

BEFORE
M. DAVID VAUGHN, ESQ.
ARBITRATOR

INTEREST ARBITRATION)
)
Between) Case No. 300-08-01
)
REGIONAL TRANSPORTATION DISTRICT)
)
and)
)
AMALGAMATED TRANSIT UNION,)
LOCAL 1001)
)

**REGIONAL TRANSPORTATION DISTRICT'S
POST-HEARING BRIEF**

The Regional Transportation District (“RTD,” the “District,” or the “Employer”), by its attorneys, RTD Deputy General Counsel Rolf G. Asphaug, RTD Associate General Counsel Jenifer M. Ross-Amato, and RTD Assistant General Counsel Derrick K. Black, submits the following post-hearing brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

RTD and the Amalgamated Transit Union Local 1001 (“ATU” or the “Union”) were unable to come to terms on a new collective bargaining agreement when the existing agreement expired March 1, 2009. The Colorado Department of Labor and Employment ordered this interest arbitration in lieu of a strike.¹ Issues included term of the contract, wages, health and welfare benefits, pension benefits, plus several additional proposals by RTD:

- Changing the way mandated day-off overtime is assigned to bus operators;
- Expanding RTD’s ability to buy rebuilt parts when it is cheaper for RTD to do so;
- Giving part-time bus operators the practical ability to bid for weekend work;
- Clarifying the minimum-guarantee language to recognize the intent of the guarantee;
- Making the lateral bidding process into light rail consistent with all other lateral bidding;
- Confirming management’s right to review an employee’s record in connection with bidding to new positions;
- Ending the artificial coupling of Welder-Fabricator wage rates with those for mechanics; and
- Confirming that Mechanic Helpers, as trainees, should not get the same wages as General Repair Mechanics when training.

Other issues originally included in the parties’ last, best and final offers were settled or withdrawn either before or during the arbitration hearing. The parties consented to an “arb-med” process whereby the Arbitrator temporarily assumed the role of a mediator at the conclusion of the

¹ See C.R.S. §§ 8-3-112(2), 8-3-113(3) (Colorado statutes requiring interest arbitration as a substitute for a strike when director of division of labor finds that a strike would interfere with the preservation of the public peace, health, and safety).

hearing, but mediation proved unsuccessful. By stipulation of the parties, the Arbitrator must therefore now determine an award in a “baseball” format, on an issue-by-issue basis. As the Arbitrator has noted, he must choose the “least unreasonable” of the parties’ competing proposals on each disputed issue.

Term of contract: RTD is proposing a 27-month contract term, rather than the typical 36-month term. Given the current economic situation and the best available forecasts, RTD’s proposal is more reasonable because it allows the parties to return to the bargaining table nearly a year earlier. There is precedent for these parties previously agreeing to 28-month, 30-month and shorter contract terms, as well as ample precedent for such shorter terms in the transit industry at large, especially during uncertain or difficult economic times.

Wages: Everyone agrees that the current economic situation in Colorado and nationwide is the worst since the Great Depression. RTD, a public transit agency, is funded nearly 70 percent by sales and use tax revenues. RTD is in dire financial straits mainly because those tax revenues have plummeted over the last year along with the economy as a whole. RTD has already been forced to make significant service cuts to the public: cuts that disproportionately harm the most disadvantaged and vulnerable members of society who depend on mass transit to get to their jobs, homes, schools and medical appointments. RTD already has canceled or postponed millions of dollars of planned expenditures unless and until the economy rebounds, at least several years from now. RTD has already frozen the salaries of its non-represented employees for at least one year and possibly longer. RTD’s General Manager and Chief Financial Officer convincingly showed that an award of either of the Union’s economic demands, let alone both of them, would cause additional service cuts, with associated layoffs and furloughs. With an undisputed economic

emergency at hand, the Union's "business as usual" wage demands of nearly 2% in 2009, another 2% in 2010, and an unprecedented 4% in 2011 are unreasonable and unrealistic.² The Union's wage demands also are premised on flawed and even outright false economic data. By contrast, the District's offer, while including an undesirable but necessary wage freeze for 2009 and 2010, at least contains a generous \$1.00 hourly wage increase for a large proportion of the Union's members in 2011, and a 15-cent increase for all other members. RTD's offer also includes a lump sum of \$700 for each full-time employee and \$200 for each part-timer if the economy manages to rebound later in the contract term. RTD's proposal is even more reasonable considering that the 75% of Union full-time employees participating in the RTD-ATU health plan are getting premium holidays totaling hundreds of dollars – possibly over \$900 – during 2009, thus ameliorating to a great extent the effect of the District's 2009 wage freeze. The District's wage offer is actually much better than the three-year wage freeze that the parties negotiated during the last, much less severe, economic downturn in 2001. The District's offer also will leave RTD employees even at the end of the contract term with the best wage and benefit package for comparable employees in the Rocky Mountain region.

Health and Welfare Benefits: There is no reasonable basis for the Union's demand that RTD contribute an additional \$25 per employee this year, \$35 in 2010, and \$50 in 2011 at the same time that the health and welfare trust is so overfunded that it is granting multiple premium

² The Union's wage demand was a 1.7% increase in 2009, 2% in 2010, and 4% in 2011. RTD Ex. 29, p. 9. No RTD-ATU interest arbitrator has ever previously awarded a yearly percentage increase approaching 4%, and the last time the parties mutually negotiated a wage increase that high was in 1982. *See* RTD Ex. 174.

holidays, and at the same time that RTD is experiencing a severe economic crisis already compelling service cuts and wage freezes. No one even questions that the trust is currently in fine shape and simply does not need any more money from RTD, at least for the coming contract term.

Pension Benefits: The pension trust is, however, a reverse image of the health and welfare trust: it is currently severely underfunded. RTD's modest proposal to stop accrued vacation and sick leave payoffs from also being counted in computation of final earned income is one reasonable way to help remedy this problem. The impact on current pensioners is zero, and for future pensioners any impact would be minimal – but the savings to the pension trust fund will help return the fund to an actuarially sound condition.

Mandated Day-Off Overtime: RTD proposes to eliminate the distinction between the extra board and regular operators so that mandated day-off overtime is assigned based on inverse seniority, rotated monthly. The Union fully acknowledges that overtime *is* a hardship. Even if heavily mandated overtime is not foreseeable during this contract, RTD's proposal is more reasonable than the current contract. The reasons to eradicate this work rule extend beyond any contract. Importantly, RTD needs time to fix its leaky roof *before* the rainy season; waiting to solve the problem could prevent the solution from working and cause further damage.

Rebuilt Parts: RTD proposes to incorporate a cost analysis and prudent business decisions model and delete the current rebuilt parts side letter in determining whether to buy new, rebuilt, or rebuild a particular component in-house. The proposal will allow RTD to realize a significant financial gain as opposed to the current system. RTD remains committed to initiatives that keep the Unit Shop competitive with outside vendors. There is no intent by RTD to diminish the Unit Shop because of this proposal. Along those lines, RTD also proposes to include the same language

for Light Rail but for different reasons. Light Rail does not have a Unit Shop, the electro mechanics repair many components in Light Rail, and what cannot be rebuilt in-house are propriety components that only the manufacturer has the ability to rebuild.

Part-Time Bus Operators: The nature of the transit business requires a balance between part-time and full-time operators, reflected in the contract that already allows 21% part-time operators limited to 30 hours per week. RTD cannot fully utilize those rights because for weekend work, part-timers vote *after* full-timers. The proposal corrects this anomaly while preserving untouched the percentage and hourly limits on part-time work. Part-timers will have more flexibility and more hours; fewer full-timers will be forced to work weekends and overtime.

Minimum Guarantee: The contract should be clarified to harmonize the contract language defining the guarantee and realize the intent of the guarantee. The guarantee ensures extra board operators on report are paid as if they worked full-time, even if they are not assigned enough work for a full week. Extra board operators receiving the minimum guarantee and *not* working on a holiday should be paid only the 40-hour guarantee. An extra board operator who does not work the holiday should not make more money than a regular operator or extra board operator who actually works the holiday.

Light Rail Lateral Bidding: The reason for lateral bidding – the need to funnel operators and mechanics from bus to rail – no longer exists. Lateral bidding is not consistent with the rest of the bargaining unit. It also is costly and detrimental to the business.

Review of Record: RTD proposes that employees bidding into another job classification meet threshold qualifications for attendance and discipline. This proposal clarifies – in an objective standard – what a review of qualifications and experience, already in the contract,

actually is. This practice, which is already working in some positions, should be applied consistently throughout the bargaining unit.

Welder-Fabricator Side Letter: RTD proposes to eliminate the Welder-Fabricator side letter and adjust the wage rate to the prevailing market. Currently, the Welder-Fabricator enjoys a wage increase that is based upon a mutual mistake between both parties. The intent of the RTD was never to have the position of Welder-Fabricator and Recertified Mechanic linked together forever, as both positions require different skill sets, qualifications, and certifications.

Trainee Wages: There is no reasonable basis for paying an employee in training the same wage rate as a fully trained worker. The Mechanic Helper, as a trainee, requires direct supervision and does not have the necessary skills to complete projects as a trained employee would. RTD's proposal encourages the trainee to train and be motivated to obtain any certification required for a particular position, thus reaping the benefits of any potential wage increase.

After a brief review of the applicable legal standards for this interest arbitration, RTD will address each of the above issues in turn. References to the transcript will be by date and page/line: for example, CFO Howerter's testimony on page 163, line 14 through page 164, line 19 of the June 25 transcript will be "Tr. (6/25/09) 163:14-164:19 (Howerter)." References to exhibits will be "Union Ex." for ATU exhibits and "RTD Ex." for the District's exhibits.

APPLICABLE LEGAL STANDARDS

A. The Colorado Labor Peace Act Emphasizes the Impact on the Public.

Colorado ordered this interest arbitration pursuant to the Colorado Labor Peace Act.³ Unlike some states, the Colorado statute does not contain express criteria for the Arbitrator to apply in making an award, but the statute does demonstrate that the interest and welfare of the public are key criteria to be considered. The Act provides for interest arbitration only when the Division of Labor has determined that even a temporary strike would “interfere with the preservation of the public peace, health and safety ...”⁴ In this case, the Division determined that even a brief strike affecting only RTD’s internally operated service – only one-half of RTD’s total service to the public – could interfere with the preservation of public peace, health and safety, and that interest arbitration was therefore warranted.⁵

Under Colorado law, the interest and welfare of the public at large takes precedence over the parties’ own bargaining rights – including the Union’s right to strike and the District’s right to take a strike. Since even a very temporary suspension of a fraction of RTD’s overall service to the public has been deemed such a threat, it therefore stands to reason that arbitration as a substitute for a strike should avoid a result that negatively impacts service to the public over a longer term – such as an award requiring additional cuts in service to the public in order to pay for it.

³ C.R.S. § 8-3-101 et seq.

⁴ C.R.S. § 8-3-113(3).

⁵ Joint Ex. 3 (Division order); *see also* RTD Ex. 29, p. 11 (Colorado Labor Department official said strike was denied because “Right now, where we are, we can’t afford to prevent people commuting to and from work, or create any additional obstacles, or a scenario that would negatively affect our economy in the Denver metro area”).

B. General Arbitral Standards Also Apply

In addition to Colorado's emphasis on the public interest, general standards for interest arbitration are relevant.

1. What would the parties do if left to their own devices?

An interest arbitrator must “remember not to depart so far from a possible compromise, consistent with the respective power and desires of the parties, that one or the other of them will be likely next time to prefer open hostility to peaceful settlement.”⁶ Standards used by interest arbitrators “are, generally speaking, the very same ones that are used by the parties in their negotiations.”⁷ Arbitrators may look to “the past treatment of the issue by the parties ...”⁸

When left to their own devices, these two parties – ATU and RTD – have *consistently* focused on local conditions in negotiating not only wage issues but other interest matters. The record is devoid of any attempt, even by the Union, to point to “going rates,” “industry norms” or the like during any other years when these parties reached an agreement. For example, in 2003, the ATU and RTD voluntarily agreed to a three-year wage freeze, based on local economic conditions rather than on reference to any national trends or examples.⁹

⁶ SOULE, WAGE ARBITRATION 6-7 (1928) (*quoted in* ELKOURI & ELKOURI: HOW ARBITRATION WORKS (6th ed. 2003) (“ELKOURI”) p. 1360).

⁷ ELKOURI, *supra*, p. 1402.

⁸ *Id.* p. 1420.

⁹ *See* Tr. (6/25/09) 193:22-195:12 (Fisher); Tr. (6/28/09) 17:10-24 (Fisher) (not even Union has presented national comparables in other negotiations); Tr. (6/26/09) 38:24-40:10 (Dash); RTD Ex. 72 (the parties' negotiated wage package in 2003 was not consistent with what was bargained at other transit agencies in the country).

These parties have also regularly negotiated non-economic issues in their contracts – as witnessed by the many side letters in recent years that now form part of the CBA. The Union’s suggestion that this Arbitrator should avoid granting reasonable non-economic demands merely because the parties were sent to arbitration in lieu of a strike is illogical, discourages good-faith negotiation, and is contrary to these parties’ past practice. When the parties have previously been sent to interest arbitration, the parties and the arbitrator have readily proposed and awarded non-economic demands.¹⁰

If an important goal is to emulate what these parties would reasonably arrive at if left to negotiate a new contract, prices in Pittsburgh, wages in Washington, housing in Honolulu, or similar irrelevant and speculative data is not relevant since the parties have never relied upon it in other years. Instead, what these parties would ultimately have reasonably done, consistent with their own successful bargaining efforts in prior years, is hew close to home.

2. What is best for the public welfare?

Even if the Colorado Labor Peace Act did not also provide clear guidance in this case, interest arbitration in the public sector normally takes into account the interests of the public as a whole. In fashioning an economic award, budgetary decisions that have a critical importance to

¹⁰ ATU and RTD each made numerous non-economic proposals in the 1997 interest arbitration, a good number of which were granted. *See* RTD Ex. 54, p. 3 (Union proposed and awarded expedited arbitration), p. 9 (Union proposed changes to seniority rules), p. 18 (both sides proposed sick-leave changes), p. 25 (more non-economic changes proposed by ATU), p. 27 (both sides proposed non-economic changes).

others critical are essential.¹¹ An award that could imperil a public entity’s ability to balance its budget and curtail the provision of necessary services is to be avoided. The public interest should also be considered in non-economic issues.

3. How do the parties’ proposals stack up to *local* comparables?

It is black-letter law that interest arbitrators should attempt to find *local area* comparables for purposes of determining fair wages and to address other bargaining demands. “In many cases, strong reason exists for using the prevailing practice of the same class of employers *within the locality or area* for [contract] comparison.”¹² “[E]mployees are likely to compare their lot with that of other employees doing similar work *in the area* and seek parity ...”¹³

This interest arbitration between the ATU and RTD presents a unique situation in that there now exists in First Transit, Inc. a local comparable entity that provides virtually a mirror image of RTD in terms of the key wage rate: the top hourly wage for bus operators. First Transit’s employees belong to the exact same union local as do RTD’s employees, and are working under a contract now in its second iteration.¹⁴ First Transit’s several hundred bus operators are doing the exact same work as their counterparts at RTD, and are working in the exact same geographic

¹¹ *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 228 (quoted in ELKOURI, *supra*, p. 1361). See also ELKOURI, *supra*, p. 1442 (“The public interest is an important consideration in public utility disputes, and equally so in disputes directly involving the public sector”).

¹² ELKOURI, *supra*, p. 1408 (emphasis added).

¹³ *Id.* p. 1409 (emphasis added).

¹⁴ RTD Exs. 18 (current First Transit contract), 19 (previous contract).

area.¹⁵ Colorado's laws allowing RTD to contract out a portion of its fixed-route bus service has thus created an accurate, local, market-based competitor – competing for the same employees as RTD – by which RTD's own represented employees may be measured.¹⁶

Even leaving aside this unique, compelling local comparable, many other comparable entities and employees within RTD's general locality or area are also readily identifiable. The Arbitrator can look not only to RTD's other contractors whose employees also represented by ATU but not yet working under a bargaining agreement, and to local charter bus companies, but also to large, public, and unionized transit agencies in Colorado Springs, Pueblo, and in all the states surrounding Colorado for comparables against which RTD may readily be measured.¹⁷ Arbitrators readily resort to such common-sense, local comparables when they are available.¹⁸ Even the Union's expert has done so.¹⁹

The Union will undoubtedly argue that this Arbitrator should feel bound by Arbitrator Meyers' resort to far-flung, nationwide properties in his 1997 interest arbitration decision. However, not only was there virtually no explanation that rationale in the 1997 decision,²⁰ but the

¹⁵ Tr. (6/25/09) 65:7-67:10 (Marsella); *see also* RTD Ex. 92 (*Herisse v. First Transit* case summarizing how First Transit employees are almost identical to RTD bus operators in duties and working conditions).

