

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of the Interest Arbitration	:
	:
- between -	:
	:
Transport Workers Union, Local 106 (Transit Supervisors Organization),	:
	:
"TSO" or "Union"	:
	:
- and -	:
	:
MTA Bus Company	:
	:
"MTA Bus" or "The Company"	:
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Case No. TIA 2017-012

APPEARANCES:

For the Union

COLLERAN, O'HARA & MILLS L.L.P.

Denis A. Engel, Esq.

Transport Workers Union, Local 106

Robert Elznic, TSO Chairman, Transportation

Patrick Brennan, TSO Chairman, Maintenance

For the Employer

PROSKAUER ROSE

Neil H. Abramson, Esq.

Rosanne Facchini, Esq.

**BEFORE: CAROL A. WITTENBERG, CHAIRWOMAN OF THE PANEL
VINCENT MODAFFERI, PUBLIC EMPLOYEE PANEL MEMBER
CHARLES GLASGOW, PUBLIC EMPLOYER PANEL MEMBER**

The Parties are signatories to an expired Collective Bargaining Agreement. Negotiation and mediation efforts to agree upon a successor contract were unsuccessful. Consequently, pursuant to Section 209.5 of the Civil Service Law of the State of New York (the "Taylor Law"), the undersigned Panel was constituted to conduct hearings and render an Interest Arbitration Award to become effective June 8, 2013.

The Parties exchanged pre-hearing briefs on February 28, 2018 and appeared for hearing on March 12, 22 and 27, 2018. During the hearing, the Parties were represented by counsel and afforded the opportunity to present evidence and argument in support of their positions. At the conclusion of the hearings, the Panel requested the Parties jointly submit additional information, not directly contained in the record, necessary to evaluate the Parties' positions and render a just determination in this matter. The Parties' joint submission was submitted on November 9, 2018 and the record was then closed. These findings follow.

BACKGROUND

A. MTA Bus Company and the New York City Transit Authority

MTA Bus was created in September 2004 to facilitate the Metropolitan Transportation Authority's ("MTA") extension of its existing bus service, pursuant to an agreement with the City of New York ("City"), by providing service on routes that historically had been served by seven City-subsidized, franchised, private bus companies. A founding and continuing purpose for the establishment of the MTA is the development and implementation of a unified mass transportation policy for the twelve-county metropolitan commuter transportation district. Consistent with that purpose, MTA Bus was formed to help unify the fragmented bus service provided in Brooklyn, Queens and the Bronx and to improve the quality and efficiency of bus service in these areas. MTA Bus is responsible for both the local and express bus operations of

the seven private bus companies, consolidating their operations, maintaining current buses and purchasing new buses and adjusting schedules and route paths to better match travel demand.

The New York City Transit Authority ("NYCTA") is an affiliate of the MTA. Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA") is a subsidiary of the NYCTA. Together, the NYCTA/MaBSTOA maintain and operate all of the rapid transit lines (subway and elevated railroad lines) within the City, and also operate and maintain bus lines in all five Boroughs of the City.

B. The Transport Workers Union of America, Local 106, Transit Supervisors Organization

The consolidation of the operations of the private bus lines into MTA Bus began in January 2005 and was completed in February 2006. At that time, all first line maintenance supervisors were non-represented. First line transportation supervisors were non-represented at three locations, represented by TWU Local 100 at three locations and represented by the Amalgamated Transit Union, Local 1179 ("ATU Local 1179") at two locations.

In 2006, TSO petitioned the Public Employee Relations Board ("PERB") for recognition as the representative of all first line maintenance and transportation supervisors at MTA Bus. The certification proceeding lasted for several years, culminating in an agreement in December 2008 with MTA Bus recognizing TSO as the representative for approximately 280 maintenance and transportation supervisors, which included all except those located at the two locations represented by the ATU Local 1179. As part of the agreement, TSO assumed responsibility for negotiating the 2006-2009 round of bargaining for those first line transportation supervisors formerly represented by TWU Local 100. All former non-represented first line maintenance and transportation supervisors received all managerial wage increases and benefits through 2008.

C. The MTA Bus – TSO Initial Contract/Prior Round of Bargaining

In 2014, MTA Bus and TSO settled on an initial contract covering two bargaining rounds: (i) April 1, 2006 through March 31, 2009, which applied only to the former TWU Local 100 transportation supervisors; and (ii) April 1, 2009 through June 7, 2013, which applied to the entire bargaining unit. Prior to the initial contract, the terms and conditions of employment for the former TWU Local 100 transportation supervisors and the rest of the unit remained in status quo since 2006 and 2009, respectively. This long period without an increase in the hourly wage resulted in a compression irregularity between TSO members and the employees they supervised. The initial contract remedied much of these wage compression concerns.

