SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 61
Justice

In the Matter of the Application of
ED WATT, as Secretary Treasurer of
TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100; and TRANSPORT WORKERS

Petitioners,

-against-

HOWARD H. ROBERTS, Jr., *et al.*,

Respondents.

INDEX NO. 112001/09
MOTION DATE Oct. 20, 2009
MOTION SEQ. NO. 001
MOTION CAL. NO. 97

The following papers, numbered 1 to 16 were read on this petition to confirm two arbitration awards

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-7
Replying Affidavits	8-10
Sur-Reply Affidavits	11-13, 14-16

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 75 confirming two arbitration awards and the cross-petition for a judgment pursuant to CPLR § 7511 vacating those same two arbitration awards are decided in accordance with the accompanying decision, order and judgment.

Dated: December 11, 2009

O. PETER SHERWOOD, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

In the Matter of the Application of

ED WATT, as Secretary-Treasurer of TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100; and TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100,

Petitioners,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules Confirming an Arbitration Award

-against-

HOWARD H. ROBERTS, Jr., as President of the New York City Transit Authority and as President of the Manhattan and Bronx Surface Transit Operating Authority; the NEW YORK CITY TRANSIT AUTHORITY; the MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY; JOSEPH SMITH, as President of MTA Bus Company; and MTA BUS COMPANY,

Respondents,

----------X

DECISION, ORDER AND JUDGMENT

Index No.: 112001/2009

O. PETER SHERWOOD, J.:

PRELIMINARY

This is a proceeding pursuant to CPLR Article 75 to confirm two labor contact awards rendered by a three-person panel in an interest arbitration. One involves the New York City Transit Authority ("TA") and the Transportation Workers Union of America Local 100 ("TWU"). The other involves the Manhattan and Bronx Surface Transit Operating Authority ("OA"). The OA which operates public bus lines in New York City is a public benefit corporation and a subsidiary of the TA. The TA is a subsidiary of the Metropolitan Transportation Authority ("MTA"). An award involving OA employees who are represented by the TWU was issued on June 9, 2009 and determined the terms and conditions of employment for those workers for the period of April 16, 2006 to March 31, 2009 (the "OA Award"). The other award was issued on August 11, 2009. It

encompasses the period of January 16, 2009 to January 15, 2012 and extends to all TWU and OA represented employees (the "TA/OA Award").

On this petition, the TWU seeks to confirm both awards. The TA has filed a cross-petition seeking to vacate the TA/OA Award only. There being no opposition, the OA Award will be confirmed.

FACTS

For months preceding January 2009, representatives of management and the TWU engaged in negotiations over the terms of agreements to succeed the most recent collective bargaining agreements covering TWU-represented employees. Unable to reach full agreement by January 2009, a three-person impasse panel was convened pursuant to the public transit interest arbitration provision of New York Civil Service Law §209(5), also known as the "Taylor Law."

The parties selected John Zuccotti, a former New York City Deputy Mayor, to chair the panel. The MTA designated Dall Forsythe, a former New York State Budget Director; the TWU designated Roger Toussaint, its president. The panel conducted fifteen days of hearings between April and June 2009 and received pre-hearing and post-hearing briefs.

The Chair, joined by the TWU representative (the "Majority"), issued a written opinion and award for the panel. The MTA representative wrote a dissenting opinion. The Majority awarded four (4) wage increases of 2 percent every six months effective April 16, 2009, October 16, 2009, April 16, 2010 and October 16, 2010 and one additional wage increase of 3 percent effective January 16, 2011. By staggering the effective dates of the increases, the Majority sought to back-load the impact of the award to provide effective wage payouts of 2.5 percent in 2009 and 2010 and 3 percent in 2011. The total increase in base labor costs of these increases is 11.28 percent which means that at the end of the award period in January 2012, TWU base wages will be 11.28 percent higher than what they were when the award was made. In addition, the Majority imposed a cap on employee health contributions reducing it from 1.5307 percent to 1.5 percent of wages, measured as 40 hours per week times the hourly base rate, effective December 1, 2009. The increase to labor costs of this award is 0.71 percent. It also ordered inclusion of language in the contract to provide for 40

restricted duty jobs for Conductors on the pick.[1] The award contains other provisions not relevant to this proceeding.

