Selected Studies in Transportation Law

Volume 6
(2012 Supplement)

TRANSIT LABOR 13(c) DECISIONS

Employee Protection Digest

Transportation Research Board

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This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Shelly Brown, Shelly Brown Associates, LLC, Seattle, Washington. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

Introduction

This publication is organized in an alphabetical arrangement by case name, employer name, and subject matter and contains a catalog for key word searches. This publication should be useful to transportation labor law practitioners with specific questions about certain issues pertaining to employment claims, 13(c) interpretation, and how these issues have been decided by DOL.

The Problem and the Solution

This project follows up two earlier TCRP publications: TCRP LRD-4, Transit Labor Protection – A Guide to 13(c) of the Federal Transit Act, published in 1995, and Volume 6, Selected Studies in Transportation Law, Transit Labor 13(c) Decisions, published in 2001. The first project provided a detailed description of the 13(c) process; the second project compiled and indexed all significant 13(c) decisions and related documentation.

The current project was undertaken to collect and synthesize 13(c) decisions issued since publication of Volume 6. However, it became clear in the process of data collection that only a few 13(c) decisions had been issued since the publication of Volume 6. Research and conversations with the United States Department of Labor (DOL) revealed that the DOL had compiled - but not published - an Employee Protection Digest (EPD) that consists of DOL decisions regarding individual claims of 13(c) violations regarding transit employees. Additional sections of the EPD pertaining to railroad employees have not been included in this project. The TCRP project committee decided to index, electronically enhance, and publish the Department of Labor EPD. Such a document would, according to a consensus of the committee, provide a legal research tool not previously available and would be especially suitable for use by transit agencies. This digest provides those indexes to the decisions and adds electronic search capabilities.

Instructions

General Information

Each case has been assigned a series of Key Words to assist you in identifying cases relevant to your research. See Subject Matter Index for a complete listing of cases sorted alphabetically by Key Word.

Navigating within a PDF

Each PDF has Bookmarks in the Left Frame of the PDF window to assist you in navigating within the file if there are specific sections identified within the document. Click on any Bookmark to jump to that location.

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77-13c-24 Edwin R. Swanson v. Denver Regional Transportation District, 02/25/1981, pg. A-186

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Rail Employees Association v. Dallas Area Rapid Transit
DSP Case No. 00-13c-2
November 8, 2002
(Digest page no. A-525)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: The Rail Employees Association (REA) alleged that senior vehicle servicers were placed in a worse position by Dallas Area Rapid Transit's (DART) pre-assignment of newly hired temporary employees to positions formerly made available to permanent employees based on a seniority determined "mark-up". As a reSUlt, senior vehicle servicers were required to work at alternative locations and shifts, limiting their overtime and other employment opportunities, and some who lacked the proper skills and licenses were required to move buses. The Department determined that DART's actions were the result of a federally-funded bus purchase and placed the employees in a worse position as a result of the Project. DART violated the Protective Agreement when it failed to provide the required advance notice and opportunity for discussion of the disputed actions. DART was ordered to pay any appropriate displacement allowances, provide appropriate training ?-s needed, meet with the REA to discuss in good faith the changes in the "mark-up" procedures, and address any additional make-whole remedies.

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

In the matter of arbitration between:

Rail Employees Association *Claimant*)	DSP case no. 00-13c-2
v.)	Issued: 11-8-02
Dallas Area Rapid Transit *Respondent*)	

ORIGIN OF THE CLAIM

This claim arose under protective Arrangements first certified on September 30, 1991 for Dallas Area Rapid Transit (DART) grants and projects under Section 5333(b)[1]. of the Federal Transit law, now codified at 49 U.S.C. § 5333(b). Applying those 1991 protective terms, as amended (the Arrangement), the Department of Labor (Department) certified DART grant number TX-03-0180 (Project) on April 14, 1998. In the spring of 2000, the Rail Employees Association (REA), a labor organization that represents certain DART employees,[2] identified actions by DART that REA alleged violated the terms of the Arrangement agreed to by DART with respect to this Project. When REA and DART were unable to resolve their dispute, REA, on June 9, 2000, requested a final and binding determination by the Department of Labor, pursuant to paragraph 16(a) of the Arrangement. After considering the written submissions of both parties, and based on the terms of the Arrangement agreed to by DART, I make the following findings and conclusions.

[1] This provision was formerly part of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §1609, and is commonly referred to as Section 13(c).

[2] REA represents 17 DART Rail Servicer employees, nine permanent DART employees and eight temporary employees

FINDINGS OF FACT

DART's Maintenance Department (MD) has three divisions: Fleet Maintenance; Ways, Structures and Amenities; and Technical Services. Bus and Rail Servicer employees clean and inspect revenue and non-revenue vehicles at the several Sections within the Fleet Maintenance Division: East Dallas Bus Services, Northwest Bus Services, Oak Cliff Bus Services, Service and Inspection (S&I) Rail Services, Central Support Services, NRV Services, Body Support Services, Passenger Amenities, and Track & Right of Way. The Rail Servicer employees represented by REA in this claim cleaned and inspected the rail vehicles at the S&I Services facility. The 1998 Project, a capital grant, funded the purchase of 55 rail vehicles, more than doubling the existing fleet of 40 rail vehicles operated by DART. The Project also funded the enlargement of DART's S&I Platform, an outdoor, covered-canopy area at the S&I Rail Services facility, and the construction of a new facility for the Oak Cliff Bus Service Section.

DART uses a "mark-up" system to enable MD employees to select their work location, assignments, hours of work, workweeks[3] and days off for a six-month period. Use of the mark-up system also affects the pay (due to opportunities for overtime and shift differentials) for individual MD employees. As outlined in DART's Hourly Employment Manual (HEM), regularly scheduled mark-ups occur twice a year, in January and August. See HEM, MD2, Sec. 6A. The MD Supplement to the HEM provides that "[s]eniority in the Maintenance Department shall govern in the selection of, or assignment to, scheduled working hours and work weeks, sections, . . . vacations and holidays." HEM, MD2, Sec. 5A. The MD Supplement further provides that during mark-ups employees will select hours and assignments "on the basis of seniority provided they are qualified for the work to be performed." HEM, MD2, Sec. 6A. Seniority is based on the employee's date of hire or transfer into a classification (either skilled, or non-skilled) in the MD. For seniority purposes, mechanics and maintainers are skilled classifications; all other positions are unskilled classifications. Applying these principles, a servicer employee is entitled to mark-up (i.e., to select his preferences in the various job selection categories) at any section in the Fleet Maintenance Division on the basis of his seniority among unskilled classification employees.

In a posted letter dated March 28, 2000, DART announced a General Mark-up Notice, to include only bus mechanics and servicers. The Notice advised employees that the mark-up was being undertaken to "facilitate the service change and implementation of the South Oak Cliff Facility." The notice provided that the mark-up would take place in April 2000 and that selections would take effect on May 15, 2000. DART pre-printed the mark-up sheets that were posted in April 2000 with the names of newly hired temporary servicer employees in virtually all of the servicer positions at the S&I Platform. This blocked the permanent Rail Servicer employees from marking-up at the

[3] A workweek for these employees consists of five consecutive days on duty followed by two days off. Workweeks start on a staggered schedule so that there is coverage on each day of the week.

S&I Platform where they customarily worked and forced them to mark-up in other sections in the Fleet Maintenance Division. In these other sections, DART pre-printed the names of newly hired, temporary employees in a few slots. The Rail Servicer employees were thus prevented from selecting positions and hours at the S&I Platform based on their earned seniority, and were required to compete for position slots at other sections within the Maintenance Division.

As a result of the elimination of slots available at the S&I Platform and the limited slots at other rail service areas, some permanent Rail Servicer employees were forced to take assignments in bus service sections. These assignments, unlike Rail Servicer jobs, required employees to move buses around and required a Commercial Driver's License ("CDL"). DART did not give these employees training to enable them to fulfill certain requirements in the bus service sections, as required by Section 5333(b) and DART's certification. Because these employees had no training for these particular positions and did not have CDLs, many were "written up" for inadequate performance.[4]

After the May 15, 2000, implementation of the new mark-up assignments and the involuntary relocation of these permanent Rail Servicer employees out of the S&I Services facility, DART took steps to contract out the Rail Servicer jobs.

THE CLAIM

REA alleges that in effecting changes in its rail operations DART failed to provide advance notice and discussion of the intended changes, failed to preserve the Rail Servicer employees' seniority rights and wages (by depriving them of previous opportunities for shift differentials and overtime), and failed to observe and continue their meet and confer rights, in violation of the DART certification and protective Arrangement. REA states that, as a consequence of DART's denial of their seniority in the April 2000 mark-up, these Rail Servicer employees have been required to work in bus maintenance sections in the Fleet Maintenance Division without appropriate training, in jobs for which they lack training, experience and/or certain qualifications. REA also argues that DART hired temporary employees and placed their names on the pre-printed April 2000 mark-up sheets in anticipation of effects of the Project and that these actions are, therefore, a result of the Project. REA suggests that DART took these actions in order to ensure that no permanent Rail Servicer employees occupied the Rail Servicer positions, to avoid application of the protective Arrangement when DART proceeded to contract out those jobs.

[4] DART attempted to remove two Rail Servicer employees because they did not have Commercial Driver's Licenses ("CDL"). However, after REA grieved the matters the actions were rescinded. DART has since removed the CDL requirement for servicer employees.

REA seeks restoration of seniority and accompanying rights, privileges and benefits, as they existed prior to the April 2000 mark-up, for use by employees in selecting working hours, workweeks, and sections. REA also seeks the opportunity to discuss these changes with DART, as REA alleges is required by DART's certified Arrangement. REA seeks similar remedies regarding DART's contracting out of the Rail Servicer positions. REA additionally seeks make-whole remedies and any other remedies deemed appropriate.

DISCUSSION

The Relative Burdens of the Parties

Federal Transit law, 49 U.S.C. § 5333(b)(2)(C), requires that, as a condition of financial assistance under that statute, employees "affected by the assistance" must be protected under fair and equitable arrangements that include provisions necessary for "the protection of individual employees against a worsening of their positions related to employment." Consistent with this requirement, Section 7(c) of the DART Arrangement provides that "[a]ny employee placed in a worse position with respect to hours, working conditions, fringe benefits or rights and privileges pertaining thereto . . . as a result of the project . . . shall be made whole." REA alleges that the permanent Rail Servicer employees were "worsened" by DART's decision to install newly hired temporary employees in positions formerly available to permanent employees in accordance with their seniority by placing the names of the temporary employees on the April 2000 mark-up sheets, preventing the permanent employees from exercising their seniority rights at the S&I Rail Services Section to select working locations, working hours and workweeks. With respect to this "dispute as to whether or not a particular employee was affected as a result of the Project," Section 16(b) of the Arrangement specifies that REA must "identify the Project and specify the pertinent facts of the Project relied upon." REA has identified Project TX-03-0180 as the pertinent Project and relies on the fact that the Project financed DART's purchase of 55 additional rail vehicles and expansion of the S&I Platform, increasing the number of Rail Servicer employees needed for DART's rail operations. REA also argues that the need to staff the newly opened and federally funded Oak Cliffs Service Section necessitated the April 2000 mark-up, which resulted in a worsening of the condition of the Rail Service employees by depriving them of the right to exercise their seniority rights.

Once a claimant has identified the project and has stated the requisite pertinent facts, it is the Public Body's obligation to prove that something other than the Project was the sole and exclusive cause of the harm, effects and/or alleged violations of the protective

conditions.[5] It is clear that DART's use of pre-printed mark-up sheets on which the names of temporary employees had been filled in for all but one of the positions at the S & I Platform prevented permanent Rail Servicer employees from obtaining assignments at that location. Thus, under Section 16(b) of the Arrangement, since REA has identified the Project and specified the facts upon which it relies, the burden shifts to DART to:

> establish affirmatively that such effect was not a result of the Project, by proving that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect on the employee, even if other factors may also have affected the employee.

The Project Identified

First, DART argues that REA has failed to properly identify the Project, despite DART's own statement that the April 2000 mark-up was undertaken to "facilitate the service change and implementation of the South Oak Cliff Facility" - a facility constructed with Project funds. Specifically, DART argues that it "has never accepted or utilized federal assistance for operating its system, including paying the salaries of administrative personnel and hourly personnel...[and] has specifically rejected the grant of operating assistance...in order not to taint DART's operating activities with federal funds." DART Oct. 13, 2000 letter at p.6. However, this is a distinction without difference. Section 1 of DART's protective Arrangement provides that:

> (a) The term "Project" shall not be limited to the particular facility, service, or operation assisted by Federal funds from the...Act, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided.
>
> (b) The phrase, "as a result of the Project" includes events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto and shall also include events and actions which are as a result of Federal assistance under the Act.

[5] Affidavit of Secretary of Labor James D. Hodgson, Congress of Railway Unions v. Hodgson, 326 F.Supp. 68, n.9 (1971); Employee Protections Digest, p. D-41(burden of proof transferred from the employee to the employer).

DART's view of the scope and application of these protections cannot be reconciled with this provision. Further, DART's voluntary refusal of operating assistance has no effect on DART's obligation to apply the terms of the protective Arrangement to all effects directly or indirectly related to the instant Project. Protections applicable to any Project certified under the statute apply to both direct and indirect effects.[6] Therefore, if employees are harmed as a result of the Project, pursuant to the terms of the Arrangement, appropriate remedies must be provided.

DART also alleged that Section 1(b) of its protective Arrangement, concerning rises and falls of business, legitimizes its actions as unrelated to the Project and not within the purview of the Arrangement. Properly excluded rises or falls in business could include, for example, repetitive seasonal fluctuations in ridership, demographic shifts, or the opening or closing of a major plant. Such events, however, or changes in volume and character of employment, must be shown to have been solely caused by factors other than the Project if they are to be considered outside the scope of these protections. DART has failed to demonstrate that such circumstances occurred in this case, unrelated to the Project.[7]

Effect on the Rail Servicer Employees

DART argues that the Rail Servicer employees' hours and working conditions were not improperly affected by the April 2000 mark-up, since DART was exercising its management right to preempt the use of the seniority provision of the HEM. In an October 13, 2000 letter to the Department, DART alleged that its actions were consistent with past interpretation and implementation of Section 4A of the HEM. DART submitted this section, 4A, as Exhibit H to its October 13, 2000 letter. It reads as follows:

> Seniority in the Maintenance Department shall govern in the selection of, or assignment to, schedules working hours and work weeks, locations (East Dallas, Northwest, Oak Cliff, S&I, FMB, Support Services), vacations and Holidays and in case of layoff (reduction-in-Force) ***providing the ability to perform the required work on the affected shift and location is not substantially diminished.***

[6] H.R. Rep. No. 204, 88th Cong., 1st Sess. 16 (1963), U.S. Code Cong. & Admin. News 1964, pp. 2569, 2584 (*The committee also believes that all workers affected by adjustments effected under the bill should be fully protected in a fair and equitable manner, and that Federal funds should not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers.*).

[7] It is noted that although DART is required every five years, under Section 452.056 of the Texas Transportation Code, to "evaluate each distinct transportation service ... and determine whether the authority should solicit competitive, sealed bids to provide these transportation services," the obligation to so evaluate would not by itself demonstrate an exclusive cause of the adverse effects or establish DART's burden of proof in this case.

HEM, MD2, Sec. 4A (emphasis added by DART). This section of the HEM, which was relied upon and provided by DART as Exhibit H to its October 13, 2000 letter, bears the annotation: "M:\JWJ\hem-Aug1998\Maintsupl.lwp".

Regardless of whether such authority in the manual would establish that the exercise of it would be a "factor other than the Project," that resulted in worsened conditions for the employees, DART failed to establish that the authority in question was in effect at the time of the April 2000 markup. In the summer of 1998, DART's HEM was circulated to its employees for comment and feedback. It was adopted and distributed to the hourly employees on November 9, 1998. During the processing of this claim, DART provided to the Department a copy of the HEM identified with the notation "Rev. Published date: 2/25/00." The Supplement to this later version of the HEM, which would have applied to employees in the Maintenance Department at the time of the April 2000 mark-up, contains the following information regarding seniority:

> A. Seniority in the Maintenance Department shall govern in the selection of, or assignment to, scheduled working hours and work weeks, locations (East Dallas Bus Services, Northwest Bus Services, Oak Cliff Bus Services, S&I Rail Services, NRV Services, Body Support Services, Passenger Amenities, Track & ROW, Traction Electrification Systems, Signal Systems, Communications & Control Systems), vacations and holidays. Divisions of the Maintenance Department are Fleet Maintenance; Ways, Structures and Amenities; and Technical Services.
>
> B. The mechanic and maintainer classifications, for seniority purposes, are skilled classifications. All other classifications are unskilled classifications.
>
> An employee may not have seniority in more than one section or classification at any time.

HEM, MD2, Sec.5A and B.

The proviso cited in bold by DART in its October 13, 2000 letter and Exhibit H thereto, is not included in Section 5 in the new version of the HEM. DART has not indicated, nor is the Department aware of, any other location in the current HEM where the emphasized language may be found. DART, and several of its officers who supplied supporting affidavits, relied on a version of the HEM that was not in effect at the time of the mark-up in April 2000. DART's affidavits were submitted after the effective date of the current HEM provision applicable to these events. The language relied on in the DART affidavits was never shown to be in effect for purposes of the events that comprise this claim. Accordingly, as the management right on which DART defends its

action was not included in the manual for purposes of the events under consideration in these claims, DART has not established its claimed management authority to preempt the seniority rights of the Rail Servicer employees.

Similarly, DART's contention that safety considerations required such pre-entered assignments for the temporary hires in the April 2000 mark-up ignores the fact that the HEM provides no such qualification of employees' right to select assignments based on seniority. DART asserts that it structured the April 2000 mark-up process to ensure that newly hired, temporary employees, who are less experienced and skillful than DART's permanent Rail Servicer employees, would fill the Rail Servicer slots at the S&I Platform because they were day-shift positions. DART argues that it sought to prevent the assignment of the temporary employees to night shifts, where there is more work and less supervision. As above, the HEM provides no authority for DART to ignore the seniority of the permanent Rail Servicer employees.

Finally, while DART argues that its decision to contract out positions at the S&I Platform was not a result of the project, it fails to provide any alternative hypothesis for its administration of the April 2000 mark-up and the resulting "worsening" of the Rail Servicer employees' positions. Instead, DART argues that a higher burden of proof is required of REA, citing several prior arbitration decisions of the Department in support of this position.[8] In those cases, the employer was found to have carried its burden of proof and the claimant, consequently, was obliged to bear a higher burden of proof. That situation is not present here.

Resulting Harm to Employees

The REA has established that the April 2000 mark-up was undertaken to facilitate staffing needs resulting from Project funding and that, due to the April 2000 mark-up, the represented Rail Servicer employees were in a "worse position" as defined in the Arrangement. Section 7(c) of the DART Arrangement provides, consistent with the requirements of the statute, 49 U.S.C. § 5333(b)(2)(C), that "[a]ny employee placed in a worse position with respect to hours, working conditions, fringe benefits or rights and privileges pertaining thereto...as a result of the project...shall be made whole." REA alleged that DART's action, blocking Rail Service employees from selecting prime daytime slots, resulted in the "employees hav[ing] much less overtime opportunities in the new positions." REA June 9, 2000 letter at p. 2. Although the record does not

[8] Stephens v. Monterey Salinas Transit, 82-13c-4&6, USDOL (1982); Employee Protections Digest, p. A-343; Haddad v. Worcester Regional Transit Authority, 78-13c-43, USDOL (1981); Employee Protections Digest, p. A-196; Local 1086, ATU v. Port Authority of Allegheny County, 79-13c-12, USDOL (1980); Employee Protections Digest, p. A-88.

contain any specific evidence that the mark-up resulted in the loss of overtime opportunities, DART has not refuted the allegation. REA also has shown that the employees who were prevented from exercising their seniority rights suffered a worsening in work shifts and locations as a result, and DART has not demonstrated otherwise. REA did not allege a reduction in rate of base pay or a violation of the Arrangement regarding a change in point of employment or the entitlement to dismissal allowance.

Contracting Out

Much of DART's briefing efforts addressed whether federal funding precipitated DART's decision to contract out certain Rail Servicer positions. The Arrangement does not preclude DART from contracting out these jobs, as long as the rights, privileges and benefits of the affected employees are preserved and continued in the process. While it is apparent that the expansion of DART Fleet Maintenance Sections provided an opportunity to remove permanent employees from the affected positions in anticipation of the effects of the Project, there is no evidence that DART's decision to contract out caused additional harm to any permanent Rail Servicer employee. With regard to the temporary employees, Section 5333(b) protections do apply, but those protections are subject to DART's personnel policies. *See* Arrangement, Sec. 5. DART's temporary employees in the MD generally "are not eligible to participate in DART benefit programs," have no expectation of continued employment, have virtually no rights and benefits, and are subject to dismissal without cause at any time. *See* HEM, Sec. 3.11B. Since temporary employees at DART, therefore, have no benefits or employment status to which Section 5333(b) protections attach, the temporary employees displaced by the decision to contract out are not entitled to any remedy under the Arrangement upon termination. *See* HEM, Sec. 7.2B.1. Since permanent employees had already been deprived of the opportunity to bid on the jobs that were subsequently eliminated when DART contracted out the positions held by temporary employees, they were already entitled to the same remedies that would have been available if they had been displaced by the contracting-out decision. Accordingly, whether or not DART's decision to contract out its Rail Servicer employee positions was a result of the Project, that decision did not result in any change in the working conditions of employees protected by the Arrangement, and no additional remedy is warranted.

