The Commonwealth of Massachusetts

SPECIAL REPORT

of the

COMMITTEE ON TRANSPORTATION

relative to

THE HIRING OF ATTORNEY WILLIAM SCHWARTZ BY THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY AND THE SETTLEMENT BETWEEN SAID AUTHORITY AND BOEING-VERTOL, INC.

(under House order No. 3874 of 1980)

April 17, 1980.
FINAL REPORT ON HOUSE ORDER 3874

BY

JOINT LEGISLATIVE COMMITTEE ON TRANSPORTATION
I. Origin and scope of transportation committee investigation

This report has been prepared in accordance with the provisions of House Order No. 3874, (See Appendix A), legislation authorizing and directing the Committee on Transportation “to make an investigation and study into the events leading to the hiring of Attorney William Schwartz by the Massachusetts Bay Transportation Authority and any and all fee arrangements made by Attorney Schwartz as part of or relating to the settlement between said authority and Boeing-Vertol, Inc.”

This order was filed in the House of Representatives on January 8, 1980, and adopted by the House on February 21.

The Senate concurred and adopted this order on February 28.

The order directs the Committee on Transportation to file a report to both Houses of the General Court on or before April 15 on the “propriety and legality” of the fee arrangement.

II. Summary of Transportation Committee activities for the purposes of complying with House Order 3874.

On March 18th the Committee on Transportation met in executive session to determine what course of action the Committee would take with regard to H. 3874.

At that session the following guidelines were voted by the Committee:

1. There would be no request for subpoena powers;
2. All meetings of the Committee regarding this matter would be open to the public; and
3. Since the Attorney General’s Office, the Board of Bar Overseers and the appropriate Federal agencies were all reportedly examining the legality of the fee the Transportation Committee would concentrate on the “propriety” issues, and specifically how and why this fee was arrived at.

The Committee also scheduled two open executive sessions to receive testimony from invited witnesses. One on March 24th, to which Representative William Robinson, the sponsor of H. 3874, was invited, as well as a designee of the Attorney General, who declined the invitation, and Mr. Joseph Elcock, General Counsel for the MBTA.
At the March 24th meeting Representative Robinson criticized the size of the fee, raised several questions about the fee arrangements, and criticized portions of the settlement itself.

His written testimony, and that of all witnesses who submitted written comments, are attached to this report as appendices. (See Appendix B)

Also testifying on March 24th was MBTA General Counsel, Joseph Elcock.

Mr. Elcock outlined for the Committee the history of the Light Rail Vehicle program of the MBTA, beginning with the first deliveries in 1977, and the immediate operational problems caused by the vehicles.

Mr. Elcock then went on to describe for the Committee his personal knowledge of Mr. Schwartz involvement in the Boeing settlement.

A summary of Mr. Elcock's oral presentation is attached. (See Appendix C)

As mentioned above the Attorney General's Office declined an invitation to appear before the Committee on March 24th, while expressing an interest to work with the Committee in whatever ways possible.

On Wednesday, March 26th the Committee received testimony from Secretary of Transportation, Barry M. Locke and MBTA Chairman and General Manager, Robert L. Foster.

Secretary Locke's written testimony is attached as Appendix D. A summary of Chairman Foster and Secretary Locke's oral testimony is also attached as Appendix E.

Both officials outlined for the Committee their involvement with this settlement, and with Mr. Schwartz in particular. Both defended Mr. Schwartz's performance and the size of his fee.

At the conclusion of the March 26th meeting the Committee voted to invite Attorney Schwartz to testify.

Mr. Schwartz was invited and accepted. He appeared before the Committee on April 3 and his written and oral testimony are attached as Appendix F.

III. Chronological Summary of MBTA/Boeing controversy and settlement
The Transportation Committee finds that the chain of events leading toward the MBTA/Boeing-Vertol Settlement, and the resultant lawyer's fee which was the subject of this investigation are as follows:

October 20, 1972. The Urban Mass Transit Administration (UMTA) awards the MBTA a 33 million dollar grant towards the purchase of 150 LRV's;
April 23, 1973. MBTA executes 44 million dollar contract with Boeing-Vertol Inc. for 150 LRV's;
June 10, 1974. UMTA awards additional 7 million dollars to MBTA for 25 additional LRV's from Boeing;
September 1976. First MBTA pilot cars are delivered to Boston;
January, 1977. LRV's first put into revenue service;
April, 1977. LRV services temporarily discontinued due to numerous derailments, and other operational problems;
April, 1977 through September 1978. MBTA periodically directs Boeing to stop delivery of LRV's until problems with the cars are worked out.
October 9, 1978. MBTA notifies Boeing it is in the breach of warranty and directs Boeing to retrieve 35 LRV's on MBTA property, and not to deliver the 40 LRV's remaining on the contract;
December 15, 1978. MBTA and Boeing reach agreement on full fleet of 175 LRV's with modified specifications.
March 31, 1979. Continuing problems prompt Chairman Foster to appoint an outside study committee to review LRV situation.
April 18, 1979. Outside Study Committee recommends internal reorganization of LRV Program and quick action by MBTA Chairman to resolve "organizational, procedural and contract problems with Boeing."
April 23, 1979. Foster creates LRV "Project Management Office" to coordinate all LRV activities in one office.
May 1, 1979. Foster orders 33 LRV's returned to Boeing. MBTA unions threaten to strike claiming repair work should be done in-house.
July 16, 1979. Boeing advises MBTA it will not remove any more LRV's until labor dispute is resolved and until MBTA enters into an agreement with Boeing on modifications to the LRV's in question.
July 26, 1979. Governor King, Secretary Locke, Chairman Foster and others met with Otis Smith, Chief Executive Officer of Boeing-
Vertol, Inc. to advise Boeing that the Administration expected Boeing to rehabilitate all LRV's.

August, 1979. Several meetings between MBTA and Boeing on LRV rehabilitation program.

Late August, 1979. Secretary Locke, dissatisfied with these negotiations recommended the hiring of outside legal counsel, and contacted Attorney Schwartz to meet with himself and Chairman Foster. (See Appendix D)

Early September, 1979. Attorney Schwartz was briefed by Secretary Locke, Chairman Foster, Under-Secretary O'Leary and Attorney McCormick on the status of the LRV situation and was given materials from MBTA files to review.

September 7, 1979. Attorney Schwartz delivered to Chairman Foster and Secretary Locke a "Preliminary Memorandum pertaining to the MBTA's legal rights against Boeing".

September 18, 1979. At a meeting in Secretary Locke's office, attended by Locke, Foster, Elcock, Schwartz and others, Elcock was informed that Schwartz was retained by the Authority and directed to negotiate a fee with him. At that time Schwartz was asking for a percentage of the settlement and Elcock's position was that an hourly fee was appropriate.

September 19, 1979. MBTA issues press release announcing the hiring of special counsel to "settle" LRV problems.

September 18 through October, 1979. Elcock and Schwartz continue to negotiate for a fee arrangement, while at the same time Foster and Schwartz are in continuing negotiations with Boeing.

November 2, 1979. Elcock sends Schwartz an agreement, accompanied by a chart, proposing a sliding scale fee contingent upon the number of days it would take Schwartz to settle with Boeing and the size of the settlement. The potential fee ranged from 1 million dollars if a settlement was reached in one day for 100 million dollars to no fee if 100 days elapsed with no settlement. This was Chairman Foster's proposal. Schwartz did not respond to Elcock.

