MUNICIPAL TRANSPORTATION AGENCY
OF THE CITY AND COUNTY OF SAN FRANCISCO
IN INTEREST ARBITRATION PROCEEDINGS
PURSUANT TO CHARTER SECTIONS A8.409 AND 8A.104 (n)

Transport Workers, AFL-CIO, Local 200 Union	/	
	/	OPINION AND AWARD
and	/	
The Municipal Transportation Agency of the City and County of San Francisco Employer	/	

Board Members

Christopher D. Burdick:	Neutral Chairperson
Tom McQueen:	Union Member
Derek Kim:	Agency Member

Appearances

On Behalf of The Union:	On Behalf of the Employer
Benjamin Lunch, Esq.,	Joseph Lake, Esq.,
Neyhart, Anderson, Flynn & Grosball	Deputy City Attorney,
369 Pine Street, # 800	1390 Market Street, 5th Floor
San Francisco, CA, 94104	San Francisco, CA, 94103

INTRODUCTION

The impasse between the parties came on for interest arbitration hearings on May 14 and 18, 2019, at 1 South Van Ness Avenue, San Francisco, pursuant to Sections A8.409-4 and 8A104 (n) of the Charter ("Charter") of the City and County of San Francisco ("City").

Christopher D. Burdick, an attorney at law and arbitrator/mediator, had been previously agreed upon by the parties to act as the neutral Chairperson of the Arbitration Board. Janie Richardson, Esq., was appointed by the Municipal Transportation Authority of the City and County of San Francisco ("Agency" or "MTA") as its Board member. Upon Ms. Richardson becoming unavailable, the Agency appointed Derek Kim as its panel member. Thomas McQueen, of Transport Workers Union, Local 200, AFL-CIO ("TWU", "Local 200" or "The Union") was selected by the Union as its Board Member.

The MTA was represented at the hearing by Joseph Lake, Deputy City Attorney. The Union was represented by Benjamin Lunch, Esq., of Neyhart, Anderson, Flynn & Grosball. The hearing was recorded by a Certified Shorthand Reporter, and the parties were afforded the full opportunity to present and call witnesses, to cross-examine the witnesses of the other party, and to present evidence and arguments in support of their positions.

The evidentiary hearing concluded on May 14. On May 16 the parties submitted their Last, Best and Final Offers ("LBFO") on the extant issues still in dispute [1], and on May 18 the parties made closing oral arguments and presentations and entertained questions from the Panel, at which time the matter stood submitted for decision. After the Chair circulated his first draft of a proposed award on May 20, the Agency then requested further mediation, and so the parties met on May 21 for a full day of mediation with the Panel. At the conclusion of that mediation, the parties reached an agreement on some of the issues addressed in the proposed award, while remaining in dispute over a few others. The mediated agreement which the parties reached on certain issues (e.g., lead worker pay) were different than the last best and final offers of both parties, and in the discussion below we describe which disputed issues resulted in a mediated agreement on May 21 and those which were left to the panel for resolution. The Award is set forth below, with the description of the position and contentions of the parties on those major items on which they felt an express concurrence or dissent (without any description thereof beyond a simple "Concur" or "Dissent") was required, as well as on the major, remaining disputed issues, upon which a mediated agreement had finally been reached.

I

ISSUES

In mediation and at the commencement of, and during, the arbitration hearing, the parties had been able to arrive at tentative agreements on some matters which had been unresolved up to arbitration. The parties did agree on a Term of three-years, from July 1, 2019-June 30, 2022 and on a Wage package for those three years.

[1] These submissions were made electronically and each item upon which an LBFO was made was thoroughly supported by arguments and contentions referring to the specific provisions of the Charter and of the evidence which the Union or the Agency contended supported its position. These were truly excellent, very helpful submissions, for which the Panel was quite thankful

At the conclusion of the evidentiary hearing and the subsequent May 21 mediation, the following matters were submitted to the Board for final and binding, arbitral resolution:

(1) Equity Increases for Classes 9139, 9140 and 9141; and,

(2) Compensatory Time Off ("CTO") Caps and Limitations; and,

(3) Grievance Procedure Revisions; and,

(4) Overtime Sign Up Cancellations and Withdrawals.

II

LAST, BEST, AND FINAL OFFERS/DEMANDS OF THE PARTIES

After conclusion of the evidentiary hearing and the May 21 mediation, the LBFO of the parties on the four remaining disputed Issues (described in Part I, *supra*, and more fully hereinafter) were submitted to the Panel on May 16, as follows:

UNION PROPOSALS

The Union made two proposals which did not result in agreement with MTA and which it presented to the Panel for resolution.

1) Wage equity adjustment (9139): A 2.5% wage equity adjustment for Class 9139, divided into 12 quarters and applied quarterly to the base wage rates starting July 1, 2019. This would represent an additional 0.20833% quarterly wage increase.

2) Wage equity adjustment (9140, 9141): A 2.5% wage equity adjustment for Classes 9140 and 9141, divided into 12 quarters, and applied quarterly to the base wage rates starting July 1, 2019. This would represent an additional 0.20833% quarterly wage increase.

MTA PROPOSALS

MTA made a large number of complex proposals, some interrelated, which did not result in an agreement with the Union and which, after the May 21 mediation, it presented to the Panel for resolution.

