ARBITRATION AWARD

LOCAL 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC

and

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Before

Elizabeth Neumeier
Arbitrator

Representing:

The Union:	Thomas R. Roth THE LABOR BUREAU, INC. 1420 King Street, Ste. 500 Alexandria, VA 22314
The Employer:	Terence P. McCourt, BBO# 555784 GREENBERG TRAURIG, LLP One International Place Boston, MA 02110

Subject: Terms of Pension Agreement: July 1, 2018--June 30, 2023

AWARD

AUTHORITY PROPOSALS

1. The Authority's proposal to Amend Article I (18) to update to a current actuarial table is not awarded.

2. The Authority's proposal to Amend Article III (6) to eliminate the inclusion of unused sick leave as creditable service for the purpose of computing the amount of the retirement allowance, and to provide that 20% of unused sick leave will be paid out at retirement is not awarded.

3(a). The Authority's proposal to amend Article VI (1)(b) to reduce the multiplier is not awarded.

3(b). The Authority's proposal to amend Article VI (1)(b) to change three years to five years is not awarded.

3(c). The Authority's proposal to delete Article IV(1)(c) and (d) and replace it is awarded only to the extent that a new paragraph Article IV(1)(e) will be added as follows:

> (e) Every Member that receives a pension before age 65 will have that pension reduced for their entire retirement by 6% per year, or one half percent for each month, of retirement before age 65. This change is to be applied prospectively for all Active Members under 60 years of age and more than five years of service from retirement as of August 26, 2022.

4. The Authority's proposal to amend Article V(1)(a) to add new language: "Notwithstanding any language to the contrary, the Authority will contribute up to, but not more than, 20% of pensionable payroll to the Retirement Fund" is not awarded.

5. The Authority's proposal to permit the Authority to offer a Section 401(a) Plan option to all employees is not awarded.

UNION PROPOSALS

1. The Union's proposal to amend Section (1)(b) to provide that the normal retirement allowance shall not exceed eighty percent (80%) of average final compensation is not awarded.

2. The Union's proposals to amend Article IV, Section 2 (a) and (b) are not awarded.

3. The Union's proposal to amend the Death Benefit in the Line-Of-Duty – Article IV, Section (2) is not awarded.

4. The Union's proposal to Amend Article IV by adding a new Section (13) to provide that all allowances under this plan (including normal, early, disability, vested and survivor annuities) in effect on June 30, 2018 shall be increased effective July 1, 2018 by five percent (5.0%) is awarded, but the increase shall only be three percent (3%).

5. The Union proposal to amend Section (12)(b) by substituting the following: "For any plan year commencing on or after July 1, 2018, a Member's compensation taken into account under the fund for any plan year of the Fund shall not exceed $150,000, as adjusted in percentage terms from time to time by the Secretary of the Treasury in accordance with Section 401(a)(17)(B) of the Internal Revenue Code" is awarded.

6. The Union's proposal as to the term of the Pension Agreement.

Term – Article X

The pension agreement as changed and amended in accordance with the requests made herein shall be in effect for the period From July 1, 2018 to and including June 30, 2023 and, unless duly modified, for subsequent one-year periods, subject to change as provided in the agreement.

This proposal has been agreed to by stipulation.

<u>INTRODUCTION</u>

The Massachusetts Bay Transportation Authority ("the Authority" or "the MBTA") and Local 589, Amalgamated Transit Workers, AFL-CIO, CLC ("the Union" or "Local 589") are parties to two separate agreements: a Pension Agreement covering the terms of the MBTA Retirement Fund ("the MBTARF" or "the Fund" or "the Plan") and the so-called "Working Agreement" establishing wages, all non-pension benefits and other terms and conditions of employment. On January 12, 2022, the parties settled the terms of the Working Agreement, to be amendable on July 1, 2023.

This interest arbitration arises out of the parties' inability to reach agreement on the terms of a new Pension Agreement. The parties exchanged written notices in early May of 2018 of their mutual desire to amend the terms of the Pension Agreement. The respective notices for contract change included the parties' specific written proposals. The Authority filed a petition for mediation with the Department of Labor Relations ("DLR") on January 30, 2020.

On April 23, 2020, following the requisite statutory mediation period, the DLR mediator certified that the parties had bargained in good faith, pursuant to M.G.L. c.161A, Section 29, but remained at an impasse. That certification included the "Last Best Offers" of both parties which define the scope of the issues to be heard and decided by the Arbitrator in this case.

The undersigned arbitrator was mutually selected by the parties to hear this case in accordance with M.G.L. c. 161A, Section 32. Six hearings were held between October 7, 2021, and January 31, 2022, in Boston.

In its direct case the Authority called three witnesses: Ahmad Barnes, Mary Ann O'Hara and William Fornia.

The Union called three witnesses: David Driscoll, Ted Windsor, and Tom Roth.

On rebuttal, the Authority called Ethan Zimmer and recalled William Fornia.

Both parties submitted briefs.

At the hearing the parties entered two stipulations:

1) The term of the Pension Agreement: July 1, 2018 – June 30, 2023.

2) As reflected in a document signed by the parties on January 18, 2022, effective July 1, 2018, retroactive pension contributions from both the Members and the Authority resulting from a negotiated wage increase shall be calculated and funded at the required contribution rates in effect at the time the retroactive payment is processed.

THE STATUTE GOVERNING THIS PROCEEDING

This arbitration proceeding is governed by Massachusetts General Law-Part 1, Title XXII, Chapter 161A. The relevant provisions read as follows:

> **Section 31** FACTORS FOR DETERMINING ARBITRATION AWARDS
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> Section 31. The arbitrator shall rely primarily on the following factors in determining the basis for an award:
>
> (a) The financial ability of the authority to meet additional costs, which shall include but not be limited to: (I) the statutory requirement that the authority produce revenues in excess of expenses; (ii) the financial ability of the individual communities and the commonwealth to meet additional costs; (iii) the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.
> (b) The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked including vacations, holidays and other excused time.
> (c) All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.
> (d) The hazards of employment, physical, educational, mental qualifications, job training and skills involved.
> (e) A comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.
> (f) The average consumer price for goods and services commonly known as the cost of living.
> (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
> (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of

employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties in the public service of the commonwealth, and which are not precluded from bargaining under section 25.
(i) The stipulation of the parties.

Section 32 ARBITRATION AWARDS; WRITTEN OPINIONS

Section 32. The arbitrator shall be limited in making his award to choosing between the last best offers of the parties on each issue as certified in the mediator's report or any award in the range between the last best offers of the parties. The arbitrator shall make no award on any issue found by him to be not authorized by law to be submitted to arbitration, but shall state such finding in his written opinion. Within 30 calendar days of an award, the arbitrator shall issue a written opinion inclusive of an analysis of all statutory factors applicable to the proceedings. Any determination by the arbitrator, if supported by material and substantial evidence on the record, shall be binding upon the parties and upon the appropriate legislative or appropriating body and may be enforced at the insistence of either party or by the arbitrator in superior court. The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost-of-living adjustment which are based on changes in the consumer price index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments expressed in percent or dollar amounts, and in no case shall there be any provision for salary adjustments to occur after the expiration of the contract period covered by the award.

The cost, if any, of the mediation and of arbitration proceedings exclusive of the expenses of the individual parties provided for under sections 28 to 32, inclusive, shall be divided equally by the parties and shall be in accordance with a schedule of payments established by the American Arbitration Association.

THE PARTIES

The Authority

As provided in its enabling act, the MBTA is a “body politic and corporate and a political subdivision of the Commonwealth,” originally created in 1964 as a successor to the Massachusetts Transit Authority. Its mandate is to finance and operate mass transportation facilities within its defined territory. M.G.L. c. 161A, §2. The statute requires the MBTA to serve the public’s transportation needs and charges the Authority with the public’s trust to deliver these services safely, efficiently, and economically.

The Authority employs approximately 6,200 employees. Approximately 5,800 employees are in bargaining units represented by one of the 27 unions recognized by the Authority, with the remainder of the employees serving in non-union executive positions. MBTA non-union executive employees, and employees in the MBTA management unions -- TEA, OPEIU Local 453, and the United Steelworkers Union, Local 9501 participate in a Section 401 (a) Defined Contribution Plan. (“Section 401 (a) DC plan.”)

The MBTA’s revenues consist of operating revenues, including fares and own source revenues, i.e., advertising, parking, and real estate, and non-operating revenues that include the dedicated sales tax, local assessments, and state assistance.

The Union

Local 589, also known as the Carmen’s Union, is the largest union on the property, representing approximately 5,800 employees or one-half of the Authority’s workforce. The Local 589-represented employees participate in the defined benefit plan as set forth in the Pension Agreement.

THE PENSION AGREEMENT

The Pension Agreement establishes a defined benefit retirement plan. (“DB plan”). Employees who are or may become members of the Union are members of the Fund. Employees who are not members of the Union but are on the regular payroll of the Authority and Members of the Fund on the date of execution of the Pension Agreement are also included in the Fund. (Article II) The Pension Agreement defines creditable service (Article III); benefits for normal retirement, disability retirement, return of contributions for any Member ceasing to be an employee, and etc. (Article IV); and contributions by Members and by the Authority (Article V).