Early November, 1979. Negotiations progressing rapidly with Boeing. According to Schwartz Foster turns down at least two Boeing offers and directs him to get more money.

November 9-12, 1979. Negotiations are nearing an end. Boeing finally offers, and Foster accepts, subject to MBTA Board of Direc-
tor's approval, a 40 million dollar gross settlement. According to testimony of both Foster and Schwartz the fee arrangements were finalized by the two of them over this same period of time.

November 19, 1979. MBTA Board of Directors authorizes Chairman Foster to execute an agreement with Boeing-Vertol, Inc. concerning the acquisition by the authority of 175 LRV's.

November 20, 1979. UMTA sends a letter granting a conditional approval of the settlement pending a review of the actual settlement document.

November 21, 1979. Foster announces the settlement and says it "calls for a Boeing-Vertol payment to the MBTA of $40 million."

December 3, 1979. MBTA Board of Directors unanimously ratifies agreement between MBTA and Boeing. MBTA receives check from Boeing for $34,371,180.00. Attorney Schwartz receives check from Boeing for $799,000.

January 8, 1980. House Order 3874 is filed in House of Representatives directing Committee on Transportation to investigate legal fee.

IV. Recommendations

This settlement allows the MBTA to keep 135 LRV's; requires Boeing to make modifications to these cars; and provides the MBTA with 34.3 million dollars to pursue other alternatives for Green Line rolling stock.

The original LRV contract called for Boeing to deliver 150 LRV's to MBTA for 44.3 million dollars. The MBTA and the Commonwealth therefore recovered 75% of the original contract price, and at the same time retained 90% of the equipment.

The handling of the Attorney's fee, although apparently legal under current MBTA statutes, showed poor judgement on the part of the MBTA management.

There should have been a contract or other agreement between the MBTA and the Attorney before the attorney began negotiating with Boeing.

To leave the attorney's fee flexible until the very end of the negotiations, and at that time have it "bargained" (Appendix E & F) by the MBTA Chairman and the Attorney through informal discussions is not a process that contains adequate protections for the expenditure of public funds.
Indeed, the entire issue of how and why the Commonwealth and its political subdivisions select and hire outside legal counsel, the method of payment for these attorneys, and the advantages and disadvantages of contingency or result oriented fees for legal services in the public sector is overdue for scrutiny by State Government.

We therefore recommend that legislation requiring agreements as to fee and responsibilities prior to employment of outside counsel by the Authority should be adopted, and has therefore reported favorably a bill to accomplish this result. (See Appendix G)

Second, the Authority increased the controversy surrounding this fee by announcing that the agreement called “For a Boeing-Vertol payment to the MBTA of $40 million”, (MBTA Press Release 11/21/79).

Nowhere in the press release was the net settlement figure disclosed, or adjustments to the $40 million figure discussed.

There is a good possibility that if the nature of the agreement had been fully disclosed at the outset, rather than overstated to reach “a nice round number that sounded good”, (Chairman Foster – 3/26/80) a substantial amount of the controversy surrounding this issue might have been avoided.

Unfortunately there is no legislative solution to end the practice of misleading press releases.

Finally, the Committee, in the course of its investigation came across some disturbing information with regard to a portion of this settlement.

Section 9 of the settlement gave the MBTA the option of receiving five LRV's currently at the Boeing plant. This section reads, in part “The five cars, currently at the Boeing Vertol plant in Philadelphia, shall be delivered promptly to the MBTA, at Boeing’s cost if requested by the MBTA to do so within ten days after the ratification of this agreement by the Board of Directors of the MBTA. If no such request is made within said ten day period, title thereto shall vest in Boeing.”

The MBTA, for some reason did not comply with this notification requirement, and these cars are now Boeing’s property, and have apparently been broken down for use in supplying parts of LRV owners.

Attorney Schwartz, in his appearance before the Committee, testified that he had notified the appropriate MBTA personnel about this provision.
The Authority should have immediately notified Boeing of its desire to receive these five cars.

We recommend that the Secretary of Transportation and the Chairman of the MBTA establish whose responsibility the notification of Boeing was in this regard, and take appropriate action to ensure similar errors do not recur in the future.

As mentioned earlier in this report several organizations and agencies, including the Board of Bar Overseers, the Attorney General’s Office, the Urban Mass Transit Administration and the General Accounting Office are all looking into aspects of this settlement.

This report will be forwarded to each of these agencies and this Committee will cooperate with any of those agencies if requested.

All materials gathered by the Committee are on file in the Committee office and are available for inspection.

 Senators
Joseph B. Walsh
Robert C. Buell
Paul N. Harold
Carol C. Amick

 Representatives
Louis R. Nickinello
Jeremiah F. Cahir
Sherman W. Saltmarsh, Jr.
Thomas M. Finneran
George J. Bourque
Mary Jane Gibson
Elizabeth N. Metayer
Thomas F. Brownell
John Gray
W. Paul White
Ordered, That the committee on Transportation is authorized and directed to make an investigation and study into the events leading to the hiring of Attorney William Schwartz by the Massachusetts Bay Transportation Authority and any and all fee arrangements made by Attorney Schwartz as part of or relating to the settlement between said Authority and Boeing-Vertol, Inc. Said Committee shall file a report on the propriety and legality of such to both Houses of the General Court on or before the fifteenth day of April of nineteen hundred and eighty.

Adopted by House of Representatives on February 21.
Adopted by Senate on February 28.
REPRESENTATIVE WILLIAM G. ROBINSON, REPUBLICAN FLOOR LEADER
STATEMENT BEFORE THE COMMITTEE ON TRANSPORTATION,
MONDAY, MARCH 24, 1980

RE: $799,000 Fee Paid to Attorney William Schwartz by the MBTA

Mr. Chairman, I appreciate the opportunity to speak to the Committee on the matter of the unusual fee that was paid to Mr. Schwartz for his work on the settlement between the MBTA and Boeing-Vertol, Inc.

For a period of two months, from September 19 to November 19, 1979, Attorney Schwartz was paid a fee of $799,000. The average worker would have to work 53 years to make this amount! Assuming that Mr. Schwartz worked 24 hours a day for 7 days a week, the fee breaks down to $18,581 per day, or $775 per hour.

It is my understanding that much of the work on the contract settlement was performed by legal staff at the MBTA, and that the General Council at the MBTA is paid an annual salary of $41,000. Furthermore, it is the general practice that outside lawyers hired by the MBTA are paid a maximum of $150 per day.

Bearing these facts in mind, Mr. Chairman, and remembering that we are talking about public money — taxpayers dollars — not a private sector arrangement, there are many questions that must be answered.

— How much time did Attorney Schwartz actually spend on behalf of the MBTA? Where are his work records? Were any required? If not, why not?
— Why was Mr. Schwartz working without a contract?
— How did Mr. Schwartz come to be chosen for this job? If he was referred, was he obligated to pay a finders fee? To whom?
— Was Mr. Schwartz allowed to negotiate his own fee with Boeing? If so, why? If this fee was to be a “contingency fee” why was the percentage not agreed to beforehand?
— According to new accounts, the MBTA’s General Counsel did not know that Mr. Schwartz was negotiating his own fee with Boeing at the
same time that he was negotiating the terms and conditions for employment with the MBTA? How could this have happened?

— Even more disturbing is the issue of why the MBTA Board of Directors was not informed of the fee arrangement at the November 19 meeting, and why the Board was asked to approve a settlement agreement that it did not see at any time?