¹⁶ Tr. (6/26/09) 71:17-73:4 (Marsella).

¹⁷ RTD Exs. 7 (map of regional wages), 8 (chart of same).

¹⁸ “[A] close geographic proximity may signal certain shared characteristics such as climate, avenues of transportation ... and possibly socio-political values of the population. ... [L]abor markets tend to have geographic boundaries.” *Board of Supervisors, Sioux County, Ia.*, 87 LA 552, 555 (Dilts, 1986) (*quoted in* ELKOURI, *supra*, p. 1410).

¹⁹ Tr. (6/27/09) 149:3-12 (McCarthy).

²⁰ RTD Ex. 54., pp. 23-24.

few known facts relied upon by Arbitrator Meyers have radically changed in the intervening 12 years. Arbitrator Meyers apparently rejected RTD's proffer of local, Denver-area comparables in 1997 mainly because it was unknown back then whether any of them were unionized.²¹ Now it is instead an undisputed fact that the workforce for the most relevant local comparable to RTD – First Transit, Inc. – is unionized: and not just by any union, but by the same union local representing RTD's own workforce.

REVIEW OF ISSUES

A. Term of Contract

Given the current troubled economic situation, RTD's proposal of a 27-month contract term with no retroactivity of a wage award – rather than the parties' typical 36-month term – makes sense, regardless of which parties' other economic proposals the Arbitrator chooses to award. If the Arbitrator agrees with RTD that the economic crisis renders RTD's wage proposals "less unreasonable" than the Union's unrealistic demands, a 27-month term will get the parties back to the bargaining table that much sooner. If, however, the Arbitrator sides with the Union on other economic issues, such a decision – while still disastrous to RTD and the public it serves – would at least not carry the prospect of lump sum awards going back more than six months.²²

The Union's argument against a 27-month term was simply that these parties normally do not negotiate such terms, and have not negotiated a similar term since 1980, when the parties

²¹ *Id.* p. 23.

²² Tr. (6/25/09) 223:23-225:21 (Fisher).

agreed to a 28-month term. No one disputes that. But it is also true that not only have transit agencies across the country sometimes negotiated contract terms shorter than three years,²³ but *these two parties* have (1) previously negotiated shorter contract terms on numerous occasions,²⁴ (2) discussed a 12-month contract extension during this year’s negotiations,²⁵ and (3) previously agreed to a 28-month term in 1973 and a 30-month term in 1975.²⁶ Moreover, the concept of a non-retroactive award is not at all radical: it is merely a contract extension by another name – and these parties have agreed to extend their contracts during other uncertain economic times.²⁷

The Union complained that RTD’s proposal, if adopted, would result in the next contract ending in May rather than February. Supposedly a future strike might be less likely to imperil the public peace, health and safety if it proceeded in the summer, the Union appears to be arguing: in other words, the Department of Labor might actually allow a future strike to take place. However, there are several problems with the Union’s argument.

First, regardless of when the contract *ends*, the Union and not RTD decides when the Union will *strike*.²⁸ As it did in 2006 when it postponed its strike to begin on baseball Opening Day in

²³ See RTD Ex. 79 (listing over two dozen contracts currently having terms of less than 27 months).

²⁴ RTD Ex. 2; see also Tr. (6/25/09) 190:20-23 (Fisher) (one-year extension with wage freeze in 1987).

²⁵ RTD Ex. 55, p. 1 (bargaining transcript p. 4:6-19).

²⁶ RTD Ex. 2.

²⁷ RTD Ex. 2.

²⁸ Tr. (6/25/09) 225:15-21 (Fisher). In 2006, the Union chose to strike during a period of “shirtsleeve weather.”

April, the Union likely can continue negotiating or can time a strike to suit its purposes. (The prospect of RTD actually imposing a lockout is illusory.)

Second, the Union had every opportunity to propose, say, a 12-month or 24-month contract, either in its initial “last, best and final offer” or in response to this Arbitrator’s entreaties to both parties to “sharpen your pencils” and return with a second LBF. Instead, the Union stood pat with a three-year demand during these unsettled times, including a 4% raise in the final year.²⁹

Third, if this award causes the next contract to commence June 1, nothing prevents the Union from demanding as part of future negotiations to return to a March 1 commencement date, or for that matter some other date. Although these parties have in recent years had contracts typically starting March 1, they have also had contracts starting during various other months.³⁰ And of course, nationwide throughout the transit industry, contracts routinely end at various times throughout the year.³¹

Sound, practical reasons exist for the Arbitrator to award RTD’s proposal of a 27-month contract term, with no retroactivity.

²⁹ The Union’s last, best and final offer of a three-year term with such an extreme increase in the final year flatly contradicted its stance during negotiations, when ATU came to the table seeking a one-year standstill on wages (but unfortunately linked to an unreasonable demand on health benefits) due to “the state of the economy nationwide, statewide [and] locally.” RTD Ex. 55, p. 1 (bargaining transcript p. 4:9-11; statement by then Union chief spokesperson Larry Sorget).

³⁰ RTD Ex. 2.

³¹ RTD Ex. 79 (January, March, May, June, July, August, September and October end dates, just in this small sample of transit agency contracts).

B. Wages

RTD's wage offer this contract term represents the best it reasonably can do given the truly unprecedented economic crisis facing the agency. Never in the history of RTD – not even during the three years that the Union agreed to a wage freeze without even going on strike or seeking arbitration – has the District faced as dire a situation as it does now.³² Yet in an economic climate in which millions of jobs have been lost nationwide, and in which their brethren at transit agencies and other tax-supported public entities in Denver and across the country are either being laid off or are voluntarily accepting midterm concessions, this Union local is proposing a wage package for which the term “business as usual” is actually far too kind. The Union's package, if awarded, would include the highest RTD-ATU one-year percentage wage increase in the last quarter century.³³ The Union's wage demand is far more unreasonable than RTD's proposal particularly given the Union expert's admission that Colorado and the nation are in the worst economic crisis since the Great Depression.³⁴

1. The current economic situation is far too dire for a “business as usual” wage increase.

“Now we are confronted with a different kind of crisis,” writes one analyst. “I'm referring to the massive recession which is choking off the funding our systems need to keep rolling.” This analyst warns of transit agencies, including RTD, “facing service cuts and fare hikes. Layoffs of

³² See, e.g., Tr. (6/25/09) 190:14-191:4 (Fisher).

³³ RTD Ex. 174.

³⁴ Tr. (6/26/09) 147:24-148:6 (McCarthy).

[union] members have begun in several cities.”³⁵ “[S]tate and local revenues are way down... [W]e expect the layoff situation to get worse before it gets better.”³⁶

Is this analyst some apologist or “hired gun” for management? No: he is the International President of ATU. Other ATU analysts are equally pessimistic about the current economy: “[F]are increases, service cuts, and layoffs ... have crippled the transit industry during the past year,” says an ATU legislative report.³⁷ “All across the nation, transit systems are reluctantly carrying out some of the steepest fare increases and deepest service cuts in recent history,” says an ATU official in sworn testimony before the U.S. Senate. “No one is immune...”³⁸ The ATU describes America’s public transit systems – expressly including Denver – as “*desperate* to find a way to avoid service cuts and fare increases.”³⁹

And to further quote ATU, fare increases and service cuts are no matter of mere annoyance or slight inconvenience to the public. “Nationwide, fare increases are having a *devastating* affect [*sic*] on working families [and] the service cuts may actually be worse.”⁴⁰

³⁵ RTD Ex. 27, p. 13.

³⁶ *Id.* p. 1.

³⁷ *Id.* p. 2.

³⁸ *Id.* p. 5.

³⁹ *Id.* pp. 11-12 (emphasis added; Denver listed as one of 50 ATU properties affected). See also RTD Ex. 52, p. 1 (Transportation Trades Dept. of AFL-CIO [of which ATU is a part]: “the dire economy has caused huge shortfalls in state and local budgets. As a result, transit agencies across the country are considering deep service cuts, fare increases and laying workers off”).

⁴⁰ *Id.* pp. 5-6 (emphasis added). The ATU has itself underscored that transit service cuts have the greatest impact on the most vulnerable members of society: “Generally, when routes get cut, transit systems tend to look towards those with low ridership – early morning, late night, and weekend service. People who work non-traditional hours, typically minorities who have no other means of transportation, are disproportionately affected. The single mom who now gets her kids

ATU's national experts are unquestionably correct when it comes to the state of the national economy and the effect on transit nationwide.⁴¹ But are these national ATU experts perhaps mistaken about RTD and Denver? Is Denver somehow immune from the desperate straits facing other transit agencies? The Union actually halfheartedly tried to make such an argument at the hearing, citing only a few "whistling in the dark" newspaper articles that, in essence, said little more than that things could always be worse.⁴² Yet ATU Local 1001's own president admitted reality in a statement to a Denver newspaper: "The district definitely is in the same position as a lot of entities ... tax revenues are down, they're in a hard spot, *you cannot ignore that.*"⁴³ The ATU's president made this statement during contract negotiations, as did the Union's former chief

up at 4:30 in the morning to catch two buses in time to get her children to daycare and then herself to work cannot be expected to wait an additional hour for that transfer bus to arrive, standing in the freezing cold with two kids in tow. But that is exactly what is happening out there. Our drivers nationwide have seen it firsthand." *Id.* p. 6. (April 16, 2009 testimony of Amalgamated Transit Union before the U.S. Senate Banking, Housing and Urban Affairs Committee). *See also id.* p. 10 (almost identical comments by ATU International Executive Vice President). RTD's General Manager agreed with ATU's assessment, Tr. 6/25/09, pp. 30:16-31:9 (Marsella), as did RTD's transit industry expert Greg Dash. Tr. (6/26/09) 15:9-17 (Dash) ("the worst I've seen in my 40 years in the industry").

⁴¹ *See, e.g.*, RTD Ex. 23, p. 3 (sampling of transit agency layoffs, service cuts and fare increases), RTD Ex. 25 (multiple national reports on "dreadful," "horrible" economic crisis), RTD Ex. 63 (dozens of huge layoffs by major employers nationwide), RTD Ex. 94 ("wage implosion"), RTD Ex. 95 ("worst downturn since the Great Depression"), RTD Ex. 96 ("highest unemployment rate since 1983"), RTD Ex. 97 (high unemployment and income losses in 2009 will extend into "next year and beyond"), RTD Ex. 98 ("nearly five unemployed workers for every available job"); RTD Ex. 118 (huge, nationwide bankruptcies).

⁴² One such article was a Brookings Institution study that, comparing numerous factors, ranked Denver 39th among 100 U.S. metro areas overall. However, in *wages* Denver ranked 59th. RTD Ex. 30, p. 9.

⁴³ RTD Ex. 29, p. 14 (emphasis added).

negotiator in recognizing the difficult state of the local, regional and national economy.⁴⁴

Unfortunately, when it came time for the parties to respond to the Arbitrator's request to "sharpen their pencils"⁴⁵ and try to improve their last, best and final wage offers, the Union did indeed ignore the hard economic straits currently facing the District and the riders who depend on it.

As if the ATU's own national and local admissions were not enough, RTD presented uncontroverted testimony confirming RTD's difficult financial situation, and establishing beyond reasonable controversy that were this Arbitrator to award the Union its wage demands, further service cuts and initiation of layoffs would inevitably result.⁴⁶

RTD is funded nearly 70 percent by sales tax revenues, and in recent months those revenues have fallen "off a ledge," as CFO Howerter put it.⁴⁷ RTD presented report after report confirming beyond all reasonable doubt that not only RTD but all Colorado public entities relying on sales taxes have seen massive, catastrophic drops in tax revenues as a result of the economic downturn that had begun in the latter part of 2008 and had spiraled downward out of control in 2009: drops that will require "brutal" cuts.⁴⁸

⁴⁴ RTD Ex. 55, p. 1 (bargaining transcript p. 4:9-11). *See also* RTD Ex. 9 (2009 is first time ever that the mode for wage increases is zero); Tr. (6/26/09) 36:2-14 (Dash) (challenges facing RTD are "typical ... things are bad ... a lot bad").

⁴⁵ Tr. (4/27/09) 43:5-13 (RTD opening statement).

⁴⁶ *E.g.*, Tr. (6/26/09) 162:16-163:24 (Howerter); RTD Ex. 31 (June 23, 2009 Howerter financial status report).

⁴⁷ Tr. (6/26/09) 125:1-5 (Howerter). Howerter's characterization is similar to other analysts': "The sales tax has been absolutely hammered," said a senior fellow at the Rockefeller Institute. RTD Ex. 25, p. 26.

⁴⁸ RTD Ex. 30, p. 13; *see also, e.g.*, RTD Ex. 23, p. 1 (Marsella 1/9/09 memo: "the steepest declines in sales and use tax revenue on record for the District").

These two transit professionals, Marsella and Howerter, were not merely engaging in theoretical conjecture. Perhaps the strongest evidence of RTD's financial hardships was the fact that even before being faced with the Union's wage demands, RTD had *already* been forced to cut \$4.3 million in service to the public, and to freeze for at least an entire year the salaries of all of its non-union employees.⁴⁹ (The first series of service cuts had taken RTD from 40 under headcount for drivers to about 10 over headcount: a swing of about 50 jobs' worth of work lost.⁵⁰ No such job cushion against layoffs would be available if more service cuts are required.) RTD had *already* postponed millions of dollars of "discretionary" spending: actually, spending that RTD really has no choice but to do eventually – things like replacing aging buses and facilities – but that RTD has already had to put off.⁵¹ RTD had *already* increased fares.⁵²

The Union's attempt to rebut the above facts about RTD's economic condition encountered some difficulties. For starters, the Maryland economist retained by the Union – Dr. Amy McCarthy – committed approximately a billion dollars' worth of errors in analyzing RTD's financial statements. Her calculation of RTD's net income for one year was "slightly" off, as she characterized it: by nearly \$100 million.⁵³ At another point she double-counted a \$426 million

⁴⁹ *E.g.*, RTD Ex. 31, p. 11; RTD Ex. 29, p. 12.

⁵⁰ Tr. (6/28/09) 79:25-80:6 (Yates).

⁵¹ Tr. (6/26/09) 147:8-157:4 (Howerter). Just to balance RTD's current books – and without even taking into account the effect of awarding any of the Union's economic demands – RTD has budgeted no reserve for capital acquisitions for an astonishing five years – from 2010 to 2015: a "highly unusual" strategy to try to make ends meet.

⁵² Tr. (6/25/09) 31:10-32:18 (Marsella) ("I would not support ... additional fare increases because I don't think a majority of our ridership has the ability to pay").

⁵³ Tr. (6/27/09) 19:18, 32:14-33:18 (McCarthy).

expense.⁵⁴ At another point she forgot to put parentheses around a \$63.04 million figure, resulting in a \$126.08 million cumulative error.⁵⁵ In another place she made the same adding-versus-subtracting mistake, but with a \$63.02 million figure, causing a separate \$126.04 million error.⁵⁶ In another part of her expert report, she ignored a \$225.8 million mistake.⁵⁷ The dollar total of McCarthy's errors was actually more than twice as large as RTD's total operating expenses for the year she examined.⁵⁸

Yet for all the hundreds of millions of dollars in errors, the largest flaw with McCarthy's analysis was, as Howerter pointed out, something far more basic: it inexplicably came to a screeching halt at the end of calendar year 2008.⁵⁹ McCarthy's extremely vague suggestions that the District might somehow be able to afford the Union's economic demands were based on 2008 and earlier figures: she had utterly ignored the 2009 economic disaster and the devastating effect it has had since the start of this year on RTD's budget. The Union thus had no counter whatsoever to the District's evidence concerning its *current* financial situation.

At one point the Union asserted, without evidentiary foundation, that RTD might possibly be able to use one-time Recovery Act "stimulus" funds to pay the Union's economic demands.

⁵⁴ *Id.* 43:4-7.

⁵⁵ *Id.* 43:8-13.

⁵⁶ *Id.* 43:14-19.

⁵⁷ *Id.* 43:20-44:17.

⁵⁸ McCarthy's five errors listed above totaled approximately \$1 billion. RTD's entire operating expenditures (including depreciation) for 2008 was approximately \$472.6 million. RTD Ex. 31, p. 7.

⁵⁹ Tr. (6/27/09) 58:3-5 (Howerter).