Article VI -- Administration of Fund provides that administration is carried out by a Retirement Board consisting of seven persons appointed or elected as follows:

> (a) Three persons appointed by the Authority from time to time to serve at the pleasure of the Authority, at least one

> of whom shall be a Director.
> (b) One Member of the Fund elected by vote conducted by the Authority for a term of three years by Members of the Fund who are not members of the Union.
> (c) Two Members of the Fund to be designated by the Union to serve at the pleasure of the Union.
> (d) One person, to be known as the honorary member who shall have no vote except as hereinafter provided, to be elected, for such period as the Retirement Board may determine, by the other six (6) members of the Retirement Board.… [JX 6.]

Article VII -- Management of Funds provides that:

> All of the assets of the Fund shall be held by the Fiduciary in trust under the Trust Agreement of the Massachusetts Bay Transportation Authority Retirement Fund between the Authority, the Union and the Retirement Board as Fiduciary… For use in providing the benefits and paying the expenses of the Fund… [JX 6.]

Pursuant to Article X -- Amendments, the Pension Agreement continues in force and is binding upon the Authority and the Union until and including the 30th day of June, 2018, and from year to year thereafter unless changed by the Parties.

<u>THE FUND</u>

The Retirement Board is the trustee of the trust with the authority and responsibility of a trustee under the laws of the Commonwealth and the terms of the Trust Agreement. The Retirement board is responsible for management of trust assets and administration of the benefits to be provided by the trust under the terms of the Pension Agreement in effect between the Authority and the Union. However, the trustee is not responsible in any way for the determination of the proper amount of such payments and has no responsibility to ensure that the Fund is adequate to meet all of its obligations prescribed by the Pension Agreement or any other obligations of the Authority.

The Retirement Board may appoint a bank with trust powers or a trust company to act as the custodian for all or part of the assets of the Fund and may delegate such of its duties in the management of the Fund is it shall determine. The Trustee may appoint investment advisors to recommend investment objectives, restrictions, and guidelines in accordance with the investment objectives, guidelines, and restrictions.

APPLICATION OF THE STATUTORY STANDARDS

As has been discussed by arbitrators in prior interest arbitration proceedings between these parties, Section 31 directs the arbitrator to "rely primarily on the following factors in determining the basis for an award" but does not require that each factor be weighted equally or even found relevant in each case. The seven factors will be discussed, as relevant here, and applied to the parties' LBOs below.

> Factor (a) *The financial ability of the authority to meet additional costs, which shall include but not be limited to: (I) the statutory requirement that the authority produce revenues in excess of expenses; (ii) the financial ability of the individual communities and the commonwealth to meet additional costs; (iii) the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.*

The Authority argues that the loss in operating revenues caused by the pandemic is dispositive in finding that the ability to pay factor is at issue in this case. Application of Factor (a) must lead the Arbitrator to conclude that the Union's LBO cannot be accepted under the current fiscal circumstances where the Authority is not able to meet the statutory requirement to produce revenues in excess of expenses.

Authority witness Mary Ann O'Hara, MBTA CFO, is responsible for the accurate reporting and analysis of the operating budget, which exceeds $2 billion in both revenue and expenses. She is also in charge of making sure that the MBTA is fiscally solvent and a going concern, as well as long-term bond debt on the capital side to invest in infrastructure and expansion. Ms. O'Hara testified about the drop in operating revenue commencing in March 2020 continuing through the dates of the instant proceeding, and the infusion of one-time federal grant money.

The following is illustrative of the data presented by the Authority. In FY 17, FY 18, and FY 19 the fare revenue recovery ratio, i.e., the percentage of operating expenses covered by fare revenue, was 43%. That declined to 33% in FY 20 and was budgeted to be 8% in FY 21 and11% in FY 22. The impacts of Covid 19 were also felt in reduced revenues for parking (an 81% decrease from FY 19) and advertising (a 59% decrease from FY 19). However, there has been a 14% increase in real estate revenue from FY 19. In addition to the decreases in revenue, operating expenses increased by 3.6% in FY 20, compared to the average annual increase of 2% in FY 15-FY 19.

The MBTA received one-time revenues in federal funding totaling $1.988 billion through FY 23. Ms. O'Hara testified that those one-time funds allowed the MBTA to close budget gaps. E.g., for FY 21 the budget gap would have been $67 million, but those dollars were replaced with funds from the $800 million in the first CARES Act federal grant, at the beginning of the pandemic. Going forward, there is no expectation of any further federal funding.

The Authority contends that the Legislature's amendment of Factor (a) in 2000, adding the statutory requirement that the Authority produce revenues in excess of expenses, is highly relevant under the facts of this case in evaluating ability to pay. The "forward funding legislation" provides the MBTA with a dedicated stream of assessments and sales tax which, along with operating revenues, are intended to meet operating requirements. The Factor (a) definition evidences a legislative intent to require the Arbitrator to review revenue produced from assessments, the dedicated sales tax, and the MBTA's operating revenues in evaluating the ability to pay. However, Factor (a) does not contemplate that the MBTA's ability to pay may be based on non-recurring emergency funding from the federal government. Such funds are not "revenues produced" expressly referenced in Factor (a).

The Authority contends that even if it is able to balance its books with one-time federal funding, it is irresponsible and contrary to the statutory directive to ignore future years where that funding cannot be relied upon. Ms. O'Hara testified that in future years the MBTA faces serious fiscal challenges as the decline in ridership has not recovered, post Covid. Pension costs continue to grow at an exponential rate. In 2007, pension costs as a percent of payroll was 9%, and in 2021 had risen to 24% of payroll.

The Authority contends that the funding policy adopted effective December 31, 2009 ("the 2009 Policy"), while intended to address unfunded liability, is not doing so. When implemented in 2009 the funded ratio was 75%. Instead of increasing, that ratio declined to 54% in 2021, with the unfunded liability nearly doubling from $726 million in 2011 to more than $1.4 billion in 2021. The 2009 Policy provides for amortization payments to increase by 4% per year while payroll growth is expected to increase by only 2.75%, thus requiring that a bigger and bigger share of the payroll be devoted pension costs. Due to overly optimistic assumptions employed by the Fund regarding investment rates of return, the cost to be borne by the MBTA and its employees are likely to get even worse than what is projected.

According to David Driscoll, the Fund's actuary, the entry age normal method is the most common actuarial funding method used among public sector retirement systems in the United States. The "normal cost" attempts to look at what would be necessary to pay for participant's benefit over the course of their career, beginning at their entry age and ending at the point of their anticipated exit from the system. This number differs depending upon their age and entry, and other demographic characteristics. In the aggregate for people in the MBTA system, as of December 31, 2020, it comes to 12.13% of pay. Pursuant to the Pension Agreement, that contribution is born approximately 75% by the employer and approximately 25% by the employee. However, the actual current contribution rate is over 35%, with 22% being devoted to paying off the unfunded liability and 1% dedicated to plan expenses. The Fund's 2020 Annual Comprehensive

Financial Report shows that as of December 31, 2020, the Fund had assets for funding purposes of $1.6 billion and unfunded accrued liability of $1.4 billion.

The Authority's expert witness, William Fornia, FSA, compared the Fund's funding picture with other plans and concluded it is more poorly funded than its comparators: the MBTA fund is 53.55% funded; but the MBTA's police pension plan is funded at 84.55%; the Massachusetts Water Resources Authority ("MWRA") pension plan is funded at approximately 88%; the Massport pension plan is funded at over 92%; and the Massachusetts Housing Finance Agency ("MHFA") plan is funded at 74.4%.

Mr. Fornia also compared the Fund's unfunded liability to other major transit authorities. The Washington Metropolitan Area Transit Authority ("WMATA") is funded at almost 82% and the New York City transit plan is funded at approximately 74%. The national average plan funded ratio over the period of 2010 to 2021 showed a slight decrease from 76% to 75%. During that period the MBTA's funded ratio decreased from 70% to 54%, slipping from 6% below the national average to 21% below the national average.

The Authority contends that the Fund's unfunded liability problem has gotten worse since the 2009 Policy was adopted. The 2009 Policy calls for amortization of the unfunded liability to be made in installments increasing at the rate of 4% per year over 30 years with the goal of bringing funding eventually to 100%. While assets had modest growth between 2011 and 2020, from $1.55 billion to $1.636 billion, unfunded liability grew worse, from $726 million to $1.419 billion. The funded ratio decreased from 68.1% to 53.55%. The Fund has gone from being 94% funded in 2006 to 53.55% in 2020.

The Authority contends that, even without awarding any of the benefit improvements in the Union's LBO, the amount of revenues that need to be dedicated to address the unfunded liability pursuant to the 2009 Policy is not viable. According to Fund actuary Driscoll, by 2038 pension costs are projected to exceed $220 million annually, or 32% of operating revenue, compared to 14% of operating revenue in 2018, and 38% of payroll, compared to 25% of payroll in 2018. Ms. O'Hara testified that the 13-year projection of 30% of payroll is a significant increase, dragging away operating dollars and non-operating revenue dollars to support an expense that continues to grow at a rate much higher than the expense base. That pension funding could cause the MBTA to be insolvent over that time period.

