year.[29] This package also prohibits the MTA from implementing additional fare increases or service cuts for the next two years.[30]

The Union argues that the net effect of the State's financial assistance package is a budget surplus of $320 million (2009), $219 million (2010) and $346 million (2011), which is more than sufficient to cover the projected cost of system-wide wage increases.[31] The MTA disagrees and instead argues that there will be a budget shortfall. The disagreement centers on the parties' differing forecasts for reduced projected revenues in 2009 and 2010. Whereas the

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[28] The mobility tax is projected to generate $1.47 billion in 2009 and $1.87 billion in 2010.

[29] Union Post-Hearing Brief, Table 3.

[30] Hemmerdinger Tr. 1484.

[31] The Union's arguments and calculations are as follows:

(1) the projected cost for system-wide wage increases are $191 million (2009), $390 million (2010) and $596 million (2011) (Union Post-Hearing Brief, Table 2);

(2) subtracting the MTA's budgeted increases at CPI of $120 million (2009), $199 million (2010) and $296 million (2011) from the projected cost for system-wide wage increases, the additional cost, over budget, of the wage increases comes down to $71 million (2009), $191 million (2010) and $300 million (2011) (Union Post-Hearing Brief, Table 4); and

(3) with the revenues from the State's financial assistance package, even after granting system-wide wage increases of 4 percent, 4 percent and 3.5 percent, the MTA would still be left with $249 million (2009), $28 million (2010) and $46 million (2011).

	2009	**2010**	**2011**
Revenues from State's financial assistance package	$320	$219	$346
Subtracting the remaining cost of system-wide labor increases after taking into consideration the original budgeted increase at CPI	$71 *[$191 minus $120]*	$191 *[$390 minus $199]*	$300 *[$596 minus $296]*
Results in leftover revenues for the MTA, even after granting the proposed wage increases.	$249	$28	$46

Union projects expected revenues to be down by $400 million (2009) and $200 million (2010),[32] the MTA projects expected revenues to be down by $670 million (2009) and $732 million (2010).[33] The result of this $802 million variation in reduced revenue projections is that the Union argues that the MTA has more than sufficient funds to cover the wage increases while the MTA contends that it has no such funds and is, in fact, in the red.[34]

While the Panel recognizes that the current economic climate is unprecedented and therefore unpredictable, the Panel finds that, even if the MTA does in fact face a budget deficit, the MTA still possesses the ability to pay. First, the MTA holds $75 million in annual reserves. *See* MTA Ex. 167, NYS Comptroller Press Release (June 2, 2009) (noting that the MTA "still faces budget gaps of $100 million in 2009 and $60 million in 2010" but concluding that these budget gaps "should be manageable given the MTA's $10 billion budget and $75 million in annual reserves"). Second, on June 24, 2009, President Obama signed the Supplemental Appropriations Act ("the Supplemental Act") to the American Recovery and Reinvestment Act ("AARA"). The Supplemental Act permits the MTA to utilize 10 percent of the federal stimulus funds it has been allocated toward operating expenses. As the MTA has been allocated $1.1 billion in federal stimulus funds, under the Supplemental Act, the MTA could, if it so chooses, use $110 million toward operating expenses.[35] Finally, the MTA could,

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[32] Union Post-Hearing Brief, Table 3.

[33] The Union asserts that the MTA has overestimated the predicted drop in its system utilization rate. Citing to the State Comptrollers' Financial Outlook Report (Union Ex. 77), the Union notes that, if the utilization rate were to fall by only 4.5 percent rather than the MTA's projected 7.2 percent, then an additional $125 million in fare collections would be available to the MTA above what it has budgeted. The Union further notes that the City Comptroller has predicted real estate revenue growth of 14 percent by 2010 (Union Ex. 75).

[34] *See* Testimony of Gary Lanigan at 1776-1778, MTA's Director for Finance and Budgets (projecting a budget gap of approximately $77 million for 2009 and $100 million for 2010).

[35] In fact, federal stimulus funds are currently being used throughout the country to meet operating expenses. For example, at the end of July, as part of the Community Oriented Policing Services Program (COPS), $1 billion in

if it so chose, administer its capital program in such a manner as to reduce debt service while still maintaining the safe and efficient operation of the transit system. The MTA would not be required to defer spending on core programs – those programs necessary for maintaining the system in a state of good repair. Instead, the MTA could manage its capital programs to meet better its overall financial requirements. *See* Ravitch Report at 4 (MTA Ex. 126) ("Fundamentally the MTA's deficit is rooted in a structural budget imbalance driven by years of over-reliance on self-supported debt to fund its capital needs."). One way for the MTA to accomplish this would be through a deferral of its capital programs, which it has done numerous times in the past, particularly when faced with cost overruns or budget constraints.[36] *See* testimony of Gene Russianoff, Director of the Straphanger's Campaign – an organization representing transit riders, at 2193-95:

> We've not been critical, because it seems to us there's a balancing act here: What money is available for safe, affordable transit and what is available for the expansion projects.
>
> To us – I generally thought this was the view of the MTA leadership – is that they're very worthwhile projects. We support Second Avenue. We support East Side Access.[37]
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> But they become a luxury, or the pace of their construction becomes – it becomes unaffordable, because it's digging into money that can be used to rebuild the core of the system, to continue their Core program, or money for a decent level of service. These are concerns that we've raised with them.

The MTA has acknowledged that it has budgeted for labor cost increases of 1.47 percent in 2009 and 1.87 percent in 2010.[38] Given the Panel's wage increase schedule, and

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grants were awarded to police departments throughout the country for the hiring and rehiring of law enforcement officers.

[36] Union Ex. 70 at 4.

[37] East Side Access and the Second Avenue Subway are both expansion projects with current targeted completion dates of 2015.