However, Marsella and the Federal Transit Administration both confirmed that such funds could not legally be used to meet union wage increase demands.⁶⁰

Finally, in analyzing RTD's financial situation, no one should conclude that any cost savings from granting any or all of RTD's non-economic proposals in this arbitration would come even remotely close to funding either or both of the Union's wage and benefit demands. Any resulting savings from adoption of RTD's non-economic proposals discussed below should instead be directed toward restoring some fraction of the millions of dollars in service cuts that RTD has already had to implement.

2. The Union's wage proposal was based on false and unreliable data.

ATU's own national and local admissions, the overwhelming national and local evidence of an economic calamity unprecedented in the last 60 years, and the testimony of RTD's top officials amply met any reasonable evidentiary burden as to whether RTD could reasonably afford the Union's inflated wage demands. In addition, with regard to whether – in a perfect world – the Union's demands were even reasonably justified by increases in the cost of living, RTD's expert Greg Dash provided uncontroverted testimony that in fact, for the first time in 50 years, the cost of living index had actually *decreased* during the past year.⁶¹ As of June 2009, the Federal Reserve was predicting deflation rather than inflation as more likely “at least through early 2010, and perhaps for a longer period.”⁶²

⁶⁰ Tr. (6/25/09) 45:18-47:18, 114:10-115:10 (Marsella); RTD Ex. 202.

⁶¹ Tr. (6/26/09) 29:4-30:19 (Dash); RTD Ex. 25, p. 4 (“largest decline in prices in the United States since 1950”); RTD Ex. 119 (“Extraordinary Times”).

⁶² RTD Ex. 25, p. 5

By the time it was over, the Union's case for its wage demands had dwindled to the claim that the ATU had looked at other properties that had previously negotiated increases – i.e., before the recession had hit – and the Union's members simply desired similar increases.⁶³

The Union was also unable to present a coherent, rational basis for its wage demands. The Union's wage package included a 4% demand in 2011 that would be the highest percentage increase this Union has obtained in 24 years – and the highest ever awarded by an RTD-ATU interest arbitrator – despite the fact that all of the economic information presented to the Arbitrator indicates that the recovery nationwide, locally and for RTD from this current recession will be long and slow.⁶⁴

The Union based its “comparables” analysis on false, “cherry-picked” data, presented by an alleged expert who did not really reach any conclusions based on credible, reasonable or scientific analysis. As a fake veneer of scientific impartiality, the Union's economic expert, Dr. McCarthy, repeatedly claimed under oath that the 25 transit agencies in her report of comparables represented the *entire* number of transit agencies in the U.S. within a defined service population

⁶³ The Union's jealousy of these other agencies was misplaced, since as noted above many such agencies have since had to impose layoffs or seek mid-term concessions.

⁶⁴ E.g., RTD Ex. 196, p. 28; Tr. (6/26/09) 31:11-22 (Dash).

range.⁶⁵ However, she was utterly incorrect: there were in fact 33 additional properties within that range that she had omitted.⁶⁶

As Elkouri notes, “The selection of ‘comparable communities’ is often tainted by ‘cherry picking,’ where each party selects as ‘comparable’ only communities whose contract terms support its position.”⁶⁷ Such a taint is regrettable, and for that reason alone the Union’s analysis is flawed and should be set aside. However, during this arbitration McCarthy not only claimed that there was *no* “cherry picking” going on – that she had included all properties within the range – but, when the truth came out, she then repeatedly testified under oath that her mistake was based on representations in Union emails to her.⁶⁸ Then, when those emails were produced, it became obvious that McCarthy was simply not telling the truth: there is nothing in those emails that could reasonably have led McCarthy to believe what she testified. To the contrary, the emails clearly indicated that there *was* cherry-picking going on.⁶⁹

This was not McCarthy’s only outright misrepresentation to the Arbitrator. When RTD pointed out that her ranking of RTD in a listing of properties was based on her mistakenly including RTD’s contracted service as RTD-operated, McCarthy basically tried to blame her mistake on RTD, falsely claiming that the data as reported by RTD to the National Transit

⁶⁵ Tr. (6/26/09) 150:24-152:4 (McCarthy). McCarthy also claimed that she had checked her data against the National Transit Database. *Id.* 151:21-22. It is difficult to comprehend how she could actually have done so, since even the most rudimentary check would have disclosed her error.

⁶⁶ Tr.(6/27/09) 92:15-20 (Dash).

⁶⁷ ELKOURI, *supra*, 2008 Supplement p. 523.

⁶⁸ Tr. (6/27/09) 38:6-40:12 (McCarthy).

⁶⁹ Tr. (6/27/09) 39:14-40:2 (McCarthy); RTD Exs. 208-212.

Database failed to separate out such service, so that she “certainly” could not verify the extent to which the figures included RTD’s contracted service..⁷⁰ These untruths were quickly and easily exposed.⁷¹ When a witness so cavalierly and repeatedly mistreats the truth, an appropriate sanction is the total striking of her testimony.⁷²

Leaving such outright misrepresentations aside, the Union failed to demonstrate the underlying point: that RTD’s wage ranking even within its cherry-picked list of other transit agencies across the country somehow justified the Union’s wage demands. McCarthy failed to connect the dots of her flawed analysis.

McCarthy’s next approach was to present a list comparing home prices in various cities including Denver during an extremely limited and turbulent time period – the first quarter of 2009 – as some sort of substitute for a scientifically valid comparison of overall costs of living between

⁷⁰ Tr. (6/26/09) 156:15-157:22 (McCarthy).

⁷¹ Tr. (6/26/09) 88:21-89:8 (Dash); RTD Ex. 203 (National Transit Database report for RTD clearly depicting purchased versus in-house service).

⁷² See Tr. (6/27/09) 6:7-11:10 (RTD motion to strike based on misrepresentations). Like any tribunal, this Arbitrator has inherent authority to impose appropriate sanctions for submission of untruthful testimony or evidence. *Cf.* Fed.R.Civ.P. 37. The Arbitrator did note that “the reward for persuasive evidence, presumably, will be reflected in my determination on a particular issue. And the penalty for evidence that turns out not to be persuasive, would be that the position of that party would not be adopted.” Tr. (6/27/09) 51:17-22. As RTD noted in its motion at the hearing, evidence and testimony at arbitration hearings, even if given little weight by this Arbitrator, may be trotted out again in future arbitrations unless it is clearly and expressly stricken from the record. At a minimum, to prevent such danger RTD requests that the Arbitrator make clear on the record that McCarthy’s evidence and testimony were found entirely incredible due to the many inconsistencies, errors, and outright misrepresentations in her presentation.

cities.⁷³ McCarthy provided no scientific basis whatsoever for her approach: indeed, “better than nothing” was the remarkable way that she herself characterized her analysis.⁷⁴ There was not even the slightest effort by McCarthy to support her approach as scientifically valid or generally accepted by experts. Her analysis should therefore not merely be given little if any weight, but should be stricken altogether under the *Daubert* standard for expert testimony.⁷⁵

Finally, the Union did not attempt to explain why its own specific wage proposals made sense: why the Arbitrator should award the Union’s specific wage demands versus some other amount. For all the Arbitrator knows, the Union’s proposals were simply plucked out of the air. They were plainly not based on McCarthy’s analysis, since the emails prove that her analysis was not even begun until shortly before the hearing and months after the Union had made its last, best

⁷³ Tr. (6/27/09) 100:21-101:8 (McCarthy). The approach was nonsensical: due to extreme, temporary fluctuations in housing markets, the reported data of home prices had average home prices in Cleveland coming in at six times lower than those in Oakland, and Detroit having home prices of \$11,500 at the same time that Honolulu had prices of \$500,000. Tr. (6/26/09) 162:11-163:7 (McCarthy); Tr. (6/27/09) 111:2-7 (Dash). McCarthy did not even attempt to link such wildly inconsistent data with any true, reasonably reliable cost-of-living analysis.

⁷⁴ Tr. (6/27/09) 101:7 (McCarthy).

⁷⁵ See Tr. (6/27/09) 47:5-49:3 (RTD motion to strike based on *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *In re Williams Securities Litigation*, No. 07-5119, 2009 WL 388048 (10th Cir., Feb. 18, 2009) (confirming exclusion of expert testimony for failure to analyze and account for alternative reasons for reported economic data); *People v. Ramirez*, 155 P.3d 371 (Colo. 2007); court should consider whether the scientific principles underlying the testimony are reasonably reliable, and whether the expert is qualified to opine on such matters. RTD recognizes that there was no formal certification of McCarthy as an expert witness and no ruling accepting her as a witness, see Tr. (6/27/09) 50:10-14. However, the *Daubert* standards are still instructive “guidance by analogy,” *id.* 52:7, in determining what, if any, weight to give to McCarthy’s testimony, evidence and opinions.

and final offer.⁷⁶ The Union’s wage increase demands for even the first two years of the contract fly in the face of recent bargaining at other transit agencies involving wage freezes and concessions.⁷⁷

3. RTD’s wage proposal is a reasonable offer given current economic realities.

By contrast, RTD’s proposal does not rely on false and flawed economic hocus-pocus but instead represents a reasonable, rational response to current economic realities. If the task of the Arbitrator is to choose the “least unreasonable” of the parties’ two wage proposals, there should be no contest: it is RTD’s.

The worst economic years facing the nation, the State of Colorado and RTD for decades – since the Great Depression – are this year, and 2010.⁷⁸ That is why RTD has felt compelled to offer a proposal with, regrettably, no wage increases for represented employees during those two years. However, unlike many other public agencies, RTD has at least not proposed wage *cuts*.⁷⁹

⁷⁶ See RTD Ex. 208-212.

⁷⁷ See, e.g., RTD Ex. 26, p. 23 (ATU in New Jersey offers *mid-term* 2010 wage freeze; “the wage freezes weren’t a tough sell to the membership” said the ATU local president), p. 26 (MBTA unions agree to *mid-term, voluntary* forgoing of scheduled raises due to economic crisis), p. 38 (ATU proposes one-year freeze with BART).

⁷⁸ See, e.g., RTD Exs.25, p. 6 (deflation not inflation predicted into 2010), p. 12 (citing 18-24 month lag for public entities “even if the economy recovers tomorrow”; “many will be in worse shape in 2010 and 2011”), p. 31 (inflation to “vanish by the end of 2010”); RTD Ex. 30, p. 26 (Denver firefighter concessions), p. 27 (Denver police concessions), p. 31 (Denver newspaper concessions).

⁷⁹ See, e.g., RTD Ex. 25, p. 7 (pay cuts), p. 11 (furloughs), p. 13 (8% cut in Delaware), p. 21 (furloughs and givebacks in Connecticut), p. 23 (Tennessee layoffs and cuts), p. 25 (Detroit 10% cut sought), pp. 33-37 (cuts and furloughs in many other states), p. 38 (400 newspaper articles in one month with headlines containing “union” and “cuts”), p. 42 (40 newspaper articles in one month with headlines containing “union” and “concessions”); RTD Ex. 26, p. 9 (San Francisco

Moreover, under RTD's proposal the standard 54-month wage progression still applies, and about 50% of RTD's unionized workforce is still eligible for such progression increases.⁸⁰ This will help soften the blow.

RTD's offer of a 15-cent increase in 2011 to most represented employees – taking its top hourly bus operator rate to \$20.00 – may at first blush seem low, but remember that when these parties last negotiated a contract during troubled economic times, in 2003, the parties mutually agreed to a three-year wage freeze.⁸¹

The impact of the wage freeze in 2009 and 2010 is also lessened due to approximately 75% of full-time employees being eligible for multiple premium holidays during those years: in effect, lump sums of up to \$303 per month that could total \$909 before the end of this year.⁸²

RTD's offer also is reasonable in that it attempts to redress in a fact-based, targeted manner – to the extent RTD reasonably can do so – an identified shortfall in the wages currently paid to one large classification of represented employees: RTD's mechanics. While RTD's bus operators are already very highly paid compared to similar local employees, RTD's mechanics' wages should be improved if possible, to make RTD more competitive with other potential employers.⁸³ RTD has therefore offered a \$1.00 wage increase to those groups in 2011 when, based on the best

transit concessions), p. 10 (Atlanta transit concessions), p. 18 (Santa Clara transit 2-year freeze), p. 26 (Massachusetts transit concessions).

⁸⁰ Tr. (6/25/09) 38:17-39:4 (Marsella).

⁸¹ Tr. (6/25/09) 191:5-195:25 (Fisher).

⁸² Tr. (6/25/09) 212:23-215:1 (Fisher).

⁸³ The Union did not appear to dispute RTD's analysis that compared to other RTD occupational groups, the mechanics deserved a higher raise.

available current data, RTD is hopeful that the economy will have begun improving enough that RTD will be able to fund the increase without further jeopardizing service to the public.⁸⁴

RTD is also offering a one-time bonus – a lump sum – contingent on an economic turnaround. Lump sums are not unusual in the transit industry,⁸⁵ and other agencies make use of contingent bonuses and financial incentives.⁸⁶ RTD does not pretend that the economic requirements for the offer will likely be met: if that were the case, RTD could simply have made the offer a guarantee. However, there is at least a reasonable chance that they can be met, based on prior years' data demonstrating rapid increases in tax revenues after poor years.⁸⁷ Especially when one considers RTD's shorter proposed contract term, RTD's overall wage offer is reasonable – and far more reasonable than the Union's counterproposal.

In the public sector, “ability to pay” means that

the public employer cannot pay the increase demanded without reducing its services to a level that is in some sense inadequate or irresponsible or without raising taxes to levels that are by some standard excessive (or conceivably unattainable or illegal). In other words, the relevant claim is essentially that the union's demands entail costs that the community cannot reasonably be asked to bear or tradeoffs that the citizenry cannot reasonably be asked to make.

Foster, *'Ability to Pay' in Public Sector Fact Finding and Arbitration*, 35 Lab. L.J. 125 (1984).

Applying this standard to the facts as admitted by ATU's International, it is clear that during this hard economic time, it is not reasonable to ask RTD again to raise its fares or further cut service to

⁸⁴ See RTD Ex. 34 (comparing RTD's and Union's wage proposals for mechanics).

⁸⁵ RTD Ex. 73.

⁸⁶ RTD Exs. 64, 74, 75, 76.

⁸⁷ RTD Ex. 5, p. 1.

pay for the Union’s wage demands. A third fare increase in three years – especially one coming during this terrible economic situation – would be not only politically untenable but grossly unfair to struggling customers.⁸⁸ A fare increase, and any other means at RTD’s disposal to try to raise or shift revenues, would also not even begin to solve RTD’s current economic woes let alone pay for the Union’s economic demands.⁸⁹ An award of the Union’s demanded wages or fund contributions – even one or the other, let alone both – would absolutely come at the cost of additional service cuts.⁹⁰ Such cuts would cause serious added pain to RTD’s riders, and severe hardship to the junior Union members who would be the first to go in a layoff.

Can RTD impose higher taxes to meet the Union’s demands? No; Colorado law prohibits the government from unilaterally raising taxes without a vote.⁹¹ RTD also cannot borrow funds to meet the Union’s demands; RTD must have a balanced budget.⁹²

In summary, RTD’s economic offer is reasonable under the circumstances. The Arbitrator should consider

the context of general economic difficulty for that governmental jurisdiction or geographic area. The arbitrator considers the financial data ... and makes a judgment about the strength or weakness of the local

⁸⁸ “[S]ervices of public utilities, being constant necessities of life, should be made available to consumers at a fair price. Because wages paid by a utility will directly affect the cost of its services to the public, the amount of any wage increase granted may be affected by the arbitrator’s conclusion about the probable effect of the increase on the price of the service involved, and, therefore, the arbitrator will keep in mind the needs of the consumers.” ELKOURI, *supra*, pp. 1442-43.

⁸⁹ *See* Tr. (6/25/09) 163:20-24 (Howerter).

⁹⁰ E.g., Tr. (6/25/09) 54:18-57:14 (Marsella); 162:16-163:24, 170:12-19 (Howerter).

⁹¹ Tr. (6/25/09) 23:15-20 (Marsella).

⁹² Tr. (6/25/09) 33:25-34:15 (Marsella), 134:1 (Howerter).

economy. If it is indeed fragile and the governmental unit offers a fair increase, the decision may favor the employer because the arbitrator views the employer's offer as more in the public interest than the union's, whether or not the employer has the ability to pay more.

Krinsky, *“Interest Arbitration and Ability to Pay,”* Arbitration (NAARB 1988). In this case, RTD's offer is far more in the public interest than the Union's.