1) Grievance Procedure and Implementing Discipline

59. Pre-Discipline Due Process Rights (Skelly Meeting)

Employees shall be entitled to a Skelly meeting prior to discipline being imposed. During the Skelly meeting an employee shall be entitled to:

- A notice of the proposed action;
- The reasons for the proposed discipline;
- A copy of the charges and the materials upon which the action is based; and
- The right to respond, either orally or in writing, to the authority initially bringing charges.
- ~~SFMTA retains the right to implement discipline upon completion of Step 2 of the grievance procedure in this Article or, if no grievance is initiated within that time, twenty (20) days after the post-Skelly notice.~~
- The SFMTA Employee Labor Relations section shall conduct Skelly meetings.

2) Overtime Compensation and Comp Time, Limits on Accrual of CTO

205. a. Employees occupying Fair Labor Standards Act ("FLSA") exempt positions, including positions designated by the CITY as "Z" classifications in the Annual Salary Ordinance, shall not be paid for overtime worked but shall be

granted compensatory time off at the rate of one and a half times the hours worked, only if the overtime worked has been approved in advance.

xx. **b. Effective July 1, 2020, a "Z" classified employee shall not maintain a balance of more than one hundred and sixty (160) hours of compensatory time. Effective July 1, 2020, a "Z" classified employee may carry forward one hundred and twenty (120) hours of earned but unused compensatory time into the next fiscal year.**

xx. **c. Any "Z" designated employee with more than one hundred and sixty (160) hours of accrued compensatory time on July 1, 2020 may maintain their balance of accrued compensatory time, but shall not earn additional compensatory time until their balance of accrued compensatory time is less than one hundred and sixty (160) hours.**

206. **d.**~~b.~~ Employees covered by the FLSA (non-Z) who are required to work overtime shall be paid at a rate of one and one-half times the regular base rate, unless the employee and the Appointing Officer mutually agree that in lieu of paid overtime, the employee shall be compensated with compensatory time off.

207. **e.**~~c.~~ No Appointing Officer shall require an employee not designated by a "Z" symbol in the Annual Salary Ordinance to work overtime when it is known by said Appointing Officer that funds are legally unavailable to pay said employee, provided that an employee may voluntarily work overtime under such conditions in order to earn compensatory time off at the rate of time and one-half, pursuant to the provisions herein. NOTE: Clarify Language.

208. **f.**~~d.~~ Compensatory time shall be earned at the rate of time and one half. Employees occupying non-"Z" designated positions **may not earn more than one hundred and twenty (120) hours of compensatory time in a fiscal year and** shall not accumulate a balance of compensatory time earned in excess of 240 **one hundred and twenty (120)** hours. ~~calculated at the rate of time and one half.~~ **Any non-Z designated employee with more than one hundred and twenty (120) hours of accrued compensatory time on July 1, 2019 may maintain**

their balance of accrued compensatory time, but shall not earn additional compensatory time until their balance of accrued compensatory time is less than one hundred and twenty (120) hours.

xx. x. A non-"Z" classified employee who is appointed to a position in another department shall have the employee's entire compensatory time balance paid out at the rate of the underlying classification prior to appointment.

xx. x. A non-"Z" classified employee who is appointed to a position in a higher, non-"Z" designated classification or who is appointed to a position in a "Z" designated classification shall have the employee's entire compensatory time balance paid out at the rate of the lower classification prior to promotion.

xx. x. Subject to availability of funds, a non-"Z" classified employee, upon the employee's request, shall be able to cash out earned but unused compensatory time; approval of the cash out is at the discretion of the appointing officer.

209. **x.**~~e.~~ Employees working overtime during premium pay time shall receive overtime pay based on the premium rate.

210. **x.**~~f.~~ Non-emergency overtime shall be distributed equitably among employee(s) who have current experience in and capacity for the work required, and who indicate their willingness to participate in such work.

211. **x.**~~g.~~ Overtime Earned ("O.E."). When an employee covered by this CBA is transferred from one group to another within **the** Department, the accumulated "overtime earned" time shall be transferable by the employee to be used in his or her new position.

3) Non-emergency Overtime and Regular Day Off Withdrawal

59. f. Non-emergency overtime shall be distributed equitably among employee(s) who have current experience in and capacity for the work required, and who indicate their willingness to participate in such work. **If an employee who has been assigned the employee's requested non-emergency overtime work needs to withdraw from the assignment after the schedule has been posted, the employee shall promptly notify the Senior Operations Manager or designee. If the employee's notice is less than three hours before the employee's requested non-emergency overtime work, then the employee will go to the bottom of the list for the employee's following five (5) regularly scheduled work days in which overtime is requested, unless the Senior Operations Manager or designee determines that the employee's reason for withdrawal is justified under the circumstances.**

222. a. **Employees** ~~Supervisors~~ shall be offered RDO overtime by equal rotation.

223. b. **Employees** ~~Supervisors~~ requesting work shall submit request for work form no later than 48 hours prior to day desiring to work.

224. c. The RDO overtime log shall be kept up to date detailing requests and shifts worked. The overtime log will be posted and a copy sent to Local 200.

225. d. Employees requesting 6th day of work on RDO will be given priority in the same group over employees requesting 7th day of work.

226. e. Rotations shall be computed on a sign-up to sign-up basis and include all 9139's in that section. All work in sections will be rotated.

` 227. f. All personnel in a section who indicate their willingness to work RDO overtime shall be trained in each different aspect of the group policies, type of work and shifts, including special events. Training will take place commencing with the 9139 General Sign-up or within ninety (90) days.

