



MBTA Reform – The Case of Full, Final and Binding Interest Arbitration

by John Sivoletta

Introduction – Baker Administration Plan

The Baker administration’s legislation (H.3347) to reform the Massachusetts Bay Transit Authority (MBTA) in the wake of the agency’s “catastrophic failures” last winter includes a critical element that would empower the proposed reforms to remain sustainable in the face of predictable challenges by vested interests wanting to maintain the status quo – and structural problems – of the nation’s fifth-largest¹ mass-transit agency.

Two provisions of the bill amending §32 of Chapter 161A of the Massachusetts General Laws are designed to “bring the MBTA’s relationship with its unions more in line with the relationship between the Commonwealth and other public unions” such as those representing police and firefighters. The amendments are designed to constrain, but not terminate, the vast powers of an arbitrator in the existing system of binding interest arbitration by (a) prohibiting the arbitrator from imposing a retroactive arbitration award and (b) rendering the appropriation necessary to fund the arbitrator’s determination subject to the approval of the Fiscal and Management Control Board (FMCB) that the Baker bill would also establish. Contrary to much of the hyperbole from interests supporting the status quo, the Baker plan does not do away with interest arbitration.

The bill’s language making the appropriation subject to FMCB approval is not new or unusual. In fact, it is modeled closely after statutory text in Chapter 589 of the Laws of 1987 that revised the arbitration system between police and firefighter unions and public employers.

MBTA Interest Arbitration – Background

Remarkably, no public agency in the Commonwealth besides the MBTA is currently subject to full, final and binding interest arbitration with its unions.

As MBTA counsel explained in a brief during the last round of arbitration over the collective bargaining agreement between the MBTA and the Carmen’s Union² spanning July 1, 2010 through June 30, 2014, the lineage of this practice extends back to the early part of last century. In 1948, the legislature created the Metropolitan Transit Authority (MTA) – a precursor to the MBTA – by acquiring a set of private transit companies that had operated subways, buses and trolleys in and around Boston. As part of the deal, the legislature took on the labor contracts and collective bargaining relationships

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that had existed between the private transit entities and their employees as early as 1913. When the legislature created the MBTA in 1964, the expanded public-transit entity absorbed the MTA and, with it, a collective bargaining system that included interest arbitration.

The MBTA has struggled with chronic performance and funding issues since its founding. And the legislature has repeatedly amended the statutes governing the management of labor relations at the MBTA in search of solutions that remain elusive. Yet, the interest arbitration system has survived relatively intact.

Since the legislature revised the basics of the current interest arbitration process with the passage of Chapter 405 in 1978, the MBTA and its unions have negotiated eight agreements and many of these processes have ended up in interest arbitration. This process has not served the citizens of the Commonwealth well in terms of improving the performance of their public transportation system or with respect to the above-market costs required to run the system.

MBTA Interest Arbitration in Practice

The MBTA's current interest arbitration regime is a vestige of an earlier time. Both the recent justification offered publicly by the Carmen's Union for rejecting reform and maintaining the status quo, and a brief analysis of key examples of the arbitrator's rationale during the last round of interest arbitration, reflect this modern reality and signal a long-overdue need for reform.

Dated Perspective – Interest Arbitration a “Substitute for the Strike”

In written testimony submitted to the legislature's Joint Transportation Committee last month, Thomas Roth, who has served as counsel for the Carmen's Union in arbitration proceedings since 1974, stated that interest arbitration is a “substitute for the strike.” This notion reflects early federal labor policy, as the U.S. Supreme Court explained in cases from the 1950's and 1960's, that final, binding interest arbitration can serve as a *quid pro quo* for some public unions who avoid strikes as a negotiating tactic.

Times change, however, and all public employee strikes are illegal in the Commonwealth as they are in roughly three-dozen other states. And although other sets of public employees – like police and firefighters – are prohibited from striking and do not have ready access to final, binding interest arbitration, their collective bargaining system has seemed to work efficiently for years. The recalcitrant public stance of the MBTA's unions is thus predicated on dated justifications linking final, binding interest arbitration to the threat of public employee strikes. This clearly reflects their belief that the current system has worked very well for them during negotiations with the MBTA and those unions prefer the status quo. The current arbitration process, however, has not often served the MBTA – or the citizens who depend on it – so well.