4. RTD's offer is supported by valid, local comparables.

RTD's wage offer also recognizes that there are today true, valid comparables by which to measure the reasonableness of RTD's wages. In particular, the best comparable is First Transit, Inc., a private company operating a large percentage of RTD's service whose bus operators are represented by the very same Union local representing RTD's unionized workforce. Both parties have agreed that the “key rate” for purposes of determining a fair wage is the bus operator top hourly rate.

First Transit's bus operators currently earn a top rate of \$17.83: \$2.02 per hour less than what RTD's bus operators can earn. And it takes First Transit operators far longer than RTD's operators to reach that top rate.⁹³

Perhaps the Union will claim that it is unfair to compare the contractors' operators to RTD's operators because the contractors' operators have not been under a collective bargaining agreement for as long, or in the case of Veolia have not yet finished negotiating a contract. Yet consider also what this Union is demanding for its Veolia brethren who operate RTD-branded

⁹³ RTD Ex. 18, pp. 27-28 (132 months for First Transit operators to reach top wage; by contrast, RTD's progression to top wage takes only 54 months). In addition, RTD's benefit package is much better than those for the contractors. Tr. (6/25/09) 197:8-23 (Fisher).

service. Veolia's operators receive a top rate of \$15.03 per hour - \$4.82 less than RTD's top rate – but the Union's own demands for wage increases for Veolia bus operators – 18% over three years⁹⁴ – is an increase merely to \$17.74 per hour. If ATU is victorious in its demand, it will result in a top hourly rate for Veolia operators that is still 9 cents an hour lower than what First Transit operators currently earn – and more than \$2 per hour less than RTD's current top rate for its own operators.

This Arbitrator has previously ruled, in a case where arbitral precedent required public sector employees to be paid the same as private sector employees performing comparable work, that where the evidence demonstrated a wage premium for public sector employees compared to their counterparts in the private sector, there should be “continued restraint on wage increases.” *In re U.S. Postal Service and National Postal Mail Handlers Union* (Vaughn 1996). While the same legal standards do not apply here, the general principle remains the same. Even when RTD's proposed two-year wage freeze is taken into account, RTD's top key rate in 2011 still will be substantially higher than the corresponding top rate for all local private-sector comparable employers.

Even the Union's own witnesses inadvertently supported the conclusion that RTD's bus operators are definitely not underpaid compared to their local counterparts. When Union witness Julio Rivera was asked, in direct examination on the topic of mandated overtime, why bus

⁹⁴ Tr. (6/26/09) 80:8-81:7 (Jones).

operators leave RTD, he gave many reasons besides mandated overtime – but the wage rate was not one of them.⁹⁵

Expanding the relevant labor market farther afield, to the entire State of Colorado or even to neighboring states, does not alter the conclusion. In all such scenarios, RTD’s key wage rate tops virtually all others.⁹⁶

Furthermore, as discussed above, if the goal is to try to emulate what these parties would do if left to their own devices, then RTD’s wage proposal is the more reasonable, because these parties simply do not resort to nationwide comparables in their own negotiating sessions.⁹⁷

For all of the above reasons, RTD’s wage proposal is the “least unreasonable” of the parties’ competing proposals, and should therefore be granted by the Arbitrator.

C. Health and Welfare Benefits

RTD’s analysis of the Union’s demand on health and welfare benefits will be brief, because the Union’s demand of massive, unilateral increases in RTD’s contribution to the fund is simply absurd. Other than vague speculation about possible future increases in health costs,⁹⁸ the Union presented no explanation for its demands in general, and no explanation as to why the

⁹⁵ Tr. (6/28/09) 169:19-170:14 (Rivera).

⁹⁶ Tr. (6/26/09) 18:12-20:3 (Dash). There may be some school bus operators who earn slightly more, but those operators work only parts of the day and year. Tr. (6/26/09) 20:4-16 (Dash). While Phoenix currently pays more, Phoenix is in serious economic trouble, as the ATU itself recognizes. RTD Ex. 28, p.3 (Phoenix to raise fares by 40%).

⁹⁷ Tr. (6/25/09) 193:22-194:13 (Fisher) (discussing RTD’s bargaining strategy).

⁹⁸ The only *facts* presented on this point were that the rate of increase of health care costs is declining. RTD Ex. 88. In addition, factors specific to RTD such as stop-loss insurance are keeping health costs under control. Tr. (6/25/09) 257:25-259:20 (Fisher).

specific amounts demanded were supposedly justified. As with wages, the Union's specific proposal appears to have been plucked out of thin air.

The health and welfare trust is, if anything, massively overfunded at present.⁹⁹ At a time when even the Union's fiduciaries on the health trust's board agree that massive and unprecedented premium holidays are warranted,¹⁰⁰ there is no rational basis to increase RTD's contribution by way of an interest arbitration award. These parties are free to revisit funding of the health trust during future trust board meetings as well as in their next contract negotiations.

D. Pension Benefits

In contrast to the health fund, the pension trust undisputedly is seriously underfunded.¹⁰¹ However, only RTD presented any proposals to try to rectify the situation. RTD has reasonably proposed to stop what is, in essence, a double-counted benefit to retiring employees: they currently get their vacation and sick leave payoff amounts counted towards their final income calculations for benefit purposes, even though they also get such amounts paid out in a lump sum on retirement.¹⁰²

⁹⁹ RTD Exs. 13, 43, 46; Tr. (6/25/09) 209:11-211:7 (Fisher) (actuary recommends roughly \$4 million in reserves, which reserve as of May 31 2009 was \$8,875,262).

¹⁰⁰ See RTD Ex. 45; Tr. (6/25/09) 212:23-214:15 (Fisher). The trustees also voted to increase dental coverage. Even after the premium holidays, the trust will remain greatly overfunded.

¹⁰¹ RTD Ex. 25, p. 11 ("underfunded pension plans are a growing worry"); RTD Ex. 50 (major drop in RTD pension fund from 2007 to 2009).

¹⁰² Tr. (6/25/09) 216:19-219:16 (Fisher); RTD Ex. 49.

RTD's proposal is reasonable. It will improve the fund's reserves by approximately 1.5 to 2 percent, yet it will have absolutely no impact on current retirees and only a very minimal effect on future retirees.¹⁰³

These parties have previously negotiated changes in their trust terms in the collective bargaining agreement. RTD's Labor Relations Manager Gregg Fisher explained that in this case, the Union's trustees feel politically constrained from agreeing to such proposals.¹⁰⁴ While arbitration is also available through the trust, the facts have been fully presented in this proceeding and this Arbitrator is empowered to order RTD's proposal in the context of this proceeding.

E. Mandated Day-Off Overtime

Under Article II Section 11(L), RTD proposes to change the way mandated day-off overtime is assigned. While this proposal applies to all represented employees, it largely affects bus operators. Under the current contract, mandated overtime for bus operators is assigned first to the extra board and then to regular operators based on inverse seniority, which is rotated daily. RTD proposes to eliminate the distinction between the extra board and regular operators so that mandated day-off overtime is assigned based on occupational inverse seniority, rotated monthly.¹⁰⁵ The way mandated day-off overtime is currently assigned poses a hardship on junior operators that should be resolved in *this* contract. RTD's proposal is the more reasonable alternative.

¹⁰³ Tr. (6/25/09) 216:22-218:7 (Fisher); RTD Ex. 49.

¹⁰⁴ Tr. (6/25/09) 221:3-223:21 (Fisher). Indeed, in this year's negotiating session the Union proposed that the trustees "promise" to take certain actions. Tr. (6/25/09) 222:10-223:21 (Fisher); RTD Ex. 55, p. 3 (bargaining transcript pp. 11-12).

¹⁰⁵ Tr. (6/28/09) 82:2-11 (Yates).

1. Mandated day-off overtime poses a hardship.

The Union fully acknowledges that mandated overtime is a problem that needs to be addressed. Certain employees bear the disproportionate burden of this hardship, while RTD shoulders the costs of turnover resulting from mandated overtime.

a. The Union should be held to its claims.

RTD's proposal cannot be denied purely because mandated overtime is not a hardship, when the Union fully acknowledges that it *is* a hardship. In the 2006 strike, the Union took a stance against RTD on wages and benefits based on the hardships imposed on operators because of overtime. Then Union President Yvette Salazar repeatedly defended the Union's decision to strike based on that hardship:

*“Our members have been working seven days a week without a day off and have worked for three years without a wage increase. We want to apologize to our riders, but the workers are extremely tired. This is the last straw.”*¹⁰⁶

The Union repeatedly has taken that position on mandate overtime.¹⁰⁷ Even at the hearing, Julio Rivera testified, “[T]he Union recognizes that mandating is not a good thing for anyone.”¹⁰⁸

b. Some employees experienced hardship.

Some employees have worked with few days off for months on end, particularly in 2006 when mandated overtime was at its height.¹⁰⁹ RTD Exhibit 124 proves that hardship.

¹⁰⁶ RTD Ex. 126, p. 2, 4, 11, 13 & 15 (emphasis added).

¹⁰⁷ RTD Ex. 129; *see also* Tr. (6/25/09) 88:19 – 89:7; 90:5-22 (Marsella) (discussing employee comments on the burden of overtime); Tr. (6/28/09) 75:7 – 76:8 (Yates) (explaining that in 2006, operators frequently approached senior management about burden of mandated day-off overtime).

¹⁰⁸ Tr. (6/28/09) 171:3-4 (Rivera).

In RTD Exhibit 124, each column represents a separate two-week period in which each employee should have had four days off. The two-week period with the highest amount of overtime ended on August 26. That two-week period had 390 events of day-off overtime. However, during that two-week period, only 215 operators – out of 802 total full-time operators – actually worked mandated day-off overtime. That is 27% of the full-time workforce. Of those 215 operators, 70 worked two out of their four days off during that two-week period. Even more significantly, 30 worked three out of four days off, meaning that 30 operators had only one day off in 14 days; and 15 worked all four days off and had zero days off during that time period.

During the next period that ended on September 23, even more bus operators – 29 – worked without a day off. Importantly, because the current system for mandating overtime rotates daily, the same group of people likely worked with zero or few days off the next period. Therefore, some bus operators experienced the hardship of not having a break from work for extended periods.

c. RTD bears the extraordinary costs of turnover likely caused by overtime.

In addition to the hardships imposed on individual employees, RTD bears the costs of turnover caused by overtime. While it is of course impossible for RTD to prove with absolute certainty what percentage of its turnover is directly caused by mandated day-off overtime, several factors point towards, at a minimum, a correlation between mandated overtime and turnover:

(1) In comparing RTD Exhibit 217 (turnover data) and RTD Exhibit 122 (historical chart of mandated day-off overtime events), the fluctuations in the turnover rate parallel the number of

¹⁰⁹ RTD Ex. 122.

mandated day-off overtime events. In 2006, when mandated day-off overtime was at its peak, RTD's turnover rate also was high – 31.2%.¹¹⁰ In 2007 and 2008, turnover fell to 23% just as the incidents of mandated day-off overtime also fell.¹¹¹ In 2009, when RTD implemented service cuts that caused RTD to meet headcount, turnover similarly fell to 17.9%.¹¹²

(2) The quit rate¹¹³ (turnover rate for voluntary terminations) for full-time bus operators working less than one year – who undisputedly bear the brunt of overtime – is significantly higher than the turnover rate for more senior operators. In 2006, for example, the quit rate for full-time operators working less than one year was 11.7%, but that rate dipped to below 1% for operators with more than two years of service.

(3) The quit rate for part-time bus operators – who cannot work overtime – is significantly less than the quit rate for full-time bus operators.¹¹⁴ In 2006, for example, the quit rate for part-time bus operators working less than one year was 2.8%, whereas the same rate for comparable full-time operators was 11.7%.¹¹⁵

¹¹⁰ RTD Ex. 130 & 217.

¹¹¹ RTD Ex. 217, p. 1-2.

¹¹² *Id.*, p. 2.

¹¹³ Importantly, the quit rate (voluntary terminations) is the most modest statistic for showing a correlation between turnover and mandated overtime. The quit rate does not reflect employees who were involuntarily terminated for reasons that could be caused by mandated overtime – such as absenteeism. Tr. (7/6/09) 79: 6-15 (Sprague). A bus operator who is frustrated because he is unable to take his days off has few options: quit; not come in to work and take an absence occurrence; or stick it out until his seniority allows him to vote a better schedule. *See* Tr. (6/25/09) 89: 1-4 (“[S]everal [operators] have said to me, I have to leave because my wife or my husband says, this just isn't going to work, I never see you, you're never home.”).

¹¹⁴ RTD Ex. 217.

¹¹⁵ *Id.*

(4) The anecdotal evidence from feedback sessions with new operators and exit interviews show the primary complaint of new bus operators is mandated, day-off overtime.¹¹⁶

The costs of this turnover to RTD are substantial. In 2006, bus operator turnover cost RTD \$2,030,525.90.¹¹⁷ Therefore, if overtime is reduced, RTD should expect a correlating reduction in turnover and cost savings.

2. The problem should be resolved *now*.

Whether periods of heavily mandated overtime during this contract are foreseeable is not a reason to deny RTD's proposal.¹¹⁸ The reasons to eradicate this work rule extend well beyond the anticipated term of any contract. The proposed change should be adopted in *this* contract so that there is time to implement the changes; by analogy, RTD wants to fix the leaky roof *before* the rainy season.

The rationale for the differentiation between the extra board and regular operators no longer exists.¹¹⁹ The original purpose was to benefit operators who chose the extra board. At that time, operators chose the extra board to work as many hours – and make as much money – as they could.¹²⁰ They volunteered for extra work.

¹¹⁶ Tr. (6/28/09) 94:19 – 95:16 (Yates).

¹¹⁷ RTD Ex. 130.

¹¹⁸ Tr. (6/28/09) 119:3-13 (Yates).

¹¹⁹ Tr. (6/28/09) 151:3 – 152:20 (Fisher).

¹²⁰ Tr. (6/28/09) 71: 2-22 (Yates) (explaining difference from present to when he was on the extra board).

In contrast, today the workforce's priorities have changed. Junior operators – not senior operators – make up the majority of the extra board.¹²¹ Operators with less than four years experience make up 81.8% of the extra board, whereas overall operators with less than four years experience make up only 49.1% of the operator workforce.¹²² One of the reasons for this shift is that DOT hours of service regulations now limit the number of hours bus operators can work.¹²³ Even when not limited by DOT regulations, the Union readily admits bus operators are not volunteering for overtime.¹²⁴ For these reasons, there is no reason to differentiate between the extra board and regular operators.

Moreover, waiting to solve the mandated day-off overtime problem could prevent the solution from working and cause further damage. It is like waiting to repair a roof until the rainy season. The need for mandated overtime is a recurring problem that can be difficult to predict when it will arise again (although it is certain to reappear).¹²⁵ In the meantime, prospects for RTD bus operator positions will continue to hear through the grapevine that RTD has unreasonable work rules for new hires. Implementing a work rule takes time, as does recruiting and training new operators.¹²⁶ Greg Yates testified that hiring and training operators to solve an existing overtime

¹²¹ RTD Ex. 125.

¹²² *Id.*

¹²³ Tr. (6/28/09) 71:2-22 (Yates).

¹²⁴ *See* Tr. (6/28/09) 182: 25 – 185:2 (Rivera) (discussing how First Transit Denver does more to recruit volunteers than RTD).

¹²⁵ *See* RTD Ex. 122 (The History of Mandated Day-off Overtime Events chart shows that periods of mandated day-off overtime reoccur); *see also* RTD Ex. 127, p. 1-5 (RTD and the Union have been working on these issues since 1999).

¹²⁶ *See* RTD Ex. 123.

issue did not work because of the length of time it takes to hire and train new recruits.¹²⁷ If the change is implemented now – at a time when service cuts are still in place, RTD remains at headcount, and operators are more likely to volunteer for overtime – the change will have a less dramatic impact. The workforce will have enough time to digest the new rule – and to select work accordingly – before mandated day-off overtime becomes an immediate problem again.

3. RTD’s proposal is the most reasonable alternative.

While the Union adamantly opposes RTD’s proposal, the Union offers no alternative in this arbitration to solve the problem. While the Union generally asserts this is a “strike issue”, that bald-faced assertion should not carry any weight since this arbitration is, after all, the statutory alternative to a strike. Moreover, this cannot be a “strike issue” when the Union’s attacks lack any substance. The Union’s steadfast adherence to “seniority,” appears mostly to emphasize its own importance as the bargaining agent: “[Seniority] is also employed to demonstrate the value of concerted activities as opposed to the results workers can expect from trying to ‘go it alone’ in dealing with management.”¹²⁸ Accordingly, RTD’s proposal is the most reasonable.

a. The proposal relies upon seniority.