` 228 g. **An employee who requested** ~~Supervisors requesting~~ to work a type of RDO work and later**, before the schedule has been posted, refuses** ~~refusing~~ to work the shift offered within that time frame shall go to the bottom of the list for that type of work, i.e., night work, special events, etc. **If an employee**

who has been assigned the employee's requested RDO work needs to withdraw from the assignment after the schedule has been posted, the employee shall promptly notify the Senior Operations Manager or designee. If the employee's notice is less than three hours before the employee's requested RDO work, then the employee will go to the bottom of the list for the current pay period and following pay period in which RDO work is requested, unless the Senior Operations Manager or designee determines that the employee's reason for withdrawal is justified under the circumstances.

229. h. No overtime work shall be assigned to a person in another section if there are people in that section willing to work.

230. i. These procedures are intended to cover the equal opportunity for RDO overtime work. The appropriate logs shall be kept for each type of work. No **employee** ~~supervisor~~ shall be moved to the bottom of the list for refusing to work any shift other than that in the time frame requested.

231, j. The Department can fill any shift of five (5) or more hours but less than eight hours in its sole discretion. In the event that the shift is to be filled from the RDO, such opportunities shall be distributed equally and fairly.

III

MEDIATED AGREEMENTS

As noted above, at the May 21 mediation the parties reached agreement on a number of issues which had theretofore been in dispute and upon which the Chair had drafted an initial, first award. These agreements (which may have deviated from the parties LBFO thereon but which were the fruits of mediation and which the Panel approves as such) are as follows:

1) **WAGES –** Following mediation, the parties have agreed that all employees in the bargaining unit will receive the following wage increases on the dates noted:

Effective July 1, 2019: 3.0 %

Effective December 28, 2019: 1.0 %

Effective July 1, 2020, represented employees will receive a base wage increase of 3.0%, except that if the March 2020 Joint Report, prepared by the Controller, the Mayor's Budget Director, and the Board of Supervisors' Budget Analyst, projects a budget deficit for fiscal year 2020-2021 that exceeds $200 million, then the base wage adjustment due on July 1, 2020, will be delayed by approximately six (6) months, to be effective December 26, 2020.

Effective December 26, 2020, represented employees will receive a base wage increase of 0.5%, except that if the March 2020 Joint Report, prepared by the Controller, the Mayor's Budget Director, and the Board of Supervisors' Budget Analyst, projects a budget deficit for fiscal year 2020-2021 that exceeds $200 million, then the base wage adjustment due on December 26, 2020, will be delayed by approximately six (6) months, to be effective close of business June 30, 2021.

Effective July 1, 2021, represented employees will receive a base wage increase of 3.0%, except that if the March 2021 Joint Report, prepared by the Controller, the Mayor's Budget Director, and the Board of Supervisors' Budget Analyst, projects a budget deficit for fiscal year 2021-2022 that exceeds $200 million, then the base wage adjustment due on July 1, 2021, will be delayed by approximately six (6) months, to be effective January 8, 2022.

Effective January 8, 2022, represented employees will receive a base wage increase of 0.5%, except that if the March 2021 Joint Report, prepared by the Controller, the Mayor's Budget Director, and the Board of Supervisors' Budget Analyst, projects a budget deficit for fiscal year 2021-2022 that exceeds $200 million, then the base wage adjustment due on January 8, 2022, will be delayed by approximately six (6) months, to be effective close of business on June 30, 2022.

2) **LEAD WORKER PAY** The parties agreed to an increase of twenty-five cents per hour ($.25 per hour) from the current One-Dollar and Fifty Cents per hour ($1.50 per hour) to One-Dollar and Seventy-Five Cents per hour ($1.75 per hour). This increase meets all relevant Charter criteria (*i.e.*, the CPI, internal and extra comparability, and the MTA's financial state) and is approved by the Panel.

3) Conditions of Assignment, 3-year VTP, and VTP for 9136s

As a result of the May 21 mediation, the parties withdrew, modified, re-proposed, and finally agreed upon the following language in regards to assignment of work, bidding on shifts, hours, and days off. This mediated agreement included the Agency's withdrawal of its Proposals to remove Class 9160 from the annual VTP and on console rotation. The Panel believes that the language set forth below meets most of the relevant Charter criteria, including efficiency and the safe and effective operation of the Municipal Railway, the health and safety of employees, internal and external comparability, and the Agency's financial ability to pay. The language set forth below is therefore approved and adopted:

II. C. ASSIGNMENT OF WORK

A. Assignments

For the purpose of this Agreement, "assignment" shall mean the designation of a 9139 **or 9136** employee to a specific position or set of responsibilities at a designated division or work location.

. SFMTA shall assign employees based on the employee's training, experience, documented strengths or weaknesses, seniority, special skills, compliance with applicable .law, and SFMTA's assessment of its staffing needs.

B. Initial Assignment

For the purpose of this Agreement, "initial assignment" shall mean "the designation of a newly appointed 9139 employee to a specific position or responsibility within a division or work location for a period of time not less than one hundred eighty (180) working days." Effective the first weekday after a newly appointed 9139 employee has completed SFMTA training and has met all regulatory requirements, including all licenses and medical certifications, SFMTA shall place each 9139 employee in an initial assignment at

Street Operations. After successful completion of the initial assignment, the 9139 employee may participate in the Employee-Initiated Change of Assignment described in Section C. below.

The entirety of paragraph 85, including the one hundred eighty (180) working days initial assignment set forth in the preceding paragraph, shall be suspended for the term of this Agreement.

