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IN ARBITRATION PROCEEDINGS  
BEFORE ARBITRATOR NORMAN BRAND

**In The Matter Of A Trustee Deadlock Between** )  
 )  
**UNION TRUSTEES OF THE CALIFORNIA** )  
**TEACHERS ASSOCIATION EMPLOYEES'** )  
**RETIREMENT BENEFITS TRUST** )  
 )  
**and** )  
 )  
**EMPLOYER TRUSTEES OF THE CALIFORNIA** )  
**TEACHERS ASSOCIATION EMPLOYEES'** )  
**RETIREMENT BENEFITS TRUST** )  
 )  
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**UNION TRUSTEES'**  
**POST-HEARING STATEMENT**

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TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
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I. APPLICABLE FIDUCIARY STANDARDS ..... 1

II. ARGUMENT ..... 1

A. The Trustees Must Extend the Plan's "Green Zone" Status Through 2009 to Give the Bargaining Parties the Opportunity to Develop a "Voluntary Rehabilitation Plan." ..... 1

B. Rejecting the Temporary Relief Offered Under WRERA and Forcing the Plan to Comply With the "Red Zone" Rules and Restrictions Prematurely Would Breach the Trustees Fiduciary Duties.. ..... 4

C. A Decision to Maintain Green Zone Status May be Subsequently Revoked; a Decision to Force the Plan into the Red Zone is Irrevocable. .... 5

D. The Employer Trustees Have Presented No Case to Support Their Asserted Reasons for Refusing to Follow the Plan Actuary's Recommendation. .... 6

III. CONCLUSION ..... 9



1 The Union Trustees of the CTA Employees' Retirement Benefits Trust submit this  
2 Post-Hearing Statement to summarize the principal points in support of their motion to retain  
3 the Plan's "green zone" status pursuant to Section 204 of WRERA. The background to this  
4 trustee deadlock was set forth in the Union Trustees' Pre-Hearing Statement and the Trustees'  
5 Joint Stipulations, and will not be repeated here.  
6

7 **I. APPLICABLE FIDUCIARY STANDARDS**

8 It is important to note that although there is no 'burden of proof' in a trustee deadlock  
9 (since the Arbitrator, like the Trustees, is constrained to evaluate the issues under ERISA's  
10 fiduciary standards), not a single Employer Trustee presented any testimony, and the entire  
11 factual record as submitted by the Union Trustees was therefore undisputed. Based on that  
12 record, the Arbitrator's decision – like all trustee actions – must be made in the exclusive  
13 interest of the Plan's participants and beneficiaries, and "with the care, skill, prudence, and  
14 diligence under the circumstances then prevailing that a prudent man acting in a like capacity  
15 and familiar with such matters would use..." ERISA §§ 404(a)(1)(A), 404(a)(1)(B).  
16  
17

18 **II. ARGUMENT**

19 **A. The Trustees Must Extend the Plan's "Green Zone" Status Through 2009**  
20 **to Give the Bargaining Parties the Opportunity to Develop a "Voluntary**  
21 **Rehabilitation Plan."**

22 The Employer Trustees have framed the decision before the Arbitrator as a Hobson's  
23 choice between having to deal with the red zone rules and restrictions in 2009, or having to  
24 deal with those rules and restrictions in 2010 or later. In so doing, they have simply excluded  
25 from consideration the very strong possibility that the red zone rules and restrictions can be  
26 *avoided altogether.*



1 It is this third, common sense, alternative that the Plan Actuary, Stephen Murdock,  
2 recommended at the Board meeting in December 2008: "We recommend trustees and  
3 bargaining parties consider electing green freeze and adapting a 'voluntary' funding  
4 rehabilitation plan during 2009 bargaining to avoid red zone." (Joint Exhibit H, page 3. See  
5 also Joint Exhibit I, page 6: "Elect to 'Freeze Green' for 2009... Allows time for bargaining  
6 parties to adopt benefit or contribution changes to avoid Red Zone.") The Union Trustees  
7 moved to act on that advice, but the Employer Trustees indicated they were not ready to make  
8 such a decision, and the Board had to wait another two months before a vote could be taken.  
9 (Transcript Vol. 1, page 29-30.)