In addition, Mr. Chairman, despite this settlement, the MBTA will be paying approximately $4 million annually for maintenance and modification work on the LRVs because under the terms of the settlement worked out by Mr. Schwartz, the “T” withdrew its remaining warranty claims on the LRVs.

The final question that must be asked — and answered — is, Has there been a breach of the public trust?
APPENDIX C

SUMMARY OF MARCH 24TH OPEN EXECUTIVE SESSION ON HOUSE ORDER 3874

Representative Robinson opened the testimony with the attached statement. Also note that Chairman Nickinello outlined for those present and the record, the steps leading up to this session namely:

1. The Transportation Committee at an earlier meeting voted to have open meetings,
2. Voted not to request subpoena powers,
3. Decided after talking with the Attorney General's Office, to let that office concentrate on the legal issues, while the Transportation Committee concentrates on the propriety issues.

Representative Robinson stated that the Committee's decision was a judicious approach.

The only other testimony at this session was given by Joseph Elcock, General Counsel for the MBTA.

Mr. Elcock opened by informing the Committee that he had previously talked on this matter with the Attorney General's Office, the Board of Bar Overseers and UMTA. He also stated that the General Accounting Office in Washington was looking into this case.

Mr. Elcock went on to say that when the T received the LRV's in 1977 there were many operational problems attributed to these vehicles, (e.g. doors, brushes, articulation, air conditioning, etc.) While the Boeing people and the T engineering people were attempting to deal with these many problems, there were two basic views being presented. Boeing's view was that the T was causing most of the problems by virtue of their specifications. The T felt that the source of the troubles came from Boeing's components being less than quality.

These discussions continued until the problems with the air conditioning came about. It became apparent that this problem could not be solved and that resulted in the T stopping delivery of the LRV's.

The Law Department at the T approached the negotiations looking for Boeing to make the LRV fleet operational and to provide the necessary components and technical input that would result in a running fleet.
In early 1979, Mr. Elcock informed Washington that the T was at the stage where possible suit and/or a settlement must be made. UMTA agreed.

Representing the T Law Department in the negotiation was Mr. Elcock's function, until the hiring of Mr. McCormick at the T in early 1979.

Mr. McCormick was recommended to Mr. Elcock by Chairman Foster as being very competent and highly qualified relative to public law. Mr. Elcock concurred and the man was hired and assigned to this case.

On September 18, 1979 Mr. Elcock was called to the office of EOTC and introduced to Mr. Schwartz. It was then that Mr. Elcock was told that Mr. Schwartz was hired. His reaction being that it was not unusual for private attorneys to be used in cases like this. Mr. Elcock was under the impression that Mr. Schwartz was to do a study on the circumstances of the case and make recommendations.

Mr. Elcock was then directed by Messrs. Locke and Foster to sit with Mr. Schwartz and negotiate an acceptable fee.

Representative Brownell asked what Schwartz was negotiating, breach of warrant or product liability, noting that Mr. Schwartz is a product liability lawyer. Mr. Elcock stated again that he was under the impression that Schwartz was to do a study on the case.

Mr. Elcock went on to say that Mr. Schwartz, at that time, was well informed on the LRV problems, and that he felt all that Mr. Schwartz knew, could not have been gleaned from one meeting.

According to Mr. Elcock, Mr. Schwartz did not want an hourly fee he wanted a percentage. Initially he wanted 33-1/3%, Elcock stated that was much too high.

Mr Elcock was also asked to provide material and background to Mr. Schwartz.

Mr. Schwartz talked about a fee of 25% and Mr. Elcock again stated it was too much.

Mr. Elcock informed Mr. Schwartz that any monies realized would be partially federal. Wherein Mr. Schwartz stated he would work only off of the T money.

On September 19, 1979, the announcement was made that Mr. Schwartz had been hired as special counsel. (See attached press release.)
Mr. Elcock told Mr. Foster that he and Schwartz were negotiating about two different points, (Study vs. Settlement) and that it became more and more apparent over the next couple of weeks, that Mr. Schwartz was negotiating more than a study.

Representative Gibson asked what a study would have found? Mr. Elcock stated that, a problem would have been shown, and that recommendation would have been made as to whether or not Boeing was liable or the T had fouled up. This would have had to have been done with each of the many problems.

The week before Mr. Elcock went to EOTC Mr. McCormick was called to EOTC. He reported this to Mr. Elcock at a later date. Mr. Elcock added this was not uncommon in the Law Department or offensive. He only asked his people to keep him informed.

Representative Metayer asked, at what point the T Board was apprised of what was happening? Mr. Elcock said, at the next board meeting although he doesn't specifically recall a discussion on Schwartz.

Mr. Elcock told Mr. Schwartz that he would be glad to bring him up to date on all that the T was and had been doing. He added that he didn't think that Schwartz got all of the information he had from one sitting with McCormick.

Mr. Elcock also stated that private attorneys are hired by the T every so often particularly if a case may be of long duration, and that he generally makes the decision to do the hiring. He also added that it is usual procedure to have a signed contract or an agreed upon fee before commencement. In this case, Schwartz was engaged and Elcock must negotiate the fee.

From September 18 through October 14. Mr. Elcock states there are no entries in his daily diary although he did meet with Mr. Foster on the case.

On October 15 it became apparent that Schwartz was negotiating a settlement not on doing a study.

On October 27 Elcock discussed fee with Schwartz and he wanted 20% subject to UMTA approval. Elcock again stated this was too much. The lowest % Schwartz requested was a % of the first 100,000 and then adjust relative to the remainder. Foster and Elcock told Locke that Schwartz wanted a percentage, and Locke said he wanted nothing to do with the fee.
Foster then generated a chart (declining) that was submitted to Schwartz, with no response. (See letter to Schwartz from Elcock 11/2/79.)

Elcock felt Schwartz did not want an hourly fee because he was sure he could settle quickly.

After the letter of 11/2/80 it became apparent to Elcock that, the Chairman and Schwartz were rapidly reaching a settlement. At one meeting Schwartz wanted one million dollars, which to Elcock was unacceptable. (October 27) This was discussed with the T board and they thought it was too high. Also on October 27 it was decided that Elcock would develop an agreement regarding the fee. Elcock wanted only an hourly format and Foster then developed the declining chart.

The T Board met on 11/19/79 and Schwartz told them he thought he could settle and he indicated the fee would be acceptable. Elcock then said that the settlement would require UMTA approval.

Schwartz went to Washington on 11/20/70 and outlined the settlement to UMTA.

On 11/21/79 Schwartz and Foster came into the T with a Boeing signed settlement. Elcock was then asked to make a memo to the board and to call each member and explain the settlement.

The initial thought was that the settlement would be net Schwartz's fee, as it was the fee was spelled out in the settlement.

Q. Gibson: How was this case unusual?
A. Elcock: It had high exposure and the whole case was unique, not just the fee arrangement.

Q. Nickinello: October 27 to November 19, did you know that Schwartz was negotiating with Boeing for a fee settlement?
A. Elcock: No — I thought he was negotiating a net settlement.

Q. Did you and your staff discuss Schwartz's fee among yourselves?
A. Yes.

Q. Gray: What did Schwartz do that you couldn't?
A. Different negotiating techniques.

Q. Gray: Who hired McCormick?
A. Foster, with my concurrence.

Q. Brownell: Does Foster have direct access to McCormick?
A. Foster has contact with all attorneys.

Q. Nickinello: When did the direction change from fixing the equipment to cash settlement?
A. The approach changed from both political pressures and the hiring of Schwartz.