RTD’s proposal does not attack the Union’s seniority system.¹²⁹ Importantly, the proposal *relies upon seniority* more so than the current system. Under the proposal, mandated day-off

¹²⁷ Tr. (6/28/09) 79: 1-10 (Yates) (explaining that in 2006, RTD could not keep up with headcount caused by turnover because, in part, training takes six to eight weeks).

¹²⁸ ELKOURI, *supra*, p. 838 (quoting *Arbitration of Seniority Questions*, 28 LA 954, 954 (Schedler 1957)).

¹²⁹ Tr. (6/28/09) 171: 10-12 (Julio Rivera testified, “[W]e will not allow the District to gut the seniority issues that pertain to the Union.”).

overtime will be assigned based on inverse seniority. Bus operators still will vote for their work based on seniority. In contrast, under the current system, a more senior operator may get assigned mandated, day-off overtime before a less senior operator. For example, the more senior operator may choose the extra board – not necessarily to get more work but to get the days off he wants.¹³⁰ That extra board operator would be mandated overtime *before* a less senior operator who selected a regular run.¹³¹ That scenario under the current system directly contradicts the Union’s “seniority is everything” mantra.¹³² A true seniority system assigns forced overtime to the most junior employee; the new system relies solely upon seniority.¹³³

b. The Union has already agreed to assignment of overtime by inverse seniority.

The Union cannot reasonably argue that assignment of overtime based on inverse seniority is unreasonable, when the Union has already agreed to it in other contexts. First, this Union local never challenged the RTD maintenance division’s assignment of overtime based on inverse seniority.¹³⁴ Second, ATU Local 1001 negotiated a labor contract with First Transit Denver that assigns mandated overtime by inverse seniority.¹³⁵ Third, other locals of the ATU in Maryland, Hampton Roads, Bridgeport, and Milwaukee have agreed to assign overtime by inverse

¹³⁰ Tr. (6/28/09) 66:14 – 67:4 (Yates) (explaining that operators sometimes choose the extra board to get certain days off).

¹³¹ Tr. (6/28/09) 80:11 – 81:14 (Yates) (explaining how overtime is assigned).

¹³² Tr. (6/28/09) 36:5 – 37:17 (Rivera) (discussing Union’s assertion about RTD’s “outrageous” attempts to “circumvent” Union seniority).

¹³³ Tr. (6/28/09) 82: 2-20 (Yates).

¹³⁴ Tr. (6/28/09) 154:21 – 155:6 (Fisher).

¹³⁵ RTD Ex. 131, p. 9.

seniority.¹³⁶ The concept of inverse seniority is well recognized as reasonable within and outside RTD.¹³⁷

c. The most senior operators will not be impacted.

RTD's proposal will not create more uncertainty for senior operators by requiring them to work overtime on their days off.¹³⁸ Even in times of extraordinary mandated overtime, such as 2006, *at the most* 49% of the full-time operators would be mandated to work day-off overtime.¹³⁹ Furthermore, approximately 60% of all full-time operators have weekends off.¹⁴⁰ Since almost all overtime occurs Monday through Friday, those operators would rarely, *if ever*, be forced to work on a day off.¹⁴¹

In addition, it is important to remember that RTD's proposal is not a "pure" inverse seniority system. Instead, the assignment of overtime will reset monthly, thus directly benefiting senior operators.¹⁴² The Union cannot dispute that if RTD's proposal is adopted, its senior members will experience virtually no changes in their working conditions.

¹³⁶ RTD Ex. 131, p. 1-6.

¹³⁷ Tr. (6/25/09) 89:8 – 90:4 (Marsella).

¹³⁸ Tr. (6/28/09) 180: 9-24 (Rivera testified, "[The proposal] is making everybody's schedules unsure.").

¹³⁹ RTD Ex. 124.

¹⁴⁰ Tr. (6/28/09) 73: 9-16; 85:22 – 86:4 (Yates); 193: 2-15 (Rivera).

¹⁴¹ Tr. (6/28/09) 73:2-24; 85:9 – 86:4 (Yates).

¹⁴² Tr. (6/28/09) 88:1-19 (Yates).

d. RTD maintains an adequate extra board.

The Union's assertion that RTD does not maintain an adequate extra board is unfounded.¹⁴³ The collective bargaining agreement requires RTD "[i]n so far as practicable" to maintain an adequate extra board to avoid "working extra board employees in excess of their regular work week."¹⁴⁴ The CBA also provides that RTD "shall establish the number of operators on each [extra] board and the number of operators who may be off each day."¹⁴⁵ Generally, management has the right unilaterally to determine headcount, so long as no other provision of the agreement is violated, and in this case, the CBA has a broad management rights clause.¹⁴⁶ The contract has a broad management rights clause that grants RTD "all rights customarily reserved to management," which includes the right to determine staffing levels and to schedules hours and require overtime work.¹⁴⁷

In 2003, Arbitrator Richard Fincher denied the Union's grievance on the issue of mandated overtime purportedly caused by inadequate staffing of the extra board.¹⁴⁸ Arbitrator Fincher acknowledged the difficulty in balancing an adequate extra board with wasting public funds for operators to sit around.¹⁴⁹ Indeed, if RTD employs too many extra board operators, RTD will

¹⁴³ Tr. (6/28/09) 185:7 – 186:1 (Rivera).

¹⁴⁴ CBA, Art. III § 1(c), p. 38.

¹⁴⁵ CBA, Art. III § 5(a), p. 42.

¹⁴⁶ ELKOURI, *supra*, p. 709-10; *see also* CBA Art. I § 5, p. 2.

¹⁴⁷ CBA, Art. I § 5, p. 2.

¹⁴⁸ *See* RTD Ex. 129, p. 25-26.

¹⁴⁹ *See* RTD Ex. 129, p. 25 ("I also recognize the unique aspect of the Company's business, in that they are required by law to provide 24-hour service in a metro area that is expanding daily,

waste money by paying more extra board operators to wait around, and that is not a good use of taxpayer money. Arbitrator Fincher also found that the contract contemplated situations requiring overtime that arose outside of RTD's control.¹⁵⁰ Accordingly, the Union's assertion on the issue of headcount has been resolved and should not be part of this arbitration. Even so, Greg Yates testified in this arbitration that RTD made significant attempts to increase headcount in 2006, but that RTD reached headcount only after service cuts in May 2009.¹⁵¹

e. Previous attempts to decrease overtime have not worked.

The reason RTD needs to spread the burden of overtime rather than somehow eliminate the problem through other means is that the parties' attempts to decrease overtime by other means have not worked.¹⁵² Gregg Fisher testified that he had been working on reducing overtime with the Union since the late 1990s but no temporary measures seemed to have any effect.¹⁵³

There are several examples of measures that were intended but did not impact overtime. RTD offered a 75 cent premium for operators who worked on the extra board to encourage senior operators to voluntarily work on the board.¹⁵⁴ However, senior operators did not vote for the extra

and they are governed by a public Board of Directors typically reticent to cut service.”); *see also* Tr. (6/28/09) 63:17 – 65:5 (Yates) (explaining important role that extra board serves at RTD); Tr. (6/29/09) 129: 12-25 (Fisher) (explaining role that extra board operator on report serves).

¹⁵⁰ RTD Ex. 129, p. 26.

¹⁵¹ Tr. (6/28/09) 78:10 – 80:10 (Yates).

¹⁵² Tr. (6/28/09) 158:13 – 160:3 (Fisher).

¹⁵³ *Id.*

¹⁵⁴ RTD Ex. 127, p. 3.

board, even with the premium.¹⁵⁵ RTD also offered a \$1.00 premium for operators who volunteered for overtime, however the premium did not attract enough volunteers. RTD allowed biddable trippers but it did not reduce the need for overtime.¹⁵⁶ Fisher explained: “The reality was that it did not work.”¹⁵⁷

While the Union’s witness, Julio Rivera testified that these temporary measures *did* work, his testimony is unsubstantiated.¹⁵⁸ Fisher’s testimony is corroborated by the fact that the parties have had to implement these same agreements over and over since at least 1999.¹⁵⁹ For those reasons, the Union’s assertion that previous attempts to address overtime are adequate is not realistic or supported by the evidence.

f. The Union offers no alternative.

Finally, the Union’s assertion that there are plenty of other alternatives to reduce overtime is disingenuous, since the Union offers no proposals for the Arbitrator to consider.¹⁶⁰ When compared to RTD’s efforts to put forward options in this contract, the Union’s option is avoidance.¹⁶¹ The Union offered vague testimony that they are available to discuss these issues

¹⁵⁵ Tr. (6/28/09) 158:13 – 160:3 (Fisher).

¹⁵⁶ RTD Ex. 127, p. 4, & 128.

¹⁵⁷ Tr. (6/28/09) 159:15-18 (Fisher).

¹⁵⁸ Tr. (6/28/09) 186: 10-16 (Rivera).

¹⁵⁹ See RTD Ex. 127, p. 1-5.

¹⁶⁰ Tr. (6/28/09) 180: 5-6 (Rivera) (“[T]he reason why the Union is so against [RTD’s proposal] is, one, it does not deal with the problem.”).

¹⁶¹ RTD’s proposal on part-time bus operators in Art. III § 20, also should reduce mandated day-off overtime by making more full-time bus operators available to pick up extra work when

with RTD in the future. The Arbitrator made it clear that his job is to pick the least unreasonable alternative. In this case, there is only one choice. Accordingly, RTD's proposal is the most reasonable alternative and should be awarded.

F. Rebuilt Parts

The District proposes to eliminate the rebuilt parts side letter and allow management to purchase rebuilt components using a cost analysis and prudent business decision formula. Currently, the District may not buy rebuilt parts unless the purchase falls under a few narrow exceptions.¹⁶² This antiquated practice leads to absurd results. RTD's proposal will not affect employment of ATU members but will allow the District to realize significant cost savings.

1. The current contract does not allow for good business decisions.

Under the existing contract, the District most often purchases rebuilt parts when the inventory of a particular component is low.¹⁶³ The negative impact of this requirement cannot be overstated. First, when purchasing a component from an outside vendor the District incurs a "core charge." The vendor will only issue a refund to the District for the "core charge" if the part is returned. However, the District loses the "core charge" because, under the current contract, it must rebuild the part in-house.¹⁶⁴

overtime is required on Monday through Friday. Tr. (6/28/09) 150: 10-19 (Fisher); Tr. (7/6/09) 128:18 – 129:2 (Skinner).

¹⁶² CBA, MEMORANDUM OF UNDERSTANDING, Rebuilt Parts, p. 99.

¹⁶³ Tr. (7/7/09), p. 3:11-21 (Shaklee).

¹⁶⁴ *Id.*, p. 3:2-9 (Shaklee).

Second, if it is not cost effective to have a component rebuilt in-house, the District must purchase a new part at a higher price. Under the current contract, the District cannot purchase rebuilt components that are cheaper than buying new.¹⁶⁵ This is the case, despite the fact that rebuilt components often are available from outside vendors at a lower cost and include a warranty.

The current way of handling rebuilt parts has been going on for around thirty years.¹⁶⁶ Both parties memorialized this historical practice in the current contract. However, the current contract forces the District to make absurd decisions. The Union's own witness, Bill Fuson, acknowledged the absurdity of forcing RTD to buy a new part when it could purchase a rebuilt part for less: "If you can do it at 80% and you save twenty thousand on a hundred thousand dollar job, how can that not be effective?"¹⁶⁷

When the District must purchase parts at higher prices than it needs to, there are substantial financial consequences. It is incomprehensible that the District is required to absorb significant losses that are clearly avoidable. Accordingly, the rationale behind the District's proposal is clear: the District wants to make better business decisions concerning rebuilt parts.

2. The proposed evaluation process is reasonable.

The District offers a system that examines cost effectiveness in a transparent, objective manner. The District's comprehensive evaluation process sets forth whether it is a prudent business decision to purchase new, purchase rebuilt, or build the particular component in-house.

¹⁶⁵ *Id.*, p. 5:3-11 (Shaklee).

¹⁶⁶ *Id.*, p. (Shaklee).

¹⁶⁷ *Id.*, (7/7/09), p. 25:19-24 (Fuson).

The District already uses this evaluation process to determine whether to buy a component new or to rebuild in-house. Therefore, the District easily can include the purchase of rebuilt parts into the existing evaluation.¹⁶⁸

Specifically, the District uses a guideline of 85% for determining the cost effectiveness of purchasing a rebuilt component. Under RTD's proposal, a component will be rebuilt in-house if the cost of doing so does not exceed 85% of the cost to purchase the rebuilt component from an outside vendor. The remaining 15% mainly attributes value to the warranty given by vendors for rebuilt parts.¹⁶⁹ The Union acknowledged this approach and an 80% standard were reasonable.¹⁷⁰

It is significant that the Union already has inherent protections within the Contract to challenge any application of this evaluation process. The Union can submit a grievance on any particular decision.¹⁷¹ The Union will always have the opportunity to prove that it would be more cost effective to rebuild a part in-house.

3. The unit shop is an important element to hold vendors in check.

The District has no plans to displace any employee in the Unit Shop for two reasons.¹⁷² First, the Unit Shop rebuilds many components effectively. Second, the Unit Shop keeps vendor's contract prices for purchasing rebuilt components in check.

¹⁶⁸ RTD Ex. 187.

¹⁶⁹ RTD Ex.185. The 15% is mainly attributed to the warranty given on rebuilt parts by outside vendors.

¹⁷⁰ Tr. (7/7/09), p. 25:19-24 (Fuson).

¹⁷¹ *Id.*, (7/7/09), p. 9:11 (Shaklee).

¹⁷² *Id.*, p. 8:17-21 (Shaklee).

The District is committed to the Unit Shop, as evidenced by the recent purchase of “high dollar equipment”¹⁷³ and implementation of cost saving initiatives.¹⁷⁴ This is significant, as the District has an interest in the Unit Shop remaining effective, efficient, and a source of competition against outside vendors.

However, because of technological advances, the parties’ prior reliance on the Unit Shop to the near-total exclusion of purchasing rebuilt parts is untenable. General Superintendent of Maintenance for Bus Operations Dean Shaklee testified: “Back in the ‘80s when we were running the two-cycle engines, a new two-cycle engine would maybe last 200,000 miles, a rebuilt, maybe a hundred thousand miles . . . [but currently] we have engines going 450,000 miles, we have some that’s 700,000 miles.”¹⁷⁵ He further testified, “Over the years we have decreased the number of employees in that -- in the Unit Shop, mainly due to technology improvements.”¹⁷⁶

4. The District’s proposal is reasonable.

The Union’s main contention is that the Unit Shop will lose work and ultimately become obsolete because of the District’s proposal. However, the evidence does not support this. First, under the current system RTD is incurring unreasonable costs associated with the unreasonable

¹⁷³ *Id.*, p. 30:16-10 (Shaklee).

¹⁷⁴ *Id.*, p. 29:12-21. Shaklee testifies in response to a question by Arbitrator Vaughn concerning specific initiatives for the Unit Shop “We are always monitoring the labor it takes to rebuild a component, and we work with the employees and try to get them the education and tools that they do need at times to do their jobs more efficient.” (Shaklee).

¹⁷⁵ *Id.*, p. 8:4-11 (Shaklee).

¹⁷⁶ *Id.*, p. 8:24-3 (Shaklee). In 1980, the number of employees in the Unit Shop decreased because of technological advances. Likewise, in 2000, the District transferred some Unit Shop employees to general repair because of the District purchase of 700 new buses. *See Id.*, Page 8:21. It is important to note that there were no layoffs as a result. (Shaklee).

limits on purchasing of rebuilt parts. Second, the proposal incorporates an evaluation system that the Union agrees is reasonable and has Union protections. Third, the District has no plans on layoffs for any employee in the Unit Shop because of this proposal. Accordingly, the District's proposal should be awarded.

5. Light Rail rebuilt parts: Article VIII § 2 and the Side Letter.

The District proposes to incorporate the same provisions for purchase of rebuilt parts in Light Rail as in Bus Operations, for slightly different reasons. First, Light Rail does not have its own Unit Shop and the Light Rail vehicles require specialized parts. Second, in many instances RTD's electro mechanics repair and overhaul the components on the vehicle themselves.¹⁷⁷ Third, the District does not have the equipment, facilities, or capacity required to rebuild a majority of the Light Rail components. Therefore, parts are shipped to outside vendors for repair. As a result, most components are bought new or from the original equipment manager (OEM). Only the manufacturer can fix OEM proprietary parts.¹⁷⁸

Manager of Light Rail Vehicle Maintenance Phillip Eberl testified that under pressure from the Union he sent a few components to the Unit Shop, but there is simply not enough work to employ even one employee full time.¹⁷⁹ The Union tried to emphasize that the Rail Operations Division itself did not initiate the request for authority to purchase rebuilt parts. The distinction is meaningless. Rail Operations may not have first proposed the request, but the District as a whole sought, throughout the negotiation process, to obtain authority to purchase rebuilt parts for all of its

¹⁷⁷ *Id.*, p. 15:11-16 (Eberl).