Examples from Last Round of Interest Arbitration

The arbitrator's opinion after the last round of final, binding interest arbitration was rife with the spirit of “it was always thus” as an underlying rationale for many of her critical decisions and awards. At one point, the arbitrator warned, “(w)hile wading through the tedium and delayed benefit of litigation and arbitration, it is easy to lose sight of what the status quo protects against.” A statement like this begs the question what, exactly, does the status quo “protect” the Commonwealth against? The arbitrator ruled against the MBTA on almost every material issue across the board in this last round of interest arbitration.

For example, on the issue of wages, the arbitrator's decision was motivated primarily by maintaining the “historical ratio” whereby members of the Carmen's Union had earned 15-43 percent more than other public employees in arguably comparable positions across the state despite the case made by the MBTA that there was no justification for the vast difference in pay scale. The arbitrator reasoned that “this continuity (of wage differential) has prevailed through numerous...arbitrated decisions dating from before factor legislation³ and continuing in the 35 years since.” The ample data and comparisons provided by the MBTA did not move the arbitrator

even slightly along the wage continuum, and she opted to maintain the status quo.

Similarly, the arbitrator granted the Carmen's Union virtually everything it wanted and denied the MBTA's arguments with regards to the three-year delay of the application of the Group Insurance Commission (GIC) to MBTA public employees. The MBTA's public employees were the last of over 200,000 public employees and retirees to enter the GIC program due to the well-versed litigation and arbitration strategy of the Carmen's Union, and the MBTA estimated that the delay cost it over \$60 million. The delay also ran contrary to the original intent of the state legislature when it launched the highly successful GIC program in 2009. Nonetheless, the arbitrator remained intransigent. She reasoned, for example, that although rich components of the previous health plans for the MBTA's public retirees were "outside the norm in the Commonwealth, if not in the urban transit sector," since they had been established through prior interest arbitrations the retirees would have to be made whole by the MBTA prior to "join(ing) the mainstream of public sector retirees in Massachusetts."

The arbitrator's unwavering adherence to past practice, regardless of how inefficient and outdated certain processes may have become, was clear in her denial of the MBTA's request to "modernize and update the means by which operators select work" by implementing a roster selection system that has already been used to improve the scheduling of operators in a number of mass transit agencies including New York. According to the MBTA, the modern schedule selection system would utilize computer software (for the first time) to input and update the schedules of operators along mass transit routes.

This change to twenty-first century technology would presumably improve the staffing and, hence, the performance of a mass transit system that has encountered significant challenges in this area. The Carmen's Union argued that the new system posed a threat to its longstanding seniority-based practices, and that MBTA management rather than the operators themselves would end up creating the

weekly schedules under a new system. The Union's advocacy for the status quo again carried the day with the arbitrator.

The arbitrator readily acknowledged

"(t)here is no doubt that physically and operationally, the current pick system harkens to a bygone era. In the computer age, the pick room, with its walls littered with taped on paper schedules on which (o)perators handwrite their names in seniority order, though charming, does not present as an efficient system with which to organize the allocation of labor for a major urban transit system."

She also recognized,

"(t)he system of roster picking that the (MBTA) proposes replaces a system of yesterday with more efficient, technologically based alternative (sic). It is almost certain that such a system would take into account many variables that are hard to track using a hand done system and that *this would reduce scheduling gaps and errors* (emphasis added)."

Yet, despite the possibility that the implementation of modern technology might immediately improve MBTA performance, the arbitrator remained nostalgic for the status quo in denying the MBTA's request.

"It does not seem possible that a computer system that accomplishes the efficiency and operational control that the (MBTA) seeks without undoing a finely tuned and long-successful seniority system that the Union is determined to protect cannot be implemented with some expert help."

The arbitrator sent the MBTA back to the drawing board, as her predecessor had done in the interest arbitration proceeding covering the period 2006-2010. To this day, the scheduling of operators continues to be performed through sheets of paper taped onto the walls of Union pick rooms.