Q. Was a deadline set by the Governor?
A. No, not to my knowledge, the only directive was to solve it.

Q. Gibson: Were you astonished at a 40 million dollar settlement?
A. Not astonished, I thought 28 to 30 million would be good, but you have to consider equipment not delivered and the fact that maintenance costs are extraordinarily high. On the old cars a job would take 1 1/2 hour, on the new cars, 2 1/2 hours or more.

Elcock stated that he felt Boeing had some very strong claims against the T (26 million dollars).

Q. Brownell: Was McCormick working at the same time as Schwartz on this case, and supplying him information?
A. No.

Q. Brownell: Were documents prepared by the T, in a series of letters, relative to breach of warranties?
A. Yes. (A copy of the letters, claims, and counter claims was requested by the Committee).

Q. Brownell: Did Schwartz have access to this information?
A. Yes, there are extensive files on these problems. Schwartz sat with the engineers and occasionally McCormick, utilizing this information.

Q. Nickinello: On November 21, 1979, when Foster and Schwartz came to the Board with a net settlement, what was your recommendation?
A. I did not make one. I outlined the settlement proposal. Schwartz indicated that UMTA approved of the settlement. This is not true, they gave a conditional approval. (See attached letter DOT to Foster 11/20/79).

Schwartz and the T have been paid. The T cannot spend theirs until UMTA has signed off.

Elcock then closed with a query: That being the case, can Schwartz legally spend his?
Mr. Chairman, members of the Committee on Transportation, I am pleased to respond to your invitation to speak to House No. 3874. The subject before you is a most complex one. I would like to offer a brief statement to clarify the issues and then respond to any questions you might have.

As you know, in the early 1970's the MBTA initiated a search to purchase a Light Rail Vehicle to replace the aging PCC vehicles which operate on the T's Green Line. The German manufacturer DuWag was prepared to provide the T with prototype LRVs. Coincidentally, the Federal government announced a "New Economic Policy" to curb foreign imports. As a result, the Urban Mass Transportation Administration withdrew its grant for the DuWag vehicle and instead proposed the development of an American manufactured Light Rail Vehicle for use in North America. That program eventually led to the development of the Boeing Vertol LRVs and a joint purchase by the T and San Francisco Municipal Railway.

The MBTA's ultimate contract with Boeing Vertol was for 175 vehicles at a total cost of $50.2 million. In January, 1977, the LRVs were put into regular revenue service. However, within a few short months it became painfully obvious that the solution to the Green Line problem was not at hand.

On April 16, 1977, LRV service was discontinued because of numerous derailments and other mechanical problems. Boeing, having delivered 31 LRVs, was then directed to deliver no more than 43 LRVs until the problems were corrected. Nine days later LRV service was resumed. By June 1978, 135 LRVs were now on the property. However, problems continue.

October 9, 1978 -- MBTA notifies Boeing Vertol that it is in breach of warranty and that the conditional acceptance of 35 LRVs has been rescinded; MBTA also directs Boeing Vertol to remove the 35 LRVs
from its property for remanufacture and to deliver the remaining 40 LRVs only when they meet all specification and contract requirements.

October 26, 1978 — Former MBTA Chairman Robert J. Kiley and former Boeing Vertol President Howard N. Stuverude announce that an understanding has been reached to settle the dispute and provide the T with a fleet of 175 specification-compliant LRVs. This understanding resulted in an agreement signed December 15, 1978.

This was the scope of the problems which faced the MBTA in January of 1980.

Chairman Foster immediately recognized the LRVs as a major priority. He appointed a Study Committee "To investigate the status of the LRV program and to make recommendations for future action." The committee consisted of an attorney, an electrical engineer and a mechanical engineer. Their recommendations included:

Spending $50 million to bring 175 LRVs to the condition for reliable service;

Appointment of an outside law firm to assist the T.

In addition the Committee concluded:

"While Boeing has agreed to fund the cost of additional personnel, Boeing has also made clear their intent to claim damages for all items they believe to be outside the specifics of the contract. We believe consideration by MBTA that counterclaims against Boeing will reduce MBTA liability to zero is simply not realistic." That is, the conclusion of the Committee that Boeing's claims against the T outweighed any claims the T might have against Boeing Vertol.

On May 4, 1979 the T signed an agreement with Boeing Vertol for modification and remanufacture of 35 LRVs. On July 6, 1979, Boeing Vertol advised the T that it would not remove any more LRVs from T property. Boeing had removed only 3 of the 35 they had agreed to modify. On July 26, Governor King, myself, Chairman Foster and others met with Otis Smith, Chief Executive Office of Boeing Vertol. Mr. Smith was advised that the King Administration expected Boeing Vertol to rehabilitate all the LRVs and provide the T with a reliable vehicle.

A series of high-level meetings began with the T and Boeing Vertol. Six weeks later the T and Boeing Vertol appeared to be no closer to a satisfactory resolution. In fact, it became increasingly obvious the Boeing Vertol management expected the T to pay a major part of the rehabilitation program.
My office expressed serious concern to Chairman Foster and suggested that, perhaps, outside legal counsel be retained to impress on Boeing Vertol the seriousness of the situation and once and for all reach a satisfactory resolution of this long standing problem. The T continued to view the situation from a contract perspective while I saw it, rather, from the broader viewpoint. The LRVs were developed for public use and they had the responsibility to produce a sound product. I felt that Boeing Vertol had not, and that the T should aggressively pursue the matter on a product's liability basis.

In early September I contacted Attorney William Schwartz and asked him to meet with Chairman Foster and myself to examine the relevant legal issues. Attorney Schwartz, a nationally known legal expert, is a Professor of Law at Boston University School of Law and the author of 18 books on legal subjects including: Civil Trial Practice Manual; A Products Liability Primer; New Vistas in Litigation; Future Interests and Estate Planning, Massachusetts Pleading and Practice; and Comparative Negligence. Schwartz, former chief Executive Officer of the Association of Trial Lawyers of America, the nation's largest trial bar association, is also of counsel to the Boston law firm of Schwartz and Schwartz and is an Affiliated Scholar with the American Bar Foundation. Schwartz has served as Chairman, Legal Advisory Panel, National Commission on Medical Malpractice and in the New England Trial Judges Conference, the National College of Probate Judges, and the National Metropolitan Courts Conference. He has also served as a Representative to the Office of Public Information of the United Nations. I met him some ten years ago when my brother was the Director of Continuing Education for the American Trial Lawyers Association. At that time Attorney Schwartz was the Association's chief executive officer.

On September 7, 1979 Attorney Schwartz delivered a recommendation to Chairman Foster and myself outlining the MBTA's legal rights against Boeing Vertol.

We were convinced that Atty. Schwartz could more than ably protect the T's interests and aggressively pursue all legal remedies. I recommended to Chairman Foster that he retain Atty. Schwartz. I told Chairman Foster that the final choice was his.

On September 19, Chairman Foster announced the appointment of Atty. Schwartz. At no time did I raise with Chairman Foster the matter
of a fee. It was my belief that the fee was strictly an MBTA administrative matter.

During this time, September, October and November, I was aware of many negotiating sessions between the T and Boeing Vertol. I was briefed at regular intervals on their status by Chairman Foster.

