




July 15, 1998

**TO: BOARD OF DIRECTORS**  
**FROM: HABIB F. BALKAN**   
**OFFICE OF THE CHIEF EXECUTIVE OFFICER**

Los Angeles County  
Metropolitan  
Transportation  
Authority

**SUBJECT: CONSENT DECREE - SPECIAL MASTER RULING**

**ISSUE:**

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The Special Master has issued specific criteria to be used to determine compliance with the Consent Decree's Load Factor Targets (attached). The Joint Working Group must report by July 21, 1998, on whether or not each MTA bus line complies with the 1.35 load factor target. The JWG may choose to exempt some bus lines, and must identify the circumstances when exceptions may occur.

**BACKGROUND**

On July 8, 1998, the parties to the Consent Decree submitted arguments to the Special Master supporting their views of how load factor compliance should be determined. On July 9, 1998, replies to each other's arguments were submitted. Today, the Special Master released his findings.

We have demonstrated to the Special Master that we have made consistent improvement over the last nine months, and we remain committed to making our buses safe, reliable and comfortable for our passengers. To that end, we are seeking to increase the quantity of new buses purchased, and expedite the restoration of the ethanol-fueled buses to diesel and placing those buses back into service.

The ruling today asked that the JWG apply the following in making their determination:

- The 1.35 load factor target must be met on each MTA bus line with few exceptions. The JWG may exempt some bus lines, but also must establish a "de minimus" standard to determine when exceptions to the load factor target are permissible.
- The JWG will use fixed 20-minute time intervals in determining compliance.
- MTA is not required to include data on by-passed passengers in its ridership monitoring data.

Staff believes that these standards are reasonable and we will work in good faith with the JWG in meeting the July 21<sup>st</sup> time frame.

**CONFIDENTIAL**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS**

**LABOR/COMMUNITY STRATEGY  
CENTER, et al.,**

Plaintiffs,

vs.

**LOS ANGELES COUNTY  
METROPOLITAN TRANSPORTATION  
AUTHORITY and JULIAN BURKE,**

Defendants.

Case No. CV 94-5936 TJH (MCx)

**IN RE LOAD FACTOR  
COMPLIANCE**

**ORDER RE STANDARDS FOR  
COMPLIANCE**

**MEMORANDUM DECISION AND ORDER**

On June 24, 1998, the parties agreed to brief simultaneously the foundational legal issue of the appropriate standard by which the Special Master is to measure and determine compliance with the target load factor requirements set forth in Section II.A.1. of the Consent Decree. (See Procedural Order, dated June 29, 1998.) Having reviewed the plaintiffs' and defendants' briefs, in conjunction with the record in this proceeding, I make the following legal and factual findings:

## I. SUMMARY OF FINDINGS

A. Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis.

B. For the purpose of determining compliance with the Consent Decree, the Joint Working Group (JWG) should utilize the fixed 20-minute periods established by MTA procedures.

C. The Consent Decree does not require MTA to incorporate by-passed passenger data into its compliance calculations.

D. Section II.B of the Consent Decree envisions that MTA eventually will procure 102 buses in addition to the buses purchased for replacement purposes.

These findings are explained in more detail in the following section.

## II. LEGAL ANALYSIS

### A. **The Consent Decree Requires Compliance For All Nonexempt Bus Routes, Measured On A Line-By-Line Basis.**

The operative provision of the Consent Decree which governs the standard for compliance states, in relevant part:

"MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this Consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):

"December 31, 1997, 1.35 . . . ."

(Section II.A.1. (emphasis added).) This terminology -- requiring reduction of load factor ceilings for "all bus routes" -- is consistently used throughout Section II of the Consent Decree. For example, Section II.A.4. states:

"If MTA fails to meet the target load factors for all bus lines by the dates specified in paragraph 1 above . . . MTA shall meet the target as soon as possible . . . ."

(emphasis added).

This framework is further supported by the language and purpose of Section II.A.2., which defines "Peak load factor" as the total number of passengers divided by the total number of seats "during any 20 minute weekday peak period in the peak direction of travel on each bus line." (emphasis added). Since the measure -- "peak load factor" -- is defined by reference to "each" individual bus line, and since Section II.A.2 requires compliance for "all bus routes," the ordinary meaning of these terms, taken together, requires compliance for each and every bus line. There is no language in the Consent Decree which provides for the possibility of averaging across multiple lines.