The Authority contends that the 2009 Policy violates basic tenants of public pension policies which should be based on policy objectives. Those objectives include (I) "intergenerational equity" so that the cost of employee benefits is paid by the generation of taxpayers who receive the services; and (ii) that employer costs be a consistent percentage of payroll. Mr. Fornia testified that of the 35% of pay that is the total cost, only 12% is going to workers who are working today and 23% is going to pay for things that should have been paid, under this principle, years ago. The 2009 Policy also dictates that the employer's cost consumes a steadily increasing percentage of payroll over the coming decades, rather than being a consistent percentage.

The Authority contends that the Fund's actuary may be overly optimistic and that the future funding picture could be even worse than projected. First, the amount required to pay off unfunded liability pursuant to the 2009 Policy is not supported by payroll growth. The 2009 Policy calls for installments increasing at the rate of 4% per year over a 30-year period, while payroll is expected to grow at 2.75%. Second, the Fund's projected assumed return on investments, 7.5%, is too high. The average rate currently being used nationally by public pension plans is below 7%. Mr. Fornia testified that about one half of the unfunded liability escalation between 2015 and 2020, from $815 million to $1.419 billion, is due to investment return.

The Authority rejects the Union's attempt to blame MBTA management for the Fund's financial problems. The voluntary workforce reduction programs implemented in 1991 in 2016 were driven by financial challenges. The Zack arbitration award for the 1988-1991 Working Agreement found that the Authority had financial resources, due to the 4% pension pick up in 1985, to award annual wage increases of 6.6%, 6.3% and 6.0%. Those increases caused the need for the 1991 voluntary separation program. In 2016 the Authority was facing an unsustainable operating budget, creating a need to reduce the workforce. The 2016 voluntary separation program was for individuals not retirement eligible. On cross-examination, Mr. Roth admitted that the high rate of turnover benefits the Fund because when employees voluntarily leave the Fund keeps the 75% contribution made by the Authority on that employee's behalf.

As to the outsourcing of certain functions, Mr. Roth admitted that many of the positions at issue, such as the MBTA money room and inventory control, were eliminated due to technological changes. Pursuant to an agreement between the Authority and the Union, any employees displaced through outsourcing had the opportunity to be placed in other positions. Also, the parties agreed on a solution to curb outsourcing, with a snapback of concessions if management changed its policy.

The Authority contends that it is not responsible for managing the Fund nor should it be constrained in making personnel decisions driven by legitimate fiscal challenges based on their potential impact on the Fund. Is the job of the Fund trustees to react to and make necessary adjustments based on economic realities. Mr. Fornia testified that the whole reason to pre-fund the pension is to assign the cost of the pension to when the services are provided, and not have current active employees paying for the benefits of the current retired employees. The Authority notes that, while employees enter and leave the Fund, none of this has any bearing on the critical problem facing the Fund--namely, unfunded liability. For the Fund to address its unfunded liability, cost savings must be achieved by virtue of the Authority's LBO.

The Union agrees that Factor (a) compels the Arbitrator to consider ability to pay the cost of an award but contends that the record evidence shows no serious controversy surrounding this issue. The Authority's own exhibits and testimony established that the cost of status quo is already baked into the adopted budget through FY 2023 covering the duration of the stipulated contract term. There is no cause for the Arbitrator to consider the ability of the Authority to fund the cost of the pension beyond the term of the Pension Agreement. Future pension funding will depend on numerous factors including ridership, service and staffing levels, government subsidies, market returns, etc. There is no purpose served by speculating on these developments over the next 20 years.

DISCUSSION - Factor (a)

Ability to pay has been discussed in every cited opinion in interest arbitration disputes between these parties since the Myers case. (Myers, 1977. UX 15.) Not surprisingly, the parties here differ along the traditional lines. The Authority has presented expert testimony regarding shortfalls in revenues and the worsening projections for funding of the Pension Fund. The Union argues that the Authority has the ability to pay for the modest changes being requested.

The Authority makes an additional argument here, that the reference to "revenue" in Section 31 (a) (I) excludes consideration of one-time federal monies in assessing ability to pay. The Authority's exhibits certainly illustrate the devastation wrought by the Covid epidemic on revenues. It would not be possible, however, to fashion an award in this case based on eliminating the federal funds, received or anticipated, from consideration. Doing so would not reflect the current reality of the Authority's finances.

The "forward funding" legislation was designed to stabilize funding for the MBTA. However, as Ms. O'Hara testified, "we're in a period of time none of us in our lifetimes have seen." (Tr. 90.) Although her comment was specifically directed at it being "very hard to project what the real ridership and real fair revenue is going to be," the uncertainty of today is much broader. The "known unknowns" include not just the continuing impacts of the Covid pandemic, and additional virus concerns, but also the difficulty in hiring much-needed workers, the impact of inflation (transitory or extended), and the looming possibility of a recession. Had the legislature contemplated today's environment, it is doubtful that the narrow reading of "revenue" urged by the Authority, here, would have been adopted.

The Retirement Fund Board was tasked with selecting an amortization schedule to tackle the unfunded liability problem. They chose to base their selection of 19 years on the assumption that payroll would increase by four percent per year, even though the actuary thinks it will only go up by two percent per year. The arbitrator does not have the jurisdiction to alter the Board's choice.

Further, as Arbitrator Zack stated "my statutory responsibility is restricted to the present impasse. (Zack, 1989.) The parties have stipulated that the term of the subject Pension Agreement will end on June 30, 2023, a mere ten months from the date of this award. Either Party may notify the other Party of desired changes sixty (60) days before that date. Budgeting through that date, including the wage increases negotiated in the

Working Agreement, is already complete. As Arbitrator Cochran found:

> ..., the Authority has already budgeted sufficient funds to pay salary increases in the amount it has proposed, and its evidence does not show definitively that any additional costs over what has proposed will be prohibitive. Rather, its argument focuses on the aggregate cost of the Union's entire set of proposals . . . . [Cochran, 2004.]

Factor (a) will therefore be applied as to the ability to pay for this Pension Agreement's term, and not forward to 2039. These parties did not negotiate the 2009 policy and that policy cannot be changed through this proceeding, even if it does violate the "basic tenants" of pubic pension policies. In addition, the Pension Agreement does not determine personnel polices for the Authority.

> <u>Factor (b)</u> *The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked including vacations, holidays and other excused time.*
>
> <u>Factor (c)</u> *All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.*

The parties presented extensive evidence regarding pension benefits. In varying respects those benefits are based upon different components of overall compensation and other benefits. However, substantial questions regarding the current level of wages and benefits were not directly raised at the hearing. Therefore, Factors (b) and (c) are not directly relevant to this case.

> <u>Factor (d)</u> *The hazards of employment, physical, educational, mental qualifications, job training and skills involved.*

The Authority recognizes that its bus drivers have a difficult job and appreciates their hard work under difficult conditions. It asserts that those employees are compensated through wages and other benefits in light of those hazards of employment. The fund's membership, however, also includes office workers and many other nonhazardous positions. The Union failed to produce any substantial evidence tying hazards of employment to pension increases.

The Union notes that the vehicle operators, i.e., Bus Operators, Light Rail Operators, and Heavy Rail Motorpersons, make up 79 percent of Local 589's membership. The Union has asserted for years that the transit worker is subject to stress, continuing and progressive, which develops in direct proportion to the specialization and regulation of the task. Local 589 has always maintained that working conditions characteristic of the operator's job warrant special consideration in the determination of pensions, wages, health care, vacations, sick leave, and other benefits. However, it was not until the late 1980's that the scientific community provided the medical and statistical evidence that proves the Union's case.

The Union cites leading research on excess risk of sickness and disease in the transit operator's occupation, performed under the direction of Dr. S. Leonard Syme, a professor of Epidemiology at the School of Public Health, University of California at Berkeley, synthesizing 22 epidemiological studies devoted to excess risk of sickness and disease in bus drivers. Those studies focused on three main disease categories: (1) cardiovascular disease, including hypertension; (2) gastrointestinal illnesses, including peptic ulcer and digestive problems; and (3) musculoskeletal problems, including back and neck pain. The studies consistently reported that bus drivers have higher rates of mortality, morbidity, and absence due to illness when compared to employees from a wide range of other occupational groups. Dr. Syme's review also found that, when evaluating the impact of bias on the estimates of risk, it appeared likely that findings are conservative: strong systematic selective factors have probably favored the elimination of those in poorer health both at the time of entry into and exit from the job of bus driving and other sources of bias have most likely caused underestimations of risk.

The Union cites Dr. Syme's own research concluding that:

> The evidence presented here shows that male bus drivers have rates of hypertension significantly higher than comparable groups of employed individuals from a wide range of occupations. These differences are not explained by age or race. Furthermore, potential biases involved in our analyses would seemingly lead to a conservative estimate of the difference in rates between bus drivers and the comparison groups. In our continuing study of bus drivers from this urban transit agency, we hope to clarify the extent of disease among high risk employees and identify possible etiological relationships that can be translated into efforts to reduce or prevent such risks. [UX 69.]

The Union also cites the work of an independent study, published in 1991, conducted by Drs. David Michaels and Stephen R. Zoloth from the City of New York Medical School, Department of Community Health and Social Medicine, another independent study by Gary W. Evans from the College of Human Ecology, Cornell University, a paper by Karen Belkic, M.D., PhD, and Peter Schanll, M.D., MPH, "on a San Francisco Public Transport line: Burden and consequences upon the human operator," and a US Bureau of Labor Statistics February 2015 review reaching similar conclusions.