D. The Bargaining Pattern for the 2012-2017/Current Round of Bargaining

Prior to the MTA Bus –TSO initial agreement in 2014, NCYTA/MaBSTOA and TWU Local 100 reached an agreement for the 2012-2017 round of bargaining; the net cost was 7.5%.

In 2015, MTA Bus and TWU Local 100 entered into an agreement that provided for retroactive and prospective wage increases and improvements to benefits and other working terms, the cost of which were primarily funded by increased health care contributions and wage progression provisions. This agreement was patterned after and conformed to the cost of the NYCTA/MaBSTOA-TWU Local 100 agreement in all significant respects, except it provided that the Parties were to enter final and binding arbitration to determine any appropriate contractual pension benefit enhancement.

In 2016, the pension benefit issue was presented to Arbitrator Howard Edelman. The Company took the position then that any pension benefit enhancement must be fully funded consistent with the established bargaining pattern. TWU Local 100 acknowledged the confines of the pattern, but took the position that its members were entitled to pension parity with their

counterparts at NYCTA/MaBSTOA. In his Decision and Award, Arbitrator Edelman determined that the appropriate pension enhancement would effectively exceed the established pattern. To preserve the sanctity of the pattern while simultaneously enhancing the pension benefit, Arbitrator Edelman directed the parties to negotiate savings to account for the above-pattern expense. Following the award, the parties negotiated and entered into agreements concerning consolidation of certain bus service operations and other items between the MTA Bus-TWU Local 100 and NYCTA/MaBSTOA-TWU Local 100 units to generate savings to fund the pension benefit enhancement. These agreements ultimately conformed the MTA Bus - TWU Local 100 contract to the overall NYCTA/MaBSTOA-TWU Local 100 bargaining pattern.

In the wake of Arbitrator Edelman's ruling both TSO and ATU Local 1179 petitioned for referral to a public arbitration panel. The MTA Bus-ATU Local 1179 arbitration was presented to a panel chaired by Arbitrator Stanley L. Aiges and docketed as Case No. TIA 2017-014 (M 2016-252). Following hearings in that matter, the panel engaged the parties in additional mediation efforts in light of arguments made indicating the viability of a mutually agreeable resolution. The mediation efforts, which were expanded to include the participation of Amalgamated Transit Union, Local 1181 ("ATU Local 1181"), resulted in a proposed term sheet that was ultimately awarded by the panel. The provisions set forth in that award were again patterned after and conformed to the cost of the NYCTA/MaBSTOA-TWU Local 100 agreement in all significant respects, except it provided that the parties were to account for the above-pattern cost of the sought after pension enhancement by achieving savings through certain bus service consolidation between the ATU Locals at MTA Bus and NYCTA/MaBSTOA or, if consolidation was unsuccessful, through an extension of the term of

the of the agreement. In other words, similar to the MTA Bus-Local 100 matter, the award in the ATU Local 1179 and, by extension Local 1181, matter preserved the sanctity of the pattern while simultaneously enhancing the pension benefit by creating a framework the parties could utilize to generate savings needed to fund the sought after enhancement.

POSITION OF THE PARTIES

Union

TSO advances a strict parity argument in support of its position for significantly enhanced wages and pension benefits. TSO contends that at no point in the Hearing did the MTA Bus Company refute any of the arguments advanced by the TSO as far as the lack of parity with other identically situated supervisors is concerned. In summary, TSO argued that people who are performing the same work, in the same locale, for the same Public Authority should be paid the same rates of pay with the same benefits and working conditions as others similarly situated. These arguments are, in TSO's view, persuasive to the point of self-evident under the terms of the statute.

The Union summarized the argument set forth by the MTA Bus as follows: once a contractual "pattern" is set, other bargaining units are constrained in that their contracts must fit within the parameters of that economic envelope. No other factor is to be considered – one might say "religious" adherence to pattern is all that matters to MTA Bus.¹

According to the Union, nowhere in the statute governing this Hearing is the word "pattern" mentioned. Of course, the last statutory factor, the "catch-all" normal and customary

¹ It should be noted that the Union's position is that the initial round of bargaining resulted in a contract that exceeded the pattern.

considerations element, is where MTA Bus finds it “pattern” rationale. TSO contends that the Company purposefully and without justification ignores the very specific factors set forth in the law – effectively reading them out of the statute – and holds that the only factor that matters is a pattern previously set by *other* bargaining units, without any consideration of the unique circumstances of the bargaining unit sitting before them.