Notice and Opportunity for Discussion

Section 6 of the Arrangement requires that DART give 90 days prior notice to "the interested employees... and to the employee representative," of an intended change in operations that "may result in the dismissal or displacement of employees or a re-arrangement of the working forces of the system." Further, once proper notice is given,

employees or their representatives are entitled to meet with the public body to discuss "the application of the terms and conditions of this Arrangement to the intended change." Arrangement, Sec. 6(b).[9] The mark-up held in April 2000 was a change from DART's normal operations, which included mark-ups held twice a year, in January and August (HEM, MD2, Sec. 6A) and, as found above, employees were deprived of the right to exercise their seniority rights because of the manner in which the mark-up was conducted, losing overtime assignments and preferred shifts and locations. The notice for the April 2000 mark-up was dated March 28, 2000 and the changes in Rail Servicer assignments became effective on May 15, 2000. Accordingly, it is clear that DART failed to provide its permanent employees and their representative with the required 90-day notice and opportunity to discuss before instituting changes that could result in the adverse effects on the permanent Rail Servicer employees.[10]

There is no evidence that DART gave any notice regarding its decision to contract out the Rail Servicer positions. However, as noted above, no permanent Rail Servicer employees were dismissed or displaced by that decision. The displacements encountered by the permanent Rail Servicer employees had occurred as a result of the mark-up prior to the contracting out. Further, the temporary employees, who were virtually all terminated once the Rail Servicer positions were contracted out, had no expectation of notice prior to termination of employment. See HEM, Sec. 3.11B. Moreover, because the HEM does not afford these temporary employees access to the DART grievance procedure, consistent with the Arrangement, these temporary employees do not have the "right to present grievances and to meet with the management of the Public Body." Arrangement, Sec. 5; see HEM, Sec. 3.11B; Sec. 8.10. Accordingly, since no employees who were entitled to protection under the Arrangement were affected by DART's decision to contract out the Rail Servicer positions formerly held by temporary employees, DART was not required to give notice of the change.

The significance of the meet and confer rights, protected by Section 5333(b) as a form of collective bargaining, cannot be minimized. See Local 1338 v. Dallas Transit System, case no. 80-13c-2, USDOL (1981); Employee Protections Digest, p. A-248, 260. Part of the importance of the meet and confer process is the representational status of a labor

[9] Meet and confer rights are protected under Section 5333(b)(2)(B) as a form of collective bargaining rights. ATU Local 1338 v. Dallas Transit System, case no. 80-13c-2, USDOL (1981); Employee Protections Digest, p. A-248.

[10] When REA initially pursued this matter with DART as individual grievances, DART responded that the matter could only be pursued as a general grievance, through the general grievance process. REA decided instead to file this claim under the certified protective Arrangement. The parties did not meet and confer with respect to any grievance.

organization, allowing it to discuss conditions of employment with a public body on behalf of one or more employees. The evidence indicates that the parties herein have a practice of meeting and conferring that has continued throughout the pendency of this claim.

CONCLUSIONS AND REMEDY

REA has established that the represented Rail Servicer employees were placed in a worse position by actions taken by DART as a result of the federally funded Project insofar as they were prevented from selecting position and hours at the S&I Platform by exercising their seniority rights. DART's actions also may have caused the Rail Servicer employees to lose opportunities for overtime and shift differentials. DART also failed to provide the required advance notice and opportunity for discussion of the disputed actions and effects thereof. These failures are in violation of the Arrangement that is a condition of DART's receipt of Federal assistance. Therefore, DART is ordered to provide the following remedies, which are appropriate under the Arrangement:

Displacement Allowances – While the evidence indicates that all Rail Service employees entitled to protection under the Arrangement were able to obtain positions within the DART system, the permanent Rail Servicer employees represented by the REA may be entitled to displacement allowances computed as provided for in Section 7 of the DART Arrangement. Because the record does not contain any information regarding whether any REA-represented employee lost any compensation, appropriate displacement allowances, if any, must be established through the mechanisms outlined in Section 7(b) of the Arrangement. In making this determination, the parties will employ the date of "worsening" as May 15, 2000.

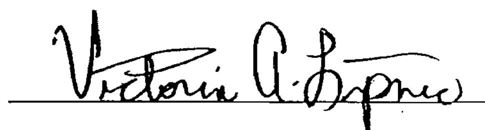
Training and Retraining - One of the primary areas of protection required by Section 5333(b) is that of training and/or retraining affected employees. DART did not fulfill its affirmative obligation under the protective arrangement to provide necessary training for these employees in their new assignments, requiring REA to pursue grievances on behalf of some of these employees to protect them from disciplinary action resulting from this lack of training. If this need remains, DART has an obligation under its certified terms and conditions to provide appropriate training, as agreed to through discussion with the REA, for these permanent servicer employees in their new jobs. In connection with this required training, DART is prohibited from reprimanding, disciplining or otherwise adversely affecting the employment of these permanent Rail Servicer employees for inability to perform the requirements of their jobs following

May 15, 2000, unless and until they have been fully trained/retrained so that they are able to meet the qualifications and requirements of such jobs.

Noticé and Discussion - DART must meet with the REA, upon request, to discuss in good faith the changes DART made in conducting the April 2000 mark-up and in limiting the availability of Rail Servicer positions at the S&I Platform for selection in that mark-up , as provided for in Section 6 of DART's protective arrangement.

Make-Whole Remedies - The protective conditions require that the Federal Project and actions related thereto are to be carried out in a manner that will not adversely affect the protected employees, and that any potential adverse effects be carried out in a manner balanced in favor of the affected employees. Additional make-whole remedies, such as, for example, adjustment in work assignments and/or locations, are to be addressed in good faith by DART and REA in their discussions as directed above.

These remedies are to be implemented not later than 60 days following the date of this decision and award, unless otherwise agreed to between the REA and DART in writing. This decision is final and binding upon the parties.



Victoria A. Lipnic

Assistant Secretary for Employment Standards

Peterson v. City of El Paso
DSP Claim No. 01-13(c)-1
December 12, 2003
(Digest page no. A-537)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimant, as president of the Employee Committee, alleged that the City's decision to terminate the use of profits from private vending machines located on City transit department property constituted a failure to preserve rights, privileges, and benefits under its Protective Arrangement. The Employee Committee had received control of the vending machines and their profits from the private provider that preceded the City. Unbeknownst to the City, for more than 20 years, the Employee Committee used the vending machine proceeds to provide a variety of benefits to transit employees and their families. The activities, which occurred outside of the work environment, included picnics, donations following deaths in an employee's family, gift certificates to local restaurants on Transit Appreciation Days, and the like. The Employee Committee had no direct involvement with work assignments, and did not deal with wages and working conditions of transit employees. Following discovery of the misuse of vending machines in another City department, the City learned of the Employee Committee's use of its vending machine profits, and required the Committee to give control of the machines, and their profits, to the City. The Department found that the Employee Committee used the profits from the vending machines to fund benevolent activities that were social in nature, occurred after working hours, and benefited employees and their families. The Committee's use of the vending machine profits was not a right, privilege, or benefit of employment because the use was never approved by the City, and violated Texas law.

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

In the matter of arbitration:

James Peterson, *Claimant*	)	
	)	DSP case no. 01-13c-1
v.	)	
City of El Paso, Respondent	)	Issued: December 12, 2003

ORIGIN OF THE CLAIM

This claim is of an ongoing nature and arises under all Federal Transit Administration grants of transit assistance to the City of El Paso, Texas. Each grant has incorporated protective conditions required under 49 U.S.C. § 5333(b) of the Federal Transit law, commonly referred to as Section 13(c), beginning with the Department of Labor's April 1, 1976 certification of protective conditions, and supplemented by a January 3, 1980, Protective Arrangement that was certified by the Department of Labor on February 13, 1980. These conditions have been certified by the Department of Labor and are incorporated into the contracts for Federal assistance between the Federal Transit Administration and the City of El Paso.

THE CLAIM

The Claimant, as President of the Employee Committee, alleges a failure to preserve rights, privileges, and benefits of the transit employees in violation of the January 3, 1980, Protective Arrangement. This alleged failure resulted from the City's decision in 2000 to terminate the Employee Committee's continued use of the profits from private vending machines located on City Transit Department property.

ISSUE

Did the City's termination of the Employee Committee's continued use of profits from private vending machines on City Transit Department property constitute a failure to preserve and continue rights, privileges, and benefits of employees, in violation of Paragraph 2 of the January 3, 1980 Protective Arrangement?

FACTUAL BACKGROUND

Prior to 1977, three private bus companies operated transit services in El Paso. One of those bus companies was El Paso City Lines. In January of 1977, the City of El Paso acquired the assets of all three bus companies with Federal grants of mass transit assistance. From 1977 to 1980 El Paso operated its transit system through a private contractor, El Paso Transit Services, Inc. In 1980 the City began direct operation of its transit system.

Prior to the 1977 acquisition, one of the private bus companies, El Paso City Lines, had vending machines on its premises. The profits from those machines were controlled by the manager of that bus company. With the City's January 1977 acquisition, that manager left El Paso City Lines and transferred control of the vending machines and their profits to Ms. Rose Monedero, a personnel employee. She asked for volunteers from among the transit employees of the operations and maintenance divisions to help plan and organize an employee function that would use revenues from the vending machines. The volunteers decided to use the funds for an employee picnic.

This was the beginning of the existence of an informal association of the City's transit employees, which later became known as the Employee Committee. Employees trace the beginning of the Employee Committee to 1977 "[b]ased on word of mouth information." While the exact date that the employees formed the Employee Committee is unknown, a bank record demonstrates that the Sun Metro Employees Fund was formally established in February 8, 1980. More recently, the City advised the Committee that its Legal Department did not want the Committee to be associated with Sun Metro's activities because of liability concerns and therefore the City instructed the Committee to omit the words "Sun Metro" from any events that it planned to sponsor.

Since its formation, this Employee Committee has continued to function entirely through volunteers from among the City's transit employees. It has used profits from the vending machines on transit property for the benefit of transit employees and their families. Its activities have occurred outside of the work situation, and have included events and activities such as holiday parties,

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picnics, outings, a donation in the event of a death in a transit employee's family, providing gift certificates at local merchants, breakfasts and luncheons on Transit Employee Appreciation Days, etc. The profits from the vending machines benefit employees in general. The Employee Committee volunteers have customarily reserved and used Transit Department (now called Sun Metro) conference rooms for their meetings. All of the meetings of the Employee Committee have been in open session and any transit employee has been welcome to participate in each meeting.

Employee Committee activities have no direct involvement with work assignments, and none of the activities sponsored by the Employee Committee have been identified as job-related. Additionally, the Employee Committee does not deal with wages and working conditions of the transit employees. Those matters are handled by a labor organization which represents the City's transit employees in their conditions of employment. The only aspect of the transit employees' work which the activities of the Employee Committee may touch upon would be improvement in the morale and job appreciation of the transit workers, which might result from the activities of the Employee Committee.

The Employee Committee handled the contact with the vending machine companies, and arranged for the installation and replacement of vending machines. The vending machines were owned, maintained and stocked by the vending companies. The vending companies paid the Employee Committee a "commission" based on the amount and type of product sold. The Employee Committee also has raised money for its social and benevolent activities through other means, such as raffles and selling tickets to entertainment events. Managers of the City's Transit Department were continuously aware of, and encouraged, the existence and activities of the Employee Committee, and occasionally participated in those activities. This situation continued for over twenty years, from the formation of the Committee through 2000.

Following a recent discovery of inappropriate vending machine activities in another City Department, the City audited vending machines in various City Departments. Among other things, the audits showed that the transit Employee Committee's placement of vending machines on Transit Department property, and use of the profits of the vending machines, had never been formally approved or authorized by the City's governing body. Thereafter, the City directed the Employee Committee to turn over the responsibility for the vending machines, and the profits from the machines, to the City.

By memorandum of December 13, 2000 the Office of the City Attorney set forth the requirement and details for transferring control of these vending machines, their costs, and profits to City control. The memorandum also set forth the distribution of Employee Committee funds, most of which were allowed to be retained by the Committee because they had come from Committee activities other than the vending machines. The City required the

remainder of funds in the Employee Committee account ($786.06 attributed to vending machine profits) be remitted to the City. The City acknowledged that the vending machines "are a positive aspect for the employees and should be continued." By letter of June 14, 2002, the City communicated, during the consideration of the instant Claim, "that should Mr. Peterson, or his employee group, be interested in operating vending machines on City property, the proper avenue would be to seek City Council approval via lease agreement." This information was not relayed to the Employee Committee in the December 13th memorandum.

The Employee Committee complied fully with the City's December 13, 2000 memoranda, and then filed its initial employee protections claim with the City on January 5, 2001 for restoration of the Employee Committee's use of the profits from the vending machines on Sun Metro property for the benefit of Sun Metro employees. By decision of February 1, 2002 the City's 13(c) Claims Committee denied the claim because the Employee Committee's loss of use of those profits did not worsen the employment position of any El Paso Transit Department employee, and because the transit employees suffered no economic harm in their position as transit employees as a result of City's discontinuance of the Employee Committee's unauthorized use of vending machines on City property. The El Paso Claims Committee further denied the claim on the basis that the change in use and control of the vending machine profits was neither related to, nor caused by, any Federal assistance to which the Section 5333(b) protections apply.

DISCUSSION

Section 5333(b) provides protections for transit employees against adverse effects of the Federal assistance in their employment positions and their conditions of employment. This includes the requirement in Section 5333(b)(2)(A) (formerly Section 13(c)(1)), reflected in Paragraph 2 of the City's 1980 Protective Agreement, that all rights, privileges and benefits of the employees be preserved. On behalf of the Employee Committee, the Claimant maintains that the Committee's use of the profits from the vending machines was a long-established right, privilege, or benefit for the City's transit employees that should be protected under that provision. For the reasons set forth below, the employees' use of the vending machine profits is not protected by the Section 13(c) Protective Arrangement.

The Employee Committee collected profits from the vending machines from about 1977 until the City terminated this practice in 2000. The City knew that the Employee Committee existed but did not discover that the Employee Committee used profits from vending machines until late 1999 or early 2000. Since the City ended the Employee Committee's use of vending

machine funds shortly after they learned of the practice, the City cannot be viewed as acquiescing or approving of the Employee Committee's use of the funds.

The Employee Committee used the profits to fund activities that were social and benevolent in nature and conducted at times other than working hours. Even though the City allowed the Employee Committee to meet in Transit Department conference rooms, the City's Transit Department had no part in arranging, planning, or approving Employee Committee activities. The Committee's activities promoted enjoyment, support, morale and cooperation among the transit employees, their families, and members of the public. The activities were not directly related to, nor are they part of, the transit employees' jobs and working conditions. These activities and their source of funds were not "rights, privileges and benefits of employees" within the meaning of paragraph 2 of the Protective Arrangement, and consequently the City had no obligation under the Agreement to preserve and continue the Employee Committee's receipt of profits from vending machines that were located on City property.

The fact that the Employee Committee never had official authorization to place vending machines on City property, or to use the profits from those vending machines for the benefit of the City's transit employees, provides further support for this conclusion. Without proper authorization, the Employee Committee could not accrue a right, privilege, or benefit to use these profits. As prescribed by the City Charter, only the City Council may approve the use of City property.[1] The Employee Committee argued, "[t]ransit [m]anagement was and has been aware of the Committee's activities and

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[1] *City of El Paso*, Charter Article III Section 3.18. LEASE; FRANCHISE; CONVEYANCE AND SPECIAL PRIVILEGE.

The right of control, ownership and use of streets, alleys, parks and public places of the City is declared to be inalienable except by ordinance passed by the entire Council. Any ordinance providing for the conveyance, lease or grant of a franchise or special privilege regarding the property of the City shall provide for payment to the City of a reasonable fee as consideration for that conveyance, lease, franchise or special privilege. In addition, any ordinance providing for the lease, franchise, or special privilege shall provide that:

1. At the termination of the lease, franchise or special privilege, the property involved, together with any improvements thereto, made or erected during the term of the lease, franchise or special privilege, shall (either without further compensation or upon payment of a fair valuation therefore as determined by the terms of the ordinance), become the property of the City;
2. No lease, franchise or special privilege shall be granted for a period in excess of thirty years; and,
3. Every lease, franchise or special privilege may be revoked by the City if necessary to secure efficiency of public service at reasonable rates, or to assure that the property is maintained in good order throughout the life of the grant.

approved of the Committee's doing business with the vending companies." However, the manager does not have the required authority to approve the employees' use of vending machine funds.[2]

Additionally, employees could not have accrued benefits, rights, or privileges that violated Texas law that was applicable to the Employee Committee's use of City property. [3] At the time the Committee was created following the City's 1977 acquisition of the private transit companies, the Committee's ability to legally derive profits from vending machines placed on City property was governed by Texas law. The Employee Committee's use of vending machine profits violated at least two provisions of the Texas Constitution.[4] Those provisions prevent municipalities from making gifts of public funds to groups such as the Employee Committee and from granting extra compensation to municipal employees without proper authorization.[5]

Finally, the City's disallowing continued use of vending machine profits was not related to receiving Federal assistance. The Employee Committee has not demonstrated a connection between the loss of the use of the vending

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[2] *See City of Greenville v. Emerson*, 740 S.W.2d 10,13 (Tex.App.—Dallas 1987, no writ) (Only the city council had authority to enter into municipal contracts. Thus, "neither the fire chief nor the personnel manager had authority to enter into such a contract, and thus the contract would not be binding on the city.").

[3] See *Local 1338 Amalgamated Transit Union v. Dallas Transit System*, DEP Case No. 80-13c-2 (USDOL 1981), *Employee Digest* A-248, A-260 ("Claimant's labor relations rights were stipulated as deriving from Texas law which prohibits collective bargaining rights for municipal employees.").

[4] Tex. Const. art. 3 §52(a) ("Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town, or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever"); Tex. Const. Art. §53 ("The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant, or contractor after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.").

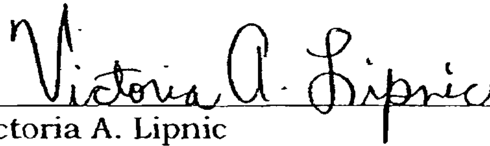
[5] *Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex.App.-Austin 2002), review denied (Nov. 14, 2002) (The court agreed with the City that it avoided violating Tex. Const. art. III §52 by entering into a lease supported by consideration. If there were no consideration, the lease would have been "a gratuitous donation of public funds or a thing of value."); *City of Greenville*, supra note 2 at 13 (Fire chief or personnel manager contracting to pay "additional sums of money for services already rendered and benefits already paid" violated Tex. Const. art. III §52).

machine funds and Federal assistance.[6] The City has established that its actions stemmed from a desire to follow Texas law rather than to deprive employee benefits.

DECISION

The Employee Committee's use of vending machines on Transit Department property to fund the Employee Committee did not come within the scope of protections under the City's Section 5333(b) Protective Agreement, because the use was not a right, privilege or benefit of employment; because the use was never approved by the City as required by the City Charter; and because the use violated Texas law. In addition, the City's ban on the use of vending machine profits is unrelated to federal assistance and stems from requirements to properly follow City and State law.

This decision is final and binding on the parties.



Victoria A. Lipnic
Assistant Secretary for Employment Standards

[6] *Clark v. Crawford Area Transp. Auth.*, OSP Case No. 94-18-19 (USDOL 1996), *Employee Digest* A-455, A-462 ("To apply the Warranty's protections in this claim, there must be some connection between the Federal assistance and the harm or other effects that concern the Claimant.").

Fonck v. City of Dubuque, Iowa
DSP Case No. 01-13c-1
April 21, 2004
(Digest page no. A-544)

Summary: A supervisory, non-union Claimant alleged that he lost his position, salary, pension, and other rights and benefits as a result of the City's federally-assisted purchase of six new buses. The Department determined that the purchase of new buses resulted in a worsening of the Claimant's employment position, and that he was entitled to a displacement allowance. The decision denied the Claimant's request that he be restored to his former supervisory position, his request for a relocation allowance, his objections to cross-training of maintenance employees, and his request for continuation of health benefits.

In the matter of arbitration between:

Kenneth F. Fonck, *Claimant*	DSP case no. 01-13c-1
v.	
City of Dubuque, Iowa, *Respondent*	Issued: April 21, 2004

ORIGIN OF THE CLAIM

This claim arises under protective arrangements incorporated in three transit grants awarded by the Federal Transit Administration (FTA) to the City of Dubuque, Iowa (City).[1] The three FTA grants, or Projects,[2] are part of the City's routine capital replacement plan under which the City purchased the six new buses in question in this claim. As a precondition of these grants, the Department of Labor (Department) certified that the protective arrangements included in each grant satisfied the requirements of Section 5333(b)[3] of the Federal transit law, 49 U.S.C. § 5333(b). The protective arrangements are incorporated by reference into each grant contract between the City and the FTA and include the Protective Agreements negotiated by the City and the labor organizations representing its transit employees. The City accepted the terms of the Department's certification by signing the contract of assistance with FTA.

As a transit employee not represented by a labor organization signatory to the negotiated Protective Agreement, Kenneth F. Fonck, the "Claimant" herein, receives, pursuant to the terms of the negotiated agreement, substantially the same levels of protection as those specified for organized

[1] These three grants, FTA Projects IA-03-0084 (1999), IA-03-0085 (2000), and IA-03-0092 (2001), were made by the Federal Transit Administration to the Iowa Department of Transportation and were then distributed to several Iowa transit entities, including the City of Dubuque.