[38] MTA Post-Hearing Brief at 2; *see also* MTA 2010 Preliminary Budget – July Financial Plan 2010-2013.

given all of the options discussed above, the Panel has determined that the Employer possesses the ability to pay for the awarded wage increases without any detrimental impact on fares or service.[39]

(iv) Cost of Living

The Panel also considered "changes in the average consumer prices for goods and services, commonly known as the cost of living." Experts are forecasting inflation rates around 2 percent. The MTA's economic advisor, Global Insight, predicts inflationary growth of 2.94 percent in 2009. The 2009 Philadelphia Survey of Professional Forecasters predicts inflation rates of 2.2 percent to 2.5 percent,[40] and the Wall Street Journal Forecasting Survey of 2009 indicates that 95 percent of forecasters expect CPI inflation in 2009 to be 2.4 percent or lower.[41] Given these forecasts, the Panel has determined that the staggered wage increases of 2 percent and 2 percent in 2009 and 2010, along with the 3 percent wage increase in 2011, will sufficiently allow Union employees to maintain their standards of living.

(v) Interest and Welfare of the Public

In considering the interest and welfare of the public, as discussed earlier (*see* ability to pay discussion, *supra*), the Panel believes the Employer can provide for the wage increases set forth in this Award without implementing service reductions or fare increases, and while still going forward with core and mega projects, by utilizing the State's May 7, 2009 financial assistance package and other available means. The Employer has a number of options in balancing its budget. For example, the Employer may choose to direct 10 percent of its federal

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[39] In fact, as noted earlier, under the terms of the State's financial assistance package, the Employer is prohibited from implementing fare increases or service reductions.

[40] MTA Ex. 175.

[41] MTA Ex. 174.

stimulus funds towards operating expenses, or the Employer may choose, instead, to administer its capital program in a different manner. *See* testimony of Gene Russianoff at 2216-17:

> Q. Do you or does the Straphangers Campaign have any objection – would it have an objection to the MTA taking . . . 10 percent of those fiscal stimulus monies and redirecting them to the operating budget?
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> A. We have no objection. . . . I know that in the other areas like health or education stimulus money has been permitted to be used for operating purposes. So 10 percent to me seems a prudent amount.

Regardless of what budget choices the Employer makes – and it is not for the Panel to usurp the Employer's authority and direct such choices – the interest and welfare of the public will not be negatively impacted by the awarded wage increases. In fact, it should be noted that the public is significantly benefited by an appropriately motivated workforce,[42] which the set forth wage increases will help to reinforce.

(vi) Other Factors

In considering "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 Panel takes note that the pattern established for union-represented employees of New York City includes 4 percent wages increases per year, compounded.

- District Council 37 ("DC 37"): In October 2008, the City agreed to award DC 37, New York City's largest municipal public employee union (100,000 members) 4 percent wages increases for the period covering March 3, 2008 through March 2, 2010, along with a 0.1 percent equity award effective March 2, 2010. In addition, MTA employees

[42] Currently, the MTA workforce is the most productive transit workforce in the country, with the highest number of passenger miles per operator and the lowest operating expense per passenger mile (Union Ex. 7A).

represented by DC 37 received a 4 percent wage increase on February 19, 2009, retroactive to May 2008.[43]

- Patrolmen's Benevolent Association ("PBA"): In August 2008, the City agreed to award the PBA (23,000 members) 4 percent wage increases for the period covering August 1, 2006 (retroactive) through July 31, 2010.
- Correction Officers Benevolent Association ("COBA"): In October 2008, the City agreed to award the COBA (8,300 members) 4 percent wage increases for the period covering November 1, 2009 through October 31, 2011.
- Uniformed Firefighters' Association ("UFA-FDNY"): In October 2008, the City agreed to award the UFA-FDNY (9,000 members) 4 percent wage increases for the period covering August 1, 2008 through September 30, 2010.
- For additional New York City contracts granting 4 percent wage increases, *see* Union Exhibit 19.

The Panel notes that this City pattern, which may have been established at the height of the economic boom in 2007, continues into the current economic downturn. During the interest arbitration, the Commissioner of Labor Relations for the City of New York indicated that, despite the economic downturn, the City has maintained a labor reserve for the potential 4 percent wage increases that will likely be awarded to the United Federation of Teachers once contract negotiations open this November.[44] Furthermore, on July 10, 2009, the municipal

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[43] MTA Ex. 8.

[44] Hanley Tr. at 828-29. *See also* The Comptroller's Comments on the Adopted Budget for Fiscal Year 2010 and the Financial Plan for FYs 2010-2013 (July 2009) at 23 (noting that the City's labor reserve "mainly reflects funds for wage increases for unions that have not yet reached contract agreements with the City such as the United Federation of Teachers," who "are expected to receive wage increases patterned after contracts agreed to by the other major unions for a two-year contract of 4.0 percent increase on the first day of the contract and another 4.0 percent on the first day of the thirteenth month").

government authorized 4 percent wage increases for approximately 6,000 managers and nonunion employees. The City wage increases – 4 percent retroactive to March 3, 2008 and 4 percent retroactive to March 3 of this year (8.16 percent total increases with compounding) – were designed to match the wage increases given to DC 37 employees.[45]

While the City pattern is not binding on the MTA, the Panel recognizes that, historically, wage increases for MTA operational employees have generally equaled or exceeded that of DC 37-represented employees .[46] In fact, the City pattern was a subject of discussion between the Union and the MTA during the TA/OA contract negotiations.[47] Moreover, as the Panel noted earlier, the public is significantly benefited by an appropriately motivated workforce, and the Panel seeks to ensure that the MTA workforce continues to be the most productive transit workforce in the country. *See* Russianoff testimony at 2222 ("I think having one force with good morale. . . are all things that go to the benefit [of] the riding public in the final instance.").

THE WAGE INCREASE SCHEDULE

Having reviewed all of the evidence and arguments submitted by the parties, and having weighed all of the factors under Section 209.5 of the Taylor Law, the Panel awards wage increases as follows:

2009: 2 percent (effective April 16, 2009, retroactive), 2 percent (effective October 16, 2009);

2010: 2 percent (effective April 16, 2010), 2 percent (effective October 16, 2010);

2011: 3 percent (effective January 16, 2011).

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[45] Mayor's Personnel Order No. 2009/2 (July 10, 2009). On August 6, 2009, the City Council granted its staff wage increases consistent with the City pattern.

[46] Union Ex. 25.

[47] Watt Tr. at 244.

These wage increases are consistent with the City pattern and assure that transit workers' wage gains will not fall behind those of municipal workers during this period.

