TESTIMONY OF GREGORY W. SULLIVAN, RESEARCH DIRECTOR OF PIONEER INSITUTE BEFORE THE JOINT COMMITTEE ON TRANSPORTATION IN SUPPORT OF HOUSE 3347

MAY 11, 2015

Thank you for allowing me to present testimony concerning Governor Baker's MBTA reform proposal.

I want to focus on three specific components of the Governor's proposal that I believe are necessary to solve the MBTA's chronic fiscal and management problems: 1) putting an end to final and binding arbitration at the MBTA, the only public entity in Massachusetts whose collective bargaining agreements are not subject to approval by a governmental entity, by substituting in its place a collective bargaining system used elsewhere in state and municipal government in Massachusetts; 2) authorizing the creation of a finance control board to implement an intensive efficiency overhaul at the MBTA; and 3) waiving applicability of the Pacheco Law at the MBTA.

Until these proposals are adopted, the MBTA will continue to be run, in effect, by arbitrators and union organizations, not by MBTA management, the legislature, or the Governor.

I recently reviewed the history of the legislature's efforts to reform the MBTA over the past 35 years, as documented in case dockets at Suffolk Superior Court in Boston. I think that any objective observer who reviews this history will come to the same conclusion expressed by the attorney Philip G. Boyle of Morgan, Brown, and Joy, L.L.P., which represented the Commonwealth in 2013 in its efforts to implement the legislature's 2009 reform legislation over the legal objections of Local 589.

Attorney Boyle presented the following statements to the court:

> "The fair conclusion that can be drawn is that Local 589 uses interest arbitration to avoid, delay or frustrate the application of legislative changes that it perceives are adverse to its members."
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> "The Union's tactical use of interest arbitration has inured to the benefit of all Local 589 members, active and retired, the past 25 years and cost the MBTA millions of dollars in lost savings."
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> "Our purpose here is to expose for the arbitrator the corrosive effect the utilization of this tactic of delay has had on the financial stability of the MBTA as she considers the gross imbalance between the MBTA's total compensation and benefits and the compensation and benefits paid to the rest of the public sector since the 1970's. There is no acceptable rationale to preserve for Local 589 active and retired employees the significant premium they have long enjoyed."

Attorney Boyle presented a lengthy and detailed analysis chronicling the legislature's efforts to effectuate reforms at the MBTA and the long history of legal and procedural opposition raised by MBTA unions. He also described decisions by arbitrators that thwarted reforms through delays , dilutions, and outright reversals of legislative action.

The attorney explained that after the legislature enacted Section 140 of Chapter 25, Local 589 filed a Superior Court action challenging the legislature's authority to have done so. Section 140 provided additional sales tax revenue to the MBTA and attempted to effectuate savings by putting MBTA employees and retirees under the Group Insurance Commission system that provides health insurance to state and participating employees, with the same health care benefits and cost contributions as their public employee counterparts. The Superior Court upheld the constitutionality and validity of Section 140 four months later.

Local 589 then filed a complaint with the U.S. Department of Labor (DOL) under DOL rule 13(C) to block the Commonwealth from receiving what the arbitrator later described as "millions or perhaps billions of dollars of federal funding of MBTA projects." The DOL directed Local 589 and the MBTA to engage in negotiations. After negotiations, the parties agreed to jointly petition the legislature to amend Section 140 to permit the Authority to engage in collective bargaining over the establishment of a Health and Welfare Trust Plan "or to pay the cost, in whole or in part as determined by collective bargaining, of any supplemental benefits or coverage provide under the Trust Plan." The legislature adopted the language as approved by the parties and Chapter 189 of 2011. This had the effect of subjecting the matter once again to binding arbitration.

Neither the DOL nor the FTA requires that disputes like this one be made subject to final and binding arbitration. Their rules require only that matters in dispute be brought before an arbitration system established by local or state law that meets DOL standards, which standards allow not only for final and binding arbitration but also for fact-finding arbitration with final approval left up to state boards, which is what Governor Baker has proposed in the legislation before you today. In other words, had the legislature not made collective bargaining at the MBTA subject to final and binding arbitration through Chapter 161A, an act adopted when the MBTA was the Massachusetts Transit Authority, the final decision on the matter of the GIC migration could have been brought before any other form of interest arbitration devised by the legislature acceptable to DOL and FTA.

The legislature has the legal authority to alter the MBTA's method of arbitration with its unionized employees by virtue of judicial decisions made more than thirty years ago.