~~85B. Within thirty working days of ratification of this Agreement, the Initial Training Program for 9139 new hires, shall be referred to the Joint Labor Management Committee (JLMC) as outlined in Section II.G on this Agreement.~~

C. Change Of Assignment

For the purpose of this Agreement, a "change of assignment" shall mean a change in a 9139 **or 9136** employee's assignment as defined in Section A. Changes of assignment can be either an Employee-Initiated Change of Assignment or an SFMTA-Initiated Change of Assignment.

1. Employee-Initiated Change Of Assignment

If SFMTA determines to fill a vacancy, it shall post the assignment, place a notice on the SFMTA Intranet, post on the bulletin board in facilities where 9139s **or 9136s** are assigned, and send an email to the TWU Local 200 Executive Board members at the email address on record ten (10) working days before selecting an employee to fill the vacancy. For purpose of this Agreement, a "vacancy" refers to an open 9139 assignment within Transit Operations **or an open 9136 assignment in Training**.

In selecting an employee to fill vacancies in a 9139 **or 9136** assignment, including employees within the **9139 or 9136** classification who have requested ~~a~~ **an** employee-initiated change of assignment within the**ir** classification, SFMTA shall ~~consider the criteria listed in paragraph D. below for each assignment, and~~ select the

employee on the basis of qualifications and skills. **Conditions of assignment shall be listed in the assignment posting bulletin and shall be consistent with the 9139 or 9136 job classification.** ~~However,~~ If two or more employees for the vacant assignment are equally qualified, SFMTA shall select the employee with the greatest seniority.

2. SFMTA-Initiated Change Of Assignment Within 9139 **or 9136** Classification

. SFMTA may initiate a change of assignment of employees within the 9139 **or 9136** classification. If SFMTA determines to fill a vacancy, posts the vacancy for ten (10) days, and no employee requests a change of assignment to the vacancy, SFMTA shall assign the least senior qualified 9139 **or 9136** employee to the vacancy.

. ~~The qualifications and skills required for specialty shall be those described in the following paragraphs.~~ *SFMTA will provide training to all affected employees in order to maintain all conditions of assignment.* **As a condition of assignment or change of assignment,** *each employee remains solely responsible for attending* **training** *and satisfactorily completing all conditions of assignment. In addition, each employee shall submit a validated copy of any required certificate(s), license(s), or other documentation to SFMTA.*

xx. *Failure to meet the ~~requirements of this section~~* **conditions of assignment** *will result in reassignment ~~to a non-schedule making assignment~~ in the affected employee's classification.*

1. ~~Condition Of Assignment Of 9139 To Training~~

~~As a condition of assignment to training, employees shall obtain and maintain all regulatory requirements, including all licenses or medical certifications required to train operators on the equipment to which operators are assigned.~~

- SFMTA will provide training to all affected employees in order to maintain all regulatory requirements required to train operators on the equipment to which operators are assigned. Each employee remains solely responsible for attending and satisfactorily completing all regulatory requirements, including all licenses, medical certifications, and training. In addition, each employee shall submit a validated copy of any required certificate(s), license(s), or other documentation to SFMTA.

- Failure to meet the requirements of this section will result in reassignment to a non-training assignment in the affected employee's classification.

2. Condition Of Assignment Of 9139 To Schedule Maker

- As a condition of assignment to schedule maker, employees shall demonstrate proficiency in Trapeze or current scheduling software, payroll systems, and mapping programs; demonstrate ability to develop and validate transit route schedules; demonstrate ability to coordinate schedules with other groups such as operations planning, operations, and vehicle maintenance; demonstrate ability to create detailed and efficient schedules based on operations planning service needs by applying work rules, hours of service, ridership and other data; demonstrate mathematical aptitude, spatial aptitude – i.e., ability to estimate driving time for streets and distances; demonstrate ability to work independently with minimal supervision; and demonstrate ability to work effectively with detailed charts and spreadsheets over long period of time.

SFMTA will provide training to all affected employees in order to maintain all conditions of assignment to schedule maker division. Each employee remains solely responsible for attending and satisfactorily completing all conditions of assignment. In addition, each employee shall submit a validated copy of any required certificate(s), license(s), or other documentation to SFMTA.

- *Failure to meet the requirements of this section will result in reassignment to a non-schedule making assignment in the affected employee's classification.*

3. Condition Of Assignment Of 9139 To Dispatcher

- As a condition of assignment to Dispatch, employees shall demonstrate proficiency in the use of the Trapeze Ops dispatch program; strong verbal communications skills; ability to interact effectively with a broad variety of personalities; strong organizational and analytical skills, detailed knowledge of SFMTA's Agreements and related work assignment policies; experience with complex filing procedures; SFMTA will provide training to all affected employees in order to maintain all conditions of assignment to dispatch. Each employee remains solely responsible for attending and satisfactorily completing all conditions of assignment. In addition, each employee shall submit a validated copy of any required certificate(s), license(s), or other documentation to SFMTA.

- Failure to meet the requirements of this section will result in reassignment to a non-dispatcher assignment in the affected employee's classification.

4. Condition Of Assignment Of 9139 To Central Control

- As a condition of assignment to Central Control, employees shall demonstrate at least two (2) years of experience as street supervisor or dispatcher or similar position in comparable transit agency; proficiency in Trapeze or current scheduling software, strong verbal communications skills; ability to interact effectively with a broad variety of personalities; strong organizational and analytical skills, detailed knowledge of SFMTA's Agreements and related work assignment policies. SFMTA will provide training to all affected employees in order to maintain all conditions of assignment to Central Control. Each employee remains solely responsible for attending and satisfactorily completing all conditions of assignment. In addition, each employee shall submit a validated copy of any required certificate(s), license(s), or other documentation to SFMTA.