The Panel realizes that these are uncertain economic times and that reasonable people may disagree with respect to the timing of recovery. The Panel further recognizes the MTA's need to manage its cash flow during an uncertain economic climate. The Panel seeks to achieve a compromise between competing goals – equitable treatment for MTA employees and the financial requirements of the Agency. The Panel believes this compromise is accomplished by the staggered wage payment schedule,[48] which diminishes the cash demands on the MTA until the economy has begun to recover. The degree of relief offered is substantial. An award with wage increases of 1.47 percent in January 2009, 1.47 percent in January 2010 and 1.47 percent in January 2011, for which the MTA had originally budgeted,[49] would require incremental wage expenditures of $35.9 million in 2009, $72.2 million in 2010 and $109.2 million in 2011.[50] An award with wage increase of 4 percent in January 2009, 4 percent in January 2010 and 3.5 percent in January 2011, which was part of the tentative settlement in October 2008, would require incremental wage expenditures of $96 million in 2009, $195 million in 2010 and $298 in 2011.[51] The Panel's Award requires incremental wage increases of 2 percent and 2 percent in 2009, requiring incremental wage expenditures totaling $47.8 million; 2 percent and 2 percent in 2010, requiring incremental wage expenditures totaling

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[48] The wage increases for 2009 take effect on April 16, 2009 and October 16, 2009; the wage increases for 2010 take effect on April 16, 2010 and October 16, 2010.

[49] *See* Union Ex. 34.

[50] As the Panel noted in Footnote 16, *supra*, the Agency's newly adopted budget sets aside a labor reserve for wage increases of 1.47 percent in January 2009, 1.87 percent in January 2010 and 2.23 percent in January 2011, further narrowing any differences in required incremental wage expenditures.

[51] Union Ex. 60; MTA Ex. 131.

$145.32 million; and 3 percent in 2011, compounded on the wage rate in effect on February 1, 2010, requiring incremental wage expenditures totaling $271.57 million. Thus, the Award reconciles the competing objectives of equitable treatment for MTA employees and financial relief for the Agency and is a just and reasonable determination within the meaning of the statute.

LIMITATION ON EMPLOYEE HEALTH CONTRIBUTION AND OPTO

The Panel has determined that, effective August 15, 2009, the employee health contribution shall be reduced to 1.5 percent of wages,[52] calculated based upon a maximum of 40 hours per week times the base hourly rate.

In its June 19, 2009 submission written submission, the MTA withdrew its proposal regarding the implementation of One Person Train Operation ("OPTO") on the "L" and "7" lines, despite having already invested in cars capable of safe OPTO operation. While the Panel recognizes the MTA's right to withdraw the OPTO proposal, the Panel finds that such a withdrawal does not require a conclusion that the cap on employee health contribution is no longer tenable. Rather, it simply means that 0.466 percent savings which the MTA attributed to OPTO must be accounted for elsewhere in this Award. Consequently, the Panel made the following determinations in order to counter the savings lost as a result of the OPTO withdrawal: a final year wage increase of 3 percent rather than 3.5 percent, compounded on the wage rate in effect on February 1, 2010; creation of a new Station Maintainer Helper title; denial of the dental benefit; and denial of the sick-leave cash-out improvement and 3-day leave for train operators witnessing 12-9s. In addition, as a further savings to the MTA, the Panel

[52] The current rate of contribution is 1.5307 percent.

has determined that the employee health contribution cap shall have a prospective rather than a retroactive effective date.[53]

[53] The Panel notes that union-represented employees of the Long Island Railroad (LIRR), another MTA entity, make no contributions for health insurance coverage. The Panel further notes that, generally, City employees have not made healthcare contributions. In fact, it was only recently that the City reached its 2009 Health Benefits Agreement with its unions under which employees will, going forward, make, *inter alia*, $100 co-payments for in-patient facility admissions and $50 co-payments for ambulatory surgery facility treatments or hospital emergency room visits if not admitted. While the Employer makes much of the projected $200 million in annual savings expected from these negotiated contributions, the Panel cannot ignore the fact that Union employees have been making healthcare contributions since December 2005, which has generated savings to the Employer. With respect to the City's recently proposed 10 percent contribution for health coverage, the Panel notes that the targeted date for this proposal is not until 2011 and further notes that such a proposal requires agreement from the unions. As the Panel's Award covers the period from 2009 through 2011, the City's proposal has limited relevance to this proceeding. Should the City's proposal come to fruition (either under its current terms or under a lesser negotiated amount), such an agreement would be more pertinent for the next round of contract negotiations between the MTA and the Union.

TA/OA AWARD

1. Wage Increases:

The Panel has determined that the TA/OA contract covering the period from January 16, 2009 through January 15, 2012 shall include wage increases as follows:

> 2009: 2 percent (effective April 16, 2009, retroactive), 2 percent (effective October 16, 2009);
>
> 2010: 2 percent (effective April 16, 2010), 2 percent (effective October 16, 2010);
>
> 2011: 3 percent (effective January 16, 2011).

All wage increases shall be added to the applicable wage progressions. The 2010 total wage increase shall be compounded on the wage rate in effect on February 1, 2010. The 2011 wage increase shall also be compounded on the wage rate in effect on February 1, 2010.

The total increase in base labor costs of these wage increases is 11.28 percent.

2. Non-Wage Provisions At Issue In the Language Submission:

> (1) effective August 15, 2009, the employees' health contribution shall be reduced to 1.5 percent of wages, calculated based upon a maximum of 40 hours per week times the base hourly rate;
>
> (2) the dental benefit[54] shall not be awarded;
>
> (3) the OPTO provision[55] was withdrawn by the Employer and is therefore not included in this Award (*see* MTA June 19, 2009 Written Submission);
>
> (4) a new Station Maintainer Helper position shall be created, subject to the conditions set forth in Modified Language Submission, Attachment A, Paragraph 12;
>
> (5) the improvement of a sick leave cash-out at retirement from 60 percent to 70 percent[56] shall not be awarded;
>
> (6) the 3-day leave for train operators witnessing 12-9s, where a train strikes an individual,[57] shall not be awarded;
>
> (7) Modified Language Submission, Attachment A, Paragraph 11(e) shall now read as follows: "Where the point of report for a female employee has a locker room or restroom for male employees but does not have a locker room or restroom for female employees, the female employee shall be entitled, without

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[54] Proposed Language Submission, Item 3.