The award is similar in structure to the provisions of a document prepared by the TWU negotiators in October 2008 at a time when the parties were nearing agreement on a three-year contract ("October MOU"). The document which purported to be an outline of a full agreement included wage increases of 4%, 4% and 3.5% over three years, a cap on employee contributions for retiree health benefits and implementation of One Person Train Operation ("OPTO") on the "L" and "7" lines. The MTA leadership was unable to garner support for eventual ratification by the MTA Board of Directors. The October MOU was never signed.

Mr. Forsythe, the dissenting arbitrator, wrote that the Majority used the October MOU as a "starting point and benchmark" for the award and argued that by so doing the Majority had made a "fundamental error" given the changed economic circumstances as well as leadership changes at the MTA since October 2008. The Majority responded that "while the fall 2008 understandings between the negotiators were taken into account, the Majority did not...adhere to the [October MOU] as the benchmark or starting point for this Award. Far more significant to the Majority was the economic data and other evidence submitted by the parties."

Section 209(5)(d) of the Taylor Law which gives rise to these arbitrations provides that:

> (d) Such panel shall make a just and reasonable determination of matters in dispute. In arriving at such determination, the panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:
>
> (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;

---

[1]At oral argument on the motion to confirm the award, counsel for petitioner represented that the panel intended and the TWU understood that this provision would have no financial impact. Accordingly, any alleged failure of the panel to include a statement that the pick provision shall have no financial impact is without practical significance.

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

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

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

(v) the interest and welfare of the public; and

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

Consistent with these requirements, the Majority identified each of the six (6) criteria and made findings as to each of them.

Regarding the comparability requirement, New York Civil Service Law §209(5)(i), the Majority found that because of the size and hours of operation (24 hours per day, 7 days per week) of the MTA, "comparisons to other public transportation workers are not particularly relevant or persuasive." It considered other public employees' employment terms and conditions in New York City "and other comparable communities," including a pattern of 4 percent wage increases that New York City employees receive, more relevant.

As to the overall compensation paid criteria, New York Civil Service Law §209(5)(ii), the Majority acknowledged the "significant" overall compensation and supplemental benefits TWU-represented workers receive but gave it little weight. It found that the high cash compensation received which includes special premium payments for overtime, night shift differentials, swing pay and spread pay, are premium payments arising from "the demanding and unique nature of employment" in an extensive system that covers a large area and operates 24 hours per day, 7 days per week.

The Majority and the dissent focused much of their attention on the ability to pay criteria, New York Civil Service Law §209(5)(iii). The Majority found that an MTA financial assistance

package, enacted by the New York State Legislature in May 2009, was a source of funds sufficient to pay for the increases awarded. The Majority based its finding primarily on an analysis of MTA finances presented by the TWU's expert economist.

The dissent argued that because of the recent decline of the economy, particularly in the New York region, tax revenues required to support the regional transportation system are unavailable. Mr. Forsythe stated that New York State was in the second year of a multi-billion dollar deficit and that the then most recent quarterly budget update of the State Division of the Budget estimated a $2.1 billion shortfall in the current year. The Majority acknowledged these economic conditions but held that even if the MTA is faced with a budget deficit, it still has the ability to pay. It identified an additional $185 million in 2009 and potential additional funds arising from deferral of non-core capital projects that it believed can be used to make up for any deficit.

Turning to the cost of living criteria, New York Civil Service Law §209(5)(iv), the Majority noted estimates of 2009 inflation of from 2.2 to 2.94 percent. The Majority gave limited weight to this criteria and awarded wage increases that are substantially above the current cost of living index. It found that the increases which are to be implemented on a staggered schedule, "will allow Union employees to maintain their standard of living."[2]

The Majority considered and gave little weight to the interest and welfare of the public criteria, New York Civil Service Law §209(5)(v). It found that the MTA is able to provide the wage increases awarded without fare increases or deferral of core capital projects. It concluded that the public will not be negatively impacted by the wage increases awarded and found that "the public is significantly benefitted by an appropriately motivated workforce, which the ...wage increases [awarded] will help to reinforce."

The Majority then listed "other factors" that it found relevant to the award, New York Civil Service Law §209(5)(vi). It noted a pattern of 4 percent annual wage increases negotiated by New York City and a number of labor unions, including DC-37 for a two-year period covering March 2008 through March 2010, police officers for a four-year period August 2006 through July 2010, corrections officers for a two-year period November 2009 through October 2011, firefighters for a

---

[2]Citing a reduction of 0.8 percent in the cost of living for June 2009, the dissent argued that the 2009 wage increase award was the equivalent of an inflation adjusted increase of as much as 4.8 percent.

two-year period August 2008 through September 2010, amounts budgeted by the City of New York for future contract settlements and 4 percent wage increases for managers and nonunion employees.