> "Under section 13(c), states remain free to adopt any constitutionally permissible public sector collective bargaining law they choose. Nothing in UMTA pre-empts this authority, nor do section 13(c) or the labor agreements created under it override state law." See Jackson Transit Authority, 457 U.S. at 27, 102 S.Ct. at 2209 (section 13(c) does not supersede state law); Local Division 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 627 (1st Cir.1981). Stephen Breyer, U.S. Federal Circuit Judge.

> "In the Jackson Transit decision, the Supreme Court agreed with the 11th Circuit Court's decision in ATU v. MARTA. Noting that neither the statute nor the legislative history expressly addressed the means for enforcing a [Department of Labor] Section 13(c) agreement, the Court relied primarily on the strong preference voiced by the Congress in enacting Section 13(c) for leaving matters of public employment for Congress intended that labor relations between transit workers and local governments would be controlled by state law. Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations." (Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union 457 U.S. 15, 102 S. Ct. 2202 (1982))

While the legislature has possessed legal authority to adopt a system other than binding arbitration at the MBTA since at least 1982, it has thus far not done so. Because of this, the GIC transfer matter wound up being decided by an arbitrator statutorily empowered by the legislature itself to make a final and binding decision. Ironically, the arbitrator's decision in the GIC transfer matter effectively overruled an act of the governor and the legislature, despite the fact that their legislative act had been upheld by the Superior Court, by virtue of an earlier act of the legislature, Chapter 161A .

In the GIC migration arbitration matter, the arbitrator ordered that the transfer to the GIC should be delayed until the conclusion of binding arbitration, upon request by Local 589. According to the MBTA, this delay cost the MBTA $61 million.

The Union demanded that the effect of Section 140 be reversed and that its members "be made whole" for all additional costs borne by its members because of its adoption.

During arbitration, Local 589 told the arbitrator, "Without adopting the Union's proposals regarding the Health and Welfare Fund, the economic impact on employees and retirees will be devastating." In the list of so-called "devastating" outcomes that Local 589 presented to the arbitrator were the following:

- Premium contribution: Local 589 active members pay 15%; GIC requires premium contributions of 20% for most employees and 25% for those hired after July 1, 2003;
- Non-Medicare retirees: Local 589 non-Medicare eligible retirees pay 0%; 10% for recent retirees. GIC non-Medicare retirees pay 10%, 20%, and 30% depending on retirement date;
- Deductibles: Local 589 active members and retirees currently paid no deductibles (except for out-of-network); GIC: $250 individual; $500 family of 2; $750 family 3+;
- Co-pays for inpatient hospitalization; outpatient surgery; diagnostic imaging. MBTA employees and retirees: no co-pays for these services; GIC: $200-$750;
- Tiered co-payments: MBTA members pay $20 for a physician visit; GIC has a three-tier system with co-pays up to $45 for Tier 3 physicians;
- Limited network: MBTA can go to any provider; GIC offers less expensive Limited Network plans with certain providers off limits.

Ultimately, the matter of Local 589 and other MBTA union members' right to receive compensatory funding from the Health and Welfare Trust was submitted as a matter of collective bargaining to an

arbitrator in binding arbitration. The arbitrator ultimately included in her decision three elements that the MBTA later unsuccessfully challenged in Superior Court: 1) the benefits of the Trust were extended to MBTA retirees; 2) the benefits of the Trust were extended to include life insurance; and 3) the benefits of the trust were extended to include full coverage of Medicare Part B for retirees. The arbitrator also ordered the MBTA to provide $3,175,289 to the Trust for the remaining period of the collective bargaining agreement, through June 30, 2014. Most significantly, the matter of further benefits was made subject to future collective bargaining and arbitration.

For those who would claim that calls for elimination of binding arbitration at the MBTA are anti-union initiatives, I call your attention to the following excerpt from Stuart Weisberg's book, "Barney Frank: The Story of America's Only Left-handed, Gay, Jewish Congressman."