[55] Proposed Language Submission, Item 6.

[56] Proposed Language Submission, Attachment A, Paragraph 4.

[57] Proposed Language Submission, Attachment A, Paragraph 7.

loss of pay, to report to the nearest reporting facility with a women's restroom or locker room"; and

(8) Modified Language Submission, Attachment A shall be supplemented with Paragraph 13, which shall now read as follows: "The Authority agrees to include 40 restricted duty jobs for Conductors on the pick."[58]

3. The Other Material Terms In the Proposed Language Submission:

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

4. Dissent

Public Employee Panel Member Dall W. Forsythe dissents with respect to the TA/OA Award, and Panel Member Forsythe's Dissent ("Dissent") is attached hereto as Appendix D.

5. Majority Comment

The Majority respects and appreciates the views of dissenting Member Forsythe. The bases of disagreement are sufficiently discerned from a reading of the Opinion and Award and Member Forsythe's Dissent and need not be elaborated. The Majority notes, however, that while the fall 2008 understandings between the negotiators were taken into account, the Majority did not, as Member Forsythe suggests, adhere to the draft October 2008 MOU as the benchmark or starting point for this Award. Far more significant to the Majority was the economic data and other evidence submitted by the parties. The Majority arrived at its Award after a detailed analysis and consideration of the statutory criteria set forth in Section 209.5 of the Civil Service Law.

[58] The Panel includes this supplemental provision in its Award pursuant to the MTA's June 24, 2009 Written Submission Attachment at page 7.

MTA BUS II AWARD

1. Wage Increases:

With respect to the MTA Bus contract covering the period April 1, 2009 through January 15, 2012, the Panel has determined that the MTA Bus employees shall receive wage increases commensurate with TA/OA employees, as set forth in this Award. Thus, wage increases for MTA Bus employees shall be as follows:

> 2009: 2 percent (effective July 1, 2009, retroactive), 2 percent (effective January 1, 2010);
>
> 2010: 2 percent (effective July 1, 2010), 2 percent (effective January 1, 2011);
>
> 2011: 3 percent (effective April 1, 2011).

All wage increases shall be added to the applicable wage progressions. The 2010 total wage increase shall be compounded on the wage rate in effect on May 1, 2010. The 2011 wage increase shall also be compounded on the wage rate in effect on May 1, 2010.

The total increase in base labor costs of these wage increases is 11.28 percent.

The MTA Bus II contract shall terminate on January 15, 2012, at the same time as the TA/OA contract.

2. Other Provisions:

The Panel has further determined, that, commensurate with the TA/OA Award and benefits:

> (1) the MTA Bus employees' health contribution shall continue at the current contribution rate of 1.5307 percent of gross wages until November 30, 2009;
>
> (2) effective December 1, 2009, the health contribution rate for MTA Bus employees shall be reduced to 1.5 percent of wages, calculated based upon a maximum of 40 hours per week times the base hourly rate;[59] and
>
> (3) effective as of the date of this Award, MTA Bus is hereby ordered to begin monthly contributions of $5,800 to the Training and Upgrading Fund and $3,200 to the Childcare Fund.

3. Net Economic Value With the TA/OA Award:

The total increase in base labor cost for the TA/OA contract is 11.771 percent (*see* Appendix A). However, the total increase in base labor cost for the MTA Bus II contract is 12.067 percent – 0.296 percent greater than the total increase in base labor cost in the TA/OA contract.

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[59] This November 2009 effective date ensures parity of treatment between TA/OA employees (original rate effective date of December 15, 2005) and MTA Bus employees (original rate effective date of April 1, 2006). As the original rate effective date for MTA Bus employees began 3.5 months after the original rate effective date for TA/OA employees, the reduced rate effective date for MTA Bus employees shall begin 3.5 months after the reduced rate effective date for TA/OA employees.

As pension benefits for MTA Bus employees do not escalate with wage increases[60] as they do for TA/OA employees,[61] the Employer realizes a savings of 0.7 percent with MTA Bus employees that is not realized with TA/OA employees.[62] In the MTA Bus II Award, this 0.7 percent savings from the non-escalation of pension contributions is offset by the 0.7 percent cost of the January 15, 2012 terminal date.[63] However, the total increase in base labor costs in the MTA Bus II Award still remains 0.296 percent above the total increase in base labor costs in the TA/OA Award due to the following differences: (1) additional costs of 0.077 percent from the Training and Upgrading Fund contributions; and (2) the lack of a parallel provision to the savings of 0.219 percent realized from the creation of a new Station Maintainer Helper position in TA/OA.

As the MTA Bus II contract is 0.296 percent greater than the total increase in base labor cost in the TA/OA contract, the parties are hereby ordered to negotiate and resolve this costing gap within 60 days of the publication of this Opinion and Award. The Panel shall retain jurisdiction with respect to this matter, and should the parties fail to come to a resolution within the requisite time period, the parties are hereby directed to make written submissions to the Panel.

	Provision	Increase In Base Labor Cost
1)	Wage increases 2009 July 1, 2009: 2% retroactive January 1, 2010: 2% 2010 July 1, 2010: 2% January 1, 2011: 2% 2011* April 1, 2011: 3 %	11.28% * The 2011 wage increase shall be compounded on the wage rate in effect on May 1, 2010.
2)	Limitation on healthcare contribution (1.5% without escalation, on 40 hours)	0.71%
4)	Contribution to Training & Upgrading Fund	0.077%

[60] Pensions for MTA Bus employees are determined by multiplying a fixed dollar amount by years of service.

[61] Pensions for TA/OA employees are calculated as a percentage of their final average salaries.

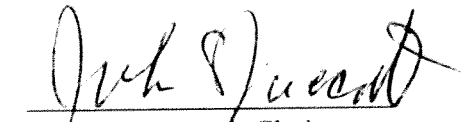
[62] *See also* MTA Bus I Award (June 9, 2009), where this Panel awarded a cost advantage related to the non-escalation of pension benefits from wage increases.