The Taylor Law Impasse Procedure statute relevant to this dispute provides as follows:

Section 209(5)(d):

... in addition to other relevant factors ...

(i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York city or comparable communities;

The statute says that where sets of employees perform “similar work” that fact must weigh in favor of the same pay and benefits for the employees who perform such similar work. Here the work is *identical* and no one can credibly argue that it is different. This factor is, according to the Union, entirely on the side of TSO.

The second factor is:

(ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

This factor also favors the position taken by TSO, it maintains, in that the items listed are, in their totality, *less* than the total compensation paid to other identically situated workers – that is to say – there is no “hidden” benefit for working at MTA Bus versus working at NYCT/MaBSTOA.

The third factor is:

(iii) the impact of the panel's award on the financial ability of the public employer to pay, on the present fares and on the continued provision of services to the public;

The Union states that the moderate increases their members seek would have absolutely no impact whatsoever on the ability of MTA Bus to pay them. It may impact the subsidy that the City of New York must pay, but the statute does not ask about what a third party has to pay – it asks whether the *employer* has the ability to pay. In this case, MTA Bus clearly has the ability to pay the moderate demands of the TSO, especially given the relatively small bargaining unit involved herein.

The next part of the statute requires an examination of the impact of the increases sought on “present fares” – and once again the answer is that it will have no impact at all. The entire MTA is slated for fare increases of 4% - as part of its now routine schedule – regardless of these insignificant (in the context of the entire MTA expenditures) demands.

Lastly, the statute requires an inquiry into the “continued provision of services to the public . . .”

The modest demands made by TSO, the Union argues, will not have an impact on MTA Bus’ bottom line or on its ability to provide services to the public.

The fourth statutory factor is:

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

The CPI for the period July 2012 to March 2017 has been historically low, (around 7.0%), which is matched by very modest wage increases (totaling 8.0%).

The fifth statutory factor is:

(v) the interest and welfare of the public;

In the context of the MTA's approximately \$15.1B operating budget, the difference between the demands made by the TSO and the offer made by MTA Bus is extremely small, to the point of non-existent. The "impact on the interest and welfare of the public" were the TSO to prevail would be similarly small to non-existent.

It should be noted, the Union argues, that none of these arguments were refuted in any effective way by MTA Bus.

The last statutory factor is:

(vi) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits and other working conditions in collective negotiations or impasse panel proceedings.

This is where the MTA Bus' "pattern" argument goes. As noted above, the statute doesn't actually use the word "pattern", but the perceived wisdom is that "pattern" is what is meant. TSO does not deny what the pattern is – the Union simply denies that it applies to them under these unique circumstances.

Company

MTA Bus argues that the law and fundamental principles of labor relations require that the cost of the award for this contract cannot exceed the cost of the bargaining pattern established by TWU Local 100, enforced by Arbitrator Edelman and now followed by Arbitrator Aiges. MTA Bus submits that it negotiated the initial contract/prior round with the TSO under those parameters MTA Bus achieving substantial long-term cost savings to meet this standard. MTA Bus notes that the contract was signed after the NYCTA/MaBSTOA-TWU Local 100 pattern

was set for the current round of bargaining. Thus, according to MTA Bus, TSO entered into its initial contract with an understanding of the pattern they were expected to conform to in the next/current round.

Since it has been an absolute imperative for MTA Bus that any final agreement must be consistent with the established bargaining pattern, MTA Bus proposed increased health care contributions and wage progression provisions, which were the primary cost saving items that funded the MTA Bus-TWU Local 100 agreement. MTA Bus submits that the savings that could be generated from such items would bring the Parties slightly below pattern, but would not resolve TSO's demands for the costly pension benefit enhancement awarded by Arbitrator Edelman or the other benefit improvements that TSO proposed.

MTA Bus submits that given the substantial above-pattern cost of TSO's demands, the Panel must deny TSO's unfunded demands outright. Alternatively, MTA Bus submits that the Panel must, as Arbitrator Edelman and Arbitrator Aiges have done, direct that the Parties account for any funding gap in the context of the subsequent round of bargaining.