Section II.A.3. provides two specific ways of exempting specific bus lines from the load factor reduction requirements. First, if ridership increases by more than 15 percent on any bus line, MTA may defer the target on that line for one year. Second, the Consent Decree provides that "the JWG [Joint Working Group] will designate a list of bus lines which may be exempted from the load factor reduction requirement, such as lines with low frequency service." Apparently, MTA has not invoked the first exception, and the JWG has not specifically designated a list of bus lines to be exempted.<sup>1</sup>

Reading these sections together, I have concluded that MTA is obligated by Section II.A.1. of the Consent Decree to meet the December 31, 1997 target load factor of 1.35 on all nonexempt bus routes, measured on a line-by-line basis.

In the absence of ambiguity, a court will interpret a contract or statute according to the clear, explicit meaning of the words used. See e.g., *Averco Ins. Co. v. Davenport*, 140 F.3d 839, 842 (9th Cir. 1998); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The preceding provisions allow for only one common meaning: compliance with the load factor ceiling is required for all bus routes except those exempted under the provisions of II.A.3.

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<sup>1</sup> Although the JWG has not specifically listed exempt lines, it was noted at the status conference on June 24, 1998 that there are a number of lines for which sufficient and timely monitoring data (i.e., point checks) had not been obtained in order to concentrate monitoring resources on the 77 most traveled lines. This approach, which was discussed by counsel to both parties and the Special Master at a previous informal conference, essentially means that the data are available for measuring compliance on approximately 77 lines.

The MTA suggests that the standard for compliance should be a measurement of MTA's overall compliance rate, per time period, against the industry-wide percentage of service interruptions. In effect, MTA argues for a percentage "cushion" equal to the industry-wide rate of interruptions for each time period. While MTA presents a thoughtful and analytical case for the complexities and difficulties of achieving the target load factors, which apparently were not fully understood by MTA at the time it entered into the Consent Decree, there are several problems with the approach it now suggests. First, there is no support for this standard in the language of the Consent Decree itself, which clearly refers to "all bus routes" and "all bus lines" and measures performance on "each bus line." Second, MTA's proposal assumes that a service interruption on a particular line will automatically cause the load factor to be exceeded for that line. Although it may be that an exceedence of the ceiling is more likely under such circumstances, as an empirical matter MTA has not -- and probably cannot -- establish that every service interruption leads inevitably to exceeding the target. Finally, even if these factors were co-extensive, the Consent Decree does not excuse a failure to meet the load factor ceiling merely because of service interruptions. Equipment malfunctions, traffic, weather and other variables are contingencies which were known at the time of the execution of the Consent Decree and therefore must be taken into consideration in planning for compliance with the load factor ceilings.<sup>2</sup>

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<sup>2</sup> MTA cannot be heard to argue that to comply with these requirements it will have to achieve a load factor well below the 1.35 initial target. While this may be the case for some bus lines, the load factor targets are ceilings and MTA is required to take all feasible steps to ensure that they are not exceeded. In any event, since the MTA is required to meet even stricter targets in the future, such steps will be necessary to meet these later requirements.

MTA does not dispute "that the target load factor requirements are applicable to all of its bus routes." (MTA Reply at 1.) However, MTA does dispute "the contention that if the load factor target of 1.35 is not achieved in any single 20-minute time period, then the MTA is in breach of the Consent Decree." (*Id.*) MTA contends that while the Consent Decree describes how to compute the peak load factor, it does not explicitly state that failure to obtain the 1.35 load factor ceiling in any 20-minute period constitutes a breach. Consequently, MTA contends that the Special Master has some discretion to determine what is reasonable compliance, in order to avoid a harsh and unreasonable result.

While MTA's contentions and concerns are not without merit, it should be noted that the Consent Decree does build-in some flexibility for MTA in meeting the load factor targets:

- The 20 minute period (for peak periods) and one-hour period (for non-peak periods) is an average of all buses travelling on a bus route during the specified time period. Thus, individual buses may exceed the load factor without exceeding the target if the average of all buses on that particular route in the period meets the target.
- MTA may defer the target for a year for any line on which the ridership increases by more than 15 percent.

- The JWG is directed to designate a list of exempted buses.
- The Consent Decree expressly reserves to MTA "the discretion in determining how the targets will be met." (Section II.A.3.)

In addition, plaintiffs acknowledge that there are circumstances where MTA would be excused from compliance with the performance standard in Section II.A.1. and that enforcement action would not be appropriate for *de minimis* noncompliance. (See Plaintiffs' Opening Brief at 15, n.11.)

I agree that the language of the Consent Decree affords the Special Master some discretion in fashioning a remedy where the failure to meet the target load factor is *de minimis*. This is consistent with the well-established principle that courts have discretion to deny a remedy where the noncompliance is *de minimis*. See *Withrow v. Concannon*, 942 F.2d 1385, 1388 (9th Cir. 1991)(district courts have discretion to deny injunctive relief where noncompliance is *de minimis*); see also *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). Accordingly, the JWG is directed to develop and apply an appropriate *de minimis* standard which should reflect the understanding that certain bus lines, which may not exhibit consistent indicia of overcrowding, may nevertheless fail to meet the load factor target on a few, isolated occasions. A *de minimis* standard is intended to obviate an immediate remedial plan for specific bus lines where the periods in which the load factors are exceeded are infrequent, likely attributable to unique and nonrecurring circumstances or events, and not reflective of a continuing condition of overcrowding.