[63] *See* MTA Bus Exhibit 18 at 15-16.

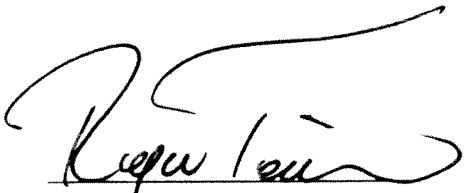
	$5,800/month Contribution to Childcare Fund $3,200/month	
5)	Terminal date of January 15, 2012	0.7%
6)	Savings from non-escalation of pension contributions	(0.7%)
	TOTAL	**12.067%**

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.

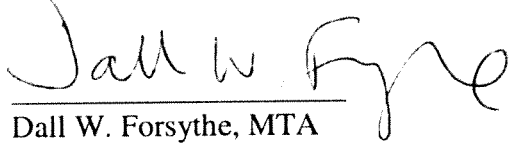
Dated: August 11, 2009



John E. Zuccotti, Chairman



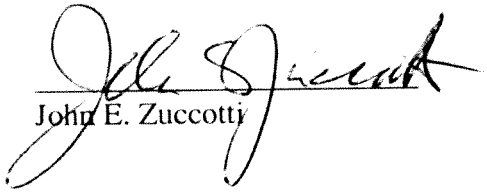
Roger Toussaint, TWU



Dall W. Forsythe, MTA

ACKNOWLEDGEMENT

On this 11th day of August 2009, I, John E. 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 E. Zuccotti

APPENDIX A

TA/OA

	Provision	Increase In Base Labor Cost
1)	Wage increases 2009 April 16, 2009: 2% retroactive October 16, 2009: 2% 2010 April 16, 2010: 2% October 16, 2010: 2% 2011* January 16, 2011: 3%	11.28% * The 2011 wage increase shall be compounded on the wage rate in effect on February 1, 2010.
2)	Limitation on healthcare contribution (1.5% without escalation, on 40 hours)	0.71%
3)	Station Maintainer Helper	(0.219%)
	TOTAL	**11.771%**

APPENDIX B

MTA BUS II

	Provision	Increase In Base Labor Cost
1)	Wage increases 2009 July 1, 2009: 2% retroactive January 1, 2010: 2% 2010 July 1, 2010: 2% January 1, 2011: 2% 2011* April 1, 2011: 3 %	11.28% * The 2011 wage increase shall be compounded on the wage rate in effect on May 1, 2010.
2)	Limitation on healthcare contribution (1.5% without escalation, on 40 hours)	0.71%
4)	Contribution to Training & Upgrading Fund $5,800/month Contribution to Childcare Fund $3,200/month	0.077%
5)	Terminal date of January 15, 2012	0.7%
6)	Savings from non-escalation of pension contributions	(0.7%)
	TOTAL	**12.067%**

APPENDIX C

MODIFIED LANGUAGE SUBMISSION

1. TERM

This agreement shall continue in effect through January 15, 2012.

2. REDUCTION OF EMPLOYEE HEALTH CONTRIBUTION

The employees' health contribution shall continue to be 1.5307% of gross wages through August 14, 2009. Effective August 15, 2009, the employees' health contribution rate shall be reduced to 1.5% of wages, measured as a maximum of 40 hours per week times the base hourly rate.

3. NEW SICK LEAVE BENEFIT

The practice of pro-rating sick leave shall be changed as follows. On each May 1, beginning with the sick leave year that commences May 1, 2009, all employees who have been in the employ of the Authorities for at least one year, including all employees in unpaid status, shall have twelve (12) days added to their sick leave banks. On each April 30, beginning April 30, 2010, the sick leave allotment for the year ending that day shall be reduced by one day for each month in the preceding twelve (12) months that the employee was on an unpaid leave of absence for the majority of the month, but no reduction may result in a negative sick leave balance.

4. SURVIVING SPOUSE BENEFITS

The three-year entitlement to health benefits for surviving spouses of employees who suffer accidental death in the line of duty shall be continued during this contract. These shall include the surviving spouses already covered. The line of duty death benefit ($100,000) shall be maintained during this contract.

5. SAFETY

A. The Authorities will provide to the Union immediate notification of investigations, accidents and serious exposure reports received by the Office of System Safety (OSS) that relate to bargaining unit members.

B. Management agrees that departments will not implement or publish new safety policies without the prior approval of the Office of System Safety. OSS will provide the Union with the opportunity to review and comment on new and revised policy instructions and safety rules before they are approved. Safety bulletins, advisories and memos from all departments will be sent to the Union immediately upon issuance.

C. Participants of the Joint Management Union Committee established to accept input and suggestions regarding new bus procurements and bus design will be provided with five (5)

days of training on ergonomics and design annually, provided by trainers selected by TWU Local 100. The Authorities will absorb the costs associated with this training. The Committee will be provided with adequate lead time, notice and information to be able to influence issues such as operator station design, maintenance as it affects ergonomics and work demands, and vibration impact. The extension of these activities to other departments shall be investigated during this contract period and implemented where indicated. (This paragraph is not intended as a waiver of the Union's legal or other rights.)

D. Any Union Representative released for safety related work will not incur a loss of pay (for example, Specialist pay), excluding extras in the Department of Buses.

E. The parties agree that the Safety Resolution Form procedure (2002 MOU Attachment G) shall be continued.

F. All full time safety union representatives will be provided the two (2) day Dupont Safety training and other safety trainings currently provided to managers and supervisors.

6. MISCELLANEOUS

See Attachment A.

7. CED Release

In 14 CED shops where no release time currently exists, release time will be available on the same basis as in DOB Maintenance and charged to the TWU separately.

8. WELLNESS

The parties agree to establish a jointly administered Wellness Program.

9. Timekeeping Procedures for Release

As currently is the practice with respect to employees released with pay to perform Authority-wide functions, such as safety and Membership Services, weekly or biweekly timekeeping records for employees who are released from RTO, MOW and Stations, will be signed off on by Union staff representatives (or their designee) responsible for their whereabouts and for coordinating their movement. Approved timesheets or time documents will be submitted to the individual payroll or timekeeping departments of the employee's work department. The union shall maintain and furnish complete and accurate records to the timekeeping departments which carry the individual.