The Majority interpreted the issues facing the MTA due to economic uncertainty as creating a need for the MTA to manage its cash flow. It concluded that by staggering the wage payment schedule, the cash flow challenges of the MTA were properly balanced against the goal of equitable treatment for MTA employees.

As found by the Majority, the percentage increases and related costs (in millions) budgeted by the MTA, outlined in the draft October 2008 MOU and awarded are summarized below.

	MTA Reserve		**Oct. MOU**		**AWARD**	
Year	***Increase***	***Cost***	***Increase***	***Cost***	***Increase***	***Cost***
2009	1.47%	$ 35.9	4%	$ 96	2+2%	$ 47.80
2010	1.47%	$ 72.2	4%	$195	2+2%	$145.32
2011	2.23%	$109.2	3.5%	$298	3%	$271.57

DISCUSSION

The Taylor Law sets forth criteria to guide the decision-making process for arbitrators (*see* New York Civil Service Law §209). The Taylor Law does not contain provisions concerning judicial review of arbitration awards (*see* Transcript of Oral Argument, November 20, 2009, p. 43). Such awards are subject to judicial review pursuant to CPLR Article 75 which applies to judicial review of arbitration generally.

Because the Taylor Law provides for mandatory arbitration of disputes regarding the terms and conditions of employment of public sector employees and prohibits such employees from withholding their services during such disputes, the Court of Appeals has held that as a matter of due process, arbitration in such circumstances is subject to broader judicial scrutiny than is applied to consensual arbitration under CPLR §7511 (*see Mount St. Mary's Hosp. v. Catherwood*, 26 NY2d 493 [1970] and *Caso v. Coffey*, 41 NY2d 153 [1976]). The standard of review of compulsory arbitration awards pursuant to CPLR Article 75 is the arbitrary and capricious standard of CPLR Article 78 (*see Caso*, 41 NY2d at 158). In addition to the limited grounds for review of arbitration awards provided in CPLR §7511 (all involving "misconduct, bias, excess of power or procedural

defects" *Austin v. Board of Education of City School District of City of New York*, 280 AD2d 365 [1st Dept 2001]), a court charged with reviewing a compulsory arbitration award must assess whether the decision of the arbitrators was rational or had a plausible basis (*see In re Petrofsky [Allstate Insurance Co.]*, 54 NY2d 207, 211 [1981]). Referring to the statutory criteria governing arbitral awards under the Taylor Law, the Court of Appeals has stated that "[a]n award may be found on review to be rational if any basis for such a conclusion is apparent to the court. And it need only appear from the decision of the arbitrators that the criteria specified in the statute were 'considered' in good faith and that the resulting award has a 'plausible basis'" (*Caso*, 41 NY2d at 158 [*internal citations omitted*]).

The Taylor Law assigns to the arbitrators exclusive responsibility to make "a just and reasonable" determination of the matters in dispute. In making that determination, the arbitrators must "take into consideration" six criteria outlined in the Taylor Law. In order to allow meaningful review, the law requires that the arbitration panel "specify the basis for its findings." New York Civil Service Law §209(5). The arbitrators must consider each of the five (5) specific criteria listed. (The sixth is a catchall category). The law does not set forth the relative weight to be assigned each criterion. That responsibility is reserved for the arbitrators in the circumstances of the particular case.

The responsibility of the court in applying these tests is limited to determining whether the award was affected by misconduct, bias or procedural defects; whether the award exceeded the authority of the arbitrators; whether the arbitrators applied the statutory criteria in good faith; and whether the award was otherwise rational. The court may not second-guess the decision of the arbitration panel. If the arbitrators made a just and reasonable determination in good faith, explained its decision in accordance with the criteria set forth in the statute and the determination had a plausible basis, the award must be confirmed (*see id*, 41 NY2d at 158).

The TA argues that the award must be vacated because the Majority failed to specify the basis for its findings. Specifically, the TA argues that the Majority failed to specify its findings as to the final year of the award (2011) and the cap on employee health contributions. The TA also argues that the Majority gave only lip service to the important first (comparability) and fifth (interest and

welfare of the public) criteria and wrongly accepted faulty analyses of the financial condition of the MTA presented by the TWU.[3]

The TA has the burden of showing that the Majority failed to render a just and reasonable determination, that it failed to apply the statutory criteria in good faith or that the award is arbitrary and capricious (*see Lackow v. Dept. of Educ.*, 51 AD3d 563, 568 [1st Dept 2008]). The TA has not carried that burden.

