

Grant Pecor  
Partner  
616-742-3911  
[gpecor@btlaw.com](mailto:gpecor@btlaw.com)

February 19, 2021

Kenneth Zatkoff  
Dean & Fulkerson, P.C.  
801 W. Big Beaver, Suite 500  
Troy, MI 48084-4724

Taylor E. Muzzy  
Jacobs, Burns, Orlove & Hernandez LLP  
150 N. Michigan Ave., Suite 1000  
Chicago, IL 60601

RE: CATA Response to Fact Finder's Report & Recommendations

Gentlemen,

This letter follows the issuance of the Fact Finder's Report on February 12, 2021. Section 1(e) of the parties' Dispute Resolution Procedure for Section 13(c) Agreements requires each party to notify the Fact Finder and other party to the fact finding proceeding of "whether it accepts the fact finder's recommendations, in whole or in part, within ten (10) days after the issuance of such recommendations." As such, I am writing on behalf of the Capital Area Transportation Authority ("CATA") to provide notice to the Fact Finder and Union that it is accepting the Fact Finder's recommendations, *in part*, and to provide its rationale for the recommendations that it is not accepting.

Initially, it should not be lost on anyone that the Fact Finder worked diligently to weigh each party's position based on the factors required. In doing so he appears to have made recommendations based on what he thought would help the parties resolve their ongoing negotiations and help ensure a sustainable future for CATA and its employees. For that, the Fact Finder's efforts are greatly appreciated. Nevertheless, there were several recommendations where the Fact Finder appeared to have marginalized the critical need for CATA to demonstrate effective stewardship of public resources, as well as implement sustainable business practices and operations. These are strategic commitments, directed by CATA Management and its Board of Directors, and communicated to taxpayers and news media. Unfortunately, in these instances, the Fact Finder offers little to no rationale for his recommendation. It also appears that the parties will be returning to the table for additional bargaining, even if both parties elect to accept the Fact Finder's report in its entirety, because the report suggests that both parties agree on how the Extra Board will operate. Further, the Fact Finder's recommendation permits CATA to bundle work to operators assigned to the Extra Board, but did not incorporate the rest of CATA's proposal, instead recommending the parties negotiate over how work will be distributed on the Extra Board.

Therefore, several issues remain in dispute and will require further negotiations. As such, CATA believes that returning to the table in pursuit of more sustainable alternatives to some of those recommended by the Fact Finder is warranted.

In this regard, some of the Fact Finder's recommendations do not appear to sufficiently address the operational inefficiencies that plagued CATA in the recent past, demonstrated poor stewardship of taxpayer dollars, and eroded public trust in CATA's leadership. Rather, while the Fact Finder certainly raised several points that will be considered in the parties' future negotiations, CATA's commitment to efficient and sustainable regional mobility requires that it continue to bargain in pursuit of more effective stewardship of limited public resources than was recommended by the Fact Finder in several instances. In doing so, CATA declines several of the Fact Finder's recommendations, *in part*, for the following reasons:

1. FMLA: The Family Medical Leave Act (FMLA) has always recognized that the replacement costs often associated with granting employees medical leave under the Act (e.g. overtime) are compounded when an employer is forced to replace an individual more than once. Indeed, Congress included express language in the FMLA allowing employers to require paid leave be used concurrently with any portion of an otherwise unpaid leave. *See* 29 USC 2612(a) and 29 CFR 825.207(a). This allows employers to better avoid replacing individuals twice because of the legislative mandate to provide medical leave in certain instances. As such, CATA's proposals are nothing more than an attempt to coordinate paid leave with medical leave in a manner expressly authorized and where the current practice undisputedly has contributed to the excessive overtime practices plaguing its operations.

The Fact Finder recognized "it may be reasonable to have employees utilize at least some portions of their paid time off concurrently with FMLA." However, in recommending that the parties not incorporate such a requirement in this instance (despite evidence that other comparable employers require as much), the Fact Finder relied on the erroneous conclusion that CATA administrative staff are not required to use available paid time off concurrently with FMLA leave(s). This assertion is clearly an error and fails to recognize (or simply misses) the undisputed testimony presented to the Fact Finder. That is, CATA requires its administrative staff to use vacations, floating holidays, and other paid time-off benefits to cover FMLA qualifying leaves of absence. As such, the Fact Finder's recommendation is based on an incorrect factual finding and must be rejected to the extent it contributes to current inefficiencies.