10  
11 The prospect of staying out of the red zone altogether is quite realistic. Mr. Murdock  
12 has projected that 11%-12% in additional contributions to the Plan, together with certain  
13 straightforward changes in actuarial methodology, would keep the Plan out of the red zone for  
14 the foreseeable future. (Union Exhibit 8; Transcript Vol. 2, pages 38-41.) Mr. Murdock  
15 described this result as "favorable" compared to the other alternatives he had presented to the  
16 Trustees. (Union Exhibit 9.) At negotiations on March 26, 2009, Jim Clark, the Chair of the  
17 management bargaining team, acknowledged that a 12% additional contribution would enable  
18 the Plan to avoid the red zone. (Union Exhibit 12, page 7.) As a result, and after just two  
19 bargaining sessions, the parties have already made considerable progress toward resolving the  
20 Plan's funding problems, with CTA indicating a willingness to increase its contributions and  
21 the Unions indicating a willingness to divert other benefit contributions into the Plan.  
22 (Transcript Vol 1, page 45; Transcript, Vol. 2, pages 75-77; 79-82.) To state under these  
23 circumstances that the "parties haven't done their work [and] haven't come up with an  
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1 agreement that the trustees would review" (Transcript Vol. 1, page 17), as counsel for the  
2 Employer Trustees did in attempting to justify the Employer Trustees' insistence on the red  
3 zone, carries no conviction.

4 In their Pre-Hearing Brief, the Employer Trustees argue that as fiduciaries they must  
5 assume the worst case scenario – that the parties will not agree on a solution to the Plan's  
6 funding problems – notwithstanding what is actually happening in the negotiations. Yet the  
7 mere possibility that the bargaining parties *may not* reach agreement to avoid benefit cuts  
8 certainly does not create a fiduciary duty to act on the assumption that the bargaining parties  
9 *will not* reach such agreement. In fact, what the parties agree to do or not to do with respect to  
10 future benefits and benefit funding is entirely outside the scope of the Trustees' fiduciary  
11 responsibility.  
12

13 Not only *can* trustees take account of the history and status of the parties' negotiations  
14 when making fiduciary decisions, they *must* do so if they are to act, as fiduciaries must, with  
15 "the care, skill, prudence, and diligence under the circumstances then prevailing." The  
16 Trustees can no more ignore the status of collective bargaining when making long term  
17 decisions about the Plan's future than they can ignore the state of the economy when making  
18 decisions about long term investments of Plan assets. Their fiduciary duty plainly requires  
19 that they obtain and act on all relevant information in all circumstances.  
20

21 In this case, a prudent fiduciary would have to conclude, based on the fact that the  
22 bargaining parties have successfully concluded contract negotiations on every occasion since  
23 1980 (Transcript Vol. 2, page 83-84), and based on the fact that the parties have already –  
24 after just two bargaining sessions – gone far towards addressing the Plan's funding problems,  
25  
26



1 that there is a strong likelihood a "voluntary rehabilitation plan" will emerge in the course of  
2 the 2009 negotiations. To saddle the Plan and its participants with a mandatory rehabilitation  
3 plan when a more effective and less burdensome funding agreement is near, defies common  
4 sense.

5  
6 **B. Rejecting the Temporary Relief Offered Under WRERA and Forcing the**  
7 **Plan to Comply With the "Red Zone" Rules and Restrictions Prematurely**  
8 **Would Breach the Trustees Fiduciary Duties.**

9 To force the plan into the "red zone" immediately will complicate, if not derail, the  
10 parties' continuing negotiations; it will also impose additional, and at this stage unnecessary,  
11 burdens on both the Trustees and the bargaining parties.

12 First, compliance with the red zone rules will result in the immediate issuance of  
13 notices to Plan participants and participating employers that are likely to cause a heightened  
14 level of concern and impede progress at the bargaining table. (Union Exhibits 10-11.) The  
15 statutory imposition of a default "rehabilitation plan" including potential benefit cuts will  
16 necessarily be perceived as giving the Employer an unfair advantage in bargaining. These are  
17 issues that have fiduciary relevance to the extent they diminish the prospects for successful  
18 negotiations, and therefore also the prospects for a successful resolution of the Plan's funding  
19 problems.  
20

21 Second, many participants who have long planned on early retirement will likely  
22 choose to retire when they receive the red zone notice. A high percentage of CSO and CAS  
23 members are currently eligible for early retirement (Union Exhibits 5-6; Transcript Vol 1,  
24 pages 37-38, 61), and as Mr. Murdock testified, under these circumstances he "would expect  
25 more people to retire than we currently assume." (Transcript Vol. 2, page 35.) The Trustees  
26



1 have agreed that anyone submitting a retirement application on or before April 28, 2009, will  
2 be protected from any potential reductions in "adjustable benefits" under the red zone.  
3 (Transcript Vol. 2, page 7.) This increase in the number of early retirements will cause a  
4 further actuarial loss in 2009.