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- 9139 Voluntary Transfer Process (Classification 9139): There shall be a voluntary transfer process within the 9139 classification once every three (3) years. Movement

~~among specialty assignments as a result of the voluntary transfer process will be phased in over a one year period.~~

- ~~9139 Specialty Assignments: Schedules, Safety and Training, and Central Control shall be limited to a turnover of thirty percent (30%). Movement as a result of change of assignments in the period between Voluntary Transfer Process will be considered as part of the 30% limitation at the time of the Voluntary Transfer Process.~~

Voluntary Transfer Process (VTP) (Classifications 9139 and 9136): There shall be a VTP within the 9139 and 9136 classifications once every three (3) years. For the 9139 classification, turnover between work units shall be limited to thirty percent (30%), with the exception of Schedules, which shall be limited to fifteen percent (15%) turnover. For the 9136 classification, turnover between work units shall be limited to thirty percent (30%), with the exception of Rail Training, which shall be limited to fifteen percent (15%) turnover. Movement as a result of change of assignments in the period between VTPs will be considered as part of the percentage limitation at the time of the three-year VTP. Movement among assignments as a result of the VTP will be phased in over a one-year period. If movement is not completed within the one-year period, then upon request of Local 200 the SFMTA shall meet and confer in a joint labor-management session and attempt to resolve the issue. If the parties do not resolve the issue, either party may advance the issue to expedited arbitration.

The existing work units subject to the 9139 classification three-year VTP are Dispatch, the Incident Response Unit, Metro Rail Operations, Schedules, Street Operations, and the Transportation Management Center. The existing work units subject to the 9136 classification three-year VTP are Division Instructors, Rubber Tire Training, and Rail Training. If the SFMTA creates a new department or work unit to which SFMTA will assign employees in the 9139 or 9136 classifications, then upon request of Local 200 the SFMTA shall meet and confer with Local 200 regarding application of paragraphs 102 and 103. If the SFMTA creates a new classification to which SFMTA will assign employees in the 9139 classification, then upon request of Local 200 the SFMTA shall meet and confer with Local 200 regarding application of paragraphs 102 and 103.

IV

RELEVANT CHARTER PROVISIONS

Under the City Charter, unresolved differences in negotiations between the MTA and a recognized employee organization which persist to the point of impasse are submitted to final and binding interest arbitration, to be heard and decided by a three-member board. The MTA appoints one member thereto, the union appoints its member, and those two members select a third, neutral person to chair the board.

Charter Section A8.409 requires the arbitration board to decide each issue in dispute by "selecting whichever last offer of settlement on that issue it finds by a

> preponderance of the evidence presented during the arbitration most nearly conforms to those factors…including, but not limited to: changes in the average consumer price index for goods and services; the wages, hours, benefits and terms of conditions of employment of employees performing similar services; the wages, hours, benefits and terms and conditions of employment of the employees in the city and county of San Francisco; health and safety of employees; the financial resources of the city and county of San Francisco, including a joint report to be issued annually on the City's financial condition for the next three fiscal years from the Controller, the Mayor's budget analyst and the budget analyst for the board of supervisors; other demands on the city and county's resources including limitations on the amount and use of revenues and expenditures; revenue projections; the power to levy taxes and raise revenues by enhancemnts or other means; budgetary reserves; and the City's ability to meet the costs of the decision of the arbitration board."

In addition, Article VIIIA of the Charter, dealing with the creation and operation of the MTA, requires, in section 8A.104 (n), that the Board also consider "the interests and welfare of transit riders, residents, and other members of the public [and] the Agency's ability to meet the costs of the decision of the arbitration board without materially reducing service." In addition,

since 2010 Charter Section A8.409-8 has provided that "… For the fiscal year commencing July 1, 2010, and ending on June 30, 2011, and every year thereafter, in any mediation/arbitration proceeding under A8.409-4, the mediation/arbitration board shall recognize as wages the ongoing economic expenditures made by the City and County beginning, during and continuing beyond fiscal year 2009-2010, as a result of this Charter amendment submitted to the voters at the June 3, 2008 election when evaluating any economic proposals contained in the last offer of settlement by either party."

This Charter interest arbitration system is referred to in the labor world as "issue-by-issue, baseball arbitration." The Charter's arbitration board may only select the offer on each disputed issue made by one party. The Board may not modify or alter, to its choosing, any proposal but may approve only one of the competing proposals on each subject still at impasse. Here, as noted above, there are four "issues" to be resolved.

IV

DISCUSSION AND ANALYSIS

We discuss the few issues remaining in dispute after the May 21 mediation hereinafter, in no particular order, summarizing the overall proposal, the arguments in favor of and against them,[2] and our discussion of the merits (or lack thereof), and our proposed disposition.

A) Union Proposed Equity Increases The Union proposes two "equity increases", at 2.5% for the 9139 class, spread out quarterly in small pieces over the life of the CBA and a 2.5% increase, also spread over the life of the CBA, for the 9140 and 9141 classes. The justification for the 9139 increase is based solely on "external comparability" -- that is what the Union regards to be much higher prevailing rates paid for this class in comparable jurisdictions in the Bay Area and in Sacramento. The proposed equity increase for the 9140 and 9141 class is

[2] Here, we merely summarize the arguments and contentions for and against each proposal and wish to note that the written submissions made by the parties on May 16 contain far more complete and fulsome explanations of their positions on each item in dispute.

based upon "internal equity," an attempt to bring those classes closer to the 9172 class series which, the Union contends, is doing the same work previously performed exclusively by the 9140 class series.