> In 1976, [Barney Frank] proposed repealing the law requiring that MBTA collective bargaining disputes be submitted to binding arbitration because he felt that MBTA employees should be treated the same way other state employees were. The previous year the legislature had raised taxes and denied a cost-of-living increase to state employees but MBTA employees got an adjustment through arbitration. His measure was defeated by a vote of 84 to 138. In 1978, he bucked several labor unions to win approval of legislation to bring about reform of MBTA operations and collective bargaining, to cut substantial waste, and to bring greater efficiency to the MBTA. The bill strengthened the management right to control labor costs, for example, by hiring part-time workers for peak hours rather than hiring them all day, and by contracting out such jobs as cleaning and security. The legislation amended the MBTA enabling state by establishing criteria that must be considered by an arbitrator in deciding wage issues. It required an arbitrator to compare the salaries of MBTA employees with those of other in-state public employees rather than transit workers from other cities such as New York, Chicago, and San Francisco. The Carmen's Union called it the most anti-labor bill to come from the legislature. In 1981, the First Circuit of Appeals, in a decision written by Judge Stephan Breyer, upheld the validity of this legislation, overturning a district court ruling that parts of the law were unconstitutional.
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> Barney detested wasteful government spending and inefficiency. "It's the liberal's responsibility to try to save money because if we don't save money in the right places, it's going to be cut in the wrong places," he said. As a liberal he is an enthusiastic supporter of trade unionism. But he took the lead in efforts to reduce the power of public employee unions in Massachusetts. He sponsored legislation to limit the power of MBTA unions because he thought they were out of control and their demands for salary and benefits were excessive and contrary to the public interest, and he wanted to curb what he viewed as the excesses of civil service and the intolerable inefficiency at the MBTA. He described [the MBTA] in these words: "Never has one organization paid so much to so many people to do so little." He complained that MBTA work rules "required three people to change a fuse- two to carry the ladder and one to supervise." He wanted to make it easier for managers to discharge MBTA employees for poor performance. 'You can't hire them, you can't fire them, you can only yell at them," he said with frustration. He wanted to make it easier for MBTA managers to discharge MBTA employees for poor performance. "I am not trying to make it easier to fire a hundred MBTA employees, I just want to make it a reasonable task to fire one employee," he said.

The management rights bill that then-State Representative Barney Frank helped make into law in 1980, Section 8 of c.581 (codified at MGL c.161A, Section 19), became the subject of nearly sixteen years of contention in the courts, arbitrator's hearing rooms, and the work place following its passage. It was not until 1996 that the MBTA/Local 589 contract was finally amended to strike out provisions that the management rights bill had deemed ineligible for collective bargaining years earlier. During the intervening period, many MBTA management rights initiatives were watered down and discontinued.

Pioneer Institute has advocated for the MBTA to be placed under a receivership board. Such an action would follow the successful models employed in Chelsea and Springfield. Both receiverships balanced municipal budgets and streamlined operations; in the case of Springfield, the city addressed a $41 million deficit in 18 months. Both cities earned higher bond ratings as a result.

A key role of the finance control board would be to reinstate fully the aforementioned management rights enacted through amendments to the MBTA's enabling legislation in 1980 when the T faced a previous crisis. Another key role would be to establish performance metrics that can be used as benchmarks for accessing financial incentives.

Finally, the Legislature and Governor should exempt the MBTA from the provisions of the Pacheco Law, MGL Chapter 7, Section 52. When the Legislature passed the MBTA Management Rights Law in 1980, it empowered T management to seek competitive bids from outside vendors to bring down costs. The Pacheco Law effectively trumped the management rights bill by severely constraining the possibility of outsourcing MBTA services, as demonstrated by the Supreme Judicial Court of Massachusetts decision in MBTA vs. Auditor of the Commonwealth (430 Mass. 783). The MBTA can simply no longer afford the large and unnecessary cost of the Pacheco law.

In a previous report, Pioneer Institute described an example of successful savings attributable to competitive procurement at the MBTA. In December of 2012, MBTA managers outsourced the full-scale "mid-life" reconstruction of 192 diesel buses purchased by the MBTA in 2004/2005 to a Michigan bus refurbishing company following a competitive bidding process. Because of MBTA work-scheduling limitations then occurring, the Pacheco Law was not applicable in this instance. The 192 diesel buses constituted 22.5% of the buses the T needed for maximum service, which was 850 in 2011, according to the NTD data. The MBTA's decision to outsource followed the recommendations of a transportation consulting company whose hiring was approved by the MBTA Board of Directors. Saving money was on board members' minds when they voted to outsource the bus overhauls. Meeting minutes indicate that the board's chair asked the MBTA's chief procurement officer to compare the cost of contracting to the in-house alternative. She responded that it would cost 50% more to do the work in-house. The board then approved the contract.

The Governor's bill includes all three of the elements that I have described that are essential in my opinion to bringing MBTA costs under control, increasing efficiency, and improving performance.