What follows is the Panel's AWARD, with Opinion to follow:

AWARD

Case No. TIA 2017-002

1. Term

On a non-precedential basis, this Agreement shall continue in full force and effect from June 8, 2013 through August 31, 2018.

The Panel recognizes that there is a funding gap that must be accounted for in the context of the subsequent round of bargaining. In the event the parties are unable to mutually agree on terms to resolve the funding gap, the terms of the agreement will be extended four (4) months and continue in full force and effect through December 31, 2018 to fully and completely resolve the funding gap.

2. General Wage Increases

The wage rates for employees represented by the Union shall be increased as follows:

<u>Effective Date:</u>	<u>Increase:</u>
June 8, 2013	1.0%
June 8, 2014	1.0%
June 8, 2015	2.0%
June 8, 2016	2.0%
June 8, 2017	2.0%

3. Wage Progression

Employees hired or promoted into a supervisory title subsequent to issuance of an Award in TIA 2012-012 shall progress to top rate of pay according to the following schedule:

1 st year	88% of top rate
2 nd year	90% of top rate
3 rd year	90% of top rate
4 th year	92% of top rate
5 th year	94% of top rate

The parties acknowledge and agree that employees who are not currently at the top rate of pay will be grandfathered into the terms of the wage progression they were in when they were hired/promoted. The parties further agree that in no event will an employee who is hired/promoted after issuance of an Award in TIA 2012-012 remain on the progression scale for more than five (5) years.

4. Pension Benefit

Employees represented by the Union shall receive the identical pension benefit as employees of MTA Bus represented by TWU Local 100, with full retroactivity, including, without limitation, the increase in the rate of the employee contribution.

5. Health Benefits

A. Active employees covered by an Award in TIA 2012-012 who are enrolled in the MTA Bus TWU Local 100 medical and prescription drug benefit package or who opt-out of medical and prescription drug coverage will contribute 2% of their bi-weekly gross wages. Employees who are enrolled in NYSHIP shall make employee contributions under the same terms and conditions that apply to managerial employees at MTA Bus. All contributions shall be on a pre-tax basis.

B. Dental Benefits – The parties agree to amend the dental package for current MTA Bus supervisors and current and future retirees receiving the New York City Transit TSO, Local 106 Dental Plan, as set forth in Attachment A. The Company shall be obligated to maintain the level of benefits set forth therein. The new plan will be subject to the Company's procurement process. The current Dental Plan shall remain in effect pending the completion of the procurement and implementation process for the new provider for the new plan. It is anticipated that the new Dental Plan will be in place by the end of the first quarter of 2019.

C. Vision Benefits – The parties agree to amend the vision package for current MTA Bus supervisors and future retirees receiving the New York City Transit TSO, Local 106 Vision Plan, as set forth in Attachment B. The company shall be obligated to maintain the level of benefits set forth therein. The new plan will be subject to the Company's procurement process. The current Vision Plan shall remain in effect pending the completion of the procurement and implementation process for the new provider for new plan. All current retirees as of the date of issuance of an Award in TIA 2012-012 receiving vision benefits shall maintain their current vision package. It is anticipated that the new Vision Plan will be in place by the end of the first quarter of 2019.

D. Dental & Vision Benefits – Incumbent employees currently participating in the managerial dental and vision benefit programs pursuant to Section 5(D)(1) and (3) of the September 15, 2014 Memorandum of Understanding shall now participate in the New York City Transit TSO, Local 106 Dental and Vision Plans as amended and set forth in Attachments A and B. This provision shall become effective when the new Dental and Vision Plans are in place. Until such time, employees shall continue to participate in the managerial programs.

E. The Company will increase the line of duty death benefit to \$250,000.00.

6. Vacation

Effective the date of issuance of an Award in TIA 2012-012, one fifty-second vacation pay shall be eliminated. Vacation shall be paid on the basis of eight (8) hours per day for all

employees represented by the Union.

7. Single Day Vacation

Article 23, Paragraph Q of the Agreement shall be amended to provide that employees shall be permitted to either take up to two (2) weeks of their annual vacation in single days, to cash in up to two (2) weeks of their vacation allowance, or take one (1) week in single days and one (1) week in cash. Additionally, the requirement that employees must be eligible for 5 weeks of vacation to be eligible for single days shall be eliminated. All other provisions of Article 23(Q) shall remain in effect.