10. Traffic Checkers

The terms of the Traffic Checking agreement of 08/20/08 (including the differential for traffic checkers with driving positions and for special assignments in the Administrative Support Group, the Rapid Support Group and the GO Support Group, additional 35-hour positions on the pick, the provision of transportation and pay for Traffic Checkers who pick assignments at facilities outside MTA/New York City Transit). Additionally, the parties shall work expeditiously towards ensuring that promotional opportunities for Traffic Checkers do not adversely impact their pension or their benefit accruals.

11. Titles For Which Vacancies Are Chronically Difficult to Fill

A. MTA NYCT may increase the hourly rate by up to $4.00 per hour for titles with chronic vacancies that historically MTA NYCT have been chronically difficult to fill.
B. Any such increases are irrevocable.

12. Discipline

For purposes of Sections 2.1-B-3-a and 2.1-C-19-a, the Line General Managers in the Department of Subways and Group Assistant General Managers in Maintenance of Way will serve as the Department Heads referred to in those sections for Step 1 hearings. For purposes of Sections 2.1-B-3-b and 2.1-C-19-b, the Senior Vice President, Department of Subways or designee, and the Senior Vice President, Department of Buses or designee will be substituted for "Deputy Vice President, Labor Disputes Resolution or designee" for Step 2 hearings.

ATTACHMENT A -- Miscellaneous

1. All Departments shall allow employees to bank up to 8 AVA days, except that where existing agreements or practices allow for more than 8 days, employees shall continue to be allowed to accumulate the number of days provided by those agreements or practices. All employees may replenish their banks as days are used. The third paragraph of section 2.5(C) is hereby deleted and of no further force or effect.

2. Employees may elect to bank overtime hours in lieu of receiving overtime pay (OTO). Such time shall correspond to the overtime earned. This bank of overtime hours may be accrued up to a maximum of 72 hours. Use of such banked time as paid time off shall be within established AVA/ personal day quotas. Utilization of such banked time beyond established quotas must be approved by Management. Time not utilized by December 31 of each year will be paid in cash during the subsequent January. In schedule-driven Departments, OTO shall be used in increments of whole days only.

3. Employees shall be allowed to swap RDOs with the following understanding:

- Employees may swap one or both RDOs within the pay week;
- Requests for swaps must be submitted seven days in advance, and any requests on less than seven days' notice will require specific management approval;
- Failure to appear on two occasions for a day of work arranged by RDO swap will disqualify the employee from further RDO swaps for six months from the date of occurrence;
- The employee agreeing to the swap must be already be qualified to cover the job of the employee requesting the swap; and

- Both employees agree to accept the actual pay associated with the job worked – one may have a penalty job and the other doesn't; one may have a yard job, etc.

In RTO, TWU representatives will coordinate directly with the RTO crew offices and access crew offices to help facilitate the pairing of RDOs for purposes of the swaps.

4. For the purposes of calculating all retirement sick time cash out, OA employees hired before September 1, 2003, shall be entitled to a Fresh Start commencing with the grant of additional sick days effective September 1, 2003.

5. All newly hired employees shall receive a half-day Union orientation. Conductors, Station Agents, Train Operators and Station Cleaners shall receive this orientation at the Union Hall. The location of Union orientation for Bus Operators will be arranged by the respective bargaining units' representatives.

6. All Divisions and Responsibility Centers shall furnish the Union-designated representative with reports of overtime distribution by employee not less than monthly. Where such reports are currently furnished more frequently, they will continue to be furnished at such frequency.

7. Effective the date of this award, the overtime caps in Maintenance of Way shall be established at $117,000.

8. The Operating Authority (OA) shall fill clerical vacancies by seniority from among bargaining unit clerical workers presently employed in OA before seeking to fill those positions from outside the bargaining unit.

9. In Supply Logistics, in the re-selection of assignments within a location that occurs when a vacancy arises between picks, a full realignment of those in the location will be permitted.

10. RPCs (OA) shall receive the Maintainer Supplement.

11. Women's Employment in Non-Traditional Jobs Committee

a. The Authority and the Union agree to establish a joint labor-management Women's Employment in Non-Traditional Jobs Committee with the objective to establish programs to address the under-representation of women in nontraditional titles.

b. No later than sixty (60) days after the issuance of the award, the parties will convene this Committee to develop strategies to prepare, recruit, train and retain women in non-traditional titles.

c. The Committee will begin to identify the issues and concerns women face obtaining and working in non-traditional jobs, including but not limited to working conditions, facilities, job retention, security, and access to training for promotion and advancement.

d. Within one year of the effective date of this Award, the Authority will implement a pilot program based on the recommendations of this Committee and establish metrics to measure the program's outcomes and track its progress.

e. Where the point of report for a female employee has a locker room or restroom for male employees but does not have a locker room or restroom for female employees, the female employee shall be entitled, without loss of pay, to report to the nearest reporting facility with a women's restroom or locker room.

12. A new Station –Maintainer Helper ("SMH") position shall be created subject to the following conditions:

A. SMH duties -- Assigned to stations to clean the station, work with Structure and Lighting Maintainers to make repairs of the station, and perform the following minor repairs,

after receiving training by Structure and Lighting Maintainers to perform these housekeeping skills:

1. Lighting: Replaces light bulbs and cleans lighting fixtures.
2. Plumbing: Clears clogged drains, toilets, floor drains, and waste traps and replaces faucet washers, flush kits, toilet seats, and towel and soap dispensers.
3. Carpentry: Repairs and replaces door and cabinet hardware, such as hinges, knobs, and door closers.
4. Painting: Performs spot and incidental painting.
5. Masonry: Makes minor masonry repairs and replaces individual tiles.
6. Air conditioning: Replaces filters.

Additional duties are subject to the agreement of the parties.

B. The SMH positions will be promotional opportunities for incumbent Cleaners.

C. Station Maintainer Helpers will be paid top Cleaner rate plus $1.70 per hour.

D. Structure Maintainers in the titles of plumber, carpenter, painter, mason, and HVAC and Lighting Maintainers will instruct and work with Station Maintainers. Consistent with training pay practices in other departments, Structure and Lighting Maintainers will be paid a $4.00 per hour differential for time spent working with and instructing Station Maintainers. These assignments will be posted on the Structure and Lighting Maintainer picks.