[2] "Grant" and "Project" are used interchangeably for purposes of this decision.

[3] This provision was formerly part of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609, and is commonly referred to as "Section 13(c)."

employees. *See, e.g.*, Mar. 22, 2000, Certification, p. 7, ¶5. Accordingly, in response to his claim, filed by letter dated January 10, 2001, as provided for in each certification, the Department has appointed a member of its staff to serve as arbitrator and render a final and binding decision in this matter. *Id.*

FACTUAL BACKGROUND

The Claimant has worked for this transit system since 1969, prior to the City's 1973 takeover of the system from the Interstate Power Company. He was hired by the City's Keyline Transit Division on September 1, 1973, as an Apprentice Lead Mechanic and appointed Lead Mechanic on October 11, 1973. On June 1, 1974, he was promoted to the position of Foreman, Transit Division. In 1974, the Transit Division maintenance staff consisted of one Foreman (Claimant) and three Mechanics. The Claimant's Foreman position was renamed as Equipment Maintenance Supervisor, Transit Division, on July 1, 1990, and he continued in that position through the first half of 2001.

On January 8, 2001, the City informally transferred the vehicle maintenance activity of the Transit Division to the City's Operations and Maintenance Division. As a result, on that date, the Claimant was informed that he was relieved of his duties as Equipment Maintenance Supervisor and instructed to resume work in the capacity of Lead Mechanic. His pay and benefits were not reduced at that time.

In a March 9, 2001, letter to the Claimant, the City Manager stated that the Claimant's position of Equipment Maintenance Supervisor would be abolished as of June 30, 2001, and that he had been honorably removed from that position. In that letter, the City formally offered him a new position of Lead Mechanic effective July 1, 2001. This offered position included a 29 percent reduction in his annual salary from $51,106.00 to $36,123.00, a loss of $14,983.00 per year.[4] He accepted the offer of Lead Mechanic effective July 1, 2001. This new position placed him in the Teamsters bargaining unit with no accrued seniority.

[4] Although the Claimant's Supervisor position was not in a bargaining unit, the Claimant's new position of Lead Mechanic is in the bargaining unit represented by Teamsters Local 421. That union does not represent the Claimant for purposes of this claim for employee protections; however, because he did not become a member of the bargaining unit until July 1, 2001, after the alleged adverse effects occurred.

On July 1, 2001, the City officially reassigned the maintenance of its transit equipment, along with the Claimant's new position as Lead Mechanic and the other Transit Mechanic position, from the Transit Division to the City's Operations and Maintenance Division. The Claimant's supervisory duties were assigned to the Maintenance Supervisor in the Operations and Maintenance Department. The Claimant and the other bus mechanic continued to maintain the City's buses, and the City began rotating mechanics from the Operations and Maintenance Division for cross training on bus-maintenance. The Claimant's work location was not relocated from the Transit Division to the Operations and Maintenance Division until October 15, 2001.

Relevant facts that occurred during the time that the Claimant was the Equipment Maintenance Supervisor are evinced from a separate arbitration proceeding involving the City as Respondent, which the City submitted to the Department in connection with this claim. *See City of Dubuque and Teamsters Local 421*, Iowa PERB No. 01-GA159 (2001)(Kohn, Arb.). Therein, one of the City's bus drivers, who was neither a party to that case nor to the instant case, testified at the October 2001 hearing that the City had reduced its transit service by 50 percent in 1991, from one bus every half-hour to one bus every hour. This reduced the number of buses operated during peak hours from 16 to eight, and also reduced by half the miles driven. He further testified that this reduced level of operations remained unchanged from 1991.

Further credited testimony indicated that at the time of this 1991 reduction in bus service, the City reduced the Transit Maintenance staff (the Claimant's supervisory position and three mechanic positions) by one Mechanic position, or 25 percent. Five years later, in 1996, another Mechanic left and the City did not replace him. This achieved a 50 percent reduction in the pre-1991 bus maintenance staff (from 4 to 2), matching the 1991 reduction in transit service. From 1996 through June 2001, the Transit Division Maintenance staff remained unchanged; one Supervisor and one Bus Mechanic. This is consistent with the Claimant's representations.

Federal assistance for the City's purchase of new buses had been approved through its 1999 FTA Project, its 2000 FTA Project, and its 2001 FTA Project, which was certified March 6, 2001 and received by the City on March 12, 2001. In June 2001, the City purchased the six new buses with these three grants of Federal funds with delivery scheduled for Spring 2002. Prior to purchasing the new buses, City's fleet consisted of 18 buses, 16 operable and two inoperable. The six new buses would replace 12 of the City's older buses out of its total fleet of 18, leaving the City with a fleet of 12 buses.

THE CLAIM

The Claimant argues that as a result of the above-noted Federal funding, the City acquired new buses to replace older buses, resulting in a reduction of maintenance demands and in bus maintenance personnel, including the elimination of the Claimant's former position with the accompanying loss of salary, rights and benefits. For this worsening of position, the Claimant seeks restoration of his former position, wages and seniority, as well as other remedies.

DISCUSSION AND CONCLUSIONS

The Relative Burdens of the Parties

The Federal Transit law, 49 U.S.C. § 5333(b)(2)(C), requires that, as a condition of financial assistance, employees "affected by the assistance" must be protected under fair and equitable arrangements that include provisions necessary for "the protection of individual employees against a worsening of their positions related to employment." Consistent with this requirement, the City's Section 13(c) Protective Agreement, that was negotiated with Amalgamated Transit Union Local 329 and International Brotherhood of Teamsters, Local 421, provides that "[a]ny employee ... placed in a worse position with respect to compensation, hours, working conditions, fringe benefits or rights and privileges pertaining thereto . . . as a result of the project . . . shall be entitled to any applicable rights, privileges, and benefits . . . ." Mar. 3, 1975, Protective Agreement ("Agreement"), ¶4.

Separate standards for burdens of proof for the employee and the employer are incorporated as part of the statutory requirements for grants of Federal transit assistance under 49 U.S.C. § 5333(b) of the Federal Transit law.[5] The City argues that the instant claim should be denied because the

[5] On February 5, 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R" Act). Section 402(a) therein (*See* Employee Protections Digest, p. D-78) provides that the protections required under Section 5(2)(f) of the Interstate Commerce Act shall include the protective provisions (Appendix C-1 and Appendix C-2, Employee Protections Digest, pp. D-8, 22) certified by the Secretary of Labor pursuant to Section 405 of the Rail Passenger Service Act (Employee Protections Digest, p. D-2). Section 5(2)(f), recodified at 49 U.S.C. § 11326, constitutes part of the minimum statutory requirements under 49 U.S.C. § 5333(b) of the Federal Transit law. The Appendix C-1 and Appendix C-2 provisions pertain to, among other things, the parties' respective burdens of proof.

Claimant failed to demonstrate "that a Federal project *caused* adverse affects in an individual's employment." City's Brief at 2. However, the Claimant need not establish such a causal connection to satisfy his initial burden of proof. In fact, "[o]nce a claimant has identified a project and has stated the requisite pertinent facts, it is the Public Body's obligation to prove that something other than the Project was the sole and exclusive cause of the harm, effects and/or alleged violations of the protective conditions."[6] *See Rail Employees Ass'n v. DART*, case no. 00-13(c)-2, USDOL (2002); Employee Protections Digest. Further, the City agreed to apply the Agreement that specifies the burden of proof applicable in any claim for protections involving the grants in question:

> *(5) ....Throughout claims and arbitrations procedures, the Public Body or other operator of the transit system shall have the burden of affirmatively establishing that any deprivation of employment, or other worsening of employment position, has not been a result of the Project, by proving that only factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon his employment, even if other factors may also have affected the employee.*

Agreement, ¶5. Therefore, the Agreement requires that the recipient must prove, affirmatively, that something other than the project affected the claimant. Otherwise, the project, at least in part, will be found to have adversely affected the claimant and the claimant will prevail.

The Claimant's Proffer

The Claimant has sufficiently identified the Federal Project(s) as the three grants for the purchase of two new buses each, for a total purchase of six new buses. The Claimant also has described the pertinent facts, as described above in the Claim section, on which he relies in his claim. Further, it is clear that the City's elimination of the Equipment Maintenance Supervisor position at the Transit Division worsened the Claimant with regard to salary and other benefits. Under the City's Protective Arrangement, the Claimant has satisfied his burden of proof.

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[6] Affidavit of Secretary of Labor James D. Hodgson, *Congress of Railway Unions v. Hodgson*, 326 F.Supp. 68, 76 n.9 (1971); Employee Protections Digest, p. D-41(burden of proof transferred from the employee to the employer).

The City's Proffer

Once the Claimant has established his burden of proof, the City needs to affirmatively establish "that any deprivation of employment, or other worsening of employment position, has not been the result of the Project by proving that only factors other than the project affected the employee." Agreement, ¶5. The City alleges that its purchase and use of the new buses was part of a "routine replacement" of older buses and that, therefore, it should not be considered an event that could give rise to protective obligations. A routine replacement project, however, does not suggest that protections would not be applicable, or that the Project would be seen as something outside the purview of the Agreement. Rather, Paragraph 11 of the Agreement defines "Project" as follows:

> *(11) The term "Project", as used in this agreement, shall not be limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, or facilitated thereby. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project.*

Accordingly, the Claimant's worsening may have resulted from the Project irrespective of the underlying motivation for the purchase of new buses with federal grant funds.

The City offers several theories to satisfy its burden of proof. Initially, the City asserts that its shift of its bus maintenance was a managerial decision that was based on a decline in service over a period of several years, a reduction in the size of its bus fleet, and a review and study clearly finding that fewer employees were needed to perform the mechanical service work on the bus fleet. *See* City Brief at 7.

While the City asserts that these conclusions are supported by a number of studies, examination of these studies reveals that they are insufficient bases for such conclusions that the Projects played no role in the worsening of the Claimant's employment position. Specifically, they do not establish that the City's purchase of new, low-maintenance buses to replace older, high-

maintenance buses was not a cause of its decision to reduce its maintenance staff and downgrade the Claimant's job, as opposed to other factors such as a decline in demand for transportation services.

One study, on which the City relies to show that the adverse effects encountered by the Claimant are unrelated to the City's Projects, was contracted for by the City's Operations and Maintenance Division in 2000 and prepared by DMG-Maximus. The study evaluated the City's Maintenance Garage capabilities, including a review of the City's Transit Division vehicle maintenance operations and found that a substantial amount of Transit Division maintenance time was spent servicing the older buses in the City's fleet. DMG-Maximus recommended that, with the retirement of the older buses through the City's routine replacement plan for purchasing new buses, the City could maintain its new fleet with only one mechanic instead of a Maintenance Supervisor plus a mechanic. In his December 29, 2000, memorandum to the City Manager, the City's Transit Division Manager relied on this study in recommending this reduction in transit maintenance staffing that involved the Claimant. The DMG-Maximus study is premised on the replacement of the older buses with new buses. The new buses are those funded by Federal assistance under the three Projects for the City's routine replacement of buses. Rather than supporting the City's position, this study showing a connection between the new Federally-funded buses and a diminished need for transit maintenance staffing weighs strongly in favor of the Claimant.

To demonstrate changes in the service delivery levels "over a period of several years," the City relied on the summary of a Transit Division Review Team study,[7] comparing City bus activity levels in 1987 and 2000 and concluding that maintenance for a bus fleet of Keyline's size requires one or less full-time equivalent mechanic. *See* City Brief at 7. In the December 2000 memorandum noted above, the Transit Manager, in recommending consolidation of Transit Division maintenance under the City's Operations and Maintenance Division, interpreted the study to show that a substantial decline occurred between 1987 and 2000 in miles driven (-46 percent), peak bus demand (-57 percent), and total fleet size (-38 percent).

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[7] Also referred to as the Transit Department Review Team study.

However, the full Transit Division Review Team study was not submitted into the record and no explanation is provided for the choice of the thirteen-year period for study. The City's summary of that study shows that reductions in transit service levels of approximately 50 percent occurred sometime during that 13-year period. The summary suffers from a lack of specificity as to when the reductions occurred, and whether they occurred all at one time or at various times during this 13-year period. If, for example, the substantial decline had occurred over the most recent year, and no reductions in transit maintenance staff had been made during, or subsequent to, that year, then such decline might lend support for the City's reduction in bus maintenance staffing disputed in this claim. Alternatively, if all of this service decline had occurred during one single year near the beginning of this 13-year period, that would raise the question of why it would be necessary to implement transit staff reductions in 2001 as a result of a reduction in service occurring, say, 12 years earlier. The broad summary of this Transit Division Review Team study does not afford answers to specific questions such as these. Nor does the summary show whether other reductions in transit staffing had been made during the study period or afterward. Consequently, the summary cannot justify the City's reduction of transit staffing at issue in this claim.

Further, the arbitration decision submitted by the City, involving similar facts and events, appears to confirm that in 1991 the City's transit service was reduced by 50 percent and has remained relatively unchanged since then. *See* *City of Dubuque and Teamsters Local 421*, Iowa PERB No. 01-GA159 (2001)(Kohn, Arb.). The City's broad summary of the Transit Division Review Team study is not inconsistent with these facts and does not argue to the contrary. The record does not demonstrate that any reductions in levels of transit service occurred after 1991. Thus, the only decline in the City's transit service established in this case occurred in 1991, when the City responded with a comparable reduction in its transit maintenance staff. The description of the 2001 transit staff reduction as resulting solely from a decline in transit service ten years earlier, a reduction that the City had previously responded to with a comparable reduction in its transit maintenance staff, is not reasonable.

The City also relies on conclusions of the Transit Department Review Team drawn from seven weeks of bus maintenance logs of the Claimant and the Transit Division Mechanic, developed in early 1998 by the Transit Division Manager from cards maintained by the Claimant and the other bus mechanic. The City interprets these logs as demonstrating that the Claimant and the other mechanic spent 31 percent and 42 percent of their time, respectively, on

maintenance. The use of these cards was challenged contemporaneously by the Claimant on the basis that the cards covered only major maintenance and omitted a substantial portion of the bus maintenance work of the mechanics. Under these conditions, it is not clear whether those logs accurately gauge the total amount of work per week spent by the Claimant and the other bus mechanic on bus maintenance. Those conclusions cannot be relied upon in this matter.

The City's position that, although the new buses will require less maintenance than the older buses, transit maintenance work is not expected to decline has not been substantiated. The City's position that the replacement of its 12 older, maintenance-intensive buses (two-thirds of its bus fleet), with only six newer, lower-maintenance buses, will not cause a reduction in required maintenance work, possesses a similar lack of substantiation.

Additional Defenses

The City also maintains that changes to Keyline's maintenance structure, including those affecting the Claimant, constitute a program of efficiencies or economies unrelated to the Projects. *See* City's Brief at 10-11. The City points out that part of the savings sought in these changes in the Transit Maintenance staffing would result from the elimination of overtime in transit maintenance. However, it appears that the City's ability to eliminate overtime under these circumstances would result from replacement of its maintenance-intensive buses with new buses requiring less maintenance. It has not been demonstrated that the reorganization alone resulted in any reduction in overtime requirements for transit maintenance.[8] Moreover, the City's reliance upon transit maintenance overtime in the years immediately preceding these June 30, 2001, changes contradicts the City's arguments that the transit maintenance staff was too large and was underutilized.

There might be some legitimate economies or efficiencies in this situation that are not related to the Projects, such as consolidation of the ordering of parts. Such consolidation of ordering parts could have been achieved without eliminating the Claimant's position. However, no evidence has been offered to show that such consolidated ordering of parts would have had a substantial diminution on the need for the Claimant's position. Therefore, the City has

[8] In fact, it appears that approximately $15,000 of the City's claimed savings of $161,000 from this reorganization is achieved solely from the reduction made in the Claimant's base salary.

not demonstrated that the Claimant was affected exclusively by factors other than the Projects. Further, the City's Agreement defines "Project" to include any program of efficiencies or economies related to "any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided." Agreement, ¶11. The effects on this transit employee's working conditions are part of such a program of efficiencies or economies related to the purchase of these six buses.

In a separate argument, the City suggests that its retirement of the older buses represents the termination of a former Project that had provided funds for their purchase. *See* City's Brief at 11-14. As the City correctly observes, mere termination of a Project generally does not give rise to an obligation to apply the employee protections. Such an argument might have weight here if the old buses had simply been retired, instead of being replaced with new buses funded by Federal assistance. It is the use of Federal transit assistance to purchase new buses to replace the older buses that is of concern here, not the question of the retirement of the older buses.

The City has not shown that the changes it made in the Claimant's position, salary, pension, and other rights and conditions of employment were caused exclusively by factors other than the purchase of the six buses under these Projects. The six new buses will require significantly less maintenance than the 12 older buses being replaced (out of a fleet of approximately 18). This conclusion was indicated by the Claimant, affirmed by the bus maintenance study performed for the City by DMG-Maximus, and uncontroverted by evidence. Absent compelling proof to the contrary, such replacement of a majority of the City's buses with new buses, admittedly requiring less maintenance, shows the result of the Projects on the Transit Maintenance staff and specifically on the Claimant in this dispute.

Finally, the fact that the new buses were expected to arrive approximately nine months after the adverse effects occurred does not alter the conclusion that the Projects adversely affected the Claimant. The Protective Agreement specifies that events and effects occurring in anticipation of the use of Federal assistance are included in the scope of the protections, which is the case here. Agreement, ¶11. While the City may have had additional reasons for implementing some or all of the actions considered herein, that does not show that the adverse effects on the Claimant were not also a result of the Projects. The adverse effects encountered by the Claimant resulted, at least in part, from these Projects. The claim is upheld.

REMEDIES

The following remedies are awarded with respect to the Claimant's rights, privileges, benefits and other conditions of employment that have been adversely affected as a result of the Projects.

Displacement Allowance

In the position of Lead Mechanic with the City, which the Claimant accepted effective July 1, 2001, the Claimant's job and benefits have been significantly worsened as a result of the Projects. He is entitled to a displacement allowance as provided for in the City's Protective Agreement, including applicable general wage increases and cost of living adjustments beginning July 1, 2001. *See* Agreement, Exh. A, ¶1(a),(b). During the period that the Claimant receives a displacement allowance, he is to experience no reduction in any rights, privileges and benefits related to his employment prior to the June 30, 2001 elimination of his position of Equipment Maintenance Supervisor. *See* Agreement, Exh. A, ¶4.

Specifically, Paragraph 4 of the Agreement provides that the Claimant, as asserted in his claim, is not to be deprived of such benefits as "hospitalization, and medical care," and "continued status and participation under any disability or retirement program . . . ."

Restoration To His Former Position

The Claimant asks to be restored to his former supervisory position as part of the protection of his conditions of employment and the preservation of rights, privileges and benefits. He argues that someone else will be performing his former Supervisory job at the City's new maintenance facility. The Department finds that this issue is not ripe for decision inasmuch as the record evidence does not indicate that the supervisory position has been created or that the City has denied the Claimant any accordant right, privilege or benefit.[9]

[9] In a letter dated March 9, 2001, the City assured the Claimant that for three years his name would be carried on a preferred list for appointment to Equipment Maintenance Supervisor.

Relocation Allowance

The Claimant seeks a relocation remedy because his commute to his new job is 1.7 miles, compared to his former commute of three blocks. The City correctly argues that this change in the point of his employment, and the requested remedy of a vehicle, do not come within the protective arrangement's provisions on protection of conditions/benefits of employment, relocation or moving. No remedy is awarded in this matter.

Cross-training

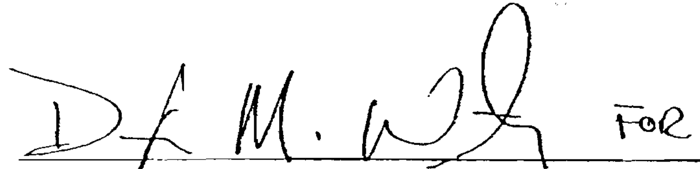
Notwithstanding the Claimant's objections, the City correctly maintains that cross training of its maintenance employees in this case is within the scope of its management rights. No remedy is awarded in this matter.

Continuation of Health Benefits

Following commencement of work in his new position of Lead Mechanic on July 1, 2001, the Claimant suffered two work-related injuries. As a consequence of those injuries he remains on permanent medical restrictions that preclude his return to work. Effective March 1, 2003, he exhausted his extended health insurance coverage for a disabled worker provided in the Teamsters Local 421 collective bargaining agreement. In March of 2003, the Claimant modified this claim by submitting a request for an additional allowance/remedy of $779.68 per month to pay for his continued health insurance coverage beyond March 1, 2003. The City argues that the change in the Claimant's health insurance coverage is governed by that collective bargaining agreement. The record indicates that the length of the Claimant's health insurance coverage following a work- related injury, 14 months, is identical whether working in his current position as Lead Mechanic, covered by collective bargaining agreement (CBA), or in his previous position as a supervisor, covered by the City's group insurance plan. Accordingly, the Claimant is not entitled to additional health insurance coverage, since such benefits would have expired 14 months after the Claimant's injury in either case, and that time period has elapsed. No remedy is awarded in this matter.

IMPLEMENTATION OF REMEDIES

The remedies provided herein are to be implemented within 30 days of the date of this decision, unless otherwise specifically provided herein. This decision is final and binding upon the parties.