As with Factor (a), the parties here have repeated arguments previously made. The cited Syme article was published in 1987. Although newer studies confirm the points made about the health risks for operators, in particular, that does not overcome the fact that this bargaining unit contains a mix of jobs. That mix distinguishes this bargaining unit from those covered by Groups 3 (State police officers) and 4 (Fire fighters, police officers, and some correction officers) under the Massachusetts Public Employees' Pension Classification System. The parties are free to negotiate provisions in the Working Agreement to address specific concerns. Factor (d) is not a relevant consideration here.

> *Factor (e) A comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.*

The Authority notes that there was a substantial amount of evidence comparing pension benefits. Mr. Fornia conducted a comparison of the Fund with other Massachusetts statewide retirement plans and with plans of other transit agencies outside of the Commonwealth, on the basis of 1) benefit levels and 2) at what point an individual has full retirement eligibility. He found that other state pension plans have lower benefit levels, MBTA's full retirement eligibility is more favorable than other state plans, and the Fund is more generous by both measures than those of the CTA, BART, NYC, WMATA, AND SEPTA.

The Authority contests the methodology used by Mr. Windsor to conclude that the net benefit value of the MBTA Plan was 1.47%, as compared to 2.45% for Group 1, and 7.45% for Group 4. Mr. Fornia did not agree that Social Security is worth less than what the members put into it, and disagreed with Mr. Windsor, who subtracted 1.45 for Social Security. Mr. Fornia concluded that even if Social Security has no value, the MBTA's benefit of 2.92 is stronger than Group 1, but not as strong as Group 4, police and fire.

The Authority contests Mr. Roth's "opportunity cost" comparison of an individual's Social Security benefit with investing that amount indexed to the Standard & Poor's 500. Mr. Fornia noted shortcomings in the opportunity cost model, including the assumed wage rate; investing the entire sum in the S&P 500; the period selected (1985 to 2020) was one of the best 35-year periods in the history of the stock market; and the assumption that in the following 35 years the individual will earn an average rate of return of 7.25%. Further, Mr. Roth's analysis assumed that the individual would know with 100% certainty the day they would die and would withdraw their account accordingly.

As to Mr. Windsor's conclusion that Fund Members should be compared to Massachusetts State Employees Group 4 based solely on mortality rate, mortality is not the sole factor. Mr. Fornia testified that the criteria include: 1) whether the employee can continue doing the job beyond a given age such as 50 or 55; 2) the difficulty of the job; and 3) the public's desire to not have an employee doing certain public safety functions beyond a given age.

Both parties presented extensive evidence regarding Factor (e). That factor is highly relevant to this case.

> *Factor (f) The average consumer price for goods and services commonly known as the cost of living.*

The Authority contends that, even if it can be shown that the cost of living has risen, in light of the financial problems facing the MBTA and the Fund, and the precipitous drop in operating revenue caused by Covid, the Arbitrator should not award any of the Union's proposals that increase costs for the plan.

Mr. Zimmer presented an exhibit depicting the cost of living from 1982 to 2021 using four different indices: the U.S. CPI-U; the U.S. Core CPI-U; the Boston CPI-U and the Boston Core CPI-U. Even with the so-called 4% pension pickup in 1985, the top operator wage increases have outpaced the Boston and U.S. CPI-U. Since 2008, the top operator wage increases have outpaced each of the four indices. Mr. Zimmer testified that in his view and in the view of other economists, the CPI measurement contains an upward bias and overstates inflation. He compared the CPI to wage data and not pension increases because the parties have agreed that the operators' wage rate is the benchmark, but there is not a benchmark for pensions. Everyone retires with a separate pension allowance that is subject to ad hoc increases over time.

The Union argues that the statute requires the Arbitrator to give primary consideration to Factor (f) and, if Factor (f) means anything, it means the maintenance of the pension purchasing power for those currently retired.

Although the parties disagreed as to the proper index to measure the cost of living, Factor (f) is relevant to this case.

> *Factor (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.*

The Authority argues that, given the dramatic changes brought about by the Covid pandemic, the notion of adding costs to the Pension Fund, to be funded 75% through MBTA contributions, should be outright rejected in light of the loss of revenues and uncertain future. After the parties formulated their LBOs on March 17, 2020 (Union) and April 17, 2020 (Authority) circumstances changed dramatically. The law requires that the change in circumstances be taken into consideration and must lead to a constrained approach with the goal of reducing costs and maintaining a viable pension fund.

The Authority notes that, prior to Covid, (FY 2015-2019), operating revenues increased 4% annually on average while operating expenses increased 2% annually. In FY 20, operating revenues decreased 19% while operating expenses increased 3.6%. Specifically, in FY 19, the MBTA's operating revenues totaled $762 million. In FY 20, the effects of the pandemic were experienced for a few months and operating revenues decreased to $619 million. In FY 21, experiencing the effect of the pandemic for a full year, operating revenues decreased to $171 million. The FY 22 Budget projects a slight rebound in operating revenues to $246 million which still represents a 68% decrease from FY 19.

The Authority further notes that, as a result of the Covid pandemic, MBTA ridership declined significantly. Ms. O'Hara testified that "if ridership before Covid was 100%, in March and April of 2020, we were seeing 8, 9% level of ridership. Which means the $700 million of fare revenue that we have counted on year on year went away. And in FY 20 and 21 we lost well over $500 million in fare revenue."

The Authority notes that the impact of Covid has decreased the MBTA's own source revenues. Prior to Covid, own source operating revenue realized 25% average annual growth from FY 15 to FY 19. Specifically, in that period, there was a 41% increase in parking revenue, 15% increase in advertising revenue, and 9% increase in real estate revenue. In sharp contrast, the FY 22 Budget projects $45 million in own source revenue representing a 57% decrease from FY 19 levels. Specifically, the FY 22 Budget projects an 81% decrease in parking revenue from FY 19, and a 59% decrease in advertising revenue from FY 19.

The Union contends that Factor (g) suggests the recent increases in the CPI over the past three years during the pendency of the arbitration should be given weight. Mr. Roth’s testimony and exhibits demonstrate that retirees on a fixed pension suffer a gradual diminution in real pensions over their retirement lives. At a mere 3 percent annual inflation rate the purchasing power of a pension will decline 43 percent over a typical retirement life in the absence of post-retirement adjustment(s).

Factor (g) is a consideration in this case.

> *Factor (h)* *Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties in the public service of the commonwealth, and which are not precluded from bargaining under section 25.*

The Union views this Factor as a "catch all" that codifies standards traditionally advanced by either party and reflects the common law of interest arbitration. Citing numerous interest arbitration decisions, between these parties and elsewhere, the Union argues that interest arbitration is more an instrument of collective bargaining than adjudication, and that bargaining history is the best guide to decide issues as the parties should have agreed through direct negotiations.

The Union notes that the Pension Agreement represents the aggregate product of nearly 80 years of negotiations involving literally generations of negotiators on both sides. Those 80 years of hard bargaining resulted in 23 separate pension agreements, only four of which were determined through arbitration.

Further, the Union argues that any suggestion that the Arbitrator in this case undo the results of the parties' past negotiations is an indictment of all who participated in those settlements, including thirteen General Managers and their respective bargaining teams who have signed-off on consensual agreements. It cannot be assumed that Authority representatives erred through lack of knowledge or incompetence; and certainly it cannot be assumed that decisions were made and agreements reached outside the full view of the statutory standards – whatever their meaning may be.

The Union argues that previous arbitrators have recognized that the statutory standards, alone, provide little definitive guidance and each arbitrator necessarily relied upon bargaining history in determining weight and authority among the vast number of statistical comparisons. In reading statutory factors, it is reasonable to study how, and to what extent, these same factors have shaped the parties' agreements in the past.

The Union cites numerous arbitration decisions holding that the party seeking structural change or changes incompatible with bargaining history must prove special circumstances or intervening events warrant the change. If arbitration is viewed as an extension of the collective bargaining process, contract determinants must be validated in the experience of the parties.

Factor (h) is a consideration in this case.

Factor (I) *The stipulation of the parties.*

The parties entered into two stipulations:

the term of the Pension Agreement:

> July 1, 2018 to and including June 30, 2013 and, unless duly modified, for subsequent one-year periods, subject to change as provided in the agreement.

and that:

> Effective July 1, 2018, retroactive pension contributions from both the Members and the Authority resulting from a negotiated wage increase shall be calculated and funded at the required contribution rates in effect at the time the retroactive payment is processed.

THE PARTIES LAST BEST OFFERS

The Authority's LBO

1. ARTICLE I - Definition of Terms in this Agreement

Amend Article I (18) to update to a current actuarial table.

The actuarial table referenced in Article I (18) of the Pension Agreement is the "1989 George B. Buck Mortality Table (male and female), assuming all Members are males, and all beneficiaries are female...." (JX 6, pg. 4.)

The Authority notes that it is not making this proposal as a cost savings measure. As Mr. Fornia testified, the 1989 table is not used to make actuarial valuations, but is used to convert benefits, such as when a member wishes to cover a spouse with a reduced pension. When the tables are obsolete, certain members would be overpaying or underpaying for certain benefit provisions. This proposal is simply intended to utilize an updated actuarial table.