13. The Authority agrees to include 40 restricted duty jobs for Conductors on the pick.

APPENDIX D

DISSENTING OPINION, PUBLIC EMPLOYER PANEL MEMBER

I cannot join my colleagues in the decisions they have made about the TA/OA contract. I commend the thoughtful and careful craftsmanship evident in this Award but believe that they have made a fundamental error by adhering to the October 2008 draft memorandum of agreement (MOU) as a starting point and benchmark for this Award. Since last fall, we have seen far-reaching changes in the economy, in consumer prices and in the MTA's leadership. In my view, an award appropriate to today's circumstances should look quite different from the Majority decision.

Changing Circumstances

In October of 2008, negotiators for of the Transport Workers Union (TWU) and the MTA were nearing agreement on a three-year labor contract. MTA leadership began to canvass for support of the agreement, with an eye toward eventual ratification from the MTA Board. Dale Hemmerdinger, the MTA Board Chair, voiced objections to any agreement at that time,[64] and support from other board members, especially those appointed by the Mayor, seemed uncertain. In January, this impasse Panel was convened to determine an award instead.

Since last fall, the economy has changed in significant and unforeseen ways. In mid-September, Lehman Brothers collapsed into bankruptcy and a full-fledged financial panic began. Lending by banks and other credit sources dried up, and credit-related economic activity, like real estate sales and development, collapsed. Now, three quarters later, the credit freeze seems to be thawing and the economic free-fall may have finally bottomed out, but New

[64] Hemmerdinger Tr. at 1514-16.

York's economy remains badly damaged. The effects on the finances of the MTA, the State of New York, and the City of New York have been severe.

For example, in New York City, the center of the MTA's service area, taxes on real estate transactions are still falling. To quote Mayor Bloomberg's commentary in his Executive Budget last May:

> Real property transfer tax collections are forecast to decline by 44.6 percent in 2009 (after declining 18.4 percent last year) resulting from the combined impact of frozen credit markets on high-value commercial transactions and a deteriorating residential market. Mortgage recording tax collections are forecast to decline 50.4 percent in 2009 (compared to last year's decline of 27.6 percent), steeper than the declines seen in the real property transfer taxes as credit market conditions have led to a lower loan-to-value ratios in the residential market and the lack of funding for high-value commercial transactions.[65]

These same real estate transaction taxes are an important source of support for the MTA's budget.

The City's employment base has also been hard-hit. Between October and June of 2009, the New York City economy has lost approximately 97,100 jobs, and the unemployment rate has risen from 6.2 percent to 9.5 percent.[66]

A damaged economy means diminished ability to pay by the MTA and the governments which subsidize it. Although the State enacted a package of additional taxes and fees for support of the MTA, budget projections for these new funding sources are unusually risky, since there is no historical data to guide the forecasters, and some of those funds are earmarked for the MTA's capital plan. Moreover, both the State itself and New York City are suffering through their second year of multi-billion dollar deficits. Those deficits were cushioned this year by Federal stimulus funds. Even with that one-time assistance, however,

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[65] Message of the Mayor, FY 2010 Executive Budget at 23.

[66] BLS, Nonfarm Employment, New York City (not seasonally adjusted).

both governments continue to adjust their spending downward and their taxes upward, searching for budget balance. In the State's most recent quarterly update, for example, the Division of the Budget estimates a $2.1 billion shortfall in the current fiscal year, and the Governor has called for a special session to act on additional gap-closing actions in September. In concert with the State and the City, the MTA has been reducing its existing economically sensitive revenue estimates with each budget update.

The stress on government budgets will not end quickly when the economy ends its downturn. As Dr. Donald Boyd indicated in his testimony before this Panel, any improvement in tax collections will lag significantly behind an upturn in the economy, and it is likely to be several years before the state and city fully regain their fiscal health.[67]

A second significant change in the economic climate has been less obvious than the economic downturn, but it is equally significant for the deliberations of this Panel. We have seen this year a transformation in consumer prices, another of the statutory criteria the Panel is directed to consider. As the economy has slowed, consumer prices have stopped rising and begun to decline. Last October, the consumer price index (as measured by CPI-W for the New York Metropolitan area) was higher than its level of a year earlier by 4.6 percent. Against that benchmark, a 4 percent wage increase would have left workers slightly behind the increasing cost of living. In May of 2009, the CPI-W *fell* from the level of the previous year by 0.3 percent, the first year over year drop since 1956. In June, the year over year decline was even larger, at 0.8 percent.[68] Against this most recent benchmark, a 4 percent wage increase would be equivalent to an inflation-adjusted salary hike of 4.8 percent.

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[67] *See* MTA Exhibit 176 for a full treatment of these lags, and Figure 1 in that Exhibit for a graphic depiction of this phenomenon.

[68] BLS Press Release (June 17, 2009) and Data Table CWURA101SA0.

This shift in consumer prices, which is less visible than the economic slowdown, should nevertheless be given great weight in collective bargaining. In an economic environment where consumer prices in New York are actually declining, wage settlements at the levels proposed by the majority would produce unprecedented inflation-adjusted wage increases for the TWU membership.

The third seismic shift in the MTA's collective bargaining environment has been in its leadership. As the MTA struggles through the economic downturn, arguably the worst since the Great Depression 75 years ago, the MTA is also entangled in an unexpected transition in leadership. In May, Elliot Sander left his position as executive director. In the interim, Chairman Hemmerdinger and interim executive director Helena Williams have led the agency. As their testimony before the Panel indicates, the new leadership team has an approach to this labor situation which is markedly different from the previous regime. In mid-July, Governor Patterson nominated Jay Walder to serve as the Agency's new executive chairman. The schedule for Mr. Walder's confirmation is uncertain, and Mr. Walder's views on MTA labor relations are unknown. Leadership changes are underway on the Union side as well. Roger Toussaint, who has led the TWU in New York for a number of years, has moved up to a position as international vice president of the Transport Workers Union, and elections are underway to choose new leadership for Local 100, which represents workers in the MTA.