¹⁷⁸ *Id.*, p. 16:24-25 (Eberl).

¹⁷⁹ *Id.*, p. 17:10-12 (Eberl).

operations – whether Bus Operations or Light Rail. The same general principles and rationales for such authority apply to both divisions; the only difference is that due to the fleet age and increased repair needs, Bus Operations will see a greater short-term benefit from obtaining such authority. Therefore, there is absolutely no reason to have a requirement in the contract that Light Rail use bus mechanics in the Unit Shop to rebuild a few parts.

G. Part-Time Weekend Work

RTD proposes to modify Article III § 20(d) to permit part-time bus operators to vote weekend work before full-time operators, so that RTD can fully utilize its existing contractual rights.¹⁸⁰ Part-time bus operators – balanced with full-time operators – are an essential component of RTD’s business model. RTD should be able to fully utilize its existing contractual rights. The proposal gives part-time operators more flexibility and more hours. In addition, it forces fewer full-time bus operators to work weekends and overtime.

1. The balanced use of part-time bus operators fits the transit business model.

The nature of the transit business requires a balance between part-time and full-time operators.¹⁸¹ Sherie Skinner testified, “[I]t’s way too costly to have only full-time folks working when you need just a few hours covered here and a few hours covered here and maybe a special event or two coming in over here.”¹⁸² Part-time operators are flexible and available for short pieces of work necessitated by peak hours, long spans of service and special events that cannot be broken

¹⁸⁰ See RTD Ex. 207, p. 21.

¹⁸¹ Tr. (7/6/09), pages 126:14 – 127:1 (Skinner).

¹⁸² Tr. (7/6/09), pages 126:19-22 (Skinner).

into full-time runs. In contrast, full-time operators are experienced and available for a complete schedule, plus overtime.

RTD's current contract addresses the need for this balanced workforce. The current contract allows 21% of bus operators to have part-time status; part-time operators can work no longer than 30 hours per week.¹⁸³ In his 1997 interest arbitration decision, Arbitrator Meyers granted RTD increased use of part-time bus operators largely to allow RTD a balance between full-time and part-time: "[Part-time operators provide] the flexibility which the RTD needs in order to economically and effectively run its transit system."¹⁸⁴

Other transit properties use part-time operators in a similar manner or even to a greater extent.¹⁸⁵ In fact, many collective bargaining agreements in the transit industry have *no restrictions* on using part-time bus operators.¹⁸⁶ The ATU Local 1001 negotiated the First Transit Denver contract, which provides limits on part-time similar to RTD's contract: up to 20% part-time operators to work no more than 25 hours per week.¹⁸⁷ Based on those negotiated terms in the First Transit contract, as well as Arbitrator Meyers' award on this issue in the 1997 interest arbitration, the Union cannot reasonably assert here that RTD's proposal is somehow off limits in this interest arbitration as a "strike issue" or an issue that the Union would never agree to at the bargaining table.

¹⁸³ CBA Art. III § 20(b) & (c), p.49.

¹⁸⁴ RTD Ex. 54, p. 27-29.

¹⁸⁵ RTD Ex. 136 & 137.

¹⁸⁶ RTD Ex. 137.

¹⁸⁷ RTD Ex. 18, First Transit Denver CBA, Article 24(A) & (F), p. 25.

2. RTD should be able to fully utilize its existing contractual rights.

RTD is entitled to fully utilize its existing contractual rights. Although RTD may use up to 21% of total bus operators as part-time, only 9-10% of bus operators are actually working part-time.¹⁸⁸ RTD intends to increase its percentage of part-time operators to 18%, which is still less than the 21% allowed by the current contract.¹⁸⁹ At present, part-time operators work only about 20.9 hours per week instead of the 30 hours allowed by the current contract.¹⁹⁰ RTD's proposal would give part-time operators more opportunities to work closer to 30 hours per week.¹⁹¹

RTD currently is unable to fully utilize its contractual rights because, under the current contract, for weekend work part-timers vote *after* full-timers. Sherie Skinner explained that in order for a part-time operator to get a weekend piece of work, he would have to forgo his voting priority for week-day work.¹⁹² Part-time operators do not take that risk because if the weekend work ends up being unavailable, they will not get the hours they wanted for the week.¹⁹³ RTD's proposal corrects this irrational anomaly while preserving untouched the percentage and hourly limits on part-time work.

¹⁸⁸ RTD Ex. 132; Tr. (7/6/09) 85:23 – 86:19 (Yates).

¹⁸⁹ Tr. (7/6/09) 90:19 – 91:4 (Yates); 134:16-24 (Skinner).

¹⁹⁰ RTD Ex. 132; Tr. (7/6/09) 86:24 – 87:4 (Yates).

¹⁹¹ Tr. (7/6/09) 90:14-18 (Yates).

¹⁹² Tr. (7/6/09) 125:11 – 126:9 (Skinner)

¹⁹³ Tr. (7/6/09) 110:7-23; 113:15 – 114:12 (Yates).

3. Part-time bus operators will have more flexibility as well as good wages and benefits.

The Union's concern about RTD's proposal is largely the same as it was in 1997: that RTD is using part-time employees in a full-time capacity without extending them the same wages and benefits.¹⁹⁴ However, RTD's proposal is intended to do something it has not done before: retain a cadre of part-time bus operators who choose to be part-time. The current part-time operators prefer flexibility over a 40-hour week schedule.¹⁹⁵ Greg Yates testified that he intends to "market the position of part time" and to hire operators who *want* to work part-time – by "making [the position] more desirable".¹⁹⁶ The position will be more desirable if part-timers have more flexibility and opportunities for increased hours while continuing to receive excellent pay and benefits.

a. Flexibility and more hours.

The concept of part-time work is to accept reduced pay and benefits for more flexibility; RTD's proposal delivers that tradeoff.¹⁹⁷ This proposal would give part-time operators more opportunities to structure their schedules around their lives. Greg Yates testified that he would like to hire some part-time operators who prefer to work weekends in order to ski or play golf during the week when it is less crowded.¹⁹⁸ For example, in the focus groups conducted by RTD, one

¹⁹⁴ RTD Ex. 54, p. 28-29.

¹⁹⁵ Tr. (7/6/09) 115:3-10 (Yates).

¹⁹⁶ Tr. (7/6/09) 115:3-10 (Yates).

¹⁹⁷ Tr. (7/6/09) 120:24 – 121:3 (Skinner) (explaining that during the focus group, while part-time operators wanted full pay and benefits, they did not want to commit to being full time).

¹⁹⁸ Tr. (7/6/09) 104:16 – 105:8 (Yates).

woman indicated she would be interested in working weekends since her husband had Tuesday off.¹⁹⁹

In addition, the focus groups indicated that part-timers wanted more hours.²⁰⁰ The proposal would give part-timers opportunities to increase their hours.

b. Excellent pay and benefits.

Part-time bus operators at RTD receive excellent pay and benefits for a part-time position. After 12 months, part-time bus operators make a generous wage: 80% of the top of the wage progression for full-time operators.²⁰¹ Part-time bus operators also receive \$250 towards health insurance, and six paid holidays.²⁰² In contrast, at First Transit Denver, which is also represented by the ATU Local 1001, even full-time bus operators exceed RTD's part-time wage rate only after working for nine years.²⁰³ Part-time bus operators at First Transit receive no fringe benefits or paid holidays.²⁰⁴

In the focus groups, part-time operators acknowledged that RTD's wages and benefits were more generous than at most employers.²⁰⁵ If part-time bus operators are nevertheless

¹⁹⁹ RTD Ex. 135; Tr. (7/6/09) 121:19-25 (Skinner).

²⁰⁰ Tr. (7/6/09) 121:8-12 (Skinner).

²⁰¹ Tr. (7/6/09) 122: 19-22 (Skinner). Even though part-timers make less money than full-timers, part-timers do not receive a discount on Union dues. Tr. (7/6/09) 123: 15-18 (Skinner).

²⁰² Tr. (7/6/09) 122:23 – 123:3 (Skinner).

²⁰³ See RTD Ex. 18, First Transit Denver CBA Article 25, p. 27.

²⁰⁴ *Id.*, Article 24(D), p. 25.

²⁰⁵ Tr. (7/6/09) 123:4-14 (Skinner).

dissatisfied with the wages and benefits, they have the option of converting to full-time status, as has been the practice for many years.²⁰⁶

4. Fewer full-time operators will work weekends or mandated, day-off overtime.

While in terms of selecting weekend work, the situation may be like pulling up a short blanket on the bed – raising the priority for part-timers by decreasing the priority for full-timers, RTD is trying to create a better balance between full- and part-time.²⁰⁷ The proposal does not take any more work away from full-time operators than is already allowed in the contract: RTD is still limited to 21% part-time headcount and 30 hours per week. RTD *cannot* layoff full-time employees as a result of this or any other adopted proposals: under the contract, full-time employees cannot be laid off as long as RTD employs part-time operators.²⁰⁸ Instead, the proposal will actually benefit full-time operators in two ways.²⁰⁹

²⁰⁶ Tr. (7/6/09) 94:2-13 (Yates).

²⁰⁷ Tr. (7/6/09) 106:25 – 107:5 (Yates). Greg Yates agreed with the Arbitrator’s assertion that RTD is trying “to adjust the balance, that presumably, some full-time operators who want to work weekends, and some part-time operators who don’t, but maybe they’re more willing to, to get their hours up”. *Id.*

²⁰⁸ CBA Art. III § 20(r), p. 51; *see also* Tr. (7/6/09) 127:2-9 (Skinner).

²⁰⁹ Tr. (7/6/09) 105:23 – 107:5 (Yates). This fact is undeniable given that RTD’s estimated cost savings are based upon the wage differential between full- and part-time. *See* RTD Ex. 134. If 10% of weekend runs are bid by part-time bus operators, the estimated savings is approximately \$80,720.25 per year. If 15% of weekend runs are bid by part-time bus operators, the estimated savings would be approximately \$121,078.43. *Id.*

First, more full-time bus operators will have weekends off. Fewer full-time operators, who normally do *not* want to work weekends, will be forced to work weekends.²¹⁰ Nevertheless, full-time operators who *want* to work weekends still will have that opportunity. Due to the existing contractual limits on the use of part-time operators, if RTD's proposal is granted, RTD anticipates only 10% to 15% of the weekend work will be selected by part-time employees.²¹¹

Second, fewer full-time bus operators will be mandated to work day-off overtime. More full-time operators will be available Monday through Friday, when the need for overtime arises most often. Consequently, during that time, more operators will be available to take extra pieces of work that otherwise would be assigned as mandatory, day-off overtime to those with days off during the week.²¹² Sherie Skinner testified that RTD's hope is to "free up some of the weekend full-timers so that the work is covered by people that either are just free to pick that work and cover it or can just pick it up as maybe a little bit of extra with their run versus being mandated to come in on a day off."²¹³

²¹⁰ Tr. (7/6/09) 100:24 – 101:16 (Yates); 149:6 – 150:10 (Skinner). Unequivocally, some full-time operators are forced, because of seniority, to work weekends and more full-time operators would like weekends off. Tr. (7/6/09) 106: 18-20 (Yates) ("I am absolutely certain that many operators would like to have weekends off that can get weekends off."). In addition, if full-time operators *want* weekend work, it will still be available. Tr. (7/6/09) 149: 14-17 (Skinner).

²¹¹ Tr. (7/6/09) 149: 6-17 (Skinner).

²¹² Tr. (7/6/09) 102:20-23 (Yates); 128:18 – 129:2 (Skinner).

²¹³ *Id.*

During the testimony on RTD’s mandated overtime proposal, Union witness Julio Rivera testified that RTD would not take steps to reduce mandated overtime.²¹⁴ However, with this proposal, RTD *is* trying to reduce the need for mandated day-off overtime. The Union has not offered *any* proposal to eliminate the need for mandated overtime. For these reasons, RTD’s proposal – to give full effect to the contractual allowances for part-time work already in place through a simple revision in run voting procedure – is the more reasonable alternative.

H. Minimum Guarantee

RTD proposes to clarify the contract to make clear that extra board operators receiving the minimum guarantee and *not* working on a holiday are paid only the 40-hour guarantee that was intended.²¹⁵ As demonstrated by the purpose the guarantee fills, the parties never had in mind to unjustly enrich extra board operators who do not work on a holiday. This proposal effectuates the objective of the minimum guarantee, as reflected in the plain and clear contract language.

1. The intent of the minimum guarantee is to put extra board operators on par with regular operators.

The minimum guarantee ensures that extra board operators on report are not disadvantaged by being on the extra board. The extra board operator who does not work the holiday is not entitled to any extra money simply for being on the extra board, let alone for taking the day off.²¹⁶

²¹⁴ Tr. (6/28/09) 170:12-14 (Rivera) (“So there’s a lot of things that the District could do to alleviate this problem”); 180:1-8 (“[RTD’s proposal] does not deal with the problem.”).

²¹⁵ RTD’s proposal is to add the following subparagraph: “Holiday pay shall be used in computing the minimum guarantee if the employee does not work the holiday.” See RTD Ex. 207, p. 17 & 28. The proposal only affects extra board operators who do *not* work on the holiday. Tr. (6/29/09) 131:20 – 132:6 (Fisher).

²¹⁶ Tr. (6/29/09) 144:10 – 145:4 (Fisher).

The extra board is a scheduling mechanism created by RTD to ensure that no runs are missed; extra board operators are paid specifically to be available.²¹⁷ Assignment of work to the extra board depends on the work available at the time. Accordingly, extra board operators have a pay guarantee. The guarantee is a mechanism that ensures extra board operators on report are paid as if they worked full-time, even if they are not assigned enough work to compose a 40-hour week.²¹⁸

Under the current practice, the minimum guarantee gives extra board operators who do not report for work on a holiday an unfair advantage over regular operators. If an extra board operator is excused from reporting on a holiday, the holiday pay is not used in computing the minimum guarantee. As a result, the extra board operator is paid the minimum guarantee *plus* the holiday pay, even though the extra board operator did not report on the holiday.

RTD's Exhibit 11 illustrates this problem. A regular operator is excused from working on the holiday. That regular operator does not receive his regular run pay but still he gets 8-hours holiday pay. In this example, the regular operator gets 40 hours pay. In contrast, an extra board operator who does not work the holiday receives his minimum guarantee *plus* 8-hours holiday pay.²¹⁹ In this example, the extra board operator gets 48 hours pay. The extra board operator receives eight hours *more pay* for being on the extra board.

²¹⁷ The term "on report" is simply a requirement for extra board operators to be present at work. They can be placed on report up to two times per day for a maximum of three hours per assignment. CBA, Art. III § 10, p. 45; *see also* RTD Ex. 120.

²¹⁸ Tr. (6/29/09) 130:5 – 131:1 (Fisher).

²¹⁹ Tr. (6/29/09) 135:5 – 136:13 (Fisher).

The extra board operator who does *not* work on the holiday also potentially receives the same amount of pay as an extra board operator who reports for work on the holiday. An extra board operator who works on a holiday receives the run pay on that holiday or the guarantee in addition to 8-hours holiday pay. Accordingly, the extra board operator who does *not* report on the holiday is unjustly enriched. RTD's proposal corrects these inequities.

2. The proposal is consistent with the contract's plain language.

RTD's proposal harmonizes an unintentional payroll practice to the existing contract language.²²⁰ An interpretation of a contract should give effect to all provisions.²²¹ An interpretation of a contract should not lead to harsh, absurd or nonsensical results, if another interpretation would lead to just and reasonable results.²²² When the language of a contract is clear and explicit that a past practice arose from an obviously mistaken view of a contractual obligation, the past practice need not be allowed to continue.²²³

Here, the plain language of the contract is explicit. The intent is only to guarantee 40 pay-hours per week and *only if* the operator reports for duty:

Each operator on the extra board shall be guaranteed forty pay hours per week, provided the operator reports and fills all

²²⁰ Tr. (6/29/09) 138:2-6 (Fisher) (“All we are proposing to do here is to come back into line with what the contract language says with respect to the clear intent and correct the past practice that somehow came into being without the acknowledgment of either party.”).

²²¹ ELKOURI, *supra*, p. 463.

²²² *Id.*, p. 470-71.