Victoria A. Lipnic
Assistant Secretary of Labor
for Employment Standards

Faulkner and Barnes v. Durham, NC and Coach USA
DSP Case Nos. 01-13c-2 & 01-13c-3
August 6, 2004
(Digest page no. A-557)

Summary: Two nonunion Claimants asserted that Coach USA failed to provide them substantially the same levels of protection as were afforded employees represented by the Amalgamated Transit Union (ATU) when Coach assumed operational responsibility of the Durham Transit System. The ATU Protective Agreement required that all bargaining unit employees be offered positions comparable to those held under the previous contractor. However, one of the Claimants was rehired at reduced pay and seniority in a lower rated position and the other was denied reinstatement. The Department determined that the Claimants were entitled to protections substantially similar to bargaining unit employees and did not fall within the Protective Agreement's exclusion for executive and administrative officers. Both Claimants were awarded full back pay and allowances and other benefits to make them whole, which must be satisfied by Coach. Additionally, the Department determined that the current operator of the Transit System must grant the Claimants their "preference in hiring" by offering them positions, wages, benefits, and conditions of employment comparable to those they previously occupied, plus all increases since that time. The Department retained limited jurisdiction to resolve any disagreements among the parties over the specific amounts and terms of the rights, privileges and benefits to be paid or restored.

Faulkner and Barnes *Claimants* v. Durham, NC and Coach USA *Respondents*	)	DSP Cases Nos: 01-13c-2 and 01-13c-3 Issued: August 6, 2004

ORIGIN OF THE CLAIMS

These two claims, filed on July 12, 2001 (Faulkner) and August 6, 2001 (Barnes), seek employee protections under Federal Transit Administration (FTA) grants of financial assistance to the City of Durham, North Carolina (Durham). As a pre-condition of receiving that assistance, Durham agreed to apply to those grants the employee protective arrangements certified by the Department of Labor (Department) as satisfying the requirements of Section 5333(b) of the Federal Transit law, commonly referred to as Section 13(c)[1]. The arrangements were certified for Durham's FTA grants including NC-03-0043 (capital grant, certified August, 16, 1999), NC-03-0044 (capital grant certified September 19, 2000), NC-90-X266 (operating and capital grant certified June 16, 2000), NC-90-X282 (operating and capital grant certified June 4, 2001), and NC-03-0043 Revised (capital grant certified March 23, 2001). The certified arrangements include the provisions in the Department's certification letters for each grant; the November 28, 1990 Agreement Pursuant to Section 13(c) of the Urban Mass Transit Act of 1964, as Amended (Agreement), negotiated by Amalgamated Transit Union Local 1437 (Union) and Transit Management of Durham (TMD)[2] applicable to capital assistance; an October 24, 1990 TMD side letter to the Agreement; the National

[1] 49 U.S.C. § 5333(b) of the Federal Transit law is the recodification of Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c).

[2] Transit Management of Durham was a wholly owned subsidiary of ATE Management and Service Company, Inc.

Model Agreement for Operating Assistance, dated July 23, 1975 (Model)[3] applicable to operating assistance; a November 6, 1990 TMD side letter concerning paratransit operations; and the November 5, 1990 Resolution of the Durham City Council, applicable to both operating and capital assistance. The certified protective arrangements are incorporated by reference into the grant contract between Durham and the FTA.

BACKGROUND

Prior to 1990 the Durham Transit System (Transit System) had been privately owned and operated by Duke Power Company. In late 1990 and early 1991 Durham acquired the private Transit System from Duke Power Company with one or more Federal grants of financial assistance. In order to accommodate North Carolina law prohibiting the City from bargaining collectively with the union representing the Transit System employees, the City established what is referred to as a Memphis Plan arrangement. Thereby, the management and operation of the Transit System is handled by a private entity under contract to the City, and the contractor bargains directly with the union. In September of 1990, Durham contracted for the operation and management of its Transit System by TMD. The contract authorized TMD to negotiate a Section 13(c) Agreement with the ATU, which had represented the bargaining unit at the Duke Power Company Transit System.

The claims arise from a subsequent change in the operator of the Transit System in 2001. The Claimants, two non-union employees who have been working on the System since it was operated by Duke Power, allege that this change created adverse effects upon their employment rights, privileges, benefits, pensions, and other conditions of employment. They seek remedy for these changes under the protective arrangements included in Durham's grants of Federal assistance.[4] The Claimants maintain that the Federal assistance was used to effect and support this change in operators and the alleged harms.

THE CLAIMS

On July 1, 2001, Coach USA, through its subsidiary, Progressive Transportation Services, Incorporated, d/b/a Coach USA Transit Services (Coach USA), succeeded TMD as the contract operator and manager of the Transit System.

[3] Employee Protections Digest, US DOL, p. D-43.

[4] This Federal assistance was comprised of the aforementioned operating and capital grants.

With that change in contract operators, certain rights, privileges, benefits, and conditions of employment of the Claimants were changed by Coach USA.

Claim of Barbara P. Faulkner; DSP Case No. 01-13c-2:

Claimant Faulkner began working for the Transit System on November 1, 1974, when it was owned and operated by Duke Power Company. She has continued working for the Transit System, without interruption, since that time. She notes that when TMD took over operation of the Transit System in 1991, all former Duke Power transit employees retained their positions and salary. She states that at the time of Durham's acquisition of the Transit System, "[a]ll employees were told that they were covered by a '13 C' agreement, which protected all transit positions." While employed by TMD, she had been promoted from the position of Maintenance Clerk to the position of Administrative Assistant with no increase in pay. When Coach USA succeeded TMD as operator of the Transit System, she was demoted to Maintenance Clerk and her pay was cut.

She has identified her wages and benefits in her position with TMD as of June 30, 2001, as follows:

- wages - $14.90 per hour
- vacation - 5 weeks earned per year; unused vacation accumulated and available
- sick leave - 12 days per year
- seniority - 27 years, dating from her employment with Duke Power Company
- length of service awards
- mandatory meetings outside of regular work week - overtime rate
- matching contributions for pension benefit
- holidays and personal days

As a Maintenance Clerk with Coach USA, her wages and benefits were as follows:

- wages - $13.00 per hour effective in August of 2001
- vacation - 3 weeks earned per year; in 2002, no vacation days could be used before July 1
- sick leave - 4 days accumulation per year; carry forward of unused sick leave days was discontinued
- seniority - all seniority earned prior to July 1, 2001, was forfeited
- length of service awards - discontinued
- mandatory meetings outside of regular work week - straight-time pay

matching contributions for pension benefit - discontinued
holidays and personal days - changed and/or discontinued

She states that "[w]hen the employees discussed these concerns with Coach USA they were informed that Durham was only required to honor the 13(c) Agreement as it related to the bargaining unit employees." She was told that she no longer had any seniority as of January 1, 2002, and that all administrative employees now have the same hire date of July 1, 2001, the date Coach USA took over the operation of the Transit System.

Claimant Faulkner seeks back pay, reinstatement/restoration of former wages, benefits and seniority, including accumulation and rollover of vacation and sick leave from year to year, overtime pay for meetings outside of regular working hours, and her former 401(k) benefits and matching-contribution provisions.

Claim of Montague Barnes; DSP Case No. 01-13c-3:

Claimant Barnes began working for the Transit System on August 27, 1973, when it was owned and operated by Duke Power Company. His employment continued without interruption when the Transit System was acquired by Durham. He was employed by TMD from the time of the acquisition through June 30, 2001. He was one of eight Dispatch/Supervisors at TMD and held the highest seniority in that position. In January of 2001, he was promoted to the position of Lead Dispatch/Supervisor and Trainer and reported to the General Manager of TMD. He supervised the other Dispatchers and was responsible for the operation and adherence-to-schedule of the bus drivers. As part of this job at the Downtown Transfer Terminal, he had extensive contact with the public and handled customer contact and complaints. He identifies his wages and benefits in March of 2001 as follows:

salary - $38,500 per year
vacation - 5 weeks per year
sick leave - 96 hours per year; sick leave accumulated
accumulated sick leave - 656 hours
holidays - 11 days per year

In May of 2001, in anticipation of a new organizational structure Coach USA planned to implement when it succeeded TMD, he was reassigned to Dispatch/Supervisor with no reduction in his salary or benefits.

As described by Claimant Barnes, when Coach USA took over, all non-union employees were required, prior to the July 1, 2001 change in contractors, to re-apply for employment by Coach USA in the positions they held or in some other position. After interviewing Mr. Barnes, Coach USA informed him that he would not be hired and refused to provide him an explanation for this action.

Claimant Barnes maintains that, under the terms of the certified protective arrangements, he had, and has, a right to continued employment in his job including the right to be hired by the successor contractor without examination or other re-qualification, except as required by State or Federal law. He further maintains that under these protections, no TMD employee's position should be worsened by a change in the operating and/or management entity. He seeks a dismissal allowance, reimbursement for his extra expenses incurred in consequence of this alleged violation of the protective arrangements, and restoration and continuation of all benefits that he previously held while employed with TMD in the Transit System.

REQUIREMENTS OF THE PROTECTIVE ARRANGEMENTS

The November 28, 1990 Agreement was negotiated by the Union and TMD to protect employees represented by the ATU at the time of the acquisition and thereafter. The duty of any successor contractor to accept and implement the terms of the negotiated Agreement appears in the Agreement itself at its Paragraph (21):

> (21) This Agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of the arrangements made by or for the Public Body to manage and operate the System.
>
> Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management, provision and/or operation of any System transit services under contractual arrangements of any form with the Public Body, its successors or assigns, shall agree, and as a condition precedent to such contractual arrangements, the public body, its successors or assigns, shall require such person, enterprise, body or agency to agree to be bound by the terms of this Agreement and accept the responsibility for full performance of these conditions;....

Paragraph 23 of the Agreement provides protections for employees and contractor obligations for the preservation of wages and benefits in the context of any change in contractors subsequent to the acquisition. Paragraph 23 of the Agreement reads in part as follows:

> (23)(a) In the event of a subsequent transition from private to public management and/or operation of the System, or of *a transfer of service or positions from one private operator or contractor to another,* whether by contract, lease, or other arrangement, any employee providing such services or employed in such positions (except executive and administrative officers) shall be granted a preference in hiring to fill any position on the System with the new operator which is reasonably comparable to the position such employee held. All persons employed under the provisions of this paragraph shall be appointed to such comparable positions without examination, other than that required by applicable state or federal law or collective bargaining agreement, and shall be credited with their years of service for purposes of seniority, vacations, and pensions in accordance with the Contractor's records and applicable collective bargaining agreements. (Emphasis added.)
>
> (23)(b) The obligations of the Contractor with regard to wages, hours, working conditions, health and welfare, and pension or retirement provisions for employees shall be assumed by any person, enterprise, body or agency, whether publicly or privately owned, which is required to grant employees a preference in hiring in accordance with this Paragraph, or the Public Body if it is so required, or the Public Body shall otherwise arrange for the assumption of such obligations. No employee of the Contractor shall suffer any worsening of his or her wages, seniority, pension, vacation, health and welfare insurance, or any other benefits by reason of the employee's transfer to a position with the Public Body or any such person, enterprise, body or agency undertaking management and/or operation of the System....

The terms and conditions of the Agreement are reinforced and made binding on any successors by the November 5, 1990 Resolution of the Durham City Council,[5] which also serves as one of the primary bases for the Department's certification of Durham's Federal transit grants. The Resolution provides, in part, as follows:

> (1) The City of Durham agrees that the Section 13(c) Agreement between the Amalgamated Transit Union Local 1437 (Union) and

[5] This Resolution was executed on November 28, 1990.

Transit Management of Durham (TMD)...shall be binding on and enforceable against TMD and any successor in the management and/or operation of the Transit System.

(2) The City of Durham agrees that the Section 13(c) Agreement...executed on July 23, 1975 and commonly referred to as the National, or Model Agreement, which Agreement is attached hereto and incorporated in full herein by reference...shall be binding on and enforceable against TMD and any successor in the management and/or operation of the Transit System.

(3) ....As a precondition of any future contractual arrangements relating to the management, provision and/or operation of the Durham Transit System, or any part or portion thereof, the City of Durham shall require the management company and/or other contractor to: (a) agree to be bound by the terms of the Agreements referenced in paragraphs (1) and (2) above; and (b) accept the responsibility for full performance of the conditions thereof.

As noted above, Paragraph 21 of the Agreement and the City Council Resolution require that any successor to TMD must be bound by the Agreement. Furthermore, the Agreement requires Durham "as a condition precedent" to any contractual arrangement with a successor contractor to require the contractor to be bound by the terms of the Agreement and accept responsibility for the full performance of the conditions of the Agreement. Durham carried out this obligation with respect to Coach USA through its contract with Coach for the management and operation of the transit system.

In addition to the arrangements described above, the Department of Labor's certification letters include certain enumerated conditions that form part of the certification and are made part of the FTA contract of assistance, along with the protective arrangements. A final enumerated section is included in all certifications, including those cited on the first page of this decision, which specifies that employees other than those party to the specified protective arrangements are afforded substantially the same level of protections and that disputes remaining after exhaustion of any available remedies may be decided by the Secretary of Labor or a designee of the Secretary. The final enumerated section 4 of Durham's certifications for capital assistance reads as follows:

4. Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local union which is a party to, or otherwise referenced in the protective arrangements,

shall be afforded substantially the same levels of protection as are afforded to the employees represented by the union under the agreement dated November 28, 1990, as supplemented, and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

Should a dispute remain, after exhausting any available remedies under the protective arrangements, and absent mutual agreement by the parties to utilize any other final and binding procedure for resolution of the dispute, the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination.

POSITION OF RESPONDENTS

City of Durham

Durham denies any responsibility for Section 5333(b) protections in these claims, because the Claimants were never employees of the City, and the City is not a party to the protective Agreement executed by the Union and TMD. In furthering this position, Durham affirms that it has exercised no control or authority over the management and operation of the Transit System since acquiring it from Duke Power Company in 1990. Beginning with its acquisition of the Transit System, Durham transferred all responsibility for management and operation of its Transit System to its contracted operator under a Memphis Plan arrangement. Durham also supports the position that Coach USA, its operating/management agent, has no obligation to these Claimants for employee protections under the certified terms and conditions, for the reasons set forth by Coach USA.

Coach USA

Coach USA presents it position, through its attorney, in an August 28, 2002 letter to the Department. As a threshold matter, Coach alleges that the complaints before the Secretary are barred because the Claimants failed to utilize and exhaust the remedies in the November 28, 1990 13(c) Agreement.

In its August 28, 2002 letter, Coach recognizes and affirms that it has 13(c) obligations to employees under the Agreement and that these obligations are also set forth in its management contract. Coach USA states in the August 28, 2002 letter:

> "The scope of the 13(c) obligation is set forth in 34(D) of the Contract which requires Coach to act in accordance with Paragraph 23 of the Section 13 Agreement and to 'offer all of the employees of the current Contractor who are engaged in the provision of fixed route services to the City (except executive and administrative officers) comparable positions to the positions currently held by those employees.' "

Additionally, Coach states that members of the Durham Area Transit Authority (DATA)[6], reiterated to Coach's local General Manager that it was required to offer positions to all bargaining unit employees, but that employment of non-bargaining unit or executive and administrative employees was at its discretion.

Coach USA concludes that Claimant Faulkner and Claimant Barnes were not entitled to employment in comparable positions when it assumed the operation and management of the Transit System. Coach alleges that the Claimants were executive and administrative employees of the previous contractor and are therefore excluded from coverage under both the terms of the 13(c) Agreement and its management contract. Additionally, Coach concludes that non-bargaining unit employees, such as these two Claimants, are not party to the Agreement, and neither the Agreement's terms nor the terms of Coach's management contract with the City require the extension of employee protections to non-bargaining unit employees.

Since Coach recognizes 13(c) obligations in the context of its assumption of the management and operation of the Transit System, its positions stated in the August 28, 2002 letter with respect to non-bargaining unit employees, executive and administrative employees, and the exhaustion of procedural remedies frame the only issues in this matter.

ISSUES

1. Whether the Claimants properly exhausted their remedies under the November 28, 1990 13(c) Agreement.

2. Whether the Claimants, as non-bargaining unit employees, are entitled to employee protections.

[6] The Durham Area Transit Authority is the entity created by the City to oversee the implementation of transit policy. Its seven board members are appointed by the Durham City Council.

3. Whether the Claimants are properly classified as "executive or administrative officers," and therefore excluded from the protections of the 13(c) Agreement.

DISCUSSION

1. Exhaustion of remedies. Coach asserts that claims before the Secretary by Ms. Faulkner and Mr. Barnes are barred because the Claimants did not utilize the procedural remedies referenced in the 13(c) Agreement. As transit employees in the service area not represented by the union signatory to the Agreement, the Claimants are eligible for substantially the same levels of protection. This does not, however, give them access to the Agreement's specific claims resolution procedure negotiated by the Union for the employees it represents. Non-union employees are obliged to pursue their claims through any existing reasonable and available alternate remedies established for such claims by the grant recipient or other responsible party. As non-bargaining unit employees, the procedural remedies of the 13(c) Agreement specific to the union and its members are not available to Ms. Faulkner or Mr. Barnes.

Claimant Faulkner stated that Coach told her and others that the Agreement could only be honored for bargaining unit employees. Claimant Barnes sought an explanation and assistance from several individuals including Coach's local general manager, the assistant city attorney in charge of DATA matters, a special assistant to the City manager, the City's transit manager, a City council member and the City manager. No local procedures to resolve claims for non-bargaining unit employees were offered or identified in the course of any of these contacts. Nothing in the record indicates that there are alternate procedural remedies available to these Claimants. Therefore, their claims are properly before the Department for final and binding resolution, pursuant to the final enumerated paragraph of the Department's certification letters.

2. Employee protections. Both Durham and Coach USA agree that the 13(c) obligation required Coach to offer comparable employment to all non-administrative and non-executive bargaining unit employees. The August 28, 2002 letter further states that this understanding "was reiterated to the General Manager for Coach ... by members of the Durham Area Transit Authority who discussed with him that Coach was required to offer positions to all bargaining unit employees...." In accordance with this understanding, Coach offered comparable employment to all members of the bargaining unit when it assumed operations from TMD.

The Department accepts the views of Durham, DATA, and Coach, as expressed in the August 2002 letter, as they frame the 13(c) obligations relating to bargaining unit employees who are neither executive nor administrative officers. However, Coach's assumptions regarding the non-bargaining unit employees of the previous contractor are inconsistent with the Department's certifications for the Transit System and precedent relating to the coverage of protective arrangements. For the reasons discussed below, substantially similar protections to those in the 13(c) Agreement should have been extended to non-bargaining unit employees.

The Transit System labor protective obligations under 49 U.S.C. § 5333(b) include, not only the Agreement between TMD and ATU Local 1437, but also those specified in the Department of Labor's certification letters. The Department's certification letters require in their final enumerated paragraph that all transit employees in the service area of the project be protected and those who are not party to or otherwise referenced in the specified protective arrangements are to receive "substantially the same levels of protection." This obligation to provide substantially the same protections extends to non-bargaining unit Transit System employees such as the Claimants in this case. Coach's reliance on the Department of Labor's decision in Certain Captains and The Inlandboatmen's Union v. City of Vallejo, Case No. 94-13c-20, USDOL (1995), Digest, p. A-418, is not applicable here because that case relied on a distinguishable and unique set of facts and circumstances. In Certain Captains, the City of Vallejo voluntarily extended the protections of the 13(c) agreement to unionized deckhands employed in its ferry service in the context of a project carried out entirely with State funds. It was ruled that the non-union captains were not entitled to similar benefits in that instance because no Federal funds were used in the project, and the 13(c) agreement had been voluntarily utilized as a "simple labor contract standing apart from any result of a Federal project." Here, Federal funds are used in the project, see n. 4 supra, and, accordingly, the "substantially the same levels of protection" requirements in the Department's certification letters apply.

3. "Executive or administrative officers" exclusion. The exception in the 13(c) Agreement for "executive and administrative officers" does not apply to the Claimants here. Section 5333(b) requires that fair and equitable protections for all affected mass transit employees must be in place as a precondition of the FTA grants. Although the statute does not define the term *employee*, the only established exception consistent with the statute is for the highest officers of a transit system. Coach's argument to exclude the Claimants in this case is based on its use of the phrase "executive and administrative employees," which substitutes the term *employee* for the term *officer* used in the 13(c) Agreement. The term *officer* has a specific meaning, however, and cannot be used synonymously with *employee*. *Officers* are those persons who occupy the positions

specified in a corporate charter and are typically no more than a handful of its highest-level officials.[7] In Roland G. Barnes v. Tidewater Transportation District Commission, Case No. 77-13c-31, USDOL(1980), Digest, p. A-95, for example, the Claimant was determined to be outside the definition of covered employee, because, in part, he was an officer of the private company before it was taken over by the public entity. The Claimant was elected to the positions of President and Treasurer by its Board of Directors, he was one of only two officers authorized to sign company checks, and he had executed the contract of sale to the public entity that resulted in his displacement.

Salaried Employees v. Nassau County, Case No. 75-13c-7, USDOL (1975), Digest, p. A-41, offers the most comprehensive discussion of employee coverage under 49 U.S.C. § 5333(b) and the types of positions that may be excluded from 13(c) agreements. The decision concludes that the term (covered) *employee* should be broadly construed and considered to encompass all but the top level individuals performing functions corresponding to the cited positions in the definition of "employee of a railroad in reorganization" in the Regional Rail Reorganization Act. Those excepted positions are: "a president, vice president, treasurer, secretary, comptroller, and any person who performs functions corresponding to those performed by the foregoing officers." The decision further explains that due to variances from carrier to carrier, coverage decisions should be based on a review of the actual functions that an individual performs, and that this review should focus on the extent to which the individuals "impact upon management policy and whether they exercise independent judgment and discretion of the type generally associated with top level management."