As a matter of principle the Union does not oppose this change, as actuarial assumptions should always be subject to refinement in recognition of actual experience. However, for the Union, it is a matter of priority. With this proposal the Authority is apparently willing to spend 0.61 percent of payroll, a cost greater than the combined cost of adopting the Union's proposals to increase the cap to 80 percent, increase disability benefits, increase on-the-job death benefits, and lower the top-heavy limit. These changes in total cost to the MBTA is an estimated 0.60 percent of payroll. For the same money it is far more critical to fix these deficiencies in the Plan than to adopt a new mortality table.

The current actuarial table is from 1989. While the Authority has made a sound argument for updating it, one with which the Union concurs, no compelling case had been made as to why the actuarial table needs to be updated now. In light of the ongoing cost of making this change and the current financial pressures, this Authority proposal will not be awarded.

AWARD

The Authority's proposal to Amend Article I (18) to update to a current actuarial table is not awarded.

2. ARTICLE III - Creditable Service

Amend Article III(6) to eliminate the inclusion of unused sick leave as creditable service for the purpose of computing the amount of the retirement allowance, and to provide that 20% of unused sick leave will be paid out at retirement.

Under the terms of the current Pension Agreement, unused sick leave accumulated at the time of a Member's retirement is included in creditable service for the purpose of computing the amount of the retirement allowance. It does not permit an employee to convert unused sick leave at retirement to determine eligibility to retire.

The Authority contends that this proposal is intended to bring the MBTA pension more in line with comparable plans, including the Commonwealth's Plan. As Mr. Fornia testified, this proposal is also aimed at treating sick leave as intended, so that individuals who are sick do not come to work because they are hoarding their sick leave to use it to count toward their pension. The current provision also results in actuarial losses as the actuary does not build into their models the accumulation of sick leave. The Plan actuary did not cost-out the savings associated with this proposal. The Authority's expert estimated that it would result in a savings of approximately $586,000 per year.

The Union notes that the sick leave credit provision was adopted in 1973 by the Rubin Arbitration Board by a majority decision with the Authority-appointed member agreeing with Chairman Rubin, and the Union-appointed Board member dissenting in whole. The sick leave credit provision has survived 12 subsequent bargaining cycles, spanning 49 years, without change.

The Union argues that employees at the end of their work lives and within the retirement zone are more likely to suffer chronic ailments which call for frequent sick leave use. Rather than stay on the sick leave rolls, defer retirement and occupy an otherwise productive position, the Union and the Authority thought it wise to incentivise employees to retire earlier rather than later by providing sick leave pension credit. Giving these employees a choice between delaying retirement and using sick leave, or forfeiting all sick leave, is untenable. The current rule presents a compromise acceptable to both parties for nearly half a century.

While the Authority estimates that adopting the 20 percent rule would save 0.12 percent of payroll, the Union views that as a fanciful calculation. It fails to account for the obvious change in employee behavior when the incentive to conserve sick leave is virtually eliminated. The calculation is based on experience when the sick leave credit incentive was in place. But what happens when the member is given a clear choice between using sick leave at 100 percent or 20 percent? As illustrated in Union Exhibit 104, the pension service credit, while not as valuable as 100 percent use of sick leave, is worth nearly twice the 20 percent cash-out. The parties' current provision strikes a reasonable balance and should be preserved. The Authority's ill-conceived proposal may save a few pennies in pension costs, but it will spend far more in payroll.

On this record the Authority has not made the case for removing accumulated, unused sick leave from creditable service for the purpose of computing the amount of the retirement allowance. While the Authority has documented the current stress on operating revenues, it did not cost out the impact of making this change on operations or attempt to balance that against the forecasted $586,000 in savings per year to the Plan. The Union and the Authority have negotiated the terms of the Pension Agreement that differ from those of the Commonwealth plan in several respects. It would not be proper for an arbitrator to remove those differences without a compelling justification.

AWARD

The Authority's proposal to Amend Article III (6) to eliminate the inclusion of unused sick leave as creditable service for the purpose of computing the amount of the retirement allowance, and to provide that 20% of unused sick leave will be paid out at retirement is not awarded.

3(a) ARTICLE IV- Benefits

[Note: At the hearing the Authority clarified that the intent of all aspects of this proposal is to be effective the date of the Arbitrator's award, not July 1, 2018. (Tr. 38.)]

Amend Article IV(l)(b) to change the multiplier from 2.46 percent to 1.80 percent. This change is to be applied retroactively and prospectively for all Active Members under 60 years of age and more than five years of service from retirement as of July 1, 2018.

The Authority argues that this proposal should be awarded for three main reasons. First, it makes the MBTA Plan more consistent with comparable plans. For example, the multiplier for the MWRA, Massport, MassHousing, and Commonwealth plans are at 1.45%.

Second, there is evidence in the record that the current plan design provides incentives for individuals to retire young because the multiplier is not adjusted based on whether an employee takes an earlier or later retirement. This is contrary to best practices as the benefit amount is not adjusted to reflect the number of years that the benefit would be paid. Under the terms of the current Pension Agreement, any member hired prior to December 6, 2012 and who has completed at least 23 years of service may retire on an early normal retirement allowance, at any age. For those employees hired on or after

December 6, 2012, if the employee has attained age 55 and completed at least 25 years of service, that employee may also retire on an early normal retirement allowance. In either case, the multiplier is the same, set at 2.46%, and is not adjusted for age of retirement, unlike Social Security benefits and other pension plans. This creates the incentive for the MBTA employee to start collecting a pension at age 55 or even younger if hired before 2012. By contrast, an individual covered by the Commonwealth's Retirement Plan cannot retire until age 60, and if they retire at 60, the multiplier is only 1.45 %, increasing to 2.20% at age 65 and 2.50% at age 67.

Third, this proposal will result in substantial savings to the Plan by reducing total costs by about 6.5% from 35.15% to 28.59% which is a savings of $30 million per year. The ability to pay factor requires the Arbitrator to consider the MBTA's production of revenue in excess of expenses. Since it is uncertain how long it will take for the MBTA's operating revenues to recover to prior levels, the Arbitrator must take a close look at reducing expenses in meeting the Factor (a) statutory mandate.

The Union argues that the structure of the MBTA's proposed benefit formula, which increases the multiplier with age, is apparently intended to encourage employees to work longer. This objective is also advanced by enabling employees to continue to earn pension credit with longer years of service. When pensionable credit stops after 30.5 years, and the benefit is capped, employees are incentivised to retire earlier than later.

3(b) ARTICLE IV- Benefits

Amend Article IV(1)(b) to change three (3) years to five (5) years. In determining average regular compensation, if regular compensation in any year (of creditable service) exceeds the average of the regular compensation of the previous two years (of creditable service) by more than 10%, then when calculating the benefit, regular compensation in any year cannot exceed 10% of the average of the previous two years. These changes are to be applied retroactively and prospectively for all Active Members.

The Authority argues that this proposal is intended to eliminate benefit manipulation whereby an individual might receive a promotion or large increase in pay in the three years prior to retirement. In addition, the 10% provision is designed to prevent "salary spiking" where a large salary increase in a given year creates a large pension increase that was not anticipated or prefunded. This period is also more consistent with comparable retirement systems. It is projected to save the Pension Plan $3 million per year, reducing total costs by 0.65% from 35.15% to 34.50%.

The Union argues that the proposal to reduce benefits by changing the final average earnings (“FAE”) from the average of the highest three years to high five years is arguably a severable issue within the proposal to change the benefit formula.

The Union notes that the only reference to this proposal in the Authority's case was in connection with Authority Exhibit 7, slide 47, which claimed that the "3-year averaging period allows higher opportunity to manipulate benefits." The Union argues that this is a ridiculous proposition, considering the fact that overtime is excluded from the FAE calculation. The MBTA's witness never explained how the individual could "manipulate" benefits. No evidence of this behavior was offered. The proposal is entirely baseless and must be rejected for this reason alone.

The Union further argues that the change from high-5 to high-3 came in two steps: the Myers arbitration award 46 years ago established FAE as high-4; and the 1985 Agreement improved it to high-3. The later change was financed by the employees with their "excess contributions." The Arbitrator should not think about unwinding a quid-pro-quo arrangement made by the parties 37 years ago, particularly in the absence of any supporting evidence or intervening events which might compel a change.

3(c) ARTICLE IV- Benefits

Delete Article IV(1)(c) and (d) and replace with the following: Minimum retirement age is increased to age 60. Every Member that receives a pension before age 65 will have that pension reduced for their entire retirement by 6% per year, or one half percent for each month, of retirement before age 65 as follows:

Age	*65*	*62**	*63*	*62*	*61*	*60*
Accrual	*1.80%*	*1.69%*	*1.58%*	*1.48%*	*1.37%*	*1.26%*

These changes are to be applied retroactively and prospectively for all Active Members under 60 years of age and more than five years of service from retirement as of July 1, 2018.

Corresponding and/or technical amendments may be made to other sections of the Agreement to implement changes noted above.