²²³ *Id.*, p. 627-28.

assignments offered to the operator on the operator's scheduled work days during the pay period.²²⁴

In addition, the contract spells out that holiday pay cannot be used in computing the minimum guarantee if the operator works on the holiday.²²⁵ Therefore, it is illogical to bestow holiday pay to an operator who does *not* report on the holiday.

Since the current practice is illogical and blatantly contradicts the plain language of the contract, the fact that up to this point neither RTD nor the Union made any attempt to modify the language proves this practice was inadvertent and unintentional.²²⁶ The parties have never negotiated the current practice.²²⁷ The Welder-Fabricator arbitration decision, which the Union relies on in this arbitration, makes clear that if the parties' understanding on an issue is left out of the contract by mutual fault, the agreement should be reformed to give effect to the parties'

²²⁴ CBA Art. III § 11(a), p. 46; Art. VII § 13(a), p. 78. The Parties define the workweek as 40 hours (5 days at a minimum of 8 hours per day). CBA Art. III § 1(a), p. 38.

²²⁵ CBA Art. III § 11(c), p. 46; Art. VII § 13(c), p. 78.

²²⁶ Tr. (6/29/09) 138: 7-22 (Fisher). While RTD is not aware of any improper conduct (and does not allege so), the payroll clerks who issue the paychecks are union employees and could have been motivated not to raise the issue with management, if they had known about it. *Id.* at 138:23 – 139:8.

²²⁷ Tr. (6/29/09) 137: 12-20 (Fisher). Rudy Trujillo testified that in 1989 or 1990, a division manager indicated he was not entitled to the guarantee because he did not work the holiday. *See* Tr. (6/29/09) 156:5 – 157:21 (Trujillo). However, neither RTD nor the Union ever made any attempt to raise this issue at the bargaining table. Trujillo's speculation about the division manager's knowledge regarding a single incident approximately 20 years ago is hardly evidence of RTD's intent. *See id.* at 160:13-25. Moreover, Trujillo ultimately received 8 hours holiday pay for that day. *See id.* at 159:17-22.

original intent.²²⁸ This issue is no different. The contract should be reformed to reflect the parties' original intent.

I. Light Rail Lateral Bidding

RTD proposes to eliminate lateral bidding between bus and light rail as of March 1, 2010.²²⁹ This proposal is more reasonable than returning to the current contract for three reasons. First, the business reason for lateral bidding no longer exists. Second, lateral bidding is not accepted in the rest of the bargaining unit. Third, lateral bidding is costly and detrimental to the business.

1. The rationale for lateral bidding no longer exists.

The conditions warranting lateral bidding no longer exist. In general, a change in seniority systems is warranted by a change in conditions or circumstances.²³⁰

In 1994, RTD opened its first light rail line – 5.3 miles of track – using 22 light rail operators and 7 electro mechanics.²³¹ A group of bus operators trained to operate light rail vehicles, called the “B Board”, served as relief rail operators. Light rail employees had separate

²²⁸ See RTD Ex. 193, p. 23. In this decision, the arbitrator found the parties “unilaterally neglected to incorporate a side letter “In this circumstance, the Arbitrator’s function is to reform the Agreement, not to effect any change in the parties’ Agreement, but to simply give effect to the parties’ original intent.”).

²²⁹ See RTD Ex. 207, p. 16-17. Current light rail employees will maintain their relative seniority as it exists as of March 1, 2010. See Tr. (6/29/09) 24:18 – 25:19 (Fisher).

²³⁰ ELKOURI, *supra*, p. 841 (citing *Printing Pressmen No. 7 v. Chicago Newspaper Publishers Ass’n*, 772 F.2d 384, 386 (7th Cir. 1985) (which held that an employer did not violate its bargaining agreement by unilaterally changing its seniority system after 30 years)).

²³¹ Tr. (6/29/09) 26:5-23 (Fisher); 73:1-2 (Shankster).

seniority from their counterparts in bus operations.²³² The purpose was to give stability to a small, fledgling workforce.²³³

In the 1997 contract negotiations, RTD had plans to expand its rail system and open the Southwest Corridor. RTD expected to grow the light rail workforce up to 70 light rail operators.²³⁴ Accordingly, the parties negotiated common seniority for certain job categories between bus and light rail in order to attract more bus operators and vehicle mechanics to rail to work as light rail operators and electro mechanics.²³⁵

Today, RTD has built up a “critical mass” of employees in Rail Operations. RTD employs approximately 120 light rail operators and 50 electro mechanics.²³⁶ Currently, RTD Rail Operations is poised to double its light rail operator workforce and add 25 or 30 more electro mechanics.²³⁷ The purpose for the increased numbers is that in 2013, RTD will open the West Corridor, adding 16 more miles of track to the system.

RTD’s Rail Operations Department looks nothing like it did in 1997, when the parties negotiated the lateral bidding rights in the current contract. The department is established and

²³² That original group carried their wage rates with them to rail. Tr. (6/29/09) 28:21 – 29:1 (Fisher).

²³³ Tr. (6/29/09) 27:4 – 28:14 (Fisher); Union Ex. 73.

²³⁴ Tr. (6/29/09) 30:10-15 (Fisher). RTD added 8.3 miles to the Southwest corridor in 2000 and added an additional 1.5 miles in 2002. In 2006, RTD opened its Southeast corridor, adding 19 miles of light rail line. Tr. (6/29/09) 73:3-14 (Shankster).

²³⁵ Tr. (6/29/09) 28:15 – 31:9 (Fisher). Those categories are listed in the current CBA, Article VII § 1(b), p. 69.

²³⁶ Tr. (6/29/09) 31:17 – 32:3 (Fisher); 74:14-25 (Shankster).

²³⁷ Tr. (6/29/09) 73:18 – 75:25 (Shankster). FasTracks also includes plans to extend the existing Southeast and Southwest corridor lines. *Id.*

self-sufficient. It is growing quickly and is no longer dependent on the Bus Operations Department to funnel its workforce. Combined seniority in 1997, affected only 22 light rail operators and a handful of electro mechanics; today, combined seniority affects the seniority of a larger and growing group.

Moreover, the positions with combined seniority – primarily operators, mechanics and service and cleaning workers – are no longer interchangeable. They require different skills and different training; there are different work expectations and different certifications.²³⁸ For these reasons, the conditions that allowed common seniority in 1997 no longer exist. The Rail Operations Department needs separate seniority for the same reasons that the parties negotiated separate seniority in 1994 – to give stability to the workforce.

2. Lateral bidding is not accepted in the rest of the bargaining unit.

The current contract language allows lateral bidding only within one occupational group.²³⁹ RTD and the Union have established a precedent for separating job classifications into different occupational groups. Therefore, RTD's proposal brings light rail in line with the rest of the bargaining unit.

In 2006, the Union requested (and RTD agreed) to separate one Maintenance of Way (MOW) occupational group (II) that contained three job classifications into three occupational groups: signal power track maintainers, track maintainers and rail laborers. The purpose was to create stability and to give credence to the fact that an employee should be able to maintain his

²³⁸ Tr. (6/29/09) 57: 4-18 (Fisher); 89:17 – 90:24 (Shankster).

²³⁹ Tr. (6/29/09) 35:18 – 37:11 (Fisher).

seniority *vis a vis* other workers with different skills entering into the classification.²⁴⁰ In doing so, the Union recognized how disruptive common seniority among three similar, but different, classifications was to the operation of the Department.

The parties also had negotiated separate seniority for different bus divisions, even though they were within the same occupational group.²⁴¹ Importantly, the reasons for separate seniority in these other situations are the same reasons why separate seniority is warranted here.

The Union cannot assert that one group of employees deserves stability and certainty from separate seniority and another group of employees do not deserve the same. Every member of the bargaining unit should have the knowledge that their seniority and experience within their job classification will pay off and eventually give them better shift and vacation selection.

3. Lateral bidding is costly and detrimental to the business.

Finally, while seniority normally is a union issue, it is *still* a bargained-for right that must be negotiated.²⁴² An arbitrator has the authority to modify seniority when the Union's proposal (or lack thereof) is a wasteful, cumbersome and uneconomical method of operation.²⁴³ An arbitrator

²⁴⁰ Tr. (6/29/09) 37:12 – 40:8 (Fisher).

²⁴¹ Tr. (6/29/09) 40:9 – 41:8 (Fisher).

²⁴² Tr. (6/29/09) 124:16 – 125:6 (Jones). “[S]eniority benefits exist as ‘rights’ only to the extent made so by contract.” *See* ELKOURI, *supra*, p. 839 (citation omitted)).

²⁴³ ELKOURI, *supra*, p. 839 (quoting Standard Oil Co., 24 LA 424, 426 (Beatty, 1954) (faced with a decision between a union proposal and a company proposal on seniority, the arbitrator picked the company's proposal because it would allow the company to operate more efficiently)).

may adopt an employer's proposed seniority system if it is necessary to operate an efficient business.²⁴⁴ In this case, lateral bidding is costly and detrimental to the business.

a. Lateral bidding is costly.

Lateral bidding is costly. First, there is a direct cost every time an employee leaves Rail Operations. Second, there are duplicative training costs.

First, Rail Operations makes a substantial investment in training employees in skill-specific jobs.²⁴⁵ There is no other way to do it; most employees hired into Rail Operations positions have no experience in rail. It is a unique business. RTD spends \$6,904.80 to train one light rail operator and \$26,160 to train one electro mechanic.²⁴⁶ In order to get a return on that investment, RTD needs employees who are committed to a career in light rail.²⁴⁷

There is a precedent for employees leaving light rail positions for other positions in order to secure their seniority.²⁴⁸ For example, Robert Dohr took an \$8,000 pay cut for a position where he could accrue seniority.²⁴⁹ The Stewart brothers became signal/traction power maintainers, because, as discussed above, MOW job classifications have separate seniority.²⁵⁰

²⁴⁴ *Id.* (quoting Standard Oil Co., 24 LA at 427 (“I must agree with the company that carrying seniority to the extreme requested by the union would make for a wasteful, cumbersome and uneconomical method of operation.”)).

²⁴⁵ Tr. (6/29/09) 78:5 – 80:15 (Shankster); RTD Ex. 146 & 147.

²⁴⁶ RTD Ex. 146 & 147.

²⁴⁷ Tr. (6/29/09) 89: 6-9 (Shankster).

²⁴⁸ Tr. (6/29/09) 47:16 – 49:14 (Fisher); RTD Ex. 145.

²⁴⁹ Tr. (6/29/09) 48:13 – 49:14 (Fisher).

²⁵⁰ *See* RTD Ex. 145.

Second, in addition to the training costs when an employee enters Rail Operations, RTD incurs duplicative costs to train workers on buses when their ultimate goal is to work at light rail.²⁵¹ Gregg Fisher testified, “[W]e’re paying training costs twice.”²⁵² RTD spends approximately \$5,215.05 for six weeks of training for new bus operators. If a bus operator transfers to light rail after only a few years, those costs are virtually lost. RTD must spend another \$6,904.80 to retrain the individual as a light rail operator and another individual to replace that person in Bus Operations.

The two operations are not interchangeable.²⁵³ Gregg Fisher testified that in 2006, when the bus operator headcount was low and RTD was heavily mandating overtime, RTD enlisted light rail operators to drive buses. Because of the difference in jobs and the cross-training required, the transference did not work.²⁵⁴ Similarly, electro mechanics must complete a certification within the first 12 months and recertify every two years thereafter; in contrast, bus mechanics’ certification is self-paced.²⁵⁵

²⁵¹ Tr. (6/29/09) 31:17 – 35:2 (Fisher); RTD Ex. 123.

²⁵² Tr. (6/29/09) 32:17-23 (Fisher).

²⁵³ Tr. (6/29/09) 55:22 – 57:18 (Fisher). The only overlap is the costs to obtain a CDL, which is \$1,453.68. *See* RTD Ex. 146.

²⁵⁴ Tr. (6/29/09) 56:13 – 57:3 (Fisher).

²⁵⁵ Tr. (6/29/09) 82:12 – 84:17 (Shankster).

As the light rail system continues to grow and more employees are hired, these costs will balloon. For example, if RTD hires 120 additional light rail operators, the additional, unnecessary costs to first train them as bus operators is \$451,364.40.²⁵⁶

b. Lateral bidding is detrimental to the business.

Lateral bidding has proven to be detrimental to the business. RTD wants a stable, productive, and positive work environment.²⁵⁷

It goes without saying that happy, content, secure workers are more efficient.²⁵⁸ In other contexts during this arbitration, the Union acknowledges the importance of seniority for employees who want the stability of knowing that by experience, an employee's choices on schedule improve.²⁵⁹ The Union emphasized that employees who remain loyal and develop the skills and experience that improve with seniority deserve certainty in their work schedules and vacation picks. RTD's Rail Operations Department does not have that kind of work environment.²⁶⁰

Lateral bidding – and the uncertainty that goes with it – is disruptive. In 2003, a group of electro mechanics filed a grievance demanding separate seniority from bus operations.²⁶¹ Those

²⁵⁶ Compare RTD Ex. 123 & 146 (\$3,761.37 x 120). The unnecessary cost to train a bus operator in this case should not include the cost to obtain a CDL (\$1453.68). Therefore, that cost is subtracted from the total cost of 6 weeks training for bus operators (\$5,215.05).

²⁵⁷ Tr. (6/29/09) 76:25 – 77:14 (Shankster); 124:16 – 125:6 (Jones).

²⁵⁸ Tr. (6/29/09) 102: 19 – 103:4 (Shankster).

²⁵⁹ Tr. (6/28/09) 180:1-21 (Rivera).

²⁶⁰ Tr. (6/29/09) 87:5 – 89:16 (Shankster).

²⁶¹ RTD Ex. 138. A ULP also was filed. Tr. (6/29/09) 42:10-18 (Fisher).

employees complained that they could not accrue enough seniority to improve their schedules or vacation picks because employees bidding into light rail from bus operations had higher master seniority.²⁶² Advancements in seniority for some employees necessarily result in decreased seniority rights for others.²⁶³ Those employees felt resentful and frustrated.

Current electro mechanics may not be quite as vocal about the issue but that is probably because they know that in 2003, being vocal got those employees nowhere. Light rail employees have few options.²⁶⁴ They are the captive minority in the Union's democratic decision-making process.²⁶⁵ However, the same situations that existed in 2003 still exist. For example, George Sweeney became an electro mechanic in April 2000.²⁶⁶ When Marvin Roberts became an electro mechanic in March 2005, he bumped Sweeney down the seniority ladder.²⁶⁷ Roberts is fifth in seniority; he works the best schedule – 8:30 a.m. to 5:00 p.m., Saturday and Sunday off.²⁶⁸ In contrast, Sweeney is thirteenth in seniority even though he is the fourth most experienced electro

²⁶² It is also an awkward situation when light rail employees are forced to train new employees - who bid from bus operations - who ultimately would bump the trainer down the seniority list. Tr. (6/29/09) 42:19 – 44:2 (Fisher); 52:24 – 54:12 (Fisher).

²⁶³ ELKOURI, *supra*, p. 840 (quoting Ford Motor Co., 23 LA 296, 297 (Shulman, 1954)).

²⁶⁴ *See* RTD Ex. 140. Light Rail employees are likely well aware of the history and the Union's stance on the issue. Tr.: 112: 5-8 (Roberts). No employee would expect the Union to take action. Moreover, Marvin Roberts is one of the employees who transferred to light rail later in his career, thereby bumping more experienced electro mechanics to get a premium work schedule. Tr. (6/29/09) 108: 23 – 110:17; 111: 11-13 (Roberts).

²⁶⁵ Tr. (6/29/09) 118: 11 – 120:18; 121: 5-15; 127:4-12 (Jones).

²⁶⁶ RTD Ex. 142.

²⁶⁷ *See id.*

²⁶⁸ Tr. (6/29/09) 109: 9-18 (Roberts).

mechanic.²⁶⁹ Accordingly, it is no surprise that Marvin Roberts, the Chief Steward, is unaware of the resentment. RTD witnesses testified how they continue to receive reports about the resentment and frustration in the workplace today.²⁷⁰ For these reasons, RTD’s proposal to eliminate lateral bidding between Bus Operations and Rail Operations is more reasonable than adhering to the current contract.

J. Review of Record upon Lateral Bidding

RTD proposes that employees bidding into another job classification meet threshold qualifications for attendance and discipline.²⁷¹ This proposal is more reasonable than the current contract because it clarifies – in an objective standard - what a review of qualifications and experience, which is already provided in the contract, should involve. This practice, which is already working in some positions, should be applied consistently throughout the bargaining unit.