Before his reassignment in anticipation of Coach's new organizational structure, Claimant Barnes occupied the position of Lead Dispatch/Supervisor and Trainer. As such, he trained, supervised, evaluated, and disciplined other dispatch/supervisors. He was responsible for the general operation of the Dispatch Office and the Downtown Transfer Terminal. He dealt directly with the public and handled passenger complaints. He also served on two Statewide public transportation committees. He reported directly to the General Manager of TMD, who determined his wages and benefits. There is no indication in the record, however, that Claimant Barnes exercised independent control over any of his duties or participated directly or significantly in top level policy determination. Supervisory or managerial duties, even of a significant nature, do not place an individual outside the scope of 13(c) protections. See Giampaoli v. San Mateo County Transit District (Interim Determination), Case No. 77-13c-30, USDOL (1981), Digest, p. A-172-6. It appears that Claimant Barnes' position was that of

[7] See 18B Am. Jur.2d Corporations §1343.

an administrative employee or perhaps an executive employee, but not that of an executive or administrative officer.

Claimant Faulkner's position with TMD was that of Administrative Assistant to the General Manager. She apparently performed general administrative tasks for the General Manager and Assistant General Manager. As such she certainly was an administrative employee, but it does not appear that she performed any function that could be construed as an administrative officer.

Because the Claimants do not fall within the 13(c) Agreement's exemption for "executive and administrative officers," they are entitled to the protection of the Agreement. The transition under which their claims arose was between a contractor and subsequent contractor, and the contractor's obligations are set out under Paragraph 23 of the Agreement, which requires that each employee "be granted a preference in hiring to fill any position on the System with the new operator which is reasonably comparable to the position such employee held."[8] Because the Claimants were not allowed to continue in positions they held with the prior contractor, it is clear that the Paragraph 23(a) preference was not granted.[9]

Any successor contractor to TMD is bound to accept responsibility for implementing the terms and conditions of the protective 13(c) Agreement and other protective arrangements. In addition to the preference requirements discussed above, obligations also exist in Paragraph 23(b) of the Agreement which provides for the continuation of the existing wages, hours, working conditions, health and welfare, and pension or retirement benefits of the Claimants. They are to suffer no worsening of wages, working conditions or any other benefits of employment and are to be credited with all seniority, vacation, accumulated sick leave, pension, and other entitlements in accordance with the records of TMD. Any accrued liabilities at the time of transfer for pension, retirement, sick leave, and vacation leave benefits are the responsibility of the City.

These claims are upheld and the Claimants are eligible for the following remedies.

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[8] The Department takes no issue with the parties' effectuation of the concept of preference within the context of their 13(c) Agreement. We note, however, that the term *preference*, in and of itself, offers less than an absolute job guarantee.

[9] Coach has made no presentation that the positions formerly held by the petitioners were eliminated, or that the duties, responsibilities, expertise, or qualifications required for the positions under Coach would not be reasonably comparable to those under the prior contractor.

REMEDIES

The Department of Labor certifications for the aforementioned grants provide that "the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination." Pursuant to that authority, the following remedies are provided consistent with paragraph 16(b), including the award of full back pay and allowances and other benefits to make employee-claimants whole. The remedies shall be implemented no later than thirty days following the date of this decision.

The City of Durham has limited responsibility for the claims presented, because, under its Memphis Plan arrangement, responsibility for the management and operation of the Transit System rests with its contractor. However, its management contract with Coach reserves the responsibility for accrued pension, retirement, sick leave, and vacation leave liabilities, as of the effective date of the contract, with the City. To the extent that the remedies later specified involve such liabilities, they are the responsibility of the City. Coach USA, on the other hand, has primary responsibility for 13(c) liabilities in its status as the independent successor contractor that succeeded TMD.[10] This responsibility covers the entire period between its assumption of the operation of the Transit System and the Claimants' acceptance or declination of employment/re-employment with the current operator of the System under this award. The employment/re-employment obligations of the following award rest with the current successor contract operator of the Transit System.[11]

The current operator of the Transit System shall grant Claimant Faulkner and Claimant Barnes their preference in hiring by offering both individuals positions with the Transit System comparable to those they occupied prior to the anticipation or effectuation of the July 1, 2001 transfer of operations to Coach. Appointment to such positions shall be without examination, other than that which may be required under applicable State or Federal law or collective bargaining agreement and shall commence immediately upon acceptance by the Claimant. Such appointment shall be under the same wages, hours, benefits, and

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[10] Effective June 30, 2003, Coach sold its transit division to First Transit, Inc. by means of an asset sale. Coach's contract with Durham (entered into by Coach's subsidiary, Progressive Transit Services, Inc.) was transferred and assigned to First Transit, Inc. as part of that sale. However, Coach retained any liabilities pre-dating the sale.

[11] MV Transportation, Incorporated entered into a five-year contract to operate the Transit System, effective July 1, 2004. This successor contractor is bound to implement the hiring preference requirements with the restoration of all compensation, rights, privileges, and benefits associated with the claimants' previous position with TMD. See 13(c) Agreement, paragraph 21.

conditions of employment, including all rights and privileges, applicable to such positions prior to the transfer of operations to Coach plus any and all increases, supplements, and betterments which have since accrued to such employment, and/or would have accrued, if the wage and benefit structures of TMD had been continued without change by Coach and all subsequent operators of the Transit System. Additionally, both Claimants are entitled to receive the full value of all wages and benefits lost due to the failure of Coach to grant their preferences.

With respect to Claimant Barnes, Coach may offset the above payments by any earned income or realized cash benefits he may have earned in any employment in the period between his last employment at TMD and his acceptance or declination of employment with the current operator of the Transit System. Should Claimant Barnes decline the offer of employment, he shall be deemed to have elected retirement and receive the same benefits and privileges that would accrue to an employee with equal seniority and service who retired or otherwise terminated employment under honorable circumstances on the date of his declination.

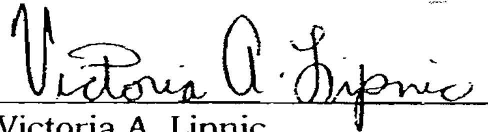
The Claimants shall exercise their hiring preference within 15 days of its offer by accepting or declining the offer of employment. However, any declination of a comparable position shall not result in the forfeiture of any current employment with the Transit System or the other remedies to which the Claimants are entitled under this award. Both Claimants, irrespective of their election to accept or decline a comparable position, shall be credited with all years of service, dating from their initial employment with Duke Power and continuing without interruption to the date of the acceptance or declination, notwithstanding any forfeiture of seniority imposed by any operator of the Transit System or any break in service caused by the failure of any operator to grant a hiring preference. Such recomputed years of service, plus all additional subsequent service, shall be utilized thereafter for the computation of seniority and all other entitlements, including but not limited to vacation, sick leave, and pension rights and benefits.

Any and all rights, privileges, benefits and conditions of employment enjoyed by the Claimants prior to the July 1, 2001 take over of operations by Coach or its anticipation, but not mentioned herein, shall also qualify for continuation and preservation at their prior levels. This includes any subsequent general wage increases or improvement in benefits for which the Claimants otherwise would have qualified after the takeover.

Prompt determination of the specific amounts and specific terms and conditions of the rights, privileges and benefits to be paid and/or restored is referred to the parties. In the event the parties cannot agree on individual amounts, terms

and/or conditions, the Department retains limited jurisdiction to resolve such disagreements for purposes of the remedies herein.

This decision is final and binding on the parties.



Victoria A. Lipnic
Assistant Secretary of Labor

Montague Barnes v. Durham, North Carolina; Coach, USA; and MV Transportation
DSP Case No. 01-13(c)-3
March 8, 2006
(Digest page no. A-573)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimant had been awarded make-whole benefits in the August 6, 2004 determination in Faulkner and Barnes v. Durham, North Carolina and Coach USA, DSP Case Numbers 01-13(c)-2 and 01-13(c)-3. The Department determined that Claimant, a non-union transit worker, was entitled to substantially the same level of protections as those afforded to employees represented by the ATU after a contract operator assumed responsibility for the transit system. In its analysis, the Department noted, among others findings, that a comparable job need not be identical to an employee's previous position, but that it must be similar in duties and responsibilities, including working conditions, to prior positions of significant duration. The Department stated that "review of employee performance is a management right concerning which the Department takes no position." Bonuses that were not regularly awarded or based on a standard formula were not found to be conditions of employment. Wage adjustments must be determined on the same basis for union and non-union employees. Vacation and sick leave, health and dental benefits, life insurance, retirement and 401(k) plans, holidays and other paid time off, and numerous other benefits were assessed for consistency with union employee benefits and awarded to Claimant at substantially comparable levels.

In the Matter of Arbitration:

Montague Barnes *Claimant* v. Durham, NC; Coach USA; & MV Transportation *Respondents*	DSP Case No. 01-13c-3 **SUPPLEMENTAL DECISION** Issued: March 8, 2006

THE CLAIM

This decision is a continuation of the August 6, 2004 determination in Faulkner and Barnes v. Durham, NC and Coach USA, DSP Case Numbers 01-13c-2 and 01-13c-3, as that determination pertains to Montague Barnes, the City of Durham, Coach USA and now MV Transportation, Incorporated (MVT). Mr. Barnes' portion of the claim was DSP Case Number 01-13c-3, and MVT is the successor to Coach USA as the current operator of the Durham Transit System (Transit System) under a five-year contract which began on July 1, 2004.

In the August 6, 2004 determination, Mr. Barnes was awarded make-whole benefits under Paragraph 16(b) of the November 28, 1990 Protective Agreement between Transit Management of Durham (TMD) and Amalgamated Transit Union Local 1437 (ATU)[1] and the provisions of the Department of Labor's (Department) certifications, which provide non-union transit workers substantially the same levels of protection as are afforded employees represented by the ATU. The benefits awarded included full back pay and allowances and a preference in hiring by the current operator of the Transit System, which is now MVT.

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[1] Transit System employees are currently represented by Amalgamated Transit Union Local 1493, which is the successor to Local 1437.

The preference in hiring was to be accomplished by offering Mr. Barnes a position comparable to the one he occupied before he was reassigned to the job of Dispatch/Supervisor in May of 2001.[2] The offer was to be under the same wages, hours, benefits, and conditions of employment, including all rights and privileges, applicable to Mr. Barnes' position prior to anticipation of the transfer of operations to Coach, plus any and all increases, supplements, and betterments which had since accrued to such employment, and/or would have accrued, if the wage and benefit structures of TMD had been continued without change by Coach and all subsequent operators of the Transit System. Mr. Barnes was to be credited with all years of service, dating from his initial employment with Duke Power, the original operator of the Transit System, and continuing without interruption to the date of his acceptance or declination of a position with MVT, notwithstanding the break in service caused by Coach's failure to reemploy him when it took over full control of the Transit System. The recomputed years of service were to be utilized for the computation of seniority and all other entitlements, including but not limited to vacation, sick leave, and pension rights and benefits. Any and all rights, privileges, benefits and conditions of employment enjoyed by Mr. Barnes prior to the anticipation of the take over of operations by Coach were also to continue and be preserved at their prior levels. Additionally, Mr. Barnes was to be granted any subsequent general wage increases or improvement in benefits for which he would have qualified after the takeover, had he been rehired.

Under the August 6, 2004 decision, the prompt determination of the specific amounts and specific terms and conditions of the rights, privileges and benefits to be paid and/or restored was referred to the parties. However, the Department retained limited jurisdiction to resolve any disagreements over the individual amounts, terms and/or conditions of the specified remedies. When communications from Mr. Barnes and MVT indicated that the parties could not reach an agreement on the specific terms of an offer of employment, the Department invoked its retained jurisdiction and reopened this case to provide a final and binding decision on these matters.

As the successor to Coach USA, MVT is bound, under the terms of Paragraph 21 of the November 28, 1990 Protective Agreement and the Department's certifications, to implement the hiring preference requirements and restore the compensation, rights, privileges, and benefits associated with Mr. Barnes' previous position with TMD. Paragraph 21 binds all successors to TMD, including each subsequent

[2] This reassignment was in anticipation of the new organizational structure of Coach USA which was about to take over operation of the Transit System from TMD.

operator of the Transit System, such as MVT, to the terms and obligations of the Agreement, while the Department's certifications provide that non-union employees shall be afforded substantially the same benefits as those provided to the union employees by the Agreement. Any organization which contracts with the City of Durham to manage and/or operate the Transit System must agree to be bound by the terms of the Agreement and accept responsibility for the full performance of the conditions of the Agreement. Paragraph 21 obligates the City to require such contractor to accept the terms and responsibilities of the Agreement, as a condition precedent to any contractual arrangement for the management and/or operation of the Transit System. Furthermore, a November 5, 1990 Resolution of the Durham City Council,[3] which also serves as one of the primary bases for the Department's certification of Durham's Federal transit grants, reinforces the City's obligations to bind successor contractors to the terms of the November 28, 1990 Protective Agreement and requires them to accept responsibility for the full performance of the Protective Agreement as a condition precedent to a contract for operation of the Transit System. (See Faulkner and Barnes v. Durham, NC and Coach USA, DSP Case Numbers 01-13c-2 and 01-13c-3, USDOL, August 6, 2004, pgs. 5-8.)

The outstanding issues regarding Mr. Barnes' reemployment, as presented by the parties, are described below. Each section of the discussion concludes with the Department's final and binding determination of the issue.

TITLE AND REPORTING

Mr. Barnes was one of eight Dispatch/Supervisors at TMD and held the highest seniority in that position. In January of 2001, he was promoted to the position of Lead Dispatcher/Supervisor and Trainer. He supervised the other Dispatchers, managed the Dispatch Office, and performed various administrative duties and special projects. He was responsible for the operation and adherence-to-schedule of the bus operators and trained or retained them as necessary. As part of this job, based at the Downtown Transfer Terminal, he had extensive contact with the public and handled customer service and complaints. He chaired the TMD Accident Review Committee and represented TMD on statewide committees of the North Carolina Department of Transportation and the North Carolina Public Transit Association. His normal work hours were

[3] This Resolution was executed on November 28, 1990.

9:00 AM to 5:00 PM, Monday through Friday. The record indicates that he reported to either the General Manager of TMD or its Operations Manager.

MVT states that it does not have a position identical to that described above. It offered Mr. Barnes, instead, the position of Operations Supervisor, reporting to its Assistant General Manager, Road Supervisor, Dispatch. In this position he would act as road and/or terminal supervisor and be responsible for various duties, such as responding to accidents and complaints and training or retraining employees. He would not supervise other dispatchers and would work a variety of shifts in various locations. MVT does not recognize seniority in the placement of its non-union employees, including Operations Supervisors. MVT states that the duties of an Operations Supervisor are broad and comparable to the position Mr. Barnes held at TMD.

The evolution of employee protections in the transportation industries suggests that the term "comparable" is not to be interpreted in its strictest sense. (See Crutchfield v. Seaboard Coastline Railroad, DSP Case No. 76-C1-4, USDOL (1976), Digest, p. B-30.) Indeed, the language of Paragraph 23 of the November 28, 1990 Protective Agreement, which outlines the contractor obligations in this case, utilizes the phrase "reasonably comparable to the position such employee held" to describe the type of position for which a preference in hiring must be granted. This indicates that some flexibility in the specification of a comparable position is appropriate. Crutchfield suggests that in considering the comparability of a position, three factors should be considered. They are pay and benefits, job responsibilities and duties, and working conditions. Pay and benefits need not be considered at this time, since these factors will be determined later by this award in a fashion that will make the Claimant whole and thus be comparable. However, the categories of job responsibilities and duties and working conditions are paramount in this ruling on the comparability of MVT's job offer.

Job Responsibilities and Duties: While a comparable job must have similar responsibilities and duties, it need not be identical to the employee's previous position. (See Daniel J. Daly v. Amtrak, DEP Case No. 86-C2-1, USDOL (1988), Digest, p. C-144.) Consideration may be given to similarities of the duties and responsibilities of the offered position to the recent history of positions the claimant has held, as well as the length of time the claimant served in the position to which the offered job is compared. (See Crutchfield.)

The position offered by MVT is distinguished from that occupied by Mr. Barnes at TMD with respect to several of its job responsibilities and duties. At MVT Mr. Barnes would not supervise other dispatchers and

would report at a lower organizational level. While he previously managed the Dispatch Office and Downtown Transfer Terminal, the proffered job as a road or terminal supervisor is apparently a hands-on position in which he would perform duties similar to those carried out by the dispatchers he supervised at TMD.

While MVT's position of Operations Supervisor lacks the managerial, supervisory, and high-level reporting elements of Mr. Barnes' TMD position, it would apparently not be that dissimilar, in terms of responsibilities and duties, from the TMD position that he occupied prior to his January 2001 promotion. In that position he scheduled and dispatched drivers, investigated bus and passenger accidents, responded to customer complaints, and trained or retrained drivers. Furthermore, Mr. Barnes held the Lead Dispatcher/Supervisor and Trainer position at TMD for only six months before he was reassigned back to the position of Dispatch/Supervisor in anticipation of the new organizational structure Coach planned to implement.[4] In view of the similarity of MVT's position to the recent history of Mr. Barnes' duties at TMD and the short duration of his promotion, the Department finds the job responsibilities and duties of MVT's position comparable to those he enjoyed at TMD.

Working Conditions: With respect to working conditions, there are only two factors that are highlighted in the discussion of "title and reporting" presented by Mr. Barnes and MVT. Those factors are the location and the working hours of the position. Mr. Barnes' previous position of Lead Dispatcher/Supervisor and Trainer was in a fixed location. He was based at the Downtown Transfer Terminal and apparently only worked at other locations if the situation demanded it. His normal work hours were also fixed at 9:00 AM to 5:00 PM, Monday through Friday. Before his promotion, working as a Dispatch/Supervisor, Mr. Barnes' schedule and duty station were selected from those available according to his seniority. In recent years he had the highest seniority ranking in that position, and he was able to select the most favorable duty station and hours. In the position offered by MVT, however, the hours and location of work are at the discretion of the MVT Assistant General Manager, and seniority would play no role in determining those working conditions. The offered position is described as having a variety of shifts, and there is an implication that both the hours and the location of his work would change periodically at the complete discretion of management.

[4] The record is inconsistent regarding the date of Mr. Barnes' promotion to Lead Dispatcher/Supervisor and Trainer. The promotion may have occurred as early as the Spring of 2000, resulting in a tenure in the higher position of approximately one year. This is still a relatively short time period, however, and would not change the Department's decision regarding the comparability of the job responsibilities and duties of the position offered by MVT.

These working conditions are not comparable to those in Mr. Barnes' position of Lead Dispatcher/Supervisor and Trainer or in the recent history of his previous position of Dispatch/Supervisor. The offered working conditions deny the benefit of the Claimant's prior service and eliminate a major condition of his previous employment at TMD. The Department's August 6, 2004 determination requires that MVT's offer be under the same conditions of employment, including all rights and privileges, applicable to Mr. Barnes' position prior to anticipation of the transfer of operations to Coach. In order to fulfill this requirement, and provide an offer of comparable employment, MVT must recognize Mr. Barnes' prior service relative to that of all other incumbents of the classification of Operations Supervisor, or similar classifications, if that classification is unique to Mr. Barnes. This recognition must allow the Claimant to select his working hours and working base location from among all those available to employees in his classification, or similar classifications, on a first priority basis.

THE COLLECTIVE BARGAINING AGREEMENT

The Claimant has stated that Duke Power, and subsequently TMD, granted all employees the same benefits, no matter what position they held, and that the benefits were based on those gained by union employees. In support of this, Mr. Barnes submitted for the record signed statements from four former officials of the Transit System during its operation by TMD that support a direct relationship between the wages and/or benefits specified in TMD-ATU collective bargaining agreements and those of non-union hourly and salaried employees. MVT, on the other hand, while confirming that it has honored the February 1, 2003 Coach-ATU collective bargaining agreement for its union employees, contends that the labor contract is irrelevant to the wages and benefits due Mr. Barnes under the November 28, 1990 Protective Agreement.[5]

A former Assistant General Manager of the Transit System whose responsibility included employee benefits stated: "The benefits that were outlined in the labor contract for bargaining unit employees were also provided to all general and administrative employees. TMD provided the same level of benefits to all employees through the ten years that TMD managed the Durham Transit System. A review of the Labor contract

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[5] The February 1, 2003 agreement between Coach USA and the ATU is the most recent collective bargaining agreement in the record of this claim. This agreement was effective through January 31, 2006, but continues year-to-year thereafter unless either party gives notice of a change to the agreement or the agreement's termination.

between ATU and TMD would provide every benefit that was available to Mr. Barnes while employed for TMD. This includes, but not limited to, any incentive programs, bonuses, sick leave, vacation, and the percentage of annual pay increases." Similar and corroborating statements were submitted by a former Finance Manager of the Transit System as well as its former Director of Transportation, whose responsibilities included the administration of employee benefits and the negotiation of collective bargaining agreements with the ATU. Additionally, the former Operations Manager of the Transit System under TMD attested to the direct relationship between the wage increases negotiated by the ATU for bus operators and those granted to all other employees.