*[*This is an error and should read 64. The 1.69% Accrual is also off by 6%.]*

Under Article IV (c) of the current Pension Agreement, any member hired prior to December 6, 2012 who has completed at least 23 years of service may retire on an early normal retirement allowance at any age. For those hired on or after December 6, 2012, any member who has attained age 55 and completed at least 25 years of service may also retire on an early normal retirement allowance.

The Authority contends that its proposal is consistent with comparable plans, and is consistent with basic practices, including Social Security and the Commonwealth's

Retirement Plan, such that if an employee takes an earlier or later retirement, there is an adjustment in the benefit amount to reflect the number of years that the benefit would be paid. This proposal would result in cost savings of $12.1 million annually, reducing total costs from 35.15% to 32.50%.

The Union contends that the proposed change in eligibility requirements is absurd. Under the proposal an employee cannot retire before reaching age 60. There is no present or proposed vesting provision. So anyone retiring before age 60 would forfeit the pension. This, of course, would be illegal in the private sector under ERISA, and has absolutely no precedent in the local public sector or in the transit industry. A forfeiture is not an idol problem. Bus Operators, the most populous classification covered by the MBTARF, are hired at age 18. Incredibly, the Authority believes it is reasonable to expect an employee to work 41 years before earning a pension.

The Union contends that a pension which requires a person to work until age 60 in order to receive a normal benefit is obviously not designed for a transit worker. Given the stress and strain of the work, particularly for an operator, a work life should be defined in years of service and not age. As it is, the MBTA pension currently requires a person to work 25 years and attain age 55 before retiring on an unreduced pension. Only five of the 20 transit plans in the Union's study require work beyond 25 years and age 55 before the maximum benefit is payable.

The Union further argues that the Authority's proposed benefit formula cannot be taken seriously. According to MIT's Living Wage Calculator, the proposed pension for someone retiring with 25 years of service and age 60 would be 43 percent below the living wage for a single adult. Even an employee retiring at 65 after 30 years of service would not be able to live on the pension.

Summary of Article IV - Benefits Proposals

The Authority urges the Arbitrator to award all three elements of Authority Proposal No. 3. Doing so, would result in substantial cost savings which is desperately needed in light of the Plan's unfunded liability problem and the MBTA's current financial picture. Specifically, if all three elements of the proposal are awarded, it would result in annual savings of $40 million and reduce costs by approximately 9%, thus reducing the total cost of the pension from 35.15% to 26.17%. The Authority's cost reduction would be 75% of this amount, resulting in a reduction for the Authority to 19.29%. Reducing these costs is compelled by Factor (a), the statutory requirement that the Authority produce revenues in excess of expenses.

The Union contends that the Authority’s eligibility for retirement and benefit formula proposals, in combination, make absolutely no sense. Presently, the normal cost of the pension is 12.13 percent of payroll and the employee contribution is 9.12 percent. Although that is the required contribution, the actual contribution is 9.33% following the Retirement Board's action to hold rates at the preceding year's level. Thus, the average member currently pays 75 percent of his/her own pension earned in the current year. However, it should be understood that the normal cost varies with proximity to retirement. While the average normal cost is 12.13 percent, a new entrant between the ages of 18 to 25 costs the fund only 8.42 percent. Thus, the new hire is currently required to pay 111 percent of the cost of his/her own pension.

The Union contends that, under the Authority's proposal to worsen the benefit formula and cap its contribution, the normal cost would be cut to 9.06 percent and the employee's contribution would go to 8.6 percent. So the average employee would be paying 95 percent of a pension worth 25 percent less. A new hire would be asked to pay 161 percent of the cost of this dumbed-down pension. Alternatively, the new hire could opt for the Section 401(a) DCP which offers a benefit worth 16 percent of pay for an 8.0 percent contribution - a benefit paid 50 percent by the employee. Under these circumstances any new hire, acting in an economically rational way, would opt for the Section 401(a) DCP.

The Union notes that, since the unfunded liability at any point in time is a fixed dollar amount, and is financed by a contribution expressed as a percent of payroll, currently 22.02 percent, the contribution rate will rise as covered payroll falls. As new employees drop out of the MBTARF, covered payroll shrinks and the unfunded liability rate increases. Because the remaining members of the MBTARF pay 25 percent of the increase, their contribution will continually increase until it represents more than 100 percent of the normal cost. The resulting "death spiral" ends in the elimination of the DB plan, when it no longer makes sense for any employee to participate. In place of this contrived proposal it would be more honest for the MBTA to simply propose the elimination of the defined benefit plan.

AWARDS

As to proposal 3(a), the Authority's evidence regarding changing the multiplier from 2.46 percent to 1.80 percent was not persuasive. True, the Pension Plan's current multiplier of 2.46% is near the top of public plans in the commonwealth. However, it is not substantially out of line with those comparables. That number was negotiated by the parties who were fully aware of the other public plans and will not be disturbed here.

The Authority's proposal to amend Article VI (1)(b) to reduce the multiplier is not awarded.

As to proposal 3(b), the bargaining history cited by the Union must be respected. The parties have negotiated improvements from contract to contract, including the "high 3" was arrived at in 1985.

The Authority's proposal to amend Article VI (1)(b) to change three years to five years is not awarded.

As to proposal 3(c), the Authority's evidence that the absence of an adjustment to the multiplier based upon whether an employee takes an earlier or later retirement is out of line with standard practice in the commonwealth, in the transit industry and federal programs is compelling. However, the Union's concern about the lack of vesting and the employee's loss of a pension is also compelling. Therefore, the Authority's proposal will only be awarded in part.

AWARD

The Authority's proposal to delete Article IV(1)(c) and (d) and replace it is awarded only to the extent that a new paragraph Article IV(1)(e) will be added as follows:

> (e) Every Member that receives a pension before age 65 will have that pension reduced for their entire retirement by 6% per year, or one half percent for each month, of retirement before age 65. This change is to be applied prospectively for all Active Members under 60 years of age and more than five years of service from retirement as of August 26, 2022.

4. ARTICLE V - Contributions

> *Amend Article V(1)(a) to add new language: Notwithstanding any language to the contrary, the Authority will contribute up to, but not more than, 20% of pensionable payroll to the Retirement Fund.*

There is currently no cap on the Authority's contribution.

The Authority contends that, if this proposal is awarded, the Authority's contribution rate would be reduced to 19.29%. The intent of Proposal 4 is to cap the Authority's costs going forward at 20%. While a 20% cap still represents 22% of the MBTA's operating revenues, awarding this proposal would provide much needed predictability and fiscal stability.

The Union contends, to begin with, that a cap on the Authority's contribution would change the very nature of the DB plan. One feature - perhaps the most important feature - of a DB plan is that the participating member is sheltered against investment risk. As it is, the MBTARF Member is already exposed to 25 percent of the risk of investment return under the 75/25 cost-sharing formula. But placing 100 percent of the risk on the employee would eliminate the main objective of the DB plan altogether, and alter the very structure of the retirement plan established by the Union and employer 80 years ago. There is no compelling reason for this radical change.

The Union further argues that capping the MBTA's contribution at 20 percent, assuming no other change, would increase the employees' contribution to 15.15 percent, or 125 percent of the normal cost. Asking Members to pay 125 percent of the cost of their own pensions means that pension compensation is not merely reduced, but completely eliminated. It would make zero sense for employees to continue participation in the DB Plan under these circumstances.

The Union is unable to find any precedent or stitch of evidence offered in support of this absurd proposal. No statutory factor supports this change. It should be rejected out of hand.

The record does not support placing this type of limitation, regardless of other considerations that may arise, on the Authority's contributions.

AWARD

The Authority's proposal to amend Article V(1)(a) to add new language: "Notwithstanding any language to the contrary, the Authority will contribute up to, but not more than, 20% of pensionable payroll to the Retirement Fund" is not awarded.

5. Other – Section 401(a) Plan

In order to attract and retain employees, the Authority shall be permitted to offer a Section 401(a) Plan option to all employees.

The proposed Section 401(a) DC Plan would have the same terms as offered to the MBTA non-union executive employees, and employees in the MBTA management unions -- TEA, OPEIU Local 453, and the United Steelworkers Union, Local 9501.

The Authority contends that the ability to offer a Section 401(a) DC Plan would assist the MBTA in recruitment and retention efforts as many individuals do not want to make a 25-year commitment to their employer. This proposal also reduces the risk of future unfunded liabilities. That is, any employee who elects the Section 401(a) DC Plan option would not carry the risk of creating an additional liability for the DB Plan.

In addition to the reasons why the Section 401(a) DC Plan would compete with the DB Plan discussed above, the Union argues that there are additional reasons to reject this proposal. Mr. Fornia has argued that replacing a DB plan with a DC plan is not in the public interest. He has stated that "DB plans are inherently more cost-efficient than DC plans" and a "typical DB plan provides equivalent retirement benefits at about half the cost of a DC plan, and 29 percent lower cost than an 'ideal' DC plan modeled with generous assumptions." The Union contends that Mr. Fornia is joined by a chorus of other experts who have argued that DC plans fail to meet the legitimate pension compensation objectives of both workers and taxpayers. This raises the question: why would an arbitrator award the establishment of a DC plan, which threatens the very existence of the present DB plan, when the MBTA's own expert witness argues against it?