On November 21 Governor King, Chairman Foster and I announced the successful conclusion of those negotiations:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>$34,371,180</td>
<td>cash payment</td>
</tr>
<tr>
<td>799,000</td>
<td>legal fees</td>
</tr>
<tr>
<td>900,000</td>
<td>withheld by Boeing pending final acceptance of test equipment</td>
</tr>
<tr>
<td>3,929,820</td>
<td>balance due Boeing on 135 LRVs already delivered</td>
</tr>
<tr>
<td>20,000,000</td>
<td>modification kits (estimated)</td>
</tr>
<tr>
<td>20,000,000</td>
<td>release of Boeing’s claims (estimated)</td>
</tr>
<tr>
<td><strong>$80,000,000</strong></td>
<td>total</td>
</tr>
</tbody>
</table>

A total settlement valued at eighty million dollars.

To my knowledge, no transit system has ever received such a large settlement from a private manufacturer. We believe the settlement to be in the public interest. The T now has the opportunity to move beyond the LRV experience and with the settlement purchase equipment which will provide commuters with a safe, reliable vehicle.

In retrospect, if I had had, or in fact if anyone concerned had had any idea of the potential fee involved, it would have perhaps been appropriate to screen several attorneys, take some time reviewing each and their planned treatment of the case, put the project out to bid, figuratively.

But it was crucial to get prompt attention on the case before the T lost anymore time with warranties running out and costing millions more dollars. I don’t think anyone realized the size of the settlement we’d get from Boeing. I’m unaware of any State agency which puts outside legal consultants jobs out for bid. As I say, in retrospect, yes, I think all of us involved would have approached this differently.

In closing, I would like to state, if I may, that the LRV situation is unprecedented in the history of mass transit in this country.
While I feel that the fee is just and reasonable, if my office has been imprudent, in any way, regarding this matter, we stand corrected and would support methods to further insure that the best interest of the general public is served at all times.


APPENDIX E,

SUMMARY

Hearing on House Order 3874 on March 26, 1980 at 3:00 P.M.

Committee Members in Attendance: Chairman Nickinello, Senator Walsh, Senator Amick, Senator Harold, Representatives: Cahir, Metayer, Gibson, Gray, Melia, Finneran, Saltmarsh and Brownell.

Testimony given by: Secretary of Transportation, Barry M. Locke, and MBTA Chairman/Chief Executive Officer, Robert L. Foster.

Secretary Locke opened with a prepared statement (see attached) this was followed by questioning by the Committee:

Representative Brownell: You stated that you met Schwartz ten years ago, was that the only time?

Secretary Locke: Yes, since that time and prior to his being retained, I heard his name mentioned many times and his reputation was outstanding.

Question: Were you aware of his specialization on railroads?
Answer: No, only his expertise on product liability.

Question: Where did you get the idea to approach this from a products liability standpoint?
Answer: At one time, I had planned on going to law school and I studied products liability, getting ready for school. I was also involved with a similar situation when I worked in St. Louis. I also found that most transit systems lost when they approached their cases from a breach of warranty standpoint.

Question: Who first contacted Schwartz?
Answer: I did approximately one week before he came to my office.

Question: Did you discuss the case with him?
Answer: Briefly.

Question: Did you discuss this with Elcock?
Answer: At that time Elcock was not involved.

Question: Did you give Schwartz material on the case?
Answer: Yes, he reviewed it over the weekend.

Question: Was the material given to him before he came to your office?
Answer: No, when he came to my office.

Question: Did you discuss fee?
Answer: No.
Question: Why did he come to your office?
Answer: That's where the material was.

Representative Metayer: Were you contacted about the fee and were you given a chance to negotiate on the fee?
Answer: I had nothing to do with the fee.
Question: Were you surprised at the fee?
Answer: Yes.
Question: Was the T involved in the fee?
Answer: Yes, it was done at the T offices, nothing on the fee took place at my office, it was done at the T.

Representative Brownell: Did you indicate that you wanted Schwartz to work on the case?
Answer: I indicated that I wanted him to look at it and he came to my office.

Question: Did it surprise you that he was not busy?
Answer: No, I asked him to look at it.

Chairman Nickinello: We would like to square away the time sequence. (Chairman reviewed Elcock's stated time structure).

Chairman Nickinello continued: On September 7, Attorney Schwartz delivered to your office a recommendation. On September 19, you called Elcock in.

Secretary Locke: There was another meeting one week to ten days before the September 7th meeting, late August.

Chairman Nickinello: You contacted Schwartz some time in August to come in?
Answer: Yes, to discuss the situation. Then we had a meeting with myself, Foster, Schwartz and Under Secretary, O'Leary on September 7th. It was at that time we gave Schwartz the basic material and asked him to review it for case purposes. He responded in a few days and stated there was a case (see attached).

Question: Did you next meet with Schwartz, Foster and Elcock on September 18th in your office?
Answer: Yes.

Question: Could you relate to us your conversation and what direction Elcock was given?
Locke: (Discussed Schwartz as aforementioned, he then added,) Schwartz stated he thought the T could retain as many vehicles as possible, with no added cost and that he would be interested in taking
Answer: No, but they were kept informed.

Question: What part did the Board play in the hiring and fee of Schwartz?
Answer: Very little.

Question: There was no vote required?
Answer: That's correct.

Representative Gibson: Based on what has happened, would you have done it differently?
Answer: No.

Representative Gray: When did you meet Schwartz?
Answer: Back in September

Question: How many times since?
Answer: Fifteen to eighteen.

Question: What was discussed?
Answer: Policy and guidance.

Question: Were you satisfied with the performance of Elcock and McCormick?
Answer: Very satisfied.

Question: Then why hire outside counsel?
Answer: For the expertise re: product liability. Our own lawyers were concentrating on contract law.

Question: How did you arrive at the fee?
Answer: Saturday I negotiated by phone with Boeing and got 1.75 million additional from the Chairman of the Board. I negotiated with Schwartz over the weekend relative to his fee.

Question: How was the fee negotiated?
Answer: Expertise by Schwartz justified his $799,000. He did what others couldn't do.

Senator Amick: When discussing Schwartz with the Board did you discuss fee?
Answer: No, just qualifications. I do recall Elcock briefing the Board on Schwartz's request for a percentage.

Representative Finneran: Was the hiring of Schwartz a joint decision?
Answer: No, there were several meetings and a consensus developed to hire Special Counsel.

Question: Was the Governor informed of the potential to hire Schwartz?
Answer: Yes and the Governor did not know him.

Question: In the negotiations what was the give and take, what leverage did you have?

Answer: I am a good negotiator also. Schwartz knew that time was up as the settlement drew near. Also Boeing had to pay the bill and I hoped they would. That was the last blank filled in on the settlement.

Senator Harold: I feel it is normal for a fee to be settled before not after.

Response: I disagree, this was an unusual case and timing was critical.

Representative Brownell: The fact that Schwartz so quickly impressed you is difficult to comprehend. Did you get a resume?

Answer: Yes.

Question: Did he have other cases relative to transit vehicles, in the area of product liability?

Answer: No, but product liability is product liability for children's pajamas or LRV's.

Question: How did Schwartz present a comprehensive memo in such a short time?

Answer: That impressed me, he did absorb a lot in a short time.

Question: The fee arrangements confuse me, (Brownell then mentioned Elcock's testimony re: fee) was it your decision that Schwartz would be the lawyer no matter what the fee?

Answer: Of course not, I felt sure a reasonable arrangement could be worked out.

Chairman Nickinello: Were you and Schwartz doing the settlement negotiations?

Answer: In many cases.

Question: Will you run through the fee negotiations relative to the forty million?

Answer: In the beginning after Swartz was hired, we had no idea where we would end up. We even included the P.C.C. overhaul and we got up to 75-100 million.