5  
6 Third, forcing the Plan into the red zone – even if only for one or two years – will  
7 require preparation and filing of a multitude of funding reports, including the rehabilitation  
8 plan required under the PPA, and special government filings, all of which will require  
9 extensive trust resources in time and expenses associated with actuarial and legal work.

10 Once these unnecessary burdens have been imposed on the Plan and its participants,  
11 there would be little point, and still less incentive, for the parties to agree to a *voluntary*  
12 rehabilitation plan, and the default rules of the PPA are likely to follow. As fiduciaries, the  
13 Trustees cannot take an action that will place a heavy burden the Plan and its participants  
14 when realistic alternatives exist that have a reasonable probability of success.

15  
16 **C. A Decision to Maintain the Plan's Green Zone Status May be**  
17 **Subsequently Revoked; a Decision to Remain in the Red Zone is**  
18 **Irrevocable.**

19 Just as this case was pending, the IRS issued Notice 2009-31 (Joint Exhibit M), which  
20 substantially limits the time frame in which a plan may elect to retain it's prior year status  
21 under WRERA. In particular, an election to retain the CTA Staff Retirement Plan's green  
22 zone status must be made by April 30, 2009. After that, the Plan will have to remain in the  
23 red zone. (Transcript Vol. 2, page 6.)

24 By contrast, if an election to retain green zone status is made, and it is later found that  
25 the bargaining parties are not able to reach agreement on a voluntary rehabilitation plan, the  
26



1 Trustees may move to revoke the election at any time during the year with approval of the  
2 IRS. Section 204(c)(1)(A) of WRERA, Joint Exhibit K. It cannot be seriously doubted that  
3 the IRS would routinely grant such approval, given the fact that revocation will result in the  
4 imposition of *stricter* funding rules under the red zone. As Mr. Murdock testified, plans often  
5 obtain IRS approval for changes in funding policies, and he has never had an application for  
6 such a change denied. (Transcript Vol. 2, page 46.)  
7

8 In contrast to the flexibility inherent in a green zone election, it would be highly  
9 inappropriate to commit the Plan to the inflexible red zone rules at a time when the economic  
10 and regulatory environment is rapidly changing and the bargaining parties are at the table. It  
11 was precisely in order to avoid putting plan fiduciaries in such a bind that Section 204 of  
12 WRERA was enacted in the first place. The Trustees should avail themselves of this well-  
13 timed, limited legislative relief.  
14

15 **D. The Employer Trustees Have Presented No Compelling Reasons to Justify**  
16 **Their Refusal to Follow the Plan Actuary's Recommendation.**

17 When pressed for their reasons to insist on red zone status, the Employer Trustees  
18 stated on two occasions that they believed it was preferable to opt for the 3-year extension to  
19 the rehabilitation period under Section 205 of WRERA rather than the "freeze green" election  
20 under Section 204, and that they believed it was important for the parties to be able to  
21 negotiate over reductions in early retirement benefits, something that can only be done in the  
22 red zone. (Transcript Vol. 1, page 36, 68, 70.)  
23

24 As already argued in the Union Trustees' Pre-Hearing Statement, the Employer  
25 Trustees' reliance on the alternative three year extension of the rehabilitation period to justify  
26 their position is belied by the fact that they did not and still have not made any motion to that  
27



1 effect. More important, *none* of the funding options Mr. Murdock presented to the Trustees  
2 require even the full ten years to emerge back into the green zone, so it does not appear – and  
3 the Employer Trustees certainly have not established – that the extra three years offers any  
4 significant advantage. (Transcript Vol. 2, page 37.) Finally, as already noted in the Pre-  
5 Hearing Statement, if truly needed the Trustees can obtain nearly the same extension of the  
6 rehabilitation period by electing to retain the Plan's green zone status for 2009 and entering  
7 into a rehabilitation plan in 2012.

9 Turning to the second of the Employer Trustees' proffered reasons, it is certainly odd  
10 that they would urge red zone status in order to enable the parties to negotiate over reductions  
11 in early retirement benefits, as they have argued that collective bargaining should play no role  
12 in trustee considerations. Be that as it may, there is no reason the parties cannot negotiate  
13 over reductions in early retirement benefits even if the Trustees elect to remain in the green  
14 zone for 2009. The only difference is that the effective date of any reductions in early  
15 retirement benefits would have to be April 30, 2010, just one year later than it would be under  
16 a 2009 rehabilitation plan. Given the fact that the Employer has not submitted or suggested  
17 any changes to early retirement benefits to date, there would not appear to be any significant  
18 delay in waiting one year. (Transcript Vol. 2, page 78.)