The Authority references the need to attract more workers as a reason for this proposal, yet other proposals likely will make the Local 589 jobs less appealing. Bloodsworth's 1994 decision mentions features that make employment at the MBTA very attractive, "as witnessed by the fact that when Local 589 job vacancies were last advertised to the public approximately 14,000 individuals replied." (Bloodsworth 1994 at 15.) Times have changed.

The risk to the viability of the DB plan described by the Union more than offsets any marginal attraction the option of a Section 401(a) DC plan might have for a limited number of short-term employees, whose departure under the DB plan would benefit the Fund.

AWARD

The Authority's proposal to permit the Authority to offer a Section 401(a) Plan option to all employees is not awarded.

The Union's LBO

The Union contends that the record in this case - particularly in connection with statutory factors (a), (d), (e) and (h) - supports a reduction in employee contributions and improvements in the basic benefit formula. However, the Union states that its specific proposals are far more modest. The proposals affecting active employees amount to a total employer cost of 0.60 percent of payroll. To place this number in perspective consider that the Authority agreed last January to a 5.1 percent increase in wage and wage-related compensation (in addition to non-pensionable lump sums totally $4,500 per employee). The increase in the wage base upon which pension contributions are made will increase MBTA pension costs by $6.1 million. The cost of 0.60 percent of payroll is only $2.8 million. The total MBTA operating budget in FY 22 exceeds $2.2 billion. In this context, the Union proposals affecting active employees are minuscule and can have no meaningful impact on the Authority's funding one way or the other.

The Authority contends that with respect to Union proposals 1-3, now is not the time to increase costs to the Pension Plan for all of the reasons discussed at the hearing and in this brief. For that reason, the proposals should be rejected.

1. *Normal Retirement Allowance Formula – Article IV, Section (1)*

   Amend Section (1)(b) to provide that the normal retirement allowance shall not exceed eighty percent (80%) of average final compensation.

Currently the maximum pension is seventy five percent (75%) of final-average-earnings. The current rule means that the maximum creditable years of service is 30.5 years.

The Union proposes to increase the maximum to 80 percent at an Authority cost of 0.12 percent of payroll. With a cap of 80 percent the maximum number of years will increase to 32.5.

The Union notes that the structure of the MBTA's proposed benefit formula which increases the multiplier with age is apparently intended to encourage employees to work longer. This objective is also advanced by enabling employees to continue to earn pension credit with longer years of service. When pensionable credit stops after 30.5 years, and the benefit is capped, employees are incentivised to retire earlier than later.

The Union argues that the 80 percent rule is fully supported by Factors (e) and (h). It is identical to all Groups under the Commonwealth's retirement system, and is supported by transit practice. Only three of the other 19 major transit plans impose any limitation on creditable years of service. There is a wisdom in a plan design which rewards employees for longer service.

As discussed above, the 2.46 percent multiplier is near the top of public plans in the commonwealth. No compelling reason has been shown to, in addition, raise the allowable average final compensation to 80%.

AWARD

The Union’s proposal to amend Section (1)(b) to provide that the normal retirement allowance shall not exceed eighty percent (80%) of average final compensation is not awarded.

2. Disability Retirement Allowance – Article IV, Section (2)

(a) Amend Section (2)(a) to reduce the six (6) year service eligibility requirement in case of disability due to a non-occupational accident or sickness to four (4) years.

(b) Amend Section (2)(b) to provide that the minimum disability retirement allowance shall be fifty (50) percent of the amount earned by the member in his last full twelve (12) months of service immediately preceding the disability.

The Union contends that these two amendments, together, would cost the Authority 0.42 percent of payroll. Transit jobs, especially those represented by Local 589, are physically demanding. For operators who make up 79 percent of the Local 589 membership, it is well established that work exposes them to elevated risk for mortality, morbidity, and general occupational health hazards. Transit workers are easily and routinely disqualified for occupational and non-occupation medical disability. In fact, the disability retirement rate for Local 589 members is four times the rate for police and firefighters; and for all members of the MBTARF the rate is three times as high. Yet, many fall through the crack and are denied a disability pension altogether. If you have less than six years of service, and disqualified from performing your job at the MBTA, you're kicked to the curb without any benefit. The absence of vesting adds to the problem, resulting in a forfeiture of five years worth of pension credit. This inequity must be corrected by at the least eliminating the distinction between an occupational and non-occupational cause of disability.

With respect to the proposal to increase the disability minimum, the Union contends that it must be understood we deal here with those who are totally and permanently medically disqualified from performing their job at the MBTA. The disability pension recipient is subject to medical examination at the request of the Board and can be denied a continued pension if found capable of performing any job offered by the Authority. It is worth noting that the Authority did not produce any testimony or other evidence in opposition to these proposals.

While these proposals are projected to have a minor fiscal impact, no compelling reason has been offered as to why these changes need to be made now. The parties will have the opportunity to negotiate over disability retirement benefits in the very near future.

AWARD

The Union’s proposals to amend Article IV, Section 2 (a) and (b) are not awarded.

3. Death Benefit in the Line-Of-Duty – Article IV, Section (2)

Amend Article IV Section (2)(a) to provide a lifetime benefit to surviving spouse and/or dependent children equal to 100% of amount earned by the member in his last full twelve (12) months of service immediately preceding death.

Currently, the benefit paid to an employee’s survivor in the event of death resulting from an injury sustained in the performance of his/her job is a lifetime annuity equal to the pension the member would have been entitled to at the time of death, with a minimum of 15 percent of the FAE.

The Union proposes to increase this to 100 percent of the members last 12 months of earnings. As reflected in the cost of this benefit - 0.11 percent of payroll - death in the line of duty is rare at the MBTA. Nevertheless, it does occur with devastating impact on the surviving family. The survivor of a member with 20 years of service would receive a benefit below the living income level for a single adult, let alone a family.

The Union proposal would bring the provision in line with the Group 4 benefit under the Commonwealth's system. The survivor of a police officer or firefighter receives

100 percent of the employee's last year's salary plus adjustments for general wage increases and cost-of- living. Even the death benefit for Group 1 covering office workers is more adequate, providing the survivor with a minimum benefit equal to 72 percent of the employee's last year's earnings. This proposal is of minor consequence to the Plan, costing one-tenth of a percent of pay. Yet, it has a life-changing, positive impact on those few families benefitting from the change.

As discussed above, effectively placing Local 589 members in Group 4 is not appropriate. Raising the Death Benefit in the Line-Of-Duty to the level received by Group 1 members might be appropriate, but that has not been proposed here.

AWARD

The Union's proposal to amend the Death Benefit in the Line-Of-Duty – Article IV, Section (2) is not awarded.

4. Retired Members Benefits – Article IV

Amend Article IV by adding a new Section (13) to provide that all allowances under this plan (including normal, early, disability, vested and survivor annuities) in effect on June 30, 2018 shall be increased effective July 1, 2018 by five percent (5.0%).

The Union calculates that the cost of this proposal to the Authority is 1.35 percent of pay.

The Union argues that it is a truism that retirees on a fixed pension suffer a gradual diminution in real pensions over their retirement lives. At a mere 3 percent annual inflation rate the purchasing power of a pension will decline 43 percent over a typical retirement life in the absence of post-retirement adjustment(s). The MBTARF Member has not received an adjustment since July 2006 - more than 15 years ago. Between July 2006 and July 2021 the CPI has risen 31.1 percent. During the pendency of this round of bargaining the CPI has increased 7.2 percent alone. This ignores the recent spike in inflation reported in the popular press. Those retired after the amendable date of the Agreement on July 1, 2018 are excluded from the proposed increase. Unfortunately, the proposal was made four years ago when inflation was moderate and recent events unforseen. In any case, the Union proposal for a mere 5 percent hardly makes a dent on maintenance of real pension for any beneficiary regardless of retirement date.

The Union notes that we are not dealing here with hefty pension levels. Many pensioners have been on the rolls for decades. The average pension for all existing beneficiaries is $33,101 per year. Thirty-five percent of current beneficiaries are not yet eligible for full Social Security. There are 690 beneficiaries on disability pensions with an average pension of $19,109 per year. Survivors receive pensions averaging $17, 302.

To place these sums in perspective consider that the living wage for a single adult in the Boston area is $39,874. The poverty level for a single adult is $12,750. We are not suggesting that MBTA retirees are impoverished, presumably they have other retirement assets. Nevertheless, it is true that the average beneficiary could not live on the MBTA pension alone.

The Union argues that there is ample precedent in the bargaining history between the MBTA and Local 589 to justify additional post-retirement adjustments. Between 1949 and 2006 – a 57-year period – every pension settlement agreement provided a post-retirement adjustment. This includes all four interest arbitration awards. All of the awards granted increases above that proposed by the Union in this round. In past negotiations the parties have embraced the principle of maintaining real pensions. If interest arbitration is to be viewed as and extension of the collective bargaining process it is entirely appropriate to follow the parties lead in this regard.

The Union also relies upon state and local practice. The Public Employee Retirement Administration Commission (PERAC) oversees the administration of 105 state and local pension plans in Massachusetts. This includes the three largest plans, covering teachers and state employees. All plans include an automatic post-retirement-escalator provision based on the change in the Consumer Price Index (CPI) subject to a maximum annual increase of 3 percent per year on the first $13,000 of the annual benefit. Notwithstanding the actual change in the CPI, each individual retirement board may grant increases up to 3 percent per year. The record indicates that for the past 22 years members of the respective state plans have regularly received the full 3 percent adjustment.