1. The proposal clarifies RTD’s existing contract rights.

RTD already has the ability to consider whether an employee bidding to a new job is qualified. The contract provides that “employees bidding upon vacated or new positions may be interviewed to determine their qualifications and experience.”²⁷² The current contract recognizes that before RTD invests in training an employee in a new position, the employee must prove that

²⁶⁹ RTD Ex. 142.

²⁷⁰ Tr. (6/29/09) 87:5 – 89:16 (Shankster).

²⁷¹ See RTD Ex. 207, p. 6.

²⁷² CBA Art. I § 13(a), p.9. This proposal does not affect employees bidding within the same job classification. Tr. (7/6/09) 152:18 – 153:19 (Skinner).

he can successfully perform the job.²⁷³ The only means of reviewing an employee's likelihood of success is by a review of qualifications and experience...

The proposal clarifies what a review of qualifications and experience should entail. RTD identified the criteria it would use as threshold qualification standards: dependability, reliability and safety, as based upon a review of the employee's record over the prior year.²⁷⁴ The criteria are objective and leave no room for interpretation.²⁷⁵ In the arbitration hearing, the Union never challenged the criteria themselves.

2. The proposal gives consistency to existing practices.

Under RTD's proposal the expectations for employees throughout the entire bargaining unit will be consistent. Currently, employees bidding for positions as light rail operators or bus operator instructors must meet these qualifications.²⁷⁶ While historically the parties had other reasons for implementing qualifications, there is no reason why *all* employees should not meet these qualifications.

Importantly, the attendance policy and performance code apply to every employee in the bargaining unit.²⁷⁷ While the Union testified that the qualification criteria could adversely impact bus operators, that rationale makes little sense when the attendance policy applies to every

²⁷³ Tr. (7/6/09) 159:8-20 (Skinner).

²⁷⁴ RTD Ex. 154; Tr. (7/6/09) 153:20 – 154:8 (Skinner).

²⁷⁵ Tr. (7/6/09) 155: 13-15; 155: 23-1 (Skinner).

²⁷⁶ RTD Ex. 156.

²⁷⁷ See Rules, Regulations and Performance Code, attached hereto as Ex. __. RTD's Rules, Regulations and Performance Code has been upheld by an arbitrator. See Performance Code Arbitrations, attached collectively hereto as Ex. __.

employee. Julio Rivera admitted, “RTD went to great lengths and great pains to establish a performance code and an attendance policy for every single employee within the bargaining unit.”²⁷⁸ For example, for every employee the tenth absence occurrence leads to termination of employment, regardless of the position. If all employees who are interested in bidding to another position are aware of the criteria to qualify for a position, they will do their best to meet those standards.²⁷⁹

3. The Union will ensure RTD applies the standard reasonably.

The Union’s contention – that RTD’s application of the qualification standards will go unchecked – is baseless, since the Union and the employee have multiple remedies. The Union can grieve any disciplinary decision that could later affect an employee’s opportunities to bid to another position.²⁸⁰ Any decision about an employee’s qualifications also could be grieved.²⁸¹ In addition, the employee could ask RTD to consider extenuating circumstances that may have impacted the employee’s inability to meet the threshold qualifications.²⁸² Sherie Skinner gave some examples of extenuating circumstances: grief from the death of a husband, or babysitter problems. Employees also are protected by several laws that prevent certain leaves of absence from adversely impacting an employment decision such as this.²⁸³ Finally, the qualifications

²⁷⁸ Tr. (7/6/09) 168:15-18 (Rivera).

²⁷⁹ Tr. (7/6/09) 178:10-23 (Rivera).

²⁸⁰ CBA Art. I § 10, p. 5.

²⁸¹ Tr. (7/6/09) 156:2-10 (Skinner).

²⁸² Tr. (7/6/09) 191:21 – 192:14 (Skinner).

²⁸³ See Rules, Regulations and Performance Code, attached hereto as Ex. __; see also Tr. (7/6/09) 174:24 – 175:5 (Rivera); 189:19 – 190:11 (Skinner).

themselves could be challenged for reasonableness.²⁸⁴ In fact, Bill Jones testified that the Union had previously grieved the reasonableness of the qualifications for bus operator instructors.²⁸⁵

For these reasons, RTD's proposal to clarify the threshold qualification criteria for bidding between job classifications is the more reasonable alternative.

K. Welder-Fabricator Wages

The District proposes to delete the Welder-Fabricator side letter so that the Welder-Fabricator no longer mirrors the wage rate of a Recertified Mechanic. The arbitration decision upholding the side letter does not preclude the parties from further negotiating the Welder-Fabricator's wages. Here, RTD's proposal is more reasonable: the Welder-Fabricator's wages should be tied to the prevailing market, not to another irrelevant position.

- 1. The arbitration decision is not dispositive; the District did not negotiate the wage rate to be tied to a recertified mechanic ad infinitum.**

An omission by both parties led to the Welder-Fabricator continuing to maintain the higher wage rate after the original employee had left the District. However, it was never the intent of the District to have the Welder-Fabricator mirror the wage rate of a Recertified Mechanic forever, and it is certainly reasonable to change this practice.

Prior to 2000, the District employed a welder who worked in the Unit Shop alongside the Mechanics and Unit Shop Technicians. That welder also happened to be a Recertified Mechanic. He was responsible for fabricating components for the Unit Shop and the Body Shop.²⁸⁶ In 2000,

²⁸⁴ Tr. (7/6/09) 163:14-16 (Skinner).

²⁸⁵ Tr. (7/6/09) 185:23 – 186:8 (Jones).

²⁸⁶ Tr. (7/6/09), p. 11:7-14 (Fisher).

RTD created a new position entitled “Welder-Fabricator,” and moved the position from the Unit Shop to the Body Shop. The Union requested that as a condition of this move, the wage rates for the employee in the position not be affected, and the District agreed.²⁸⁷

Thereafter, during negotiations for the following two contracts in 2003 and 2006, the parties did not negotiate the wages for the Welder-Fabricator. Gregg Fisher explained that the parties were consumed with larger issues.²⁸⁸ However, the parties did agree to limit the 2006 CBA to specific side letters, and the side letter for the Welder-Fabricator was not among those listed. During the term of the current contract, the Union brought the issue to arbitration when the Welder-Fabricator did not get a raise negotiated mid-term for General Repair Mechanics.

In his arbitration decision, Arbitrator DiFalco framed the issue narrowly. Since both parties agree there was a mistake, “[t]he only question to be addressed [in this arbitration] is whether that mistake was unilateral, as asserted by the Employer, or mutual, as claimed by the Union.”²⁸⁹ Arbitrator DiFalco found a mutual mistake and kept the side letter in place, tying the Welder-Fabricator wage rate to a Recertified General Repair Mechanic.²⁹⁰

²⁸⁷ *Id.*, p. 11:5-12 (Fisher). “The only concern the Union had was that when we moved this position out of the unit shop and over to the body shop was that we did not adversely impact Couch’s [the welder’s] wages.”

²⁸⁸ *Id.*, p. 11:11-20. During the negotiations in 2003, there was a three-year wage freeze. In 2006, in addition to a one-week strike and the particular position only dealing with one employee, Fisher noted that this particular issue was not “high on the radar.” (Fisher)

²⁸⁹ RTD Ex. 193, p. 19.

²⁹⁰ *Id.*, p. 23. As Arbitrator DiFalco stated: “In that the evidence is clear that the parties reach an understanding in 2000 as to how the Welder-Fabricator would be paid, that they have a past practice of incorporating Memorandums of Agreements and side letters into their Collective Bargaining Agreement, that there is no evidence that either party unilaterally neglected to

Contrary to the Union's argument, the DiFalco decision does not preclude RTD's proposal here; to the contrary, it supports RTD's position. Arbitrator DiFalco gave no restrictions on the parties' ability to negotiate wages and benefits in the future; in fact, he impliedly suggested that the parties do so in future negotiations, simply leaving the linkage of Welder-Fabricator to General Repair Mechanic as the status quo until the parties proposed and negotiated a different solution. Although the parties may have negotiated in the past to a higher wage, there is no reason the wage rate cannot be up for reconsideration in this contract.

2. The Welder-Fabricator's wages should be tied to the prevailing market and not an unrelated position.

The Welder-Fabricator's wages should be linked to the market, not to a position that is totally unrelated. There are two primary reasons.

First, the job requirements of a Welder-Fabricator and a Unit Shop Technician (or a general repair mechanic) are nothing alike.²⁹¹ Gregg Fisher testified that the Welder-Fabricator position "is a completely different skill set than the Unit Shop Technician". The Unit Shop houses the General Repair Mechanics and Unit Shop Technicians and focus primarily on rebuilding engines, transmissions, and air compressors.²⁹² Whereas, the Welder-Fabricator assists the Unit Shop and

incorporate such side letter, indeed, the evidence is that they mutually neglected to incorporate it, as neither party acted as if it was no longer in effect, there had been no negotiations regarding it, and there hadn't even been a problem relative to the Memorandum of Agreement until the wage rate issue was discovered independently by a Union officer."

²⁹¹ See RTD Ex.s 199 and 198.

²⁹² Tr., p. 12:8-12 (Fisher).

General Repair in welding and fabricating equipment such as transmission stands and storage racks.²⁹³

Second, unlike a mechanic, the Welder-Fabricator does not require certification in order to receive a wage increase. Fisher testified as to the significance of obtaining certification as a mechanic.²⁹⁴ In short, to become a certified mechanic, the employee must become, in essence, an expert in approximately six out of twelve zones determined by the District. The mechanic may then apply for the recertification premium one year after he passes either a hands-on test or a class. This very complicated and grueling process of recertification does not exist for a Welder-Fabricator.

Other employers also recognize a distinction between the two positions. In the Mountain States Employers Council Wage Survey, a vehicle mechanic within the Denver Area makes a minimum average wage of \$18.10 per hour. In contrast, a welder makes less – a minimum average wage of \$16.54 per hour. Similarly, the maximum average surveyed wage for vehicle mechanics is \$25.43, whereas the maximum average wage for a welder is \$23.80.²⁹⁵

For these reasons, RTD's proposal is more reasonable than keeping the side letter. If RTD's proposal is granted, future wages for the Welder-Fabricator position will be negotiated based on reasonable, rational information instead of an arbitrary, obsolete linkage. As a result, the District should be awarded its proposal concerning the Welder-Fabricator side letter.

²⁹³ *Id.*, p. 14:6-14 (Fisher).

²⁹⁴ *Id.*, p. 12-13:1-16 (Fisher) *Also See*, RTD Ex. 200.

²⁹⁵ RTD Ex. 194.

L. Trainee Wages

The District proposes that employees in training for a new classification be paid at their regular rate of pay for their current classification. This proposal effects primarily RTD's mechanic helper program, which trains employees to become certified General Repair Mechanics.²⁹⁶ However, any employee who has already obtained the training or certification necessary to perform duties outside of her normal job would not be adversely impacted. Instead, the employee would receive either her normal wage rate or the entry-level wage of the work she is performing, whichever is higher.

Currently, Mechanic Helpers are not earning the same wages as General Repair Mechanics. Mechanic Helpers are training to become General Repair Mechanics and cannot yet perform all the functions of General Repair Mechanics. Therefore, Mechanic Helpers receive a wage rate reflecting their current skill level. Since 2006, 22 employees have held the Mechanic Helper position and of those, 14 have become full-fledged General Repair Mechanics.²⁹⁷

While the contract is silent on trainee pay generally, it is nonsensical to pay a Mechanic Helper – who is undergoing closely monitored training – a wage rate equal to a fully trained General Repair Mechanic. First, the trainer, who must take time out to train the employee, is less productive. On top of that, the trainee cannot work as efficiently or effectively as an employee properly trained or certified. Second, an arbitrator already upheld RTD's right to create the

²⁹⁶ Tr. (7/6/09), p. 11: 8-10 (Skinner).

²⁹⁷ Tr. (7/6/09), p. 9:13-15 (Shaklee). Included in the 14 are one mechanic helper who went to Light Rail and another to Facilities Maintenance.

mechanic helper position and to negotiate its wages and benefits. Third, the proposal gives employees an incentive to complete training and improve their skills thus reaping the benefit of any potential wage increase.

1. The trainer is less productive and the trainee is not as efficient.

A Mechanic Helper is not a General Repair mechanic. In fact, a Mechanic Helper requires the direct supervision of a trainer to complete tasks. Therefore, two employees end up working on a project that one certified General Repair Mechanic could perform.

RTD already pays the trainer – a General Repair Mechanic - a premium wage to train a Mechanic Helper. However, a trainer is less productive while training the Mechanic Helper. This is a result, of the trainer taking time out of her regular work to impart their knowledge to the Mechanic Helper. The trainer works alongside the trainee, advising the Mechanic Helper on each task “from beginning to end.”²⁹⁸ The trainer is required to not only - meet her own job requirements - but also to take responsibility for training the Mechanic Helper.

Moreover, even leaving aside the training issue, the Mechanic Helper is not as productive as a General Repair Mechanic. RTD’s Exhibit 182 shows the average time per task for a Mechanic Helper versus the average time per task for a General Repair Mechanic. As Dean Shaklee testified, “it’s quite known that it takes a helper longer to do a task than it takes a general repair mechanic.”²⁹⁹ Therefore, an untrained or unskilled employee should not receive the pay equal to a trained and skilled employee.

²⁹⁸ Tr. (7/6/09), P. 9: 16-17 (Shaklee).

²⁹⁹ *Id.*, p. 10:1-3 (Shaklee).

2. An arbitrator already upheld the district’s right to create the mechanic helper position and to define its wages and benefits.

In opposition to RTD’s proposal, the Union offers the same argument that they presented in the Mechanic Helper Arbitration. In that arbitration, the arbitrator upheld the District’s right to create and maintain the position of Mechanic Helper. Article I, Section 5, provides “The Employer shall continue to have all rights customarily reserved to management, including but not limited to.... the right to create positions.”³⁰⁰ In that case, the arbitrator held that the Union’s refusal to negotiate the wages and benefits of the Mechanic Helper position allowed the District to specify the wages and benefits of the position.³⁰¹ This year, the Union has taken the same tack, and the result should therefore be the same. The arbitrator found the same exhibits relied upon by the Union in this arbitration to be inconsequential.³⁰²

3. The proposal gives an incentive for employees to improve.

The District has a policy to promote internally. This proposal gives employees an incentive to gain additional knowledge and qualifications. By doing so, employees receive wage

³⁰⁰ CBA Art. I § 5.

³⁰¹ RTD Ex. 180, p. 24, where the Arbitrator determined that “While the Arbitrator finds troublesome the fact that there was no formal negotiation of the terms and conditions of the New Mechanic Helper position with the Union it is evident from the testimony and evidence in this case that the Union, in effect refused to negotiate this issue given their position that it should be negotiated as part of an apprenticeship program. Accordingly, in considered Judgment of the Arbitrator the Union failed to fully exercise its right to negotiate the terms and conditions of the new ‘Mechanic Helper’ position with RTD and by doing so it absolved RTD of any responsibility to fulfill its obligation in this regard.”

³⁰² See RTD Ex. 180, *Mechanic Helper Arbitration*, where the Union did not negotiate the newly created position of the Mechanic Helper because they argued that it was an apprenticeship program and therefore the District was required to negotiate with the Union prior to creating the position under Article 4, Section 10.

increases. If a fully trained employee instead earns the same wage rate as a trainee, the employee has no incentive to complete the training. For these reasons, the Arbitrator should award RTD its proposed language in Article I, Section 12 (c).

CONCLUSION

For the above reasons, RTD respectfully requests that the Arbitrator accept RTD's positions on each of the above-referenced proposals, and grant RTD all other relief to which it may be entitled.

September 8, 2009.

Respectfully submitted,

REGIONAL TRANSPORTATION DISTRICT

By _____
Rolf G. Asphaug, Atty. Reg. No. 18701
Deputy General Counsel
Jenifer M. Ross-Amato, Atty. Reg. No. 34665
Associate General Counsel
Derrick K. Black, Atty. Reg. No. 37919
Assistant General Counsel
Attorneys for RTD
1600 Blake Street
Denver, CO 80202-1399
(303) 299-2203

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email and placed in the U.S. Mail, first class postage affixed, this 8th day of September, 2009, addressed to:

ORIGINAL TO:

M. David Vaughn, Esq.
13732 Lakeside Drive
Clarksville, MD 21029-1345
Email: vaughnarbr@aol.com

COPY TO:

Thomas Buescher, Esq.
Buescher Goldhammer Kelman & Dodge, P.C.
1563 Gaylord Street
Denver, CO 80206
Email: tbuescher@laborlawdenver.com