Question: Can you reconstruct the negotiations?

Answer: No I can't.

Question: When the ante was up 1.75 million, Schwartz was asking 1.4 million, what was the base?
Answer: Thirty-three million.
Question: You wanted another two million to get to thirty-five million?
Answer: Yes.
Question: How did you get to forty million?
Answer: We decided to put in some public relations and added in the items that Boeing was to pay over the cash settlement. Forty million sounded better.
Question: How many items were negotiable problems between Boeing and the T?
Answer: 50 - 150 and Schwartz was expert here.
Question: You negotiated the fee with Schwartz and he initially wanted twenty percent, then 1.4 million, then 1.1 million, how did you get to $799,000?
Answer: Basic negotiations, I told him that the T would pay $500,000. There was give and take, Schwartz wanted 1.1 million. I said no, then he stated he wanted not a penny less than $800,000. I offered $799,000 subject to approval of both Boeing and the T Boards and he accepted.
Question: Did the feds already approve this settlement with the fee included?
Answer: The settlement was conditionally approved by UMTA without a specific fee.
Question: When did the T Board approve?
Answer: At the very next Board meeting.
Elcock stated then that anything under one million was an acceptable fee. The Board vote was unanimous.
Question: With regard to federal approval specifically the legal fee, was Schwartz aware that this approval was required?
Answer: Yes.
Question: If the feds do not support this settlement, what will happen to the $799,000?
Answer: Eighty cents of each dollar is federal, they will have to agree, UMTA has already conditionally approved. (Foster cited the UMTA letter of 11/20/79 to him).
Representative Brownell: Mr. Foster you were impressed with Mr. Schwartz and his product liability background. In the memo of September 7 from Schwartz and Schwartz paragraph 2 no mention is even made of product liability.
Answer: It was implied.

Representative Brownell: A third year law student would have added another paragraph on product liability.

Mr. Foster: Product liability was discussed during the negotiations. You are asking this question to the wrong people.

Senator Walsh: Was there a finders fee?
Answer: No.

Representative Gray: How much time did Schwartz put in?
Answer: Two months — no specific hours but at times long stretches.

Question: Were there any work records?
Answer: No.

Question: Why not?
Answer: I don’t know.

Representative Melia: It seems to me you are not using your in-house people to the fullest, you acted too quickly and you didn’t fully inform the Board.
Mr. Chairman and Members of the Committee:

I am pleased to respond to your invitation to appear voluntarily before this Honorable Committee to relate the circumstances of a legal representation which has resulted in substantial and unprecedented benefits to my client, the MBTA, and to the public.

The Committee must determine whether the MBTA had the authority to hire outside counsel and to determine counsel's terms of employment, including his compensation. In this connection, the following is clear:

1. The MBTA has been given independent authority by the Legislature to hire and compensate outside private attorneys. Mass. Gen. Laws, Ch. 161 A, sections 2, 3, 6, and 21. It was the obvious intent of this enabling legislation to give the MBTA the independence to operate in the same manner as do individuals and corporations in the business community generally.

2. There are no legal limits to the MBTA's authority to hire, fire, and compensate outside professional experts. The Commonwealth is the beneficiary of this legislation since it enables the Authority to engage; in its sole judgment, the best available talent to accomplish needed results. In this case, this independence enabled the MBTA to obtain a maximum result in the public's interest.
3. Under the above unequivocal and clear legal authority, I was retained to attempt to achieve a result in a case which was extraordinarily difficult in terms of the time constraints imposed upon me by the circumstances of the case and the needs of the Commonwealth and in terms of the complexities of the case that made it a poor litigation risk.

The documented fact is that when I was retained, the MBTA, after protracted negotiations, had been unable to obtain a cash offer from Boeing. It is for this reason that Chairman Foster publicly stated that: “We needed a specialist in product liability and we like to get the best” and that my hiring was “essential”. Boston Herald American, Thursday, December 6, 1979, A3. The zero-cash offer from Boeing is documented in the written proposal from Boeing which I am hereby submitting to the Committee with the permission of my client.

An Independent Special Study Commission had concluded, a short time prior to my retention, that: “We believe consideration by MBTA that counter-claims against Boeing will reduce MBTA liability to zero is simply not realistic”. Special Study Committee Report, April 18, 1979, p. 42. Thus, this Independent Study Commission concluded that (before my involvement) there was a real danger that the MBTA might, in fact, wind up owing Boeing money.

Boeing vigorously disputed that the LRVs were defective or that any alleged defects were attributable to Boeing. Boeing contended that the defects, if any existed, were caused by poor maintenance by the MBTA, poor tracks, operational errors by drivers, and cannibalization of cars by the MBTA.

4. The total economic benefit to the MBTA of the settlement is as follows: My efforts led Boeing from a zero-cash offer to a 40 million dollar gross offer. This amount almost equalled the original cost of the LRV cars (and the MBTA was permitted to keep the cars). In addition, the final settlement provided that Boeing was to furnish the MBTA with substantial numbers of parts to repair and modify the design of the cars. Boeing also agreed to cancel its counterclaims against the MBTA. The total value of the settlement to the MBTA was viewed by my client as being in the range of 80 million dollars. This result was achieved despite the difficulties and complexities of the case.

5. The MBTA, under its established authority to select and compensate counsel of its choosing, negotiated, at arms length, a binding fee contract which was validly and in good-faith entered into, and it has since been reaffirmed and ratified by the parties.
6. The fee paid was clearly result-oriented. That large results give rise to large fees is an accepted practice in the legal and business community. It is not at all uncommon. In the products liability field, a 33 1/3% fee is usually the minimum fee charged.

7. There was no requirement, legal or otherwise, that the MBTA executives and its advisors conduct a poll in order to arrive at a consensus as to what a reasonable fee would be.

8. I was, and continue to be, pleased that I was able to achieve an excellent result for my client, that we were able to agree upon a reasonable fee and that to this day my client is “proud” and pleased with every aspect of my representation, including the settlement and the fee.

9. The executive judgment of Mr. Foster and his advisors in approaching this matter in a business-like and efficient manner directly resulted in the creation of a substantial fund, the interest on which has already more than paid for all legal costs and fees. Even a fund of 34 million dollars invested at 15% (an amount less than the prevailing market interest rates) results in an increment of 5.1 million dollars in the first year. This is more than $800,000.00 in less than 2 months. The $799,000.00 fee measured against the result achieved is not unreasonable or unusual. Any reasonable client would have been delighted to pay a $799,000.00 fee for the receipt of a 40 million gross settlement.

10. While a discussion of the fee might be of some political interest, I respectfully submit that the Committee should not allow itself to be drawn into a process which could interfere with professional and contractual relationships legally and properly entered into under existing precedent and authority. Aside from the client's statutory authority (cited above) to enter into the fee contract, the standard used in arriving at the fee was clearly within the guidelines established and sanctioned by the Supreme Judicial Court in First National Bank of Boston v. Brink, 361 N.E.2d 406, 412 (Mass. 1977). Under the rule in the Brink case, an attorney does not have to have a contingent fee arrangement in order for the client and the attorney to take the result achieved into account as a major measure of the value of the attorney's services. The Brink case also clearly established that attorneys are not limited to a per hour determination of the value of their services. Result-oriented fees have been earned by attorneys in a wide variety of cases including, but not limited to, products liability cases, tax rebate
proceedings, and probate and estate matters. Such a desirable practice, which works to the advantage of clients, is not limited to the legal profession. Real estate professionals, financial consultants, and other professionals who enable clients to acquire funds earn large result-oriented fees for substantial results.