The Union notes that the automatic post-retirement adjustment provision under the Commonwealth's retirement system is far superior to the ad-hoc increase proposed by Local 589. For instance, the average annual benefit under the Massachusetts Teachers' Plan is $45,145. The annual increase on $13,000 equals $390; $390 each year is a 0.86 percent per year increase in the total average pension. Over the past six years the total pension has increased 5.2 percent - more than that proposed by the Union. Thus, the Union's proposal is supported in full by comparison to state and local practice.

The Union contends that its proposal is also supported by transit practice. Among the 20 major urban transit systems covering 60 percent of all transit workers in the nation, three have DC plans and information regarding post-retirement adjustments on two others was not available. Of the remaining 15 plans, 14 provide adjustments to existing retirees. Significantly, seven of the 14, provide annual adjustments under an automatic adjustment formula typically based on changes in the traditional CPI. (Washington is based on change in the active employee wage rate).

The Union further notes that, for state and local government retirement systems across the country, the evidence in support of providing a post-retirement adjustment is overwhelming. The NASRA survey of 100 public retirement systems found that all systems provided adjustments. Seventy-two percent of the plans call for annual automatic adjustments. The rest are ad-hoc. The Wisconsin Legislative Council survey of 87 public sector retirement systems reports that 96 percent provided post-retirement adjustments. Sixty-one percent were provided under automatic formulas; 22 percent were ad-hoc.

The Union finds the Authority's defense on this issue curious. That is, through the testimony of Mr. Zimmer "the CPI [used by the Union to measure the reduction in real pensions] overstates the change in the cost of living," they are apparently suggesting that the Arbitrator rely instead on one of the thousands of other iterations of the CPI published by the Bureau of Labor Statistics when measuring the change in the cost-of-living. However, in light of the Union's proposal, the whole argument is academic, and in the end, totally irrelevant. Based on Mr. Zimmers' Exhibit 25, the traditional CPI has risen 35 percent (through September 2021) since the last ad-hoc adjustment. After making his several "corrections" the index advances by 27 percent. The Union is proposing a measly 5 percent increase. Moreover, since the amendable date of the current Agreement (July 1, 2018), the so-called "corrected" CPI has gone up 6.5 percent. So what exactly is the point of the exercise? All the "overstatement" in the world will not erase the fact that real pensions have diminished and the Union has proposed only a partial remedy.

The Union shows all previous arbitrators hearing MBTA cases who have addressed this issue are unanimous in ruling that Factor (f) contemplates the use of the traditional CPI. Without belaboring the point we simply refer the Arbitrator to those decisions.

The Authority notes that, at the hearing, the Union acknowledged that this is their costliest proposal. Indeed, funding of the Union's COLA proposal imposes new costs on the Fund and increases unfunded liability. The proposal would cause pension costs to increase from 35% to 37% of pay, and the unfunded liability picture would worsen as the funding ratio would decrease from 53.5% to 51.6%. For this reason alone, the proposal should be rejected.

The Authority contends, moreover, the Union's attempt to characterize this as a mainstream proposal should be rejected. Citing to a study conducted by the National Association of State Retirement Administrators (NASRA), the Union sought to imply that all surveyed public retirement systems had a post-retirement adjustment. However, a full reading of the NASRA study relied upon by Mr. Roth is to the contrary. The NASRA Study (at Table 1) surveyed a select group of public plans that had different types of COLA provisions. However, there are many other public plans, not included in this group, that do not provide any COLA adjustments. And, even in the surveyed group of 100 plans, 23 plans rely upon ad-hoc COLA adjustments which is consistent with the Pension Fund's history.

In addition, the Authority notes that the NASRA study indicates that to help ensure the financial sustainability of their plans, many public pension plans are reassessing whether to provide COLA adjustments. The study states that as "part of efforts to contain costs and to ensure the sustainability of public pension plans, and in response to the recent period of historically low inflation, many states have made changes to COLA provisions." The NASRA study notes that: "Since 2015, the average of the prior ten years' increase in CPI-U has been at or below 2 percent…At present levels, inflation remains lower than the automatic COLA caps for most public pension plans." The study concludes: "As states consider measures to ensure the sustainability of their pension plans, for those currently retired, for those still employed, and for future generations of workers, policymakers are reexamining all aspects of benefit design and financing, including the way COLAs are determined and funded."

As for the Union's testimony regarding the COLA benefit for the Commonwealth's retirees, the Authority contends that three points are worth noting. First, that benefit is 3% (as opposed to the 5% proposed by the Union). Second, the 3% COLA is limited to the first $13,000 of the retirement allowance (whereas the Union's proposal does not have a cap). Third, and perhaps most importantly, the COLA for the Commonwealth's plan is pre-funded whereas the Union's proposal would require new funding. The Union also pointed to prior COLAs granted by the Pension Plan, but it must be emphasized that those were provided when the Plan was in good fiscal shape as opposed to the current high unfunded liability.

The Authority contends that the Union's proposal should be rejected.

Certainly, ad-hoc COLA adjustments are consistent with the Pension Fund's history. As the Union points out, they have been included in each Pension Agreement reached in the past 57 years. It is interesting timing for the NASRA study, showing that many public pension plans are reassessing COLA adjustments in light of recent low inflation. Undoubtedly, it would be wise for plans containing any type of automatic adjustments to reassess, if inflation is low. But that is not what these parties have, at this point in time. Inflation is once again present and impacting retirees in particular. Section 31(g) requires the arbitrator to consider changes in circumstance during the pendency of the arbitration proceedings and paragraph (f) requires consideration of the cost of living.

Even within the context of the trying times for the MBTA, the statutory factors compel at least a modest award of 3 percent. That amount is consistent with what the Commonwealth retirees receive. However, it would not be appropriate to introduce the concept of limiting the COLA to the first $13,000 of the retirement allowance. No such cap has existed under the Pension Agreement.

AWARD

The Union’s proposal to Amend Article IV by adding a new Section (13) to provide that all allowances under this plan (including normal, early, disability, vested and survivor annuities) in effect on June 30, 2018 shall be increased effective July 1, 2018 by five percent (5.0%) is awarded but the increase shall only be three percent (3%).

5. Definitions – Article I, Section 12

> *Amend Section (12)(b) by substituting the following: "For any plan year commencing on or after July 1, 2018, a Member's compensation taken into account under the fund for any plan year of the Fund shall not exceed $150,000, as adjusted in percentage terms from time to time by the Secretary of the Treasury in accordance with Section 401(a)(17)(B) of the Internal Revenue Code."*

The current maximum annual pensionable compensation is $200,000.

The Union contends that the current Agreement incorporates the "top-heavy" rule required of all qualified pension plans. As of 2018, under Section 401(a)17(B) of the Internal Revenue Code annual pensionable compensation cannot exceed $275,000. This is the maximum limit adjusted periodically by the IRS. The Union proposes to lower the maximum annual pensionable compensation to $150,000 as of 2018 subject to percentage increases by the IRS. This change would conform to the provisions of the Commonwealth's retirement system which limits pensionable compensation to 64 percent of the federal mandate.

The Union notes that this proposal affects very few members, but nevertheless saves 0.05 percent of payroll. The Authority did not respond to the Union proposal or otherwise mention the issue on the record. Therefore, the Union assumes it is non-controversial and will be awarded by the Arbitrator.

The Authority notes that the Union did not present a compelling reason in support of this proposal. Mr. Roth testified: "If we don't get it we don't care." Nothing more need be said. The proposal should be rejected.

When asked about the Union's intent in making this proposal, Mr. Roth testified more fully that:

> there have been illustrations in the past where certain executives of the MBTA who participate in the plan have had earnings at that level that have had massive pensions which have been reported in the press as illustrative of the, quote, 'ungenerosity,' unquote of this pension fund.
>
> We think that characterization is unfair based upon that exceptional level of the pension, and it's certainly not characteristic, as we know, of the typical pension received by a Local 589 member.

> So if there is something that we could do to limit that benefit and avoid the optics of having some exceptionally large benefit, we want to do it. That's our purpose.
>
> But, like I said in my direct, if we don't get it, we don't care. You know, it saves money. If you don't want to save money, fine. [Tr. 1067.]

The Union did offer an explanation in favor of this proposal with two parts. The first appears to be a public relations move, something not covered the factors arbitrators must consider. The second, however, has the legitimate purpose of saving money for the Fund.

AWARD

The Union proposal to amend Section (12)(b) by substituting the following: "For any plan year commencing on or after July 1, 2018, a Member's compensation taken into account under the fund for any plan year of the Fund shall not exceed $150,000, as adjusted in percentage terms from time to time by the Secretary of the Treasury in accordance with Section 401(a)(17)(B) of the Internal Revenue Code" is awarded.

The Union's proposal as to the term of the Pension Agreement.

6. Term – Article X

> *The pension agreement as changed and amended in accordance with the requests made herein shall be in effect for the period From July 1, 2018 to and including June 30, 2023 and, unless duly modified, for subsequent one-year periods, subject to change as provided in the agreement.*

AWARD

This proposal has been agreed to by stipulation.

Elizabeth Neumeier

Elizabeth Neumeier, Arbitrator
August 26, 2022