The Department finds these statements persuasive and relies upon this historical, direct relationship between the collective bargaining agreement and the wages and benefits of non-union hourly and salaried employees in its determination below of the compensation and benefits which must be included as part of Mr. Barnes' hiring preference.

STARTING SALARY

Mr. Barnes states that non-union supervisory, management and administrative employees received wage increases each July that were at least equal to the percent of increase received the previous February by union employees. The relationship between the union and non-union wage increases is corroborated by each of the three submitted statements from former Transit System officials that speak to annual wage adjustments. The relationship existed for the entire 10-year term of TMD's operation of the Transit System and apparently started earlier with the Duke Power Company, the original operator of the System. The practice is thus sufficiently well established to conclude that the union wage increases result in a general wage increase for all hourly employees. (See Norman S. Schaffer and Golden Gate Bridge, Highway and Transportation District (Supplemental Determination), DEP Case No. 77-13c-1, USDOL (1982), Digest, p. A-311.)

The Claimant states that his salary before Coach assumed operation of the Transit System was $38,500 per year and that he would have received an increase of at least 3 percent in July 2001 and each July thereafter, if TMD had remained the operator of the System. According to his calculations this would have provided him a salary of $43,321 as of July 2004. MVT offered Mr. Barnes an annual salary of $40,845, based on its belief that the budgeted amount of Mr. Barnes' last salary was less

and that Coach did not grant union employees a wage increase in every year it operated the system.

Mr. Barnes submitted an Earnings Statement for the bi-weekly pay period ending May 27, 2001, which shows a regular bi-weekly salary of $1,471.15. This would yield an annual salary of $38,249.90 at that time. The TMD-ATU and Coach-ATU collective bargaining agreements for the relative periods provide for five 3 percent union wage increases. If these were granted to Mr. Barnes each July from 2001 through 2005, they would yield an annual salary of $44,342.11, effective July 1, 2005.[6]

Based on the above, the Department rules that MVT must offer Mr. Barnes a starting salary of at least $44,342.11 per year, plus any wage rate increase which may have accrued to union represented employees between July 1, 2005, and the effective date of his hiring preference per the terms of this decision (see *infra*, p. 15).

PERFORMANCE REVIEW AND ANNUAL WAGE INCREASES

According to Mr. Barnes, TMD had initiated employee performance reviews towards the end of its operating contract in order to increase employee worth to the organization. Annual wage increases were based only on the union collective bargaining agreement, however. In addition to the negotiated union wage increase, non-union employees received a bonus, if the budget allowed. It is MVT's policy, on the other hand, to review the performance of employees annually and grant monetary increases based solely on merit.

The review of employee performance is a management right concerning which the Department takes no position. While there has been a clear and long standing direct relationship between the union negotiated wage increases and those granted other employees of the Transit System, this was pursuant to an operating policy which, for unrepresented employees, is subject to reinterpretation or modification at the discretion of management. While Mr. Barnes is entitled to the benefit of the practice in existence at the time of his dismissal for purposes of computing the starting salary for his hiring preference, he is not necessarily entitled to this past practice for the purposes of future wage adjustments.

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[6] The February 1, 2003 Coach-ATU collective bargaining agreement indicates that beginning in 2003, wage increases for union employees were delayed so that they would be effective each July. There is no indication in the record that any corresponding change was made in the effective date of salary increases for non-union employees.

Additionally, the record does not indicate that the non-union employee bonus was either regularly awarded or based on a standard formula. The bonus appears to be permissive and for this reason does not constitute a condition of employment for purposes of Mr. Barnes hiring preference. (See Soltis v. Atchison, Topeka, and Santa Fe Railway Company, DEP Case No. 76-C1-16, USDOL (1976), Digest, p. B-51.)

Therefore, the Department makes no award regarding the continuation of either the non-union bonus or the relationship between union negotiated wage increases and future wage increases following the grant of the Claimant's hiring preference. However, since Mr. Barnes' wages were not frozen under the employment policies of TMD, he must continue to be eligible for and receive periodic wage adjustments to be determined on the same basis as those of other non-represented employees in his classification or similar classifications at MVT. (See Luis Lujan and the City of El Paso, DEP Case No. 81-13c-8, USDOL (1984), Digest, p. A-379.)

VACATION AND SICK LEAVE

MVT offered the Claimant 3 weeks of vacation per year, to accrue at the rate of 4.62 hours per biweekly pay period and sick leave which would accumulate at the rate of 2.77 hours per pay period, equivalent to 72 hours per year. MVT also offered, as a starting balance, 656 hours of sick leave that accumulated prior to July 1, 2001, plus an additional 128 hours which would have accrued between July 1, 2001, and June 30, 2004.

As provided in the collective bargaining agreement for an employee with 30 years of service, Mr. Barnes claims entitlement to 6 weeks of vacation per year. He also claims the right to accumulate sick leave at the rate of 4 hours per pay period up to a maximum of 96 hours per year and prorated sick leave, as provided in the collective bargaining agreement, for employees who have accumulated more than 800 hours of sick leave. Additionally, he claims that he should be offered 288 hours of sick leave, which would have accumulated between July 1, 2001, and June 30, 2004, based on the 4 hour per pay period/96 hour maximum yearly rate.

Each of the three submitted statements from former Transit System officials that speak to vacation and sick leave entitlement confirm that non-union employees received the same vacation and sick leave provided to union represented employees covered by the collective bargaining agreement. Therefore, in conjunction with his hiring preference, the Department finds that Mr. Barnes should be offered, per the terms of the February 1, 2003 collective bargaining agreement, 6 weeks of vacation

per year and 96 maximum hours of sick leave per year to be earned at the rate of 4 hours per pay period. In addition to the 656 hours of sick leave earned prior to July 1, 2001, he should be credited with 288 hours of sick leave which would have been accumulated between July 1, 2001, and June 30, 2004, plus an additional 4 hours for each 2-week period between June 30, 2004 and the grant of his hiring preference. The provisions of Part I, Section 10 of the collective bargaining agreement shall apply to sick leave accumulations and payments which exceed the 800 hour maximum. The financial responsibility for the accumulated sick leave shall be determined as described in the "Remedies" section of the Department's August 6, 2004 decision or as otherwise agreed to by the City of Durham, Coach, and MVT.

HEALTH AND DENTAL BENEFITS

MVT offered participation in its company health and dental plans available in North Carolina, the terms of which are apparently not yet finalized. However, in its December 22, 2004 letter to the Department, MVT characterized the terms of its health insurance plan as "less favorable" than those to which Mr. Barnes claims entitlement.

Mr. Barnes claims entitlement to the health, dental, and employee assistance plans specified in Part I, Section 9, Paragraph B of the February 1, 2003 collective bargaining agreement. Two of the affidavits submitted from former Transit System officials specifically state that non-union employees were also covered by these benefit plans.

Therefore, the Department rules that Mr. Barnes must be covered by the medical, dental, and employee assistance plans specified in the February 1, 2003 collective bargaining agreement. Per the terms of the agreement, MVT is responsible for 100 percent of the monthly premium for Mr. Barnes and 60 percent of the premium for his dependents.

LIFE INSURANCE

MVT offered Mr. Barnes $5000 in life insurance coverage. It also expressed opposition to purchasing coverage equivalent to that provided under the collective bargaining agreement due to the extra costs that would result from the lapse in Mr. Barnes participation in the 1991 negotiated plan and recent changes in the status of his health.

Mr. Barnes claims entitlement to life insurance coverage, as provided to employees hired before January 19, 1991, in Part I, Section 9, Paragraphs C and E of the February 1, 2003 collective bargaining

agreement. The coverage is in the amount of two times the employee's base salary rounded to the next thousand dollars. The coverage also includes accidental death and dismemberment benefits in an amount equivalent to the life insurance benefit. According to Mr. Barnes, there is also a long-term disability benefit. The employee cost of the insurance is 20 cents per month per $1000 of coverage. All other costs are paid by the employer.

Two of the affidavits submitted by former Transit System officials specifically state that non-union employees were also included in this coverage. The Department rules that MVT must provide for Mr. Barnes' inclusion in the life and associated insurance programs as described in Part I, Section 9, Paragraphs C and E of the February 1, 2003 collective bargaining agreement under the same terms as employees in the bargaining unit. If Mr. Barnes can not be covered under the plans described in the collective bargaining agreement, MVT must provide equivalent coverage at the same employee cost as stated in Part I, Section 9, Paragraphs C and E. Should the cost of Mr. Barnes' coverage exceed the individual cost of other similarly rated plan participants due to the lapse in his participation in the plan, Coach shall be responsible for the additional costs and so reimburse MVT.

RETIREMENT AND 401(k) PLANS

Mr. Barnes claims that he is eligible to participate in the "Defined Retirement Plan" based on the Duke Power plan as it existed on January 19, 1991. He describes the plan as fully funded by the employer and outlined by the collective bargaining agreement in Part I, Section 9, Paragraph A. He also claims that he is eligible to participate in the TMD Savings Plan, a 401(k) plan, immediately upon his reemployment. He describes the 401(k) plan as allowing him to contribute up to 6 percent of his pre-tax salary and receive a company matching contribution of 50 percent of his contribution.

MVT states that it believes Mr. Barnes would be eligible for the "Defined Retirement Plan" based on his service with Duke Power. It also offered him participation in MVT's 401(k) plan after 6 months of employment. The "Plan Highlights" document submitted by MVT describes its plan as allowing Mr. Barnes to contribute as much as 100 percent of his gross pay, up to the Federal yearly maximum, and receive a dollar-for-dollar company match for amounts up to 6 percent of his compensation.

An affidavit from a former finance manager of the Transit System confirms that non-union employees of TMD were eligible for a 401(k) plan, and the TMD Savings Plan description submitted by Mr. Barnes

indicates that he would have been eligible for that Plan. The affidavit also indicates that some former employees of Duke Power "were given some grandfathering advantages," thus lending support to Mr. Barnes' claim to eligibility for the grandfathered Duke Power retirement plan. Also, MVT states that Mr. Barnes would have been enrolled in the TMD Retirement Plan and submitted a Summary Plan Description of the plan which appears to be TMD's description of the grandfathered plan.

Therefore, the Department rules that Mr. Barnes must be able to continue his participation in both the "Defined Retirement Plan" based on the Duke Power plan and a 401(k) plan that is at least as favorable as the TMD Savings Plan. Based on the "Plan Highlights" document provided by MVT, its 401(k) plan meets this requirement. Since the claimant already established his eligibility for a 401(k) plan during his previous employment with TMD, however, his participation in a 401(k) plan at MVT must begin immediately upon reemployment.

HOLIDAYS AND OTHER PAID TIME OFF

Mr. Barnes claims entitlement to 11 paid holidays, paid funeral leave, and paid jury duty, per Part I, Sections 12, 13, and 14 of the collective bargaining agreement. The February 1, 2003 collective bargaining agreement grants seven listed major holidays and 4 additional personal holidays to be agreed upon by the employee and the Transit Agency. Paid funeral leave of from 1 to 3 days is granted upon the death of certain relatives and in-laws, and jury duty is compensated at the employees' regular rate. MVT states that it grants accrued vacation time as bereavement leave for immediate family members. It does not continue pay for jury duty and grants only 7 paid holidays.

An affidavit from a former finance manager of the Transit System confirms that non-union employees of TMD received the same vacation benefits as all other employees. Two other affidavits generally point to the fact that all employees of the Transit System, union and non-union, received the same benefits. Therefore, the Department rules that MVT must grant the Claimant 4 personal holidays, in addition to the seven paid holidays already included in its employment package. It also must provide Mr. Barnes paid jury duty and paid funeral leave equivalent to that provided in the February 1, 2003 collective bargaining agreement.

WORKERS' COMPENSATION PLAN

Mr. Barnes claims entitlement to the Workers' Compensation benefits described in Part I, Section 16 of the collective bargaining agreement. He

describes those benefits as providing 80 percent of his pay for the first 90 days of accidental disability and 50 percent of his pay for the next 120 days. MVT states that, while it provides Workers' Compensation benefits in accordance with State law, it does not supplement those benefits.

The relationship between the benefits provided in the collective bargaining agreement and the benefits afforded non-union employees has been established in the affidavits supplied by the Claimant. The Department rules, therefore, that MVT must provide Mr. Barnes a Workers' Compensation plan equivalent to that provided in Part I, Section 16 of the February 1, 2003 collective bargaining agreement.

TUITION REFUND PROGRAM

Mr. Barnes claims that he should be entitled to participate in the company sponsored Tuition Refund Program as referenced in Part V, Section I, Paragraph A of the collective bargaining agreement. No reference is made to this benefit in the September 27, 2004 offer MVT made to Mr. Barnes or in the description of that offer submitted to the Department. MVT stated in a subsequent letter to the Department that it does not currently have a Tuition Refund Program.

The Tuition Refund Program was described in an affidavit from a former finance manager of the Transit System, as applying to non-union employees. However, a copy of the January 31, 1991 "Implementing Agreement" submitted by Mr. Barnes indicates that the program, which funded work-related education, was eliminated by agreement of TMD and the ATU when TMD took over the operation of the Transit System. It was then replaced with a narrower program to reimburse employees for certain costs of instruction in basic literacy and math skills. Therefore, the Department rules that the latter basic literacy and math skills program, which was in effect at the time of Mr. Barnes employment with TMD, must be made available to him by MVT, if it is currently available to bargaining unit employees.

COMMERCIAL DRIVER'S LICENSE, UNIFORMS & BUS PASS

Mr. Barnes claims that he should be reimbursed for the cost of his commercial driver's license, he should receive free uniforms required for work, and his spouse should receive a free bus pass. As support for these benefits he cites the collective bargaining agreement at Part I, Section 18; Part I, Section 23; and Part III, Section 7, respectively.

An affidavit from a former finance manager of the Transit System confirms that non-union employees of TMD received free uniforms and bus passes. Additionally, the relationship between the benefits provided in the collective bargaining agreement and those afforded non-union employees has been sufficiently established by the Claimant to conclude that he is also entitled to reimbursement for a commercial driver's license, if one is required for the performance of his work.

In its December 22, 2004 letter to the Department, MVT states that it provides free uniforms and bus passes. The Department rules that MVT should continue these practices with respect to Mr. Barnes on terms that are at least as favorable to him as those in the February 1, 2003 collective bargaining agreement. Additionally, Mr. Barnes must be reimbursed for the cost of his commercial driver's license, if it is needed for work. Since his eligibility has already been established by his prior service, the one year waiting period specified in the collective bargaining agreement for reimbursement of commercial driver's license fees shall not apply to Mr. Barnes.

AWARDS AND INCENTIVES

Mr. Barnes claims entitlement to participate in the Incentive Goal Plan, the Attendance Recognition Program, and the Safe Driving Awards Program. He cites as support for this claim Part V, Section 1 of the collective bargaining agreement and the referenced January 31, 1991 "Implementing Agreement" which lists each of the plans. MVT did not mention awards and incentives in its offer to Mr. Barnes. In a subsequent letter to the Department, MVT stated that it does not currently have an Incentive Goal Plan or an Attendance Recognition Program, other than issuing a letter of recognition for attendance. While it does have a Safe Driving Awards Program, it applies only to drivers, not to those in supervisory positions such as the one offered to Mr. Barnes.

An affidavit from a former assistant general manager of the Transit System, who was responsible for employee benefits, confirms that any incentive programs included in the collective bargaining agreement were available to Mr. Barnes while he was employed at TMD. The January 31, 1991 "Implementing Agreement" negotiated by TMD and the ATU indicates that the Incentive Goal Plan was eliminated and then reestablished in equivalent form with different performance goals and objectives. The Safe Driving Awards Program was also eliminated, but TMD agreed to establish a new program which would recognize all safe driving credits accumulated when Duke Power operated the Transit

System. The Attendance Recognition Program was apparently continued without change.

The Department rules, therefore, that the above referenced three awards and incentive programs are to be made available to Mr. Barnes for participation on the same basis as employees in the bargaining unit. Should any of the programs have been modified since 1991 through collective bargaining or other agreement between the ATU and the operator of the Transit System, the modifications shall also apply to Mr. Barnes.

IMPLEMENTATION

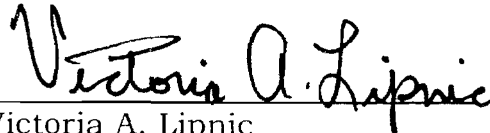
This decision is the resolution of the disputed issues involving the Claimant's preference in hiring as presented to the Department by Mr. Barnes and MVT. It is based, in large part, on the historical, direct relationship between the collectively bargained wages, benefits, and employment conditions of the Transit System's unionized employees and those of its non-union hourly and salaried employees. As noted, the most recent collective bargaining agreement in the record of this claim is the February 1, 2003 agreement between Coach USA and the ATU. This agreement was effective through January 31, 2006, but continues year-to-year unless either party gives notice of a change to the agreement or the agreement's termination.

MVT shall implement this award within 30 calendar days of its issuance by offering Mr. Barnes a preference in hiring which incorporates the terms, conditions and benefits specified by the Department above, in addition to any other terms, conditions and benefits already agreed to or accepted by the parties. If the February 1, 2003 collective bargaining agreement has been replaced or supplemented by that time, the terms, conditions and benefits of the hiring preference offered to the claimant shall reflect the new or supplemental agreement. However, past wage and benefit levels incorporated in the hiring preference, which accrued under earlier agreements, shall reflect those agreements. MVT shall coordinate all monetary and benefit items requiring the financial contribution or other input from Coach USA and/or the City of Durham as specified in the individual rulings above and as appropriate and consistent with the Department's August 6, 2004 decision and remedies in DSP Case Numbers 01-13c-2 and 01-13c-3.

Any other remaining responsibilities of the City of Durham and Coach USA should be satisfied within 20 days of the Claimant's acceptance or declination of re-employment with MVT. To this effect, within 5 days of the date of his acceptance or declination of re-employment, Mr. Barnes

should provide Coach USA with the information specified in the Department's August 6, 2004 decision necessary for the computation of Coach's offset from its financial obligation of his earned income or realized cash benefits from employment between his last service with TMD and his acceptance or declination of employment with MVT.

This decision is final and binding on the parties.



Victoria A. Lipnic
Assistant Secretary of Labor

IBEW Local 753 v. City of West Plains, MO
DSP Case No. 01-18-4
March 23, 2004
(Digest page no. A-589)

Summary: The Claimant alleged that the City failed to comply with its obligation under the Special Section 13(c) Warranty for Application to the Small Urban and Rural Program (Special Warranty), by failing to engage in collective bargaining with Local 753 over terms and conditions of employment. The Department determined that members of Local 753 are "transportation related employees" and are covered under the Special Warranty, even though their maintenance of transit vehicles is performed out of the City's Public Works Department, rather than its Transit Department. It was further determined that the Special Warranty cannot confer additional rights beyond those already established under State law, which in this case consisted of meet-and-confer rights and not collective bargaining rights as that term is understood in the private sector. The Department also decided that the meet-and-confer process in which the parties had engaged satisfied the Special Warranty's requirements for the preservation and continuation of collective bargaining.

In the matter of arbitration between:

IBEW Local 753 *Claimant*	
v.	DSP case no. 01-18-4
City of West Plains, MO *Respondent*	Issued: March 23, 2004

Origin of the Claim

Local Union 753 (Local 753) of the International Brotherhood of Electrical Workers (IBEW) brings this claim under the "Special Section 13(c) Warranty for Application to the Small Urban and Rural Program" (Special Warranty). The Department of Labor (Department) has certified the Special Warranty as providing the protections required by Section 5333(b) of the Federal Transit law, 49 U.S.C. § 5333(b)[1], for application to the Federal Transit Administration (FTA) grants of Federal transit assistance to the City of West Plains, Missouri (City) in the Federal Transit Administration's Small Urban and Rural Program under Section 5311 of the Transit law, 49 U.S.C. § 5311. Local 753 claims that the City has failed to comply with the requirements of the Special Warranty associated with all grants received by West Plains beginning in 1997, including FTA grant number MO-18-X021. Specifically, Local 753 claims that the City has failed to continue collective bargaining rights and has adversely affected rights and benefits of the employees represented by Local 753 by failing to meet and confer with Local 753 as required by Missouri state law.

Jurisdiction

The City opposes the Department's assertion of jurisdiction over this claim because, under Missouri State law, a public employer such as the City cannot enter into a collective bargaining agreement with the Union. The City argues further that Section 5333(b) cannot override State law to require the City to engage in collective bargaining and enter into a collective bargaining agreement with the Union.

[1] 49 U.S.C. § 5333(b) of the Federal Transit law is the recodification of Section 13(c) of the Federal Transit Act, formerly the Urban Mass Transportation Act of 1964, as amended.

The City accepted the terms of the Special Warranty as a condition of its receipt of Federal assistance. Section B(4) of the Special Warranty provides:

> (4) Any dispute or controversy arising regarding the application, interpretation, or enforcement of the provisions of this arrangement which cannot be settled by the parties at interest within thirty (30) days after the dispute or controversy first arises, may be referred by any such party to any final and binding disputes settlement procedure acceptable to the parties, or in the event they cannot agree upon such procedure, to the Department of Labor...for final and binding determination.

This claim concerns a dispute regarding the "application, interpretation, or enforcement" of the Special Warranty. Specifically, it concerns Section B(3) of the Special Warranty, which incorporates Paragraph (4) of the National (Model) Section 13(c) Agreement (Model Agreement), which provides as follows:

> (4) The collective bargaining rights of employees covered by this agreement, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued.
>
> The Recipient agrees that it will bargain collectively with the union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreement with the union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining....