Vast Powers Delegated to Unaccountable Interest Arbitrator

In the existing interest arbitration regime, the arbitrator has enormous discretion but the MBTA has little recourse. The agency appealed some of the decisions of the last interest arbitration outcome to the superior court, but the ensuing opinion by the

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judge denying all of the agency's claims repeatedly emphasized the "narrow scope of judicial review" and the "quite limited" power of the court to alter an arbitrator's decision. Given the absence of meaningful judicial review, the arbitrator in these proceedings has little accountability to the citizens of the Commonwealth who pay the millions of dollars necessary to implement the decisions.

Parties Can Also Shirk Accountability

Moreover, it is arguable that the existing interest arbitration regime reduces the accountability of the parties themselves to the public. Mainstream research literature on public employee dispute resolution recognizes the possibility that the specter of interest arbitration creates a "chilling effect" during the actual collective bargaining process. Under the concept, both sides are disincentivized from compromising out of a concern for making concessions that would undermine their ultimate positions in front of the arbitrator. The literature describes a related "narcotic effect" where the sides go through the process of collective bargaining but repeatedly rely on interest arbitration to resolve their disputes. The arbitration becomes habit-forming. Regardless of one's view of these theories, it is indisputable that in the case of negotiations between the MBTA and the Carmen's Union, decades of resolution have occurred through interest arbitration rather than at the bargaining table. In fact, since the Carmen's Union was founded in 1912, 19 of its 53 rounds of negotiation on the 'basic working' collective bargaining agreement have been finalized through interest arbitration.

In this way, some would argue that interest arbitration provides a convenient mechanism for the MBTA and Carmen's Union to avoid accountability because they do not have to make difficult decisions on concessions at the negotiating table and can blame poor and/or unjust results on the relatively anonymous – though powerful – arbitrator for that bargaining cycle. The delegation of substantial decision making authority to a private individual with virtually no accountability to the public political process, though upheld as constitutional by the Supreme Judicial Court, is nevertheless questionable policymaking.

Conclusion – Baker Plan: Accountability

The Baker administration's legislation is designed to rectify this problem with regard to the MBTA's public unions – just as it has been corrected already with regard to every other public employee of the state. The FMCB would ensure that the Governor, Senate President and Speaker of the House who refer and appoint the members of the control board could be held accountable by the electorate. The FMCB would answer ultimately to the Governor, and its decisions would be subject to public debate. In addition, it would presumably be subject to the open meeting and public records laws that pertain to other executive branch boards and agencies.

Again, contrary to some of the hyperbole in the public debate, the Baker administration plan offers a sunset provision. The FMCB would not be a permanent control board, but would exist only until the end of the state's fiscal year in 2018, or 2020 if the control board and the secretary of transportation agree to continue it. The policy plan beyond the three-to-five-year mark would therefore necessarily be subject to appropriate political debate, informed at that point by years of data on the performance and efficiency of the FMCB and the MBTA and its public employees. If the FMCB is not re-established through separate legislation after it sunsets, the review authority over the appropriations necessary to fund the determinations of future arbitrators would revert to the board of directors Massachusetts Department of Transportation as established under section 7 of Chapter 161A. The Baker administration added the sunset provision to its original draft, thereby eschewing a political negotiating position it could have leveraged, presumably in order to show good faith in its proposal to at least experiment with a reasonable solution to the profound challenges facing the MBTA and the citizens of the Commonwealth.

Endnotes

1. See, e.g., American Public Transportation Association. 2013 Public Transportation Fact Book, 64th edition. Washington, D.C.: October 2013, *Table 3*, page 8.
2. The Carmen’s Union (Local 589, Amalgamated Transit Union) is the largest of the MBTA’s 28 bargaining units, representing roughly 3,500 employees over a range of 45 distinct job classifications—or approximately 55 percent of the MBTA labor force. The outcome of the MBTA’s negotiations with Local 589 typically set a ‘pattern’ that the other MBTA unions follow. This method is not based on statute or in collective bargaining agreements, but is a practice that has emerged over iterations of negotiation cycles between the MBTA and its unions because of Local 589’s relative size and influence.
3. “Factor legislation” refers generally to Chapter 581 of the Acts of 1980 that required an arbitrator to take a specific list of factors into consideration when rendering a decision on wages and other benefits. Specifically, one of these factors is “(a) comparison of wages, hours and conditions of employment of the employees...in the arbitration proceedings with the wages hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.”



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