11. The wisdom of the Legislature in granting the MBTA the independent authority to engage the best outside counsel and to pay fees commensurate with the result achieved, will only serve in the future to encourage the rapid, expeditious, and beneficial resolution of the claims of the Authority. It should not be assumed that hourly fee arrangements work to the advantage of the client or that they are less costly in the long run. I respectfully submit that the Committee should focus on the final result achieved as proof that the Legislature acted prudently in granting the MBTA the independent authority to pay fees which take the results achieved into account.

12. While I am an experienced attorney who has specialized knowledge concerning matters involving allegedly defective products, I have never been actively involved in the political arena. I am gratified that my client has acknowledged its satisfaction and pride in all aspects of the settlement, including the fee. I am disappointed and perplexed that an individual has persisted in his reckless attempts to discredit such an exceptional and commendable result and those that entered into it. I feel that I have been the subject of irresponsible innuendo and rumor. Accordingly, I welcome this opportunity to appear before you and set the record straight. I respectfully request that, in its Report, this Honorable Committee put to rest, once and for all, any suggestion of impropriety and illegality, as there has been none. The fee in this case was clearly reasonable. Even assuming that one may feel that a fee is high, such an opinion cannot be the basis for a reckless charge of illegality or impropriety. In view of the totally unsubstantiated nature of the charges, I respectfully request that this Committee do nothing further to unjustifiably harm the reputations of those who worked so diligently to achieve this excellent result in the public interest. If anything, those responsible for such a beneficial result should be publicly commended.
SUMMARY

Hearing On House Order 3874, April 3, 1980, 3:30 P.M.

TESTIMONY BY ATTORNEY WILLIAM SCHWARTZ

An opening statement was made by Mr. Schwartz, (see attached). He also submitted a document in which Boeing's initial cash offer was stated, along with the L.R.V. Study Committee Report.

Representative Gibson: Have you ever represented a public agency?
Answer: No, not directly, once consulted on a case a long time ago.
Question: Is there any ethical difference between a public sector and private sector fee arrangement?
Answer: Yes and this was considered, the normal fee could have been 33 1/3%.
Question: Then you did consider the difference?
Answer: Very definitely.
Question: Should the fee have been settled in a ballpark fashion at the outset?
Answer: The Brink case cited in my opening statement, shows that the method used for settling the fee was perfectly proper.

In another transit case, the settlement was 15 million and the legal fees to the attorney amounted to 10% (1.5 million dollars). In this case my fee was less than 2%.

Question: Were you negotiating your fee from the outset?
Answer: Yes, but you must understand that on a priority basis the fee was not as important as the fact finding, the negotiations with Boeing all of which were complicated by the time restraints in the case.

Question: You don't feel that the fee should have been resolved initially?
Answer: Not necessarily. When both parties negotiate in good faith, the fee will be reached in good faith. You must also consider two factors here, 1) the results of the settlement and 2) the fact that the T by virtue of Foster's chart was willing to pay one million dollars for a fast settlement.

Representative Saltmarsh: Regarding your submitted statement on page 6, item 12, you state that an individual persisted recklessly to...
discredit the results and those that entered into these results. Would you care to name this person?

Answer: The sponsor of this legislation.

Question: Would you care to state his name?

Answer: I believe it is the Representative from Melrose, Mr. Robinson.

Question: Are you familiar with the legislative process?

Answer: No. I submit to you.

Saltmarsh: You may feel that one person has done this, but the process does not permit one person to allow this to happen. There was more than one.

Mr. Schwartz: You may disagree with the size of the fee, reasonable people can disagree on such as that, but that does not give one the right to allege impropriety and illegality.

Chairman Nickinello: What is your recollection of the events and dates leading up to your hiring, the settlement and your fee?

Answer: Locke called me in August. This was followed by a call from O'Leary, for a meeting on August 27, 1979.

Representative Finneran: When and under what circumstances did you first meet Locke?

Answer: I met Locke approximately ten years ago at a meeting of the Association of Trial Lawyers. I also saw him about 5 or 6 years ago in Washington for about 15 seconds. I did know his brother, we were professional colleagues, I was his superior. Alan Locke put on seminars and I spoke on a number of topics at some of these seminars. I did not known Foster or O'Leary.

Chairman Nickinello: If the members would please hold their questions, I would like to continue with the events and dates leading to the settlement.

Mr. Schwartz: At the meeting on Monday the 27th of August, they filled me in on the background facts of the L.R.V. They also cited my credentials. They in fact had checked me out in Martindale and Hubbell. They also said they were considering others.

They asked if I would take the case. I told them I would evaluate and submit a memo, stating whether or not we would take the case. On Friday, August 31st O'Leary called and stated that they wanted me to take the case and they sent over the material which was rather voluminous. We met again on Monday, September 10th in O'Leary's office. Attorney McCormick from the T law offices also attended and cited a
pessimistic tale regarding the T's position relative to litigation.

There was another meeting on September 18th in Locke’s office with Locke, Foster and Elcock. McCormick might have been there, I don’t recall.

At that meeting the decision was made that I would take the case.

Chairman Nickinello: Was there a discussion as to whether or not you would do a study?

Answer: There was no conception of my doing a study. Foster and Elcock asked what we would sue for and if this would have a disruptive effect with Boeing relative to parts.

On September 19th the press release was made stating the MBTA had hired special counsel to settle, (Schwartz read from the release). Attorney General Bellotti had a representative at this meeting. There was absolutely no question relative to a study or an action.

Representative White: You indicated at the initial meetings you were provided with information, did you consult with anyone outside on this case?

Answer: I consulted with senior in house people only.

Question: How many?

Answer: Directly, only me and our senior litigators.

Representative Metayer: How many hours were taken up?

Answer: The fee was not predicated on hours, but my commitment was totally to this case, it was my sole responsibility with the exception of six hours per week for teaching.

Chairman Nickinello: Was your fee discussed on September 18th?

Answer: Yes, O'Leary and Foster directed me to talk with Elcock on this matter. I discussed with Elcock, percentages, sliding scales, etc. and Elcock was to get back to me.

Question: When did you talk with Elcock again?

Answer: I can’t remember the date with specificity but he did indicate that a percentage might be okay.

Question: Was Elcock’s position on a per hour basis?

Answer: That was his original position.

Question: What was your reaction to the sliding scale offered under Foster’s proposal?

Answer: I had misgivings with Foster’s proposal.

Representative Gray: Between September 19th and November 19th, how many days did not negotiate with Boeing?

Answer: We negotiated in many formats and we had six major conferences with many telephone conservations.
Question: Where were these conferences held?
Answer: In Chicago and Boston.

Question: Did Foster accompany you on these conferences?
Answer: Yes, on all but one, possibly two and he was kept informed of any and all developments.

Question: Who in effect was calling the shots?
Answer: I was the dramatist, I was the playwright and I must say Foster was a very good actor.

Question: Did you go to UMTA?
Answer: Yes on very short notice, as a matter of fact. The entire settlement was discussed and a letter from UMTA followed. The Chief of Grants at UMTA extolled the settlement and the fee.

Question: We have had testimony that UMTA has to sign-off on this settlement and fee, and has not yet done this. Why not if they were pleased?
Answer: It does not surprise me, anyone involved with this case would want to review, it is very complicated.

Question: Who devised the strategy?
Answer: The grand strategy was devised by me primarily because of my corporate knowledge, knowing how to deal with your adversary, dealing with those at the top not below, and their counsel respected me. When I was authorized to take action a letter was sent to Boeing, it was geared to intimidate Boeing.