The right to meet and confer is covered under the statutory requirements as a form of collective bargaining. ATU Local 1338 v. Dallas Transit System, case no. 80-13c-2, USDOL (1981); Employee Protections Digest, USDOL, p. A-248. Paragraph 4 of the Model Agreement requires that this right be preserved and continued as a condition of the receipt of Federal assistance. Local 753's allegation that the City has failed to continue collective bargaining rights constitutes a dispute regarding the application or interpretation of paragraph 4 of the Model Agreement. The dispute remained unsettled for more than thirty days after it arose, and the parties were not able to agree to a final and binding dispute resolution procedure. Consequently, the Department has jurisdiction over this claim under paragraph B(4) of the Special Warranty.

The Claim

Local 753 alleges that the City failed to comply with its obligation under the Special Warranty and Section 5333(b)(2)(B) to continue the collective bargaining rights of Local 753 and the employees it represents, by failing to meet and confer with the Local 753 in a meaningful manner concerning wages, vacation time, and other workplace issues.

Missouri State Law

Chapter 105 of the Revised Statutes of Missouri governs the labor relations between the City and its employees. Section 105.500(2) defines "Exclusive bargaining representative" as follows:

> ...an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees for purposes of collective bargaining.

Chapter 105.510 provides that employees of the City may join labor organizations and "bargain collectively." That section of the State law describes the term "bargain collectively," as "the right to present proposals to any public body relative to salaries and other conditions of employment...." Section 105.520 further describes the process of bargaining applicable to these employees:

> 105.520. Public bodies shall confer with labor organizations. – Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment.... Upon completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.

Claimant's Position

Local 753 states that the employees it represents in the City's Public Works Department (sometimes referred to as the Utility Department), including those who perform maintenance work on the transportation vehicles and associated equipment under the Federally funded Project(s), have designated Local 753 as their bargaining agent. Local 753 alleges that the City has failed to collectively bargain with Local 753 over terms and conditions of employment for these employees following certification of Local 753 as their bargaining agent in

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1997. Local 753 states that Missouri Law does provide authority for public employee unions and employers to enter into collective bargaining agreements. Local 753 also maintains that these employees, although not employed in the City's Transit Department, are nevertheless transit employees covered by the Special Warranty. Local 753 asserts that the City has failed to meet with Local 753 and to bargain in a meaningful manner as required by State law.

Respondent's Position

The City maintains that the City employees represented by Local 753 are not transit employees because they do not work in the City's Transit Department. The City also maintains that the Federal transit grant funds were received for, and applied to, only the City's Transit Department and no Federal funds were used to pay the wages and benefits of the City's Department of Public Works employees. Consequently, the City concludes that the Special Warranty does not cover these employees. The City states that it has not diminished any wages, benefits and working conditions of employees in its Transit Department, and that it has increased pay for Transit Department employees by significant amounts. The City affirmatively maintains that, with respect to the Department of Public Works employees represented by Local 753, the City has met with the Union, presented proposals, considered Union proposals, and conferred and discussed matters pertaining to the Public Works employees as required by State law.

Findings of Fact

Local 753 filed this claim on behalf of the employees of the Public Works Department. Pursuant to Section 105.500 of Missouri law, the Missouri State Board of Mediation conducted an election for bargaining representative and, in November of 1997, certified Local 753 as the exclusive bargaining representative of the bargaining unit:

> ...consisting of all full-time and part-time employees of the City Public Works Department including all DPW foremen, as well as the meter readers, the city hall janitor and the warehouse/invoice clerk, excluding department heads and all other city employees.[2]

[2] November 13, 1997 Certificate of Representation issued by the Missouri State Board of Mediation in International Brotherhood of Electrical Workers, Local 753 v. City of West Plains, Public Case No. R 97-022.

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Local 753 asserted that employees it represents perform maintenance work on the City's transportation vehicles and associated equipment.[3] The City did not deny that employees represented by Local 753 performed such work. Consequently, for purposes of this claim, the Local has established that its members performed maintenance work on the City's transportation vehicles and associated equipment.

Local 753 has continued to serve as the exclusive bargaining representative of the Public Works Department employees since that 1997 certification. Upon becoming the certified bargaining representative, the Union gained the right to bargain on behalf of these employees pursuant to Section 105.500 of Missouri law. Neither party asserts that the bargaining rights provided under that law have changed since Local 753 was recognized as the bargaining representative in 1997.

As a condition for receipt of the Federal grants of assistance the City agreed to abide by the terms of the Special Warranty providing the protections required by Section 5333(b). The first paragraph of Section A, "General Application," of the Special Warranty requires, among other things, that "the terms and conditions of this warranty...shall apply for the protection of the transportation related employees of any employer providing transportation services assisted by the Project ("Recipient"), and the transportation related employees of any other surface public transportation providers in the transportation service area of the project..."

Local 753 and the City participated in meetings and discussions on new terms and conditions of employment, but did not reach agreement on such new terms and conditions. Following these discussions, the City's negotiator presented to the City for its consideration the results of these discussions, including his recommendations for certain new terms and conditions of employment that would apply to these employees, including a wage increase that was sought by Local 753. The City subsequently implemented changes in the terms and conditions of employment applicable to these employees, including raising their wages.

Discussion and Conclusions

Coverage

The City asserts that the employees represented by Local 753 who perform maintenance work on transportation vehicles are not covered under the Special Warranty because they do not work in the City's Transit Department and

[3] The City has a Transit Department, whose employees have not chosen an exclusive bargaining representative.

because no funds received by the City from a Federal transit grant were used to pay the salaries or benefits of these employees. However, Section A of the Special Warranty includes in its coverage any "transportation related" employees of any employer providing transportation services assisted by the Project as well as other surface transportation providers in the service area of the project. The City is an "employer providing transportation services assisted by the Project," and maintenance of transportation vehicles is "transportation related." Neither the terms of the Special Warranty nor Section 5333(b)(2)(B) of the Transit Act limit coverage to employees who are paid from Federal grant funds.[4] Consequently, the employees represented by Local 753 who perform maintenance work on transit vehicles and related equipment are "transportation related" employees, and the Special Warranty covers them.

Preservation of Collective Bargaining Rights.

Section 5333(b) protects the status quo of collective bargaining rights, including meet and confer rights, but does not give a party additional bargaining, or meet and confer, rights that the party does not already hold from some source other than Section 5333(b). As incorporated into the Special Warranty and applied to this meet and confer situation, the Model Agreement's Paragraph (4) reference to "collective bargaining" must be understood as "meet and confer," and it cannot provide the Claimants with private-sector bargaining rights because they did not otherwise have such rights.

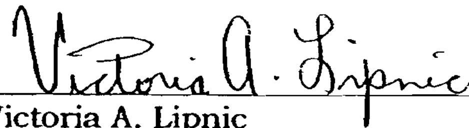
The parties agree that Section 105.500 of the Revised Statutes of Missouri governs their labor relations. This provision establishes a public sector, meet-and-confer relationship, not a collective bargaining relationship as that term is commonly understood in the private sector. While parts of that law refer to those meet and confer rights and procedures as "collective bargaining," the use of such terminology, by itself, does not establish private-sector collective bargaining rights or obligations for purposes of these Section 5333(b) protections. The meet and confer obligation established under Section 105.500 requires, for purposes of the Special Warranty, that the parties meet, confer and discuss proposals. There has been no demonstration in this case that the parties are required to bargain to "agreement" or to "impasse," as those terms are understood in the private sector. Local 753 gained the right to meet and confer in November of 1997 when it became the exclusive bargaining representative of these employees. In this claim there is neither suggestion nor

[4] *Compare,* Rail Employees Association v. Dallas Area Rapid Transit, case no. 00-13c-2, USDOL (2002), pp. 5-6; DIGEST, p. ____ (Transit grant recipient unsuccessfully argued that because it had never accepted operating assistance under the Federal Transit law, no effects on "operating" aspects (salaries, benefits, assignments, seniority, etc.) could be covered under the protective provisions applicable to its grant of capital, rather than operating, assistance).

evidence that Local 753 has any other bargaining rights. Nor does the record suggest that there has been any change in Missouri Law concerning the meet and confer rights held by the Local.

The City met with Local 753 on various occasions, exchanged and considered proposals, and discussed them to some extent. Following those meet and confer sessions, the City's negotiator offered his summary of appropriate terms and conditions for these employees, to the City's governing body for adoption, modification or refusal. No violation of the Special Warranty's requirement to continue the existing meet and confer rights has been established in this case. Either party remains free to pursue any remedies that may be available under Missouri state law with respect to the State of Missouri's collective bargaining and/or meet and confer requirements for public sector parties.

This decision is final and binding upon the parties.



Victoria A. Lipnic
Assistant Secretary of Labor
for Employment Standards

A-595

ATU, Local 898 v. Macon, Georgia
DSP Case No. 02-13(c)-2
July 19, 2002
(Digest page no. A-596)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: The Department closed the case administratively without decision or prejudice after Claimant failed to respond to requests for information.

U.S. Department of Labor

Employment Standards Administration
Office of Labor-Management Standards
Washington, D.C. 20210

Room N-5603
200 Constitution Ave. NW

202 / 693-1224

July 19, 2002

Leroy Jackson, President
Local 898, International Association of
Machinists and Aerospace Workers
3457 Walker Street
Macon, Georgia 31204

RE: ATU Local 898 v. Macon, Georgia
DSP Case No. 02-13c-2

Dear Mr. Jackson:

By letter of June 17, 2002 I informed you that if I did not hear from you by June 27, 2002 I would close this case administratively. As of today I have had no reply from you in this matter. Therefore the above-styled case is closed administratively without decision and without prejudice.

Sincerely yours,

Bruce M. Leet

Bruce M. Leet
Appeals Supervisor
for Employee Protections Claims

cc: Joseph McElroy, Director, Macon-Bibb County Transit Authority,
815 Riverdale Drive, Macon, Georgia 31202

ATU, Local 1256 v. El Paso
DSP Case No. 02-13(c)-3
September 11, 2002
(Digest page no. A-597)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimant filed a claim prematurely with the Department before pursuing local dispute resolution procedures contained in the 13(c) Arrangement. The Department dismissed the claim without prejudice and referred it back to the parties for consideration under local procedures.

U.S. Department of Labor

Employment Standards Administration
Office of Labor-Management Standards
Washington, D.C. 20210

Room N-5603
200 Constitution Ave. NW

202 / 693-1224
bleet@dol-esa.gov

September 11, 2002

Mr. George T. Myers
President / B.A., ATU Local 1256
P.O. Box 512331
El Paso, Texas 79951-0007

Mr. Raymond Telles
Assistant City Attorney
2 Civic Center Plaza, 9th Floor
El Paso, TX 79901

re: ATU Local 1256 v. El Paso
DSP case no. 02-13c-3

Dear Parties:

In this claim for Section 13(c) employee protections, the City of El Paso asserts that the claim is not properly before the Department of Labor because the local dispute resolution procedures in the Section 13(c) Arrangement have not been pursued. In reviewing Section 15 of the Protective Arrangement, and the information currently in the record, I find that the City is correct.

Section 15(a) of the Arrangement provides a procedure for raising and pursuing claims thereunder. That procedure contains the several steps, including filing the claim initially with the City, and if the claim is not immediately honored the claimant may request joint investigation of the claim with the City. Thereafter, if the claim is rejected by the City, "the claim may be processed as hereinafter provided in paragraph 15(b) below." There is no indication in the record to counter the City's assertion that these preliminary procedures have not been followed.

This claim is dismissed as premature and is referred back to the parties for consideration under the local procedures established in Section 15 of their 13(c) Arrangement. This dismissal is without prejudice to the Claimants and their pursuit of this claim.

Sincerely yours,

Bruce M. Leet

Bruce M. Leet
Appeals Supervisor
for Employee Protections Claims

Nonunion Employees v. New York City Department of Transportation
DSP Case No. 03-13c-02
December 9, 2003
(Digest page no. A-600)

Summary: The Claimants were 132 nonunion employees facing certain operational changes by the New York City Department of Transportation. They claimed the right to notice and discussion of the changes, pursuant to Department of Labor certifications, which provided nonunion employees "substantially the same levels of protection as are afforded to employees represented by the union." The Department determined that the collective rights for notice and negotiation, as stated in the union negotiated Protective Agreement, cannot be broadly construed to apply to individual, nonunion employees, and the claim of the nonunion employees for such rights was denied.

In the matter of arbitration between:

Nonunion Employees	)	
Claimants	)	
v.	)	OSP Case no. 03-13c-02
New York City Department of Transportation	)	Issued: May 24, 2004
Respondent	)	

DECISION

Origin of the Claim

This claim arises under Federal Transit Administration grants of financial assistance made to Respondent New York City Department of Transportation (NYDOT). Pursuant to Section 5333(b) of the Federal Transit law,[1] the Department of Labor (Department) must certify that fair and equitable labor protective provisions have been included when grants of assistance are made to transit operators. The Department has certified the protective arrangements for each of the applicable grants on the basis of: a) the terms and conditions in the August 8, 1975 Agreement (1975 Agreement) between Transport Workers Union (TWU) Local 100, Amalgamated Transit Union (ATU) Local 1179, and other local unions affiliated with the TWU and the ATU; several private transportation companies; and the Respondent; b) the additional provisions in Exhibit A to the 1975 Agreement; and c) the additional terms and conditions provided by the Department's letters of certification issued pursuant to Section 5333(b). Claimants in this case are 132 employees of four private bus companies[2] signatory to the 1975 Agreement that have contracted with the Respondent to provide bus service in and around the New York City metropolitan area. These employees are not represented by any union and are not covered by any collective bargaining agreement, and therefore are referred to as the "nonunion employees."

At issue in this case is paragraph 4 of the Department's certification letters, issued in connection with FTA projects numbered NY-03-0345, NY-03-0329, NY-90-X418, NY-90-X465, and others, which states:

[1] 49 U.S.C. §5333(b). This is the recodification of Section 13(c) of the FTA, formerly known as the Urban Mass Transportation Act of 1964.

[2] The four bus companies involved are Jamaica Buses, Inc., Command Bus Co., Inc., Green Bus Lines, Inc., and Triboro Coach Corporation. These companies will be collectively referred to as the "bus companies."

> Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local unions which are party to, or are otherwise referenced in the protective arrangements, shall be afforded *substantially the same levels of protection* as are afforded to the employees represented by the union under the August 8, 1975 agreement and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project. (Emphasis added.)

As the result of this paragraph in the Department's certification letters, employees that are not represented by the unions signatory to the 1975 Agreement are entitled to "substantially the same levels of protection" as those employees that are represented by the signatory unions. The claims at issue here require a determination regarding the meaning of "substantially the same levels of protection."

In their claim, the Claimants seek substantially the same levels of protection afforded represented employees under paragraph 8 of the 1975 Agreement. That provision states:

> In the event the Recipient contemplates any change in its organization or operations which will result in the dismissal or displacement of employees, or rearrangement of the working forces represented by the union as a result of the Project, the Recipient shall give reasonable written notice of such intended change to the Union. Such notice shall contain a full and adequate statement of the proposed changes to be effected, including an estimate of the number of employees of each classification affected by the intended changes. Thereafter, within 30 days from the date of said notice, the Recipient and the Union shall meet for the purpose of reaching agreement with respect to the application of the terms and conditions of this agreement to the intended changes. Any such change involving a dismissal, displacement or rearrangement of the working forces represented by the Union shall provide for the selection of forces from the employees represented by the Union on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by the intended changes shall be made on the basis of an agreement between the Recipient and the Union. In the event of a failure to agree, the dispute may be submitted to arbitration by either party pursuant to paragraph (9) of this agreement. In any such arbitration, the terms of this agreement are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to §5(2)(f) of the Interstate Commerce Act.

Respondent's Operational Plans

At the time of the submission of their claim, the nonunion employees alleged that the Respondent was in the midst of making operational changes regarding its use of the bus companies, and those changes would result in the dismissal or displacement of the nonunion employees of the bus companies. Claimants assert that the Respondent "threatens to act in the

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immediate future" in implementing such operational changes, thus triggering their right to substantially the same rights as those set out in paragraph 8 of the 1975 Agreement.

In response, the Respondent submits that, as the result of a competitive sourcing requirement to which it must adhere, it has considered for a number of years making changes to the operation of the bus lines. The Respondent concedes that among the changes it has considered over the years has been the transfer of the bus operation from the private bus companies to the Metropolitan Transit Authority (MTA), a public agency. The Respondent indicated that it had engaged in talks with the MTA regarding their assumption of the bus operations, and had set June 30, 2003, as a target date for the execution of an agreement between the MTA and the Respondent on the assumption of bus operations, but that this date had passed without an agreement. As recently as October 2003, however, the Respondent asserted that its talks with the MTA remained in their infancy, that no agreement on the transfer of the bus operations was imminent, and that state legislation, which would be necessary in order to provide the MTA the authority to operate a regional bus line, was not presently contemplated.

During the Department's consideration of the claim, the Claimants advised the Department that the Respondent announced to the press that it had entered into an agreement with the MTA to transfer, effective July 1, 2004, the operation of the bus service from the private bus companies to the MTA. The Department takes administrative notice of the Respondent's current operational plans, although the immediate nature of these plans has no substantive impact on the determination in this case.

Positions of the Parties

Claimants argue that pursuant to paragraph 4 of the Department's certification letters, they are entitled to substantially similar protections to those established in paragraph 8 of the 1975 Agreement. In particular, claimants assert that they are entitled to notice from the Respondent of any contemplated operational changes that will result in dismissal or displacement of employees, and are further entitled to meet with the Respondent to "review and discuss" all contemplated changes.

The Respondent argues that the Claimants are not entitled to paragraph 8 rights for a number or reasons. The Respondent first advances various procedural roadblocks to the effectuation of the Claimants' argument, including that the Respondent "ha[s] no actual plan" to make operational changes and that therefore paragraph 8 rights, if they exist, are not yet triggered. In addition, the Respondent argues that in order for paragraph 8 rights to apply, any contemplated changes must be made "as the result of the Project," and that this causal condition has not been met. On the merits of Claimants' argument that they are entitled to "substantially the same levels of protection" as in paragraph 8, the Respondent argues that such protections are uniquely applicable to employees represented by the union signatories to the 1975 agreement and cannot be applied to the nonunion Claimants in this case.

Discussion and Conclusion

For the reasons set forth below, it is determined that the Claimants are not entitled to notice and the opportunity to negotiate with the Respondent regarding contemplated operational changes under paragraph 8 of the 1975 Agreement. Thus, it is unnecessary to reach a conclusion on the procedural issues raised by the Respondent, including whether the Respondent's operational changes are the result of a federal project.

Section 13(c) agreements contain provisions, as does the 1975 Agreement, requiring the grantee or recipient to provide advance notice to the union of contemplated changes in the organization or operation of the transit system that may result in the dismissal or displacement of employees or in the rearrangement of work forces. Once notice has been provided, the grantee and the signatory union are required to agree on implementing terms to apply the Section 13(c) agreement to the intended changes. Implementing agreements had their origin in rail labor protection, where they typically addressed seniority roster "dovetailing," the assignment of work to affected employees, the consolidation of work rules, and other transitional matters affecting groups of employees.[3] This concept was subsequently applied in the transit industry.

Clearly, in their origin, rights to notice of operational changes and the subsequent negotiation over the impact of those changes presumed that the rights would inure to a bargaining representative that could mitigate any adverse affects to the employees on a collective basis. This application is underscored by examining the language of paragraph 8 itself, which requires with particularity that "the Recipient shall give reasonable written notice of such intended changes *to the Union*," and that "the Recipient *and the Union* shall meet for the purpose of reaching agreement with respect to the application of the terms and conditions of [the 13(c) agreement] to the intended changes." (Emphasis added.)

Moreover, the right to notice and negotiation over the effects of proposed changes are intertwined. Unlike the right to bargain a first-time agreement, which is not entirely dependent on advance notice to the other party, the right to negotiate over the impact of contemplated operational changes where an existing agreement is in place is meaningless absent notice of the changes and the nature of those changes.[4] In the context of anticipated operational changes, the right to bargain *presupposes* that the party contemplating the changes will provide reasonable notice to the affected party. The right to bargain over the impact of contemplated changes is hollow without such prior notice. Similarly, the right to be notified of a proposed change is

[3] *See "Transit Labor Protection – A Guide to Section 13 (c) Federal Transit Act,"* National Research Council (1995).

[4] Similarly, under the National Labor Relations Act, the obligation to negotiate an initial collective bargaining agreement consists of "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...." 29 U.S.C. §158(d). By contrast, in the case of an existing collective bargaining agreement that one party seeks to terminate or modify, the same duty to bargain includes the obligation to "serve written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or...sixty days prior to the time it is proposed to make such termination or modification." 29 U.S.C. §158(d)(1). By analogy, it is apparent that when operational changes have an impact on an existing arrangement, the duty to bargain over those changes, and the attendant bargaining right of the other party, cannot be satisfied without prior notification to the other party of the proposed changes. The two components are entirely interdependent.

relatively empty without the concomitant right to bargain over the impact of the proposed change.