Bus lines which meet these *de minimis* criteria, while technically falling short of the target load factor, will not require immediate remedial or enforcement action.<sup>3</sup>

If the JWG cannot agree on a *de minimis* standard, then each Co-Chair of the JWG shall recommend an appropriate *de minimis* standard and shall submit separately a list of bus lines that qualify for *de minimis* treatment.

In sum, a determination as to whether MTA is in compliance with the target load factor requirement of Section II.A.1. of the Consent Decree should be made on a line-by-line basis. Where there is sufficient and timely monitoring data which show that the target has been exceeded on a specific line, other than on an exempt line, then the MTA is not in compliance with respect to that line. If MTA fails to meet the 1.35 load factor requirement on specific lines, then (except for *de minimis* noncompliance) a remedy must be fashioned that would enable MTA to achieve and maintain compliance with respect to that line and to meet future targets.

In its briefs and accompanying Declarations, MTA has raised a number of important concerns and issues. MTA has shown the difficulty of meeting the load factor targets during peak periods where there are service disruptions. MTA has further described the specific problems that have occurred with the fleet of 200 ethanol and 500

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<sup>3</sup> Bus lines which meet these criteria shall be placed on a "watch list" and monitored closely thereafter. If they exceed the target load factors in excess of the *de minimis* standard they will be designated for remedial action.

CNG buses and the steps that are being taken to remedy these problems and add more reliable capacity to the fleet. Finally, MTA has indicated that significant progress has been made in achieving the load factor targets during the first two quarters of this year.

If, after applying the standards set forth in this Order, it is determined that MTA has not met the December 31, 1997 load factor targets and has not subsequently come into compliance with the targets with respect to specific bus routes, then the analysis and concerns set forth by MTA will be given careful and thorough consideration in designing a remedy that is practical, feasible, and reasonable.

**B. The Load Factor Shall Be Calculated Using The 20-minute Fixed Peak Periods Already Utilized By The MTA.**

The parties dispute whether the 20-minute peak period should be calculated using a "sliding window" approach or the fixed 20-minute periods utilized by the MTA. Section II.A.2. provides that "MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules." During an informal conference with the Special Master, it was decided to apply most of the limited resources available to the collection of point check data. (See Plaintiffs' Opening Brief at 3, n.2.) MTA states -- and the plaintiffs apparently do not dispute -- that its "procedures and schedules in existence at the time of the negotiation of the Consent Decree[,] and for at least ten years prior to the Consent Decree[,] used fixed 20- minute intervals." (MTA Opening Brief at 11 (citation omitted).) Since MTA was obligated to meet the target load factors, it was important to MTA to know the basis upon which the data would be collected and

used in determining compliance. On the other hand, it was important to plaintiffs that MTA supply the JWG with all such data and that the JWG be informed of "any change in data gathering/processing procedures." (Section II.A.2. (emphasis added).) The use of the term "any 20 minute weekday period" does not implicitly incorporate the concept of a "sliding" or "rolling" 20-minute period, but rather refers to the determination of the peak load factor by computing the highest ratio of any of the 20-minute periods for which the data were collected pursuant to the MTA collection procedures at the time.

Thus, for the purpose of determining compliance with the load factor targets on a line-by-line basis, it is appropriate to refer to the 20-minute periods established by MTA procedures. This does not mean, however, that computations based on a sliding 20-minute period would be inadmissible or that such data would not be useful in addressing other issues in this proceeding.

**C. The Consent Decree Does Not Require The MTA To Include Data On By-Passed Passengers.**

The parties have raised the question of whether or not the MTA is required under the Consent Decree to incorporate data on by-passed passengers in calculating its load factors. The Consent Decree does not contain any provision which explicitly requires the MTA to incorporate by-passed passenger data into its compliance calculations.

Section II.A.2. provides that "[t]arget load factors shall not be achieved by-passing passengers at bus stops." This provision prohibits MTA from intentionally by-passing passengers as a means of achieving compliance with the load factor targets. If plaintiffs make a showing, either through data or other extrinsic evidence, that the MTA is engaging in such practices, at that point the Special Master will consider what remedies or sanctions are appropriate. In the absence of such evidence, however, the MTA will not be required to incorporate such data into its compliance calculations. Collecting and using accurate by-pass data is a complex process. A passenger standing at a bus stop may not board a specific bus because he or she is waiting for another bus line that shares the same stop or because the passenger prefers to take a less crowded bus that follows closely behind or because the person is waiting to greet a disembarking passenger. Given the inherent problems with by-passed passenger data, it would not be fair to include such data in the compliance calculations except where there is evidence that operators are intentionally by-passing passengers in order to meet the load factor targets.