21 In their Pre-Hearing Brief, the Employer Trustees have minted two new reasons for  
22 their insistence that the Plan be in the red zone. First, they aver that freezing green would  
23 forfeit some \$400,000 in employer contributions that would otherwise be due as a PPA  
24 'surcharge'. (Pre-Hearing Brief at 7.) Second, freezing green "would allow the bargaining  
25 parties to delay acting on the severe financial problems that the Plan faces for three years or  
26

1 longer..." (Pre-Hearing Brief at 5.) Given the magnitude of the Plan's funding problems, the  
2 sacrifice of \$400,000 is inconsequential; the alleged 'three year' delay, on the other hand, is  
3 fictitious.

4 As noted at the hearing, *if* the Plan were in the red zone in 2010 (rather than in 2009),  
5 adjustable benefits could be reduced effective April 30, 2010 (rather than April 30, 2009,) and  
6 future benefit accruals could be reduced effective March 1, 2012 (rather than March 1, 2010,)  
7 *notwithstanding* the term of any successor collective bargaining agreements. (Transcript Vol.  
8 2, page 26.) So, in the *wholly improbable* worst case scenario painted by the Employer  
9 Trustees, the bargaining parties could delay a resolution of the Plan's funding problems for at  
10 most *one* year (in the case of adjustable benefits) or at most *two* years (in the case of the  
11 benefit formula.) Given the fact that the Employer Trustees have not once expressed any  
12 concerns about the benefit formula, it would appear that the 'delay', if any, is really just one  
13 year.  
14

15  
16 Despite the fact that the alleged "three year" delay is a fiction of their own making, the  
17 Employer Trustees proceed with highly misleading cost comparisons – one based on a "one-  
18 time lump sum" payment and the other on a fifteen year stream of payments. (Pre-Hearing  
19 Brief at 7.) The fifteen year calculation is meaningless, as it considers a stream of payments  
20 over a period of time when the Plan – unable even to meet its minimum funding requirements  
21 under ERISA – would be deemed insolvent and thus subject to an entirely different set of  
22 rules. (Transcript, Vol. 2, page 68-69.) At most, these cost 'comparisons' stand for the  
23 unremarkable proposition that the Plan's theoretical funding deficiency grows at the assumed  
24 Plan investment return rate of 8.3%. (Transcript Vol. 2, page 19.) This is not to dispute, of  
25  
26



1 course, that the funding deficiency does grow with time, and that the funding requirements  
2 and potential benefit cuts necessary to resolve the problem would grow commensurately. But  
3 the Employer Trustees have not made any serious attempt to quantify these effects,  
4 particularly in the case of potential benefit cuts, as all the benefit reduction options presented  
5 by the Actuary (Joint Exhibits J and O) assume that the reductions take effect on the same  
6 date, 1/1/2010, rather than on dates one or more years apart.  
7

8 In any event, what really matters is not the comparison of fictional payment streams  
9 with three year time lags, but the comparison, and the choice, between the very real and  
10 immediate burdens that would be imposed under the red zone and the equally real prospect  
11 that the bargaining parties may reach an agreement to *avoid the red zone altogether*.  
12

### 13 III. CONCLUSION

14 By 'freezing green' for 2009, the Plan will not experience a surge of immediate  
15 retirements, it will not have to bear the expense of issuing red zone notices, it will not have to  
16 engage its professional consultants to develop and file a rehabilitation plan, and it will avoid  
17 the several other constraints applicable to plans in the red zone. The parties will be able to  
18 continue their negotiations without impediment. If (for nearly the first time in their entire  
19 history) that proves impossible, the Trustees, or any of them, may move to revoke the green  
20 zone election.  
21

22 If, on the other hand, the Plan is irrevocably forced into the red zone at this time, it  
23 will incur substantial costs, both in benefit liabilities and administrative costs, and  
24 negotiations among the bargaining parties will suffer. For these reasons, the Union Trustees  
25 respectfully urge the Arbitrator to vote in favor of maintaining the Plan's "green zone" status  
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for 2009.

Dated: April 2, 2009

Respectfully Submitted,

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