8. Sick Leave

The following provisions are effective the date of issuance of an Award in TIA 2012-012 unless otherwise specified:

- A. Effective with the 2020 sick leave year, Article 18, Paragraph A of the Agreement shall be superseded and replaced as follows:*

Subject to the limitations hereinafter set forth, the Company will grant to every employee, who shall have been in the employ as a supervisor for at least one (1) year at the beginning of the sick leave year, sick leave with pay on each working day when he/she is unfit for work on account of illness, up to a total in any one year, of ten (10) days plus the number of days remaining in the employee's bank from the previous years. However, if an employee has used two (2) days or less of sick leave in the previous sick leave year, that employee shall be granted an additional two (2) days of sick leave with pay, up to a total of twelve (12) days for that subsequent sick leave year. There shall be no limitation on the number of days an employee can accrue in his/her sick bank.

- B. Article 18, Paragraph B shall be superseded and replaced as follows:*

Subject to the limitations hereinafter set forth, the Company will grant to every employee in his/her first calendar year as a supervisor, sick leave with pay on each working day when such employee is unfit for work on account of illness, up to a total of one (1) day per calendar month during which, or the major part of which, the employee shall have been in such employ, through December 31st of that year, not exceed ten (10) days. On January 1st of the subsequent year, the Company will grant an employee sick leave with pay on each working day he/she is unfit for work on account of illness, up to a total of ten (10) days plus the number of days remaining in the employee's bank from the previous year.

- C. Article 19, Paragraphs A and B of the Agreement shall be amended to provide to be eligible to receive additional sick leave, an employee must be eligible for an allowance of ten (10) days of sick leave pay in said sick leave year.*
- D. Article 20, Paragraph D of the Agreement shall be amended to provide that the sick leave advancement for new promotes shall not exceed ten (10) days.*

9. AVA Days

The maximum bank for AVA days shall be increased to eight (8) days.

10. Bereavement Leave

Article 40 of the Agreement shall be amended to include step-children.

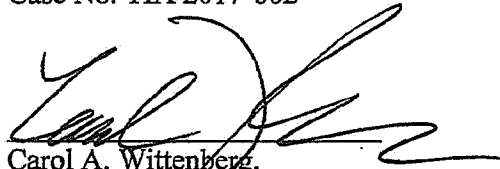
11. Longevity Pay

Longevity pay shall be eliminated effective the date of issuance of an Award in TIA 2012-012. Employees currently receiving longevity pay shall receive a pro-rated longevity payment for time accrued from November 1, 2017 through the date of issuance of an Award in TIA 2012-012.

12. Education Expense Reimbursement

Effective the date of issuance of an Award in TIA 2012-012, all TSO, Local 106 supervisors will be covered under the Company's policy Instruction/Procedure on Education Expense Reimbursement, as may be amended at management's discretion.

TSO/MTA Bus
Case No. TIA 2017-002



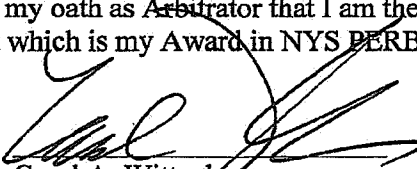
Carol A. Wittenberg,
Chairwoman of the Panel

Dated: December 21, 2018

State of New York)
) s.:
County of New York)

I, Carol A. Wittenberg, do hereby affirm upon my oath as Arbitrator that I am the individual described herein who executed this instrument which is my Award in NYS PERB Case No. TIA 2017-002.

Dated: December 21, 2018



Carol A. Wittenberg,
Chairwoman of the Panel

Concur ☒
Dissent ☐

TSO/MTA Bus
Case No. TIA 2017-002

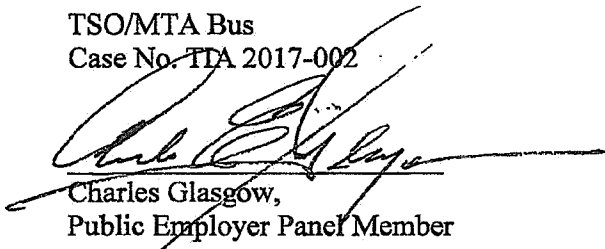


Dated: December 28, 2018

Vincent Modaferrì, *modaferrì*
Public Employee Panel Member

Concur ☒
Dissent ☐

TSO/MTA Bus
Case No. TIA 2017-002



Charles Glasgow,
Public Employer Panel Member

Dated: December 17, 2018