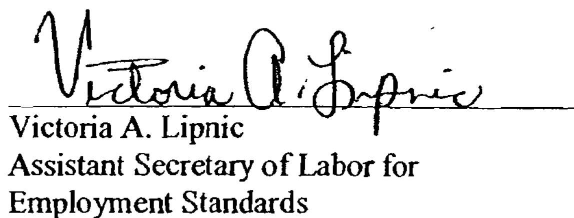
Because of their nature, not all collective rights and obligations contained in the 1975 Agreement can be interposed to the same affect on individual employees such as the Claimants. For this reason, the Department's certification letters require that the recipient provide not identical or indistinguishable protections for employees unrepresented by signatories to the Section 13(c) agreement, but rather provide "substantially the same" levels of protection for those employees. There are some rights set out in Section 13(c) agreements, such as the right to submit claims to a collectively bargained grievance-arbitration process, that presume the existence of a collective bargaining representative. Such rights do not have "substantially the same" meaning or application in the absence of such an employee representative. *See, e.g., Swanson v. Denver Regional Transportation District*, DEP Case No. 77-13c-24, Employee Protections Digest A-186 (1981) (an individual employee who was not represented by the union was not entitled to have applied to him terms intended to apply only to bargaining unit members). As stated in *Swanson*, "[w]here a provision in a protective arrangement is by its terms directly applicable to members of a bargaining unit, employees who are not members of the bargaining unit are entitled to substantially the same level of protection as provided to bargaining unit members. *Provision of substantially the same level of protection does not, however, require the broad interpretation of [the Section 13(c) agreement] proposed by the Claimant.*" *Id.* at A-194 (emphasis added).[5]

This point is underscored by examining the Department's nonunion employee certification letter. In cases in which neither the grantee's employees, nor the employees of any other transit provider in the service area are represented by a union, the Department nevertheless must certify that the recipient has agreed to the application of a basic set of statutorily sufficient labor protective provisions. The Department does so by issuing a nonunion certification letter that compels the grant recipient to adhere to certain protective provisions, such as the maintenance and preservation of previously existing employee rights and privileges and the financial responsibility to protect and compensate employees who are placed in a worse position as a result of the federal project. Notably, nowhere in the Department's nonunion certification letter is any mention of the rights contained in the instant Section 13(c) agreement to notice of contemplated changes and the ability to bargain over the impact of those changes. Such rights, as stated in the 1975 Agreement, are collectively oriented and have no "substantially similar" application to individual employees.

[5] On this point, it is not suggested that notice, particularly notice involving work reduction or layoff, to individual employees not represented by the signatory unions would not be of benefit to those employees. This decision holds only that the 1975 Agreement in this case provided for notice in the context of an attendant bargaining right, which indicates, for the reasons stated above, that it flows to the employee representatives rather than to individual employees. Similarly, it is not suggested as a broad principle that many rights and obligations enumerated in the 1975 Agreement can arguably be characterized as exclusively collective in nature and therefore inapplicable to individual employees. If this were so, the meaning of the Department's certification letter requiring that employees not represented by the signatory unions be provided "substantially the same levels of protection" would be lost. Rather, this decision should be viewed as one that is narrow in context, with applicability only to the limited issue of the meaning of "substantially the same" notice and negotiation rights contained in paragraph 8 of the 1975 Agreement.

There is no precedent in this area, nor do the Claimants cite any, for the expansive proposition that essentially collective rights contained in the Section 13(c) agreement can be broadly construed to apply to individual employees unrepresented by the signatory unions. Nothing in the terms of the Department's certification letter, the 1975 Agreement, or the statute itself compels such a result. For the foregoing reasons, the Claimants' claim for notice and negotiation in this matter is denied.[6]

Dated: May 24, 2004



Victoria A. Lipnic
Assistant Secretary of Labor for
Employment Standards

[6] The Claimants requested that the Department bifurcate their claim in this matter into two parts. In this first part, which is fully addressed by this Decision, the Claimants assert rights to notice and negotiation under paragraph 8 of the 1975 Agreement. In the second part of their claim, which remains to be presented and decided, the Claimants will assert rights to substantive protections under the 1975 Agreement.

A-605

James Lindsey et al. v. Dallas Area Rapid Transit Authority
DSP Case No. 03-13(c)-06
April 15, 2008
Final Decision
(Digest page no. A-615)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimant had been previously found to have standing to represent displaced or dismissed employees of a contractor whose service agreement was terminated for convenience. James Lindsey et al. v Dallas Area Rapid Transit Authority, DSP Case No. 03-13(c) – 06, Interim Decision. The Dallas Area Rapid Transit Authority (DART) had terminate its service agreement with Claimants' former employer 27 months before its termination date, and took over direct operation of the services. Less than 25 percent of Claimants were rehired, and those who were returned as probationary employees without seniority at entry level wages and hours. Claimants argued unsuccessfully that operating and capital funds at DART were "inexplicably intertwined," and that no mutually agreed upon forum was available to pursue a claim regarding the impacts of operating assistance. Lengthy discovery issues ensued. The Department analyzed the claim according to the three step burden of proof typical of 13(c) arrangements. Claimants met the first step: to identify the federal project or use of federal funds and the harm that Claimants sustained as a result. The second step shifted the burden to DART to prove that the alleged harm was not caused as a result of the federally funded project. The Department concurred in DART's contention that it had terminated the service agreement because of poor performance on the part of the contractor. The third and final step of the analysis shifted the burden back to Claimants to prove that federal funding did play a role in the harm to their employment. The Department found that Claimants failed to meet their burden, and concluded that the contract had been terminated for performance reasons rather than as a result of a federally funded project.

In its final decision, the Department found that federal assistance had not been used to terminate the contract prior to the end of its term, but rather, that the contract had been terminated for performance reasons.

In the Matter of Arbitration:

James Lindsey et al. *Claimants*	)	DSP Case No. 03-13c-06
v.	)	**FINAL DECISION**
Dallas Area Rapid Transit Authority *Respondent*	)	Issued: April 15, 2008

THE CLAIM

This claim involves some 400 former employees of First Transit, Incorporated (FTI), a former contract operator of certain fixed route services of the Dallas Area Rapid Transit Authority (DART). DART terminated its service agreement with FTI on October 6, 2003, twenty-seven months before it was due to terminate, and took over direct operation of the transit services, employing new hires and somewhat less than twenty-five percent of the former FTI employees. Those who were rehired were employed as probationary employees without seniority and at entry level wages and benefits.

The FTI employees had been represented by Amalgamated Transit Union Local 1635 (Local 1635). The termination of FTI's contract resulted in the loss of most of Local 1635's membership at a time when its President was too ill to keep up with the operation of the Local. Mr. James Lindsey, an Executive Board Member of Local 1635, filed a timely local claim against DART, as authorized by Local 1635's Vice President and four Executive Board Members. The claim was on behalf of all former FTI employees who were dismissed or rehired by DART at lower seniority, wages, and benefits. When DART challenged Mr. Lindsey's authority to file the claim, he attempted to clarify his authority and presented a list of some 400 individuals who allegedly were affected by the termination of the FTI contract. The list was apparently composed of all union and nonunion employees of FTI involved in the DART contract service. Mr. Lindsey also announced, at that time, his intention to file claims on behalf of each affected individual separately, if DART would not consider them as a group.

Following rejection of the claim by DART, Mr. Lindsey filed a timely claim with the Department of Labor. DART immediately questioned Mr. Lindsey's

authority to file with the Department based on the circumstances of Local 1635, Mr. Lindsey's level in the Local 1635's leadership hierarchy and the applicability of certain of the protective arrangements cited in the claim. Given these circumstances, the Department concluded that the issue of Mr. Lindsey's standing to pursue the claim needed to be resolved as a preliminary matter.

On October 11, 2005, the Department issued an Interim Decision finding that Lindsey and the bargaining unit claimants he sought to represent had standing by reason of an authorizing memorandum from Local 1635's Vice-President and four Executive Board Members issued during the Local President's incapacitation.[1] Allegations by DART that the Local had closed and that the Local's trustee and the Amalgamated Transit Union International (ATU) opposed the claim were not supported by the record. Additionally, the Department found that Lindsey could represent non-bargaining unit and service area employees, pursuant to the terms of a 1992 Addendum to the ATU-DART protective agreement for capital assistance, if they had satisfied local claims procedures and provided him with signed authorizations by the closing of the record for this arbitration. All individuals who were either members of the former FTI-Local 1635 bargaining unit or who appeared on the list of employees presented to DART with the October 2003 local claim were deemed to have satisfied the local procedures.

THE PROTECTIVE ARRANGEMENTS

In his claim before the Department, Mr. Lindsey cited the certifications of employee protections at DART under Section 5333(b) of Title 49 of the U.S. Code, Chapter 53. For operating assistance, including capitalized preventive maintenance, the protections are memorialized in the Operating Assistance Protective Arrangement dated October 22, 2003. The 2003 Operating Assistance Protective Arrangement covers employees of DART and other mass transit employees in the service area. ATU Locals 1338 and 1635, as representatives of the direct employees of DART and DART's contractor employees, respectively, are deemed parties to the Arrangement. For capital assistance, the employee protections can be found in three documents: 1) the Department's September 30, 1991 certification; 2) Attachments A and B of the September 30, 1991 certification; and 3) a September 1992 Addendum. The September 1992 Addendum applies to employees of private mass transportation companies in the service area of DART, such as FTI.

[1] See *James Lindsey et al. v. Dallas Area Rapid Transit Authority*, DSP Case No. 03-13c-06, INTERIM DECISION, October 11, 2005, Employee Protections Digest. The Interim Decision was limited to the question of the standing of the Claimants to file with the Department of Labor for a final and binding resolution of the dispute. The merits of the claim were not addressed.

In the Interim Decision, the Department ruled that it would not hear claims relating to Federal operating assistance, because the October 22, 2003 Operating Protective Arrangement provides for private arbitration under the auspices of the American Arbitration Association and does not contemplate a role for the Department.[2] The September 1992 Addendum, on the other hand, clearly provides for the final and binding settlement of disputes involving capital assistance by the Department, if the parties are unable to agree on another procedure. Contrary to the assertion of DART, the Department ruled in the Interim Decision that the term "representative" as used in Paragraph (16)(a) of the Addendum does not refer exclusively to Local 1635. Therefore, the Department concluded that employees, individually or through a chosen representative, may request a final and binding determination by the Department of issues involving capital assistance under the September 1992 Addendum.

The September 1992 Addendum contains a burden of proof at Paragraph 16(b). This paragraph applies to controversies, such as this, concerning whether or not employees have been affected by a Federal grant and are thereby entitled to protections as specified in Title 49 of the U.S. Code, Chapter 53, Section 5333(b) and the Department's certifications of employee protections for DART. Paragraph 16(b) reads as follows:

> (b) In the event of any dispute as to whether or not a particular employee was affected as a result of the Project, it shall be the obligation of the employee to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the burden of the Public Body or the private transit employer, whichever is the party to the dispute, to establish affirmatively that such effect was not a result of the Project, by proving that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee, even if other factors may also have affected the employee.

POSITION OF THE CLAIMANTS

The Claimants contend that Federal assistance was used to terminate the FTI contract before the end of its term and facilitate DART's assumption of direct operation of the service. They initially cited Federal Transit Administration

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[2] The Department has consistently ruled that, where a Claimant is a member of a unit represented by a labor union and the protective agreement or arrangement to which the union is a party provides for a final settlement of claims without reference to the Department of Labor, the Department does not have jurisdiction to consider the claim. (See *Calvin (Grimes) Muhammad v. Houston Metro*, OSP Case No. DSP-97-13c-2, March 9, 1998, Employee Protections Digest, p. A-469.)

(FTA) Project Number TX-90-X582 and capital preventive maintenance as the Federal project that had affected the FTI employees. However, the letter to the Department accompanying Mr. Lindsey's claim form also mentioned certain new buses that were funded by the same project. In subsequent communications and briefs the Claimants listed additional Federal grants which they believe may have caused or facilitated the takeover of the FTI service. Some of these grants provided for the purchase of buses, which the Claimants alleged were used as replacements for those operated by First Transit.[3] They also suggested that other grants may have funded such activities as the closeout payment to FTI for the early termination of its contract, the hiring and training of replacement workers, the repair and rehabilitation of buses neglected by First Transit, and improvements to maintenance and other facilities previously utilized by First Transit but owned by DART.

On several occasions following the Interim Decision, the Claimants unsuccessfully petitioned the Department to arbitrate this claim based on the alleged effects of both operating and capital assistance. They alleged that the capital preventive maintenance in FTA Project Number TX-90-X582 was not traditional operating assistance. They also claimed that operating and capital funds at DART were "inexplicably intertwined" in effectuating the 2003 operational change which resulted from the takeover of FTI service by DART. Additionally, the Claimants put forth several theories for the consolidation of separate arbitrations on operating and capital assistance based on the commonality of the issues; undue prejudice, delay and cost; and the possibility of conflicting or inconsistent rulings or awards.

The Claimants further argued, unsuccessfully, that no mutually agreed upon forum was available to pursue a claim based on the effects of operating assistance. During the course of this arbitration, they filed for arbitration with the American Arbitration Association (AAA), as provided under the terms of the 2003 Operating Assistance Protective Arrangement. DART, however, refused to join in the request. Despite the Claimants' reference to the protective arrangements and the Department's ruling on their standing to arbitrate similar issues based on capital assistance, the AAA found that no contract or agreement to arbitrate existed between the Claimants and DART on the operating assistance matter. The AAA, consequently, administratively closed the Claimants' arbitration request on July 6, 2006.

The Claimants petitioned for broad discovery on the alleged use of operating and capital assistance in the abrogation of the FTI contract and takeover of the contracted service. They claimed that Federal assistance was used in the termination of the FTI contract; the assumption and direct operation by DART

[3] All buses operated by First Transit in DART service were provided and owned by DART.

of FTI service and maintenance; the repair of buses operated by FTI but owned by DART; the replacement of FTI rolling stock with new buses; physical plant improvements necessary for bringing the FTI service in-house; and other unspecified activities necessitated by the abrogation of the FTI service contract. Furthermore, they suggested that operating and capital funds were inseparable or had been intermixed in some of these activities. On March 26, 2007, the Department issued a discovery order which allowed the examination of operating and capital expenditures, but specified that only capital expenditures would be considered in the final arbitration decision.[4]

The Claimants subsequently embarked on a six-week period of discovery as described in the Discovery section of this decision. A forensic accountant was employed by the Claimants to examine FTA grant dispersals, DART expenditures of Federal funds, and related general ledger entries in DART's financial records. The Claimants requested documentation of events and expenditures along five areas of inquiry and deposed DART's Chief Financial Officer (CFO).

The CFO testified that DART had considered several cost saving scenarios, involving the potential termination of the FTI service contract, and that these had been summarized in a short analytical document. The CFO further stated that the final decision to terminate the FTI contract had been based largely on operational, rather than financial, grounds. A chief consideration was FTI's failure to properly maintain DART's buses and other property. In fact, DART anticipated that the termination of the FTI contract would save little or no money over the long-term.

The Claimants alleged that DART failed to fulfill its discovery obligations by withholding much of the information and documents requested. They claimed that DART did not produce documents relating to three of the five categories in their requests. While DART provided 2800 pages of reimbursement information from the FTA computer database, it would not furnish general ledger information from its own accounting system. DART did not provide documents from a specific request following and partially derived from the Claimants' deposition of its CFO. These included general ledger information and the cost-benefit analysis concerning the termination of the FTI contract; documentation and reimbursement information for physical plant improvements possibly related to the termination; documentation and reimbursement information for the purchase of certain buses; cure notices concerning FTI's maintenance

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[4] The discovery order ruled that the Department is not an appropriate avenue for appeal or redress of any refusal to arbitrate by a party to the October 22, 2003 Operating Assistance Protective Arrangement or any ruling of lack of jurisdiction by an arbitrator or administrating agency. The Department stated that the Arrangement is in the nature of a contract under which the parties may have a remedy at law. It also affirmed that the Department is not a party to the Arrangement and lacks any authority to enforce the Arrangement.

deficiencies and receipts, disbursements, and other information regarding DART's maintenance of buses formerly operated by FTI; DART's bus replacement schedule; memos from planning meetings referenced by the CFO; and information concerning the final payout DART negotiated with FTI when it abrogated the service contract.

The Claimants maintain that DART's failure to fulfill the Department's scheduling and discovery order deprived them of the opportunity to make a forensic accounting evaluation of the contract's termination and related expenditures. They conclude that, since the termination resulted in no cost savings, despite immediate reductions in routes, salaries, and employment levels, offsetting capital expenditures must have occurred, related to the termination, of the type typically reimbursed by Federal grants. They state that they were deprived of a reasonable opportunity to develop and prove their claim by DART's discovery failures. As a consequence, they call for the Department to reopen and enforce its discovery order or draw an inference that the documents withheld would prove their allegations. As a remedy they request an award to the Claimants of a priority of reemployment and displacement or dismissal allowances.

POSITION OF THE RESPONDENT

DART alleged that the Claimants failed to meet the first step of their burden of proof, concerning capital assistance, because their initial claim cited only the capital preventive maintenance portion of FTA Project Number TX-90-X582.[5] Capital preventive maintenance funds are treated as operating assistance in the Department's labor protective certifications and are thus not within the purview of this arbitration. The funds had been used by DART to reimburse itself retroactively, as permitted by the FTA, for Fiscal Year (FY) 2002 vehicle and non-vehicle maintenance performed by its three contractors, FTI, ATC Vancom, and Herzog Transit Services. Consequently, DART believed that the Claimants had failed to address any capital assistance project and draw a nexus between any capital funds and the harms that had befallen them. DART thus opposed any further discovery and moved for a dismissal of the complaint.

The Respondent additionally countered that the Claimants were affected solely by the termination of the FTI service contract and that the termination was neither caused by nor carried out with Federal funds. DART cited two reasons for the abrogation of the contract.

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[5] The applicable burden of proof is reproduced in the section of this decision entitled *The Protective Arrangements*. An explanation of the burden of proof is included in the *Discussion* section.

First, a severe budget crisis occurred in FY 2003, because sales tax revenue to DART had declined for three years in a row and was projected to fall by 33 percent over the long-term. This prompted DART to cut its operating budget by $12.5 million and scale back its capital program by $1.4 billion. Included in the cutbacks were the elimination of 17.8 percent of the routes formerly operated by FTI and the partial elimination or reduction in frequency of 10.9 percent of the remaining former FTI routes. DART also eliminated 4.7 percent of the routes it operated directly and partially eliminated or reduced frequency on an additional 30.9 percent of its routes. Within this context, DART was able to cancel $65 million in payouts over the next 27 months by terminating the FTI contract "for convenience" and negotiating a one-time cash settlement of $1.5 million with FTI.

Second, DART had experienced continued problems with FTI's maintenance of DART-owned buses and equipment. Contract performance issues relating to such deficiencies were communicated to FTI by letter on March 20, 2001, December 5, 2001, and May 9, 2003. In November 2001, DART inspected a total of 30 buses at two FTI operated facilities, and all 30 were found to be inadequately maintained under contract standards. The December 5, 2001 communication warned FTI that the deficiencies in maintenance endangered the performance of its contract and, if not corrected, could result in its termination for default. The May 9, 2003 communication presented a recent statistical process control inspection which, by extrapolation, concluded that 89% of the DART fleet operated by FTI was in service with defects that did not comply with its operating contract. Once again, DART warned FTI that the condition of DART's buses "places your continued performance under the Contract in grave danger." By letter dated June 25, 2003, DART notified FTI that their contract was "terminated in whole for [DART's] convenience, effective October 6, 2003." The notice further directed FTI to submit a settlement proposal within 14 days. Thereafter, the parties negotiated a final payment of $1.5 million which, DART maintains, avoided the litigation that would have resulted had DART terminated the contract for substandard maintenance.

DART further maintains that no Federal capital assistance received by it adversely affected the Claimants and that the Claimants failed to prove any such connection. DART provided the Claimants with information on five years of Federal capital grants, which, it stated, failed to show any causal connection between Federal funding and the negative effects on the Claimants. With regard to Federal Grant Number TX-90-X582, cited by the Claimants, capital assistance funds were accepted for light rail and transit center construction unrelated to the FTI service, the purchase of fare collection and dispatch equipment, and the purchase of 16 replacement buses. DART alleged that the number of buses in its active fleet was not changed by the 16 buses and that they were not delivered until one year after the termination of the FTI contract. Capital assistance received from other Federal grants in FY 2003 funded unrelated construction activities and a delayed payment for eleven buses

delivered in 1999. DART concluded that the Claimants were unable to draw any connection to effects on former FTI employees from any Federal grant.

With regard to Federally funded buses, DART insists that the Claimants failed to show any relationship between the termination of the FTI contract and/or the harms that befell them and any retirement, purchase, or repair of buses. While the Claimants raise the composition of DART's fleet before and after the termination of the FTI contract, the Respondent states that such is merely a reflection of the severe economic crisis that it experienced at the time. DART states that reductions in its bus fleet actually began in 2001. In 2003, however, the aforementioned service cutbacks in both FTI and DART routes necessitated a 13.4 percent reduction in DART's overall fleet in one year. However, FTA standards concerning the useful life of transit vehicles and previous commitments to a bus replacement schedule resulted in both bus retirements and purchases during the period.[6] DART holds that there is no connection between the FTI contract termination and the resulting bus deliveries.[7] While 90 40-foot buses were delivered in 2002, this followed the retirement of 165 buses that had reached the end of their useful life in late 2001. Similarly, the delivery of 80 40-foot buses in 2004 followed the retirement of 92 similar buses in 2003. DART also renegotiated a contract in order to reduce by 35 the total number of 40-foot buses scheduled for delivery in 2005 