Implications for an Award

With these economic and managerial factors as backdrop, the arbitration Panel has concluded its deliberations. As required by the Taylor Law, the Panel will fashion an award which is "just and reasonable," and which reflects its consideration of the factors enumerated in the statute:

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 involved in the impasse proceeding, including 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.[69]

The evidence presented to the Panel demonstrates that, in the past, the TWU's leadership has been effective in achieving wage agreements that have helped its members stay at the forefront of transit workers nationally. Moreover, those settlements have generally kept pace with inflation, and the TWU has maintained its leadership position in wage settlements when compared to most other governmental workers in New York. Like other public sector workers in New York, TWU members also benefit from generous pensions as well as comprehensive health insurance during and after their period of active employment.

The Union contends that New York City's labor settlements should serve as pattern for this MTA-TWU award and emphasizes that, at the Transit Authority, TWU members work side by side with DC 37 members, who are the beneficiaries of the City settlements. In my view, no pattern can apply in this unprecedented economic environment, and we should treat

[69] Taylor Law, Section 209.5.

the TWU-MTA award as the first independent settlement to reflect the current economic downturn. A settlement responsive to those new conditions would, in my formulation, differ from the October pattern and the Majority Award in three important respects. First, it would be shorter in term; second, it would postpone decisions about the health benefits cap and one-person train operations (OPTO) for further discussion and negotiation once the new leadership of the MTA is in place; and third, its wage increases would be lower, reflecting both the reduced ability to pay of the employer and the new trend in consumer prices.

The economic disruption that is still apparent throughout the economy argues strongly for a shorter term to the Award. Because we all hope that the downturn is, in fact, cyclical, and that the economy will rebound, it would make sense for the Panel to put in place a two-year contractual term, not the three years under discussion last October. A shorter term will give the Union and the Employer an opportunity to negotiate anew in a more positive economic environment. Moreover, the next agreement should also reflect the labor-management philosophy of the next MTA Chairman and the newly elected (or re-elected) Governor and Mayor, just as elements of last fall's near-agreement reflected the continuing efforts of the previous executive director to improve labor-management relations and his emphasis on modernizing transit operations.

A two-year term will also allow labor and management to revisit two important issues which would remain unresolved in my formulation: the proposed cap on health insurance contributions by workers, and management's hope to move forward on one-person train operations (OPTO), an initiative which can have a transformational impact on TA operations. I differ with the Majority about the wisdom of moving ahead now to cap Union contributions for health benefits. Although I think the Majority has made good faith efforts to fund this item

at the level agreed upon last fall, this provision of the contract has impact and salience to the current leadership of the MTA beyond its economic value. It reflects a key concession by the TWU after the strike of 2005 and provides protection against sky-rocketing costs of health benefits. National health reform also creates uncertainty about MTA's future health costs. With those strong views and unsettled policy issues in mind, a reasonable settlement would lay aside both this provision and OPTO until these key issues can be revisited by the new leadership teams of the MTA and the TWU.

Finally, I believe that the wage increases required by this Award are simply too high in this environment of economic decline and flat or falling consumer prices. The record of the Panel's hearings provides ample evidence of the effects of the economic downturn on the MTA's own finances, and on the finances of its two primary funders, the state and city. As this is written, the economy has not turned the corner, although it is shrinking more slowly than earlier in the year, and the risks to the city, state and MTA's finances are still extraordinary – in my view, the worst since the fiscal crisis of 1975. A reasonable response to these risks requires a wage settlement at a substantially lower level than the 4 percent, 4 percent and 3.5 percent that the parties had hoped to achieve last fall and which the Majority uses as its template for this Award.

The MTA's budget now includes a reserve for wage increases of 1.47 percent and 1.87 percent for 2009 and 2010. A settlement at those budgeted levels would not put additional pressure on the riding public by requiring additional fare increases or scheduled service reductions. A settlement above the levels, like the one established by the Majority Award, will require additional cost-cutting and reductions in positions, including additional job losses for represented workers. While an award of 2 percent or less seems low by historical standards,

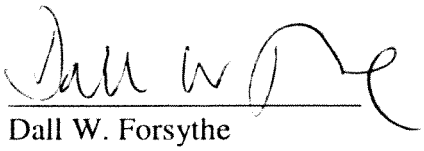
we have entered a period of flat or falling consumer prices. If that trend continues, a settlement at the budgeted levels required would still provide a real increase in wages larger than those of recent contracts, and would minimize budgetary strain on the MTA as well as the need for personnel reductions and service cuts that might affect the riding public.

In contrast, the settlement advocated by the Majority provides for effective wage payouts of approximately 2.5 percent in 2009 and 2010 and 3.0 percent in 2011. When measured against the October MOU, the Majority Award does provide budgetary savings to the MTA during the first two years of the contract, as outlined in the opinion. The Majority has made diligent efforts to keep the Award within the funding envelope developed last October, and has laid aside some of the Union's demands to do so. However, the Award levels will still require additional gap-closing actions by the MTA, and those actions will be substantial in the second and third years of the contract. Equally important, the back-loading strategy incorporated in the settlement also means that at the end of the Award period, TWU wages will be 11.28 percent higher than now. In my judgment, that "going-out" rate is likely to provide an unreasonable windfall in the form of unprecedented inflation-adjusted wage increases for the TWU workforce. It will also constitute a significant burden for the future MTA budget, which is still likely to be under economic stress when this Award expires in January of 2012.

In short, a two-year award at or close to the levels now funded in the MTA's budget would be reasonable, responsive to the current economic environment, and sensitive to the riding public's interest in reliable and clean service. It would look ahead to the difficult economic times that lie before us, not backward to the negotiations of last fall. It would allow new leadership of the MTA and the TWU to revisit key issues in two years instead of three. It

would also be likely to give the represented workers wages well above the rate of inflation, which I believe makes a settlement at those levels just as well as reasonable.

The economic provisions of this Award, which I have argued are too generous, must also be applied to the workers of the MTA Bus Company. I concur with the process outlined in the main body of the Award for effectuating that action.



Dall W. Forsythe
Public Employer Panel Member