**D. The MTA Is Required Under The Consent Decree Eventually To Purchase 102 Additional Buses.**

In the Preliminary Views of the Special Master Based on Informal Briefing (March 12, 1997), the Special Master expressed preliminary views about the requirement in Section II.B. concerning 102 additional buses. At that time, it was apparent that MTA could not satisfy this requirement by procuring 102 additional new buses within the short deadlines provided by the Consent Decree. Thus, the practical solution was to add to overcrowded routes serving the transit-dependent new buses that were already on order

as replacement buses and to extend for a reasonable period of time the life of the buses that were scheduled for phase-out.

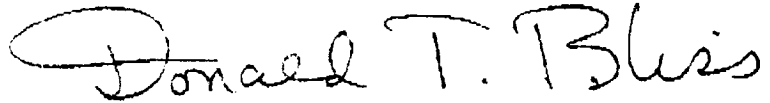
To comply fully with the express terms of Section II.B., however, it was always envisioned that the MTA eventually would procure the additional buses agreed upon in the Consent Decree since both parties recognized that the buses scheduled for replacement were near the end of their life cycle. No time was set for the procurement of an additional 102 buses that would enable MTA to phase out the buses originally scheduled for replacement while maintaining the net addition of 102 buses in the fleet. If it is determined that MTA has not met the target load factor on certain lines, it would be appropriate to consider whether the time is now ripe for the procurement of the net addition of 102 new buses, if MTA has not done so already.

WHEREFORE, it is hereby Ordered that:

1. A copy of this Memorandum Decision and Order shall be provided to the Co-Chair of the Joint Working Group ("JWG") who shall convene a meeting of the JWG to determine whether MTA has met the load factor targets set forth in Section II.A.1. of the Consent Decree.

2. The Co-Chair of the JWG shall report to the Special Master on the form attached as Exhibit A hereto on or before 2:00 p.m. PDT on July 21, 1998.

3. A conference call is scheduled for 5:00 p.m. PDT on July 21, 1998 to set a schedule for subsequent action based on the report of the JWG.



Donald T. Bliss  
SPECIAL MASTER

Dated: 7/15/98

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EXHIBIT A

The Joint Working Group met on \_\_\_\_\_, 1998 from \_\_\_\_\_ to \_\_\_\_\_. The members of the JWG have reviewed the Memorandum Decision and Order of the Special Master, dated July 15, 1998. Based on the review and advice of the JWG, as Co-Chair of the JWG, we have made the following findings, as evidenced by our initials below.

\_\_\_\_\_ We have determined that MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1. of the Consent Decree.

\_\_\_\_\_ We have determined that MTA has not met the load factor reduction target of 1.35 set forth in Section II.A. of the Consent Decree with respect to certain bus lines.

\_\_\_\_\_ We cannot agree as to whether MTA has met the load factor reduction target of 1.35. We therefore have reached impasse.

\_\_\_\_\_ MTA has not met the load factor targets on the following nonexempt bus lines (bus lines which did not meet the load factor targets but met the *de minimis* standard are to be included but may be identified separately): \_\_\_\_\_

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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_ In determining that the target exceedence for certain bus lines is *de minimis* for purposes of remedy, we have adopted the following *de minimis* standard: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_ We did not agree on a *de minimis* standard. We have attached hereto *de minimis* standards recommended by each of the Co-Chairs and a list of bus lines that would qualify as *de minimis* under each respective standard.

\_\_\_\_\_  
Co-Chair

\_\_\_\_\_  
Co-Chair

for \_\_\_\_\_

for \_\_\_\_\_

\_\_\_\_\_  
DATE/TIME



**CONFIDENTIAL****PROOF OF SERVICE**

The foregoing MEMORANDUM DECISION AND ORDER IN RE  
LOAD FACTOR COMPLIANCE/ORDER RE STANDARDS FOR COMPLIANCE  
has been served on July 15, 1998, via the United States Postal Service by first-class, pre-  
paid mail in sealed envelopes to the following parties:

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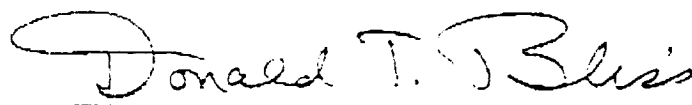
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Copies of the foregoing have been provided by facsimile to Mr. Kenneth  
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Donald T. Bliss  
Special Master