2. Premium Pay: When Brad Funkhouser began his term as CEO of CATA, the Lansing State Journal welcomed him with an editorial detailing the challenges he faced in his new role. *See* Lansing State Journal, Opinion, p. 9A, (December 7, 2017). Amongst the challenges listed was the amount of overtime being paid, with some drivers "making nearly double their salaries in overtime pay." *Id.* The Fact Finder recognized these challenges and, as a result, included several recommendations designed to greatly reduce the amount of overtime that would occur going forward. However, by recommending the parties continue the daily overtime, sixth day premium and seventh day "double time" premium despite the fact that such premiums are not required by State or Federal law, the Fact Finder proposes

the parties continue many of the very unjustified pay practices that created CATA's overtime problems in the first place. What is more, this recommendation appears to ignore the support for eliminating these practices amongst the comparable employers, instead focusing on the time the premium(s) existed in prior contracts. In doing so, the Fact Finder disregards the fact that the majority of the comparable employers will have pay premiums consistent with CATA's proposal to the extent it is adopted by the parties. Thus, CATA must decline that portion of the Fact Finder's recommendations that suggests the parties should continue these unjustified premiums going forward. Doing otherwise simply ignores its obligation to be a good steward of public monies and the negative impact these premiums have had on its previous regional expansion efforts.

3. Zipper Clause: A zipper clause is a common clause in collective bargaining agreements that makes the agreement between the parties the exclusive statement of the parties' rights and obligations. In short, a zipper clause confirms there are no other binding practices or agreements that will impact the operation of their relationship going forward. They are especially important where, like here, the parties need to clarify disputed practices and/or consolidate a litany of side-agreements.

The Fact Finder offered no explanation for his recommendation that the parties proceed without the addition of a zipper clause to their agreement despite undisputed evidence of the need to clarify that prior practices and several side agreements requiring the inefficient distribution of work must be terminated in order for the parties to successfully implement many of the other recommended changes (like work bundling). Needless to say, if CATA is truly going to prioritize its commitment to sustainable regional mobility, it must clearly establish that the inefficient practices and side-deals of years past no longer apply. This is best done through the inclusion of a zipper clause in the parties Agreement. Accordingly, CATA must insist that the parties include a zipper clause regardless of the recommendation of the Fact Finder. Not doing so would establish a vehicle for the Union to undermine the parties' Agreement going forward.

4. Vacation Pay: The record clearly demonstrated that, amongst the comparable employers involved, CATA is the only transit authority not to compensate employees based upon their regular hourly rate. Instead, CATA compensates employees based on 1/52<sup>nd</sup> of their prior year's income. While the Fact Finder undisputedly acknowledged how this practice inflates the value of vacation benefits, the Fact Finder appears to recommend the parties maintain the benefit solely based on the longevity of the practice and his belief that operational changes will temper the amount of overtime employees receive. However, by doing so, the Fact Finder wholly ignores the problem and impact that continuing this practice would have on CATA's effort to address inefficiencies like this one. Simply put, not only are the parties' vacation pay practices unsupported by any other comparable employer, but maintaining this practice completely undermines CATA's efforts to be efficient with the public monies entrusted to it. As such, CATA must reject the Fact Finder's recommendation to continue the current vacation benefit compensation practice as they directly undermine its efforts related to sustainable regional mobility.

5. Retiree Healthcare Benefits: While the Fact Finder agreed with CATA's overall proposal to cap participation in the Retiree Health Insurance Benefits, his recommendation failed to include the effective date proposed by CATA. Needless to say, the effective date proposed was the date included in the Health Benefit Corrective Action Plan approved by the Michigan Department of Treasury. However, the Fact Finder offered no explanation as to why this date should be modified and CATA believes doing so would be inconsistent with the commitments already made to the Michigan Department of Treasury and the small number of individuals impacted by the proposed date justifies further delay. Indeed, delaying would only appear to increase the liabilities involved. As such, CATA must reject the Fact Finder's recommendation to delay the effective date of its proposal.

Obviously, any time an employer asks its employees to restructure wages and benefits in a way that limits employees' ability to inflate their compensation through factors such as overtime premiums, there is bound to be pushback. This is especially true where employees consider their wage and benefit package the "gold standard" in the industry as they do at CATA. However, CATA went into this process committed to the promotion of organization-wide efficiency and effectiveness, and prioritizing CATA's commitment to a fair and equitable contract for all – including the taxpayers' whose dollars fund CATA's operations. To the extent that the Fact Finder has made certain recommendations that are inconsistent with these objectives, CATA must now decline those recommendations in hopes that the parties will be better able to address the issues involved through additional negotiations.

While I trust this letter adequately sets forth notice that CATA is accepting the Fact Finder's recommendations, *in part*, and the rationale for its decision to decline certain recommendations, please do not hesitate to contact me if either of you would like to discuss these matters in more detail. Otherwise, I will look forward to discussing these issues with the Union in more detail when the parties can next meet to further their efforts to negotiate a successor agreement.

Respectfully submitted,

BARNES & THORNBURG, LLP



Grant T. Pecor