The Majority rendered a 17-page opinion outlining its determination and the grounds for the award.[4] Each of the five (5) specific criteria set forth in the Taylor Law was separately discussed.[5]

---

[3]The TA also urges that the award must be vacated because, in reaching its determination, the Majority considered materials outside the record, primarily the MTA 2010 Preliminary Budget and July Financial Plan which was published on July 29, 2009 ("July Plan"), while the panel's decision was being drafted. The TA has ascribed a few brief references to the July Plan far more significance than did the Majority. The July Plan and other government documents cited by the Majority in footnotes are secondary materials, none of which served as a basis for the award. The arbitrators' discussion of the MTA's ability to pay focused on testimony and exhibits received during the hearing and briefs submitted by the parties (*see* Award, pp 12-16). The July Plan and the other non-record documents referenced by the arbitrators, (*e.g.* Mayor's Personnel Order No.: 2009/2 [July 10, 2009]; City Comptroller's Comments on the Adopted Budget for Fiscal Year 2010 and the Financial Plan for FYs 2010-2013 [July 2009]) are the kinds of public documents that are generated in a manner which assures their reliability and on which courts may take judicial notice (*see Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 AD3d 13, 19-20 [2d Dept 2009]; *Wakefield v. Bd. of Educ. of the City of New York*, 192 Misc 639, 643-44 [Sup. Ct. NY Co. 1948]). Arbitration panels, as to which the formal rules of evidence do not apply, may take notice of such public documents as well (*see* Elkouri & Elkouri, How Arbitration Works, Ch 8.4.I.ii and authorities cited therein.)

Finally, the record before the court does not support the assertion that the panel rejected the TA's request to submit the July Plan. The email order to which the TA refers in connection with this assertion did not rescind permission previously given allowing submission of the July Plan (*see* Tr. 2012 and 2018).

[4]The court has no reason to believe that the Majority was engaging in mendacity when it stated that although it took the October MOU into account, the economic data and other evidence submitted was "far more significant" to it in making the award. The TA has not established that the award was predicated merely on an intention to duplicate the October MOU.

[5]Because the panel considered each of the five (5) statutory criterion, the court need not decide whether the standard of review analysis is governed by *City of Yonkers v. Mutual Aid Assn of Paid Fire Dept of City of Yonkers, Local 628*, 80 AD2d 597 (2d Dept 1981) or *Buffalo Prof. Firefighters v. Masiello*, 50 AD3d 106 (4th Dept 2008), *modified on other grounds*, __NY3d__,2009 NY Slip Op 7324, 2009 NY LEXIS 3863 (Oct. 15, 2009).

The basis for the findings awarding percentage wage increases over three (3) years are set forth in the opinion. The panel gave particular weight to evidence of a pattern of 4 percent per year wage increases that were negotiated for New York City employees since 2006 or are included in the City's labor reserve for upcoming negotiations with major municipal employee unions (*see* TA/OA Award, pp. 12 and 17-19). Labor arbitration panels routinely refer to and rely on other wage settlements when fixing awards (*see, e.g., Matter of City of Johnstown and City of Johnstown Police Benevolent Assn, Inc.*, PERB Case No. IA 2007; M 2006 312, at 18 [Apr. 2009]; *United Fed'n of Teachers and New York City Bd. of Educ.*, Opinion and Award [Sep. 16, 1985]; *City Employees Union, Local 237, IBT v. NYC Housing Auth.*, Case No. I-188-86 [Mar. 20, 1987]). Contrary to the TA's argument, the opinion of the Majority includes examples of future increases that extend into 2011 and beyond (*see* TA/OA Award, p.19 and Union Exhibit 19).

The Majority estimated the increased cost of the cap on employee health contributions to be 0.71 percent (*see* TA/OA Award, p. 10). It noted that the parties had negotiated for implementation of OPTO (at a savings of 0.466 percent to the TA) as an offset to the additional cost associated with an agreement to place a cap on employee health contributions. Although the TA withdrew the OPTO proposal, the panel reviewed the potential cost savings fixed by the parties, determined to award the cap requested by the TWU and to account for the increased cost by reducing the percentage wage increase in the third year by 0.5 percent. The TA has not demonstrated that the determination to award the cap and to offset the cost by limiting a wage increase by an amount that exceeds the estimated cost of the benefit as calculated by the negotiators must be set aside because it has not shown that the determination lacks a plausible basis (*see Caso*, 41 NY2d at 158).