1) The 9139 Equity Proposal This dispute is, essentially, an argument between the Union and MTA over which other transit agencies are truly comparable and, at BART, which class there is performing work most similar to that performed by the 9139 class at Muni. The Union contends that only other agencies which have rail operations are truly comparable to MTA and that agencies which only provide "rubber tire" service (such as AC Transit or SAMTRANS) should not be considered. The Union also contends that Sacramento Transit (outside the traditional "9 Bay Area counties") should be included because it is both a rail and a rubber tire operation, on a large scale. The Agency contends, conversely, that it has never gone outside the "9 Bay Area counties" for comparisons and that limiting comparability to rail operations ignores the simple fact that MTA has a large rubber tire operation in which many, many, of the 9139 class are assigned and employed. We also have a dispute over which of three job classes at BART is most comparable to the 9139s. Not surprisingly, the Union picks the class with the highest salary (BART Transportation Supervisor) and MTA does the reverse (BART Foreworker). Of course, this is not just a dispute over intellectual purity and historical consistency but is a fight over the end result: excluding "rubber tire only" agencies results in lopping off a few small, lower-paid agencies, while including Sacramento results in driving up the external average by no small degree.

As with anything involving numbers, results can be manipulated and massaged by including or excluding certain numbers, giving greater or lesser weight to others, arguing about "the median and the mean", and the like.[3] For example, here the Union inadvertently neglected to include in its calculation of the base salary for the class the Proposition B mandate of 2.9% to be

[3] "Figures lie and liars figure."

considered as salary.[4] So, at the request of the Panel, the parties did some "higher math" to see if alternative approaches to simple averaging might produce different results. So, MTA gave us five templates with BART Foreworker and then without Foreworker, with BART's Transportation Supervisor and without Transportation Supervisor, then excluding the highest and the lowest payers of all these agencies, with and without Sacramento Transit. The Agency did the math and suggests that, including the mandatory Prop. B 2 .9%, the Agency is as high as 5% over market and as low as a little less than .30% over market. It is to be recalled that the Union advanced this proposal based on only one Charter criteria (external comparability), without reference to any of the other Charter criteria, such as the best interests of the transit-riding public or the ability of the Agency to pay, or any possible internal disruption or compaction which might arise from an equity increase for this large class, the most numerous class by FTE count in the bargaining unit.

HR's Classification and Compensation Division costed the proposed 9139 equity increase at an additional $140,000 in FY '19-'20, rising to $401,000 in FY '20-'21, and finishing at $665,000 in FY '21-'22. This is a substantial cost, although the Agency does not claim a financial inability to pay, but merely observes that the Panel must consider such increased costs as one of the numerous Charter criteria.

The Panel believes that it is not required here to get into a close analysis of which of the three BART job classes is most comparable nor whether we should include only rail agencies, while excluding those which are "rubber tire" only.[5] Regardless of which agencies are in or out, which BART class we use, and which mathematical approach is applied, the resulting numbers

[4] Since 2010, Charter Section A8.409-8 has provided that "… For the fiscal year commencing July 1, 2010, and ending on June 30, 2011, and every year thereafter, in any mediation/arbitration proceeding under A8.409-4, the mediation/arbitration board shall recognize as wages the ongoing economic expenditures made by the City and County beginning, during and continuing beyond fiscal year 2009-2010, as a result of this Charter amendment submitted to the voters at the June 3, 2008 election when evaluating any economic proposals contained in the last offer of settlement by either party."

[5] We doubt that excluding "rubber tire only" agencies such as AC Transit and SamTrans is appropriate: they are large agencies, immediately contiguous to the City and County, they carry very large numbers of passengers into and out of the City every day, and MTA itself, of course, has a large rubber tire operation to which it devotes substantial assets and resources, including a substantial portion of the Training Division.

are not high enough, or disproportionately glaring, to drive this Arbitration Panel towards a conclusion that an equity increase is needed.

MTA's records indicate that there has been only one separation from the 9139 class in the last year, which indicates that recruitment and retention is not an issue. If the Class was glaringly out-of-market by, let us say, 5% or more under any analysis (including the Prop. B mandate), then the Panel might consider an increase, but here any disparity between the relevant labor market and the MTA rate of pay is just not indisputable (based on the competing maths) or significant enough to justify the Panel's stepping in and substituting itself for the dirty work of actual collective bargaining to unilaterally impose an equity increase. Final and binding interest arbitration in San Francisco is the last, final step of the collective bargaining process, but the Arbitration process is not actual collective bargaining: it steps in when collective bargaining has failed. The Chair does not believe it is the appropriate function of the Panel to substitute itself, absent exigent circumstances or irrational behavior by one of the parties, for the free give-and-take of the bargaining table. Here, depending on the mathematic model used, and the agencies or job classes factored in or factored out, and given the Prop B 2.9% mandate, the disparity between what is offered and what is demanded does not get to 5%, and the Chair believes that the anything less than that, as a general matter, is something upon which reasonable minds can differ and in which the Panel should not insert itself. And so our Award will decline to grant one. If the numbers were starker and indisputable, we might come to a different result, but we do not have that situation here.

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Thomas McQueen

Derek Kim Date

City Appointed Board Member

x Concur or Dissent

Thomas McQueen Date: 4 June 19

Union Appointed Board Member

Concur or Dissent X

2) The 9140 and 9141 Equity Increase The Union justifies this increase upon internal equity and fairness, arguing that the few remaining 9140s and 9141's (these two classes are in essence "terminal classes", that is, once large classes with today only a few incumbents whose future departures will result in more vacant 9140 and 9141 positions unfilled) are performing essentially the same work as the employees in the higher pay 9172 series and that to the classical doctrine of "like work = like pay" should here apply. There is no doubt that the work performed by the 9140 series is well within the Class job descriptions and the "typical tasks and duties" thereof, and the same is true of the work being performed by the 9172 series: this is not an underlying "work out of class" dispute. The Agency concedes that indeed much of the work performed is sometimes identical but points out that the employees in the 9172 series have far broader everyday duties and responsibilities, managing large work units often comprised of hundreds of workers, whereas only one of the 9141's really supervises anybody and that worker has a subordinate group of about 100 workers. The Union rejoins that this is totally a result and coefficient of management decisions and assignments and that there is nothing preventing the Agency from assigning the few remaining 9141s to substantial, responsible work supervising and managing large groups of employees, all typical tasks and duties well within their job description.

As the Agency points out, the Union relies only upon one of the Charter criteria here, namely the compensation being paid to other employees of the City and County and MTA (here

the 9172's), and nothing else. We have no idea what the "prevailing rate" is for these job classes and other agencies. We are sure that to these the few remaining workers this dispiriting pay disparity is "unfair" and "inequitable," but these workers had the chance some years ago to make the transition to the 9172 class without examination, and they declined to do so. No one disputes that the assignment of tasks, duties, and responsibilities is a management prerogative (absent discrimination for an improper or illegal motive, such as union affiliation or membership), and the 9172 series was the apparently created and established with the clear goal of for eliminating the 9140 series and transferring those duties and responsibilities (and more) to a higher pay classification.

Overlapping duties and responsibilities in public employment are almost a given: simply read the job description for "Police Officer" and "Police Sergeant" in any public agency, and one will see that 80% of the "typical tasks and duties" is identical, with the only distinguishing characteristic in the higher class being supervision, team-leadership, the giving of orders and directives, and decision-making. Eighty percent of what a police officer does is the same as what a sergeant does every shift, but no one would suggest that that mere fact justifies a demand by police officers that they should get paid the same as their sergeants.

In sum, we do not believe the Union has produced sufficient evidence here (beyond questionable "internal equity") to justify the claimed equity increase and so we will reject the Union proposal for the reasons set forth above.

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City Appointed Board Member		Union Appointed Board Member	
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B. Grievance Procedure The existing Grievance Procedure set forth in the CBA contains in Paragraph 59 thereof a phrase which, as understood and implemented, prevents the Agency from immediately imposing post-Skelly discipline for a period of 20 days or until completion of Step 2 of the Grievance Procedure. MTA wishes to strike this sentence and allow the proposed discipline to be imposed (as the Supreme Court in Skelly vs. State Personnel Board, 15 Cal 3rd 175 [1975] anticipated) once the Skelly process has been completed. It appears that this language is unique to the Local 200 CBA and is not found elsewhere throughout the Agency or the City. The explanation for this is found in a 2009 Settlement Agreement entered into between the parties as result of expansive proceedings before the Public Employees Relations Board (PERB), which resulted in the CBA language which the Agency now wants deleted.

The Agency could point the Panel to only a single instance in which this language resulted in arguable detriment and harm to the Agency, a termination case in which the employee managed to postpone his post-Skelly Step 2 hearing for months on end, which meant that he was in limbo, not working but was still getting paid. The Union insists this language is a relevant, pertinent, and necessary goad to get the MTA to move along, promptly and efficiently, in the grievance process rather than wait interminably for the City Attorney's Office to get involved, appoint counsel, and select an arbitrator and so to incentivize the MTA to move the process along.[6]

[6] The Chair of this Panel heard a constant refrain at the various tables at which he sat during this round of negotiations about the frustration of numerous unions over delays at the City Attorney's Office, where cases in which arbitration has been demanded seem to languish while the unions wait for the designation of a deputy city attorney, who, in turn, then deals with the union or union counsel to select the arbitrator. More than one union

Our Award will maintain the *status quo*, as we believe the Agency has not made a sufficient case (relying upon only a single instance) to justify overturning a 10-year-old clause which was the direct result of a settlement agreement between the parties before PERB.

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City Appointed Board Member

Concur or Dissent x

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Union Appointed Board Member

Concur **X** or Dissent

C. MTA Proposed Limitations on the Accrual of CTO MTA proposes to put a cap on the amount of Compensatory Time Off (CTO) an employee may accrue, keep, and roll over every year. The bargaining unit contains job classes which are hourly and covered by the Fair Labor Standards Act (*e.g.*, 9139) and a few classes which are salaried and FLSA-exempt (i.e., 9140 and 9141). The FLSA-exempt classes are denominated by the City and the Agency as so-called "Z Classes". Hourly employees in the unit are compensated for overtime work in either cash or CTO, as the worker and her supervisor a may agree. Z class employees receive only CTO if they work overtime and presently there are no limits on the amount of CTO which can be accrued. One Z class employee in the unit apparently has almost 700 hours of accrued CTO.

described the City Attorney's Office as "a black hole into which grievances disappear." The Panel has no idea if this is true or not, but it is certainly a constant complaint.

The Agency wishes to apply a 120-hour limit on the amount of CTO which can be kept on the books, beyond which overtime work would be payable in cash only (for hourly workers) or not paid at all (to Z class employees). The Agency proposes to implement these new limits in 2020 to allow Z Class employees to burn off excess hours but would not allow them to accrue more, and to allow hourly employees over the existing 240-hour limit to cash out the excess. The City and MTA have made this identical proposal (more or less) to every bargaining unit in the City and most unions have agreed to some form thereof. The explanation for this change basically deals with the ability of workers to accrue CTO in one year and then they use it (or cash out) in future years at a higher hourly rate, as well as with unfunded liability and GASB accounting standards, which now require public agencies to calculate and declare their exposure to accruals (will which will in the future be cashed out) for such things as sick leave, vacation leave, compensatory time off, and the like. MTA wishes to put a cap on its future exposure and it is not alone among public agencies attempting to do so.

The Union's initial opposition (which was not very strong) to this proposal was simply its possible adverse impact on individual employees who have CTO well over the proposed limit. MTA has revised its proposal so that it postpones the implementation for most of its caps until 2020 and that results in no forfeiture of time over the proposed limits. As can be seen from our Award, we believe the Agency has the best arguments and contentions on this proposal, and we will accept it. It may well be that this approach will be painful for at least one Union member who has over 700 hours of banked CTO and who will have to burn it off, fairly quickly, to get down to 160 hours if he wishes to earn and accrue more CTO as he works overtime in the future, but the delay of the implementation date to 2020 and the ability to cash out should mitigate that possible painful result.

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City Appointed Board Member

x Concur or Dissent

Thomas McQueen Date: 4 June 2019

Union Appointed Board Member

Concur or Dissent **X**

D. Non-Emergency Overtime And Regular Day Off Withdrawal MTA claims that it has a severe problem with employees who sign up, in advance, to work overtime on their regularly scheduled day off ("RDO"), or as "piece" overtime, and then, with very short notice, change their minds and cancel their appearance, which means either that the assignment goes unfilled or someone else has to be brought in, on short notice, to work the overtime shift. The Agency concedes that many of its core functions both in the Local 200 unit and in the TWU 250 A unit could not be performed without substantial overtime worked, as the Agency is severely under-staffed in certain classes.

Scheduled overtime is posted in each division/work unit on the day before the shift in question, and employees are presently allowed to withdraw or cancel on little or no advance notice, basically, as a practical matter, with little or no penalty. During negotiations and mediation the Agency modified its original proposal, so that its LBFO would penalize employees who cancel with less than three hours' notice by moving them to the bottom of the list for the next sign up. If the employee can convince her supervisor that that there was good reason for such short notice (*e.g.*, family emergency, car trouble, day care foul-ups, and the like) then no penalty would be imposed. The sole purpose of Management's proposal (or so they say) is to discourage last-minute cancellations for no good reason by moving the delinquent employee to the bottom of the next sign up list.

The Union characterizes management's proposal as "punishment for withdrawals" and observes that in certain work units "the bottom of the list is the top of the list" because there are so few people eligible to sign up for overtime. The Union also notes that under the CBA and Agency work rules, employees can "call in sick" without penalty as long as they do so 45 minutes before the start of their shift, and the Union questions why there is a disparity between three-hours for one work cancellation and only 45 minutes for another. The short answer to that may well be that 45 minutes is too liberal and that three hours for a sick leave call in would be more appropriate as well.

The Union's position is basically (1) to favor the *status quo* because it is the *status quo* and (2) its concern that some managers may penalize certain employees (such as Union activists) while leaving others untouched. These possible, hypothetical worst-case scenarios are outweighed by the Agency's real-world need to encourage employees to actually show up for and work the RDO and "piece" shifts they have signed up for, rather than signing up without much thought and then canceling when showing up becomes inconvenient. If management fails to recognize truly exigent, last-minute circumstances and good reasons for short notice (*e.g.*, day care and school problems, illness, family circumstances, and the like), that is why we have a robust grievance procedure.

The Panel believes that a preponderance of Charter criteria (*e.g.*, "… the interests and welfare of transit riders, residents, and other members of the public" … [and] "the Agency's ability to efficiently and effectively tailor work hours and schedules for transit system employees to the public's demand for transfer transit service…") preponderate in favor of the Agency here (see Charter 8A.104 (n)), and so we will adopt the Agency's proposal.

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E. **TENTATIVE AGREEMENT (TA'S)** Prior to mediation and arbitration the parties reached tentative agreements ("TA's") on a number of issues, including many "City Wide" ("CW") proposals on which the MTA/City wished to meet the with all bargaining units on such relatively noncontroversial items as contract language, non-discrimination clauses, savings clauses, gender pronouns, and the like, as well as a number of issues specific to this bargaining unit. Those tentative agreements are attached hereto and incorporated herein by this reference as though set forth at length and are adopted *in toto* by the Panel.

AWARD

As set forth and described at length above, the Union proposals of Equity Adjustments for Classes 9139 and 9140/9141 is rejected. The Agency proposals on the accrual of Compensatory Time Off (CTO) and RDO and overtime withdrawal are adopted, but the Agency proposal regarding revisions to the Grievance Procedure is rejected. The Mediated and agreed resolution of the inclusion of Class 9136 in the Annual VTP and modifications to Agency proposals Nos. 17, 18, 20, 32, and 33 in regards to shift assignments, conditions of assignment, console rotation, lead pay, and the movement of 9139's are all affirmed. The

express Adoption and Rejection of the various proposals as set forth above is incorporated herein by this reference as though set forth at length.

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