I dealt with Otis Smith, T. Wilson, Clyde Skeen and Olbrecht, all of whom had great authority to settle for Boeing. In the next few weeks we met six times and had numerous phone conservations.

We devised a strategy that started out as a nitty-gritty approach (screw by screw, bolt by bolt). We shifted grounds a number of times, ending up with the case being geared toward the availability of cars rather than the reliability of cars. I studied computer print outs, worked with the T engineers and LRV man Phil Craig. I argued, a car should be available for service over 90% of the time. In a dollar amount I stated to Boeing that the problem LRV's had, to that point, cost the T between 75-100 million dollars.

Complicating the issue, was the suit that the Town of Brookline was threatening. I literally stopped that on the steps of the courthouse, stating that a suit at that time would seriously jeopardize the negotiations with Boeing. Boeing shortly afterwards concurred, that had the suit been brought, negotiations would have been brought to a standstill and the relationship strained.
Representative Cahir: Does the fact that UMTA has not signed off on the settlement in any way affect your fee status?

Answer: The UMTA sign-off does not affect the fee. The original contract authorized the T to collect damages and pay the legal fee. It did not come out of thin air. Boeing also stated that this is common practice.

Chairman Nickinelli: Did you tell the T that you had federal approval?

Answer: I got a call from O’Leary to go to Washington the very next morning to explain the settlement wherein O’Leary stated that I knew best what was going on. I did go to Washington and to answer your questions, I told the T that approval was subject to audit and review. When it came up that Boeing was paying the fee, Elcock said, that was fine and that no separate contract was needed.

Chairman Nickinelli: It has been previously stated at an earlier hearing, that on that final weekend you and Mr. Foster had discussed the fee arrangement on that Saturday, was that the case?

Answer: We had many discussions on the fee, none of which, I can assure you, took place on Saturday. That was the holiday weekend of November 12th and at the time I believe the settlement was at least 30 million dollars. Foster said I was to go back and get more. I said that we could possibly get it up over 37 million. We conferred with Wilson and Skeen of Boeing and they made a firm offer of 37.5 million.

Foster said we had to get more. I suggest to Wilson that he send Mr. Albrecht to Boston on Wednesday, November 14th with flexibility to discuss more dollars. Albrecht went to 39.5 million and Foster said get more. We then stated we wanted at least 40 million gross and that’s where it ended.

Foster met with the T Board on November 19th regarding the final settlement. The Board approved on November 21st and re-ratified the fee and all on December 3rd.

Senator Buell: I always thought product liability cases resulted from injury.

Answer: Negligence, breach of warranty, Uniform Commercial Code (At this point Schwartz went into extensive professional dialogue that summed up by saying, this would have been tried like any other tort case.)

Representative Gray: If you had to do this over again what if anything would you have done differently?
Answer: In terms of the settlement nothing. Relative to fee, I might have been pushing for a contingent fee. Many attorneys I have talked with contend that the fee is low. Foster is proud of it. I don’t have any misgivings. The fee was negotiated in good faith by both parties.

Instead of critiquing the process maybe it ought to set a precedent for the benefit of the Commonwealth.

On an hourly basis this case might have gone on for eight years, for example, with no results and the T would have a fee substantially larger than $800,000.

Representative Gibson: There was no agreement on the fee at the outset, what if Foster refused to pay more than $500,000?

Answer: When there is no agreement, you negotiate in good faith. I am not the kind of attorney that would sue for a fee. As long as reasonable people negotiate in good faith agreement will be reached. I suspect that Foster knew where we would wind up and he felt like he took me. Remember the final figure came after the bottom line settlement and I was in an inferior position.

Chairman Nickinello: Was the figure rounded off to make it 40 million?

Answer: Foster drew the line at $799,000.

Representative Finneran: When you met Locke ten years ago, how long and how many times did you see him?

Answer: I think only once. We at one other time on that weekend, met with the U.S. Secretary and a member of his staff at dinner, but I don’t think Locke was there.

Question: Was approval for your hiring required from the legislative leadership or the Governor?

Answer: No, but the Governor was talked to.

Representative Finneran: Your fee was earned.

Chairman Nickinello: Why did Boeing go from zero to 35 million?

Answer: (Mr. Schwartz reiterated his changing approach from reliability to availability and also his and his firm’s involvement in the case).

Representative Cahir: What would you recommend for legislation?

Answer: Give the hiring authority, flexibility to hire outside legal counsel.

Senator Walsh: How many times do you find a situation where both parties want to settle?

Answer: It was not as easy as you suggest.
Question: You leave us with a problem. How do we set guidelines?
This was a unique arrangement that may not recur.
Answer: Do not limit the ability to hire counsel on the basis of a result oriented fee.
Representative Saltmarsh: Can you give examples of cases similar to the LRV?
Answer: New York is presently involved in a similar problem with defective equipment.
Question: Was this the first time a political entity hired outside counsel to do legal work on a result oriented basis?
Answer: No. San Francisco did the same in the case I earlier mentioned.
Representative Gray: Why did they hire you?
Answer: I'm the wrong person to ask that of.
Chairman Nickinello: Why didn't you mention products liability in your memo?
Answer: As I stated to Senator Buelt, products liability can be breach of warranty, negligence, etc.
Question: What techniques did you use and how did you get the strategy changed?
Answer: My firm hounds the opposition to death. We rely heavily and have a reputation of extensive pretrial preparation and discovery.
The strategy changed when we approached the liability from the availability standpoint rather than the reliability factors.
Question: Did we give up warranty rights?
Answer: The bulk of warranties were to run out in the Spring of 1980.
Question: Wasn't that contingent on the acceptance of the cars?
Answer: The previous administration to Mr. Foster's erroneously issued a conditional acceptance for these cars. There is no such thing, you either accept or reject. They did not have that right. They had in fact accepted these cars. Also the warranty was limited to design and manufacturing defects.
Question: What about the five cars that had been returned to Boeing as a part of the final settlement?
Answer: When the contract was terminated I told Phil Craig and others at the T to give sufficient notice to Boeing within a 10 day period. Had that been done, there would have been no dispute.
Chairman Nickinello: Ten days does not seem like enough time why ten days?

Answer: Throughout the entire Boeing-MBTA package, Boeing stated that the T was very slow acting. I felt that 10 days was more than reasonable?

Question: Was there a finder's fee?

Answer: Absolutely and categorically no.

I repeat No! It was a firm fee and nothing else.

Chairman Nickinello: Thank you for coming before the Committee, do you have any closing remarks?

Attorney Schwartz: Thank you for giving me the opportunity to state my case. Thank you for your patience and understanding. If my remarks were misinterpreted, I apologize.

There is a very big distinction between a disagreement on the size of the fee and the way in which a fee was reached. Don't let this lead you to suggest illegality or impropriety.
AN ACT RELATIVE TO THE APPOINTMENT OF OUTSIDE LEGAL AND TECHNICAL AGENTS BY THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 161A of the General Laws is hereby amended by striking out the first paragraph of clause (d) of Section 3 and inserting in place thereof the following:

(d) To appoint and employ officers, agents and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however that the authority shall not appoint or employ legal, technical or other agents without first specifically fixing their compensation and conditions of employment; and provided further that any fee for legal services which is in whole or in part contingent upon successful accomplishment or disposition of litigation or possible litigation shall first be approved by the Attorney General; and provided further however that the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years.