In making its findings, the Majority gave some of the listed statutory criteria substantially greater weight than it gave to others. It gave considerably greater weight to the first criteria (comparability) where it emphasized a pattern of 4 percent wage increases for City workers than to the fourth (cost of living). The Majority carefully assessed the contentions of the parties and the views of Mr. Forsythe in reaching its findings regarding the ability of the TA to pay the wage increases it awarded. It found that the TA has the ability to pay the increased cost of the award and viewed the financial challenges of the MTA as cash flow issues which it sought to mitigate by staggering implementation of the wage increases awarded. Although the TA strongly disagrees with

the Majority's analysis of MTA finances, it has not shown that the findings of the Majority are not supported by substantial evidence and do not have a plausible basis (*see id; Buffalo Prof. Firefighters v. Masiello*, 50 AD3d 106, 108 [4th Dept 2008], *modified on other grounds*, ___NY3d ___, 2009 NY Slip Op 7324, 2009 NY LEXIS 3863 [Oct. 15, 2009]).

An arbitration award should be upheld when the arbitrator provides "even a barely colorable justification for the outcome reached. ... [A]n arbitrator's award should not be vacated for errors of law or fact committed by the arbitrator..." *(Wein & Malkin, LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006][internal citation omitted]). The findings of fact as determined by the Majority concerning the ability of the MTA to pay the increases awarded are supported in the record. For example, the Majority noted the contrasting estimates of future economic trends and resulting revenue projections the parties' experts provided. The Majority chose to accept less dire estimates provided by the TWU's expert. The Majority's reference to the MTA's emergency reserve as a potential source of funds is not, as the TA argues, "a gross misreading of the record" (TA Brief p. 31). According to the TA, the MTA Budget Director testified that the February Financial Plan had already "spent" that cash reserve in 2009. In fact, he testified that the February Plan "assumes that the $75 million will be spent for some type of emergency. It has not yet..." (Tr. p. 1800). He also testified that the MTA has had the $75 million reserve "probably for five years." *(id.)* The court concludes that the bases for the findings of the Majority were substantially more than "barely colorable." (*Wein & Malkin, LLP*, 6 NY2d at 479.)

In the current economic environment, the award of wage and benefits increases over three years of approximately 11.5 percent is a rich package but it is not unique. Were the court assigned direct responsibility for applying the criteria set forth in the Taylor Law to the package of economic benefits demanded by the union, the court might weigh them differently than did the Majority in this instance. It might also have adopted the approach urged by the dissenting arbitrator to limit the term of the award to two (2) years and allow time to assess whether the regional economy has rebounded sufficiently to enable the MTA to better shoulder the cost of additional wage increases to its union-represented workers.[6] However, the court is not authorized to re-weigh the various criteria and may

---

[6]A recent news article in the New York Times bearing the headline "MTA Tax Revenues Short of Estimates by $200 Million," James Barron, NY Times, December 8, 2009, at A30, illustrates how difficult it is to predict future revenues in the current economic environment.

not substitute its notion of the appropriate parameters of industrial justice in these circumstances for those of a properly constituted arbitration panel acting in good faith (*see Massiello,* 50 AD3d at108 [Affirming wage increase rewarded by interest arbitration panel despite City and Buffalo Fiscal Stability Authority recommendation for wage freeze due to "an 'unprecedented fiscal crisis'... and a 'genuine limitation'" on the City's ability to pay]).

The court has limited authority in this case. It has not been given supervisory authority over the arbitration panel. Where, as here, the panel's decision satisfies the requirements of CPLR §7511, is neither unjust nor unreasonable and is rational, the award must be confirmed (*see Caso*, 41 NY2d at 158; *In re Petrofsky [Allstate Ins. Co.]* 54 NY2d 207, 211 [1981]).

Accordingly, it is

ORDERED and ADJUDGED that the petition to confirm the Opinion and Award of the arbitration panel dated June 9, 2009 is **GRANTED**; and it is further

ORDERED and ADJUDGED that the petition to confirm the Opinion and Award of the arbitration panel dated August 11, 2009 is **GRANTED**; and it is further

ORDERED and ADJUDGED that the cross-petition to vacate the arbitration award dated August 11, 2009 is **DENIED.**

This constitutes the Decision, Order and Judgment of the court.

DATED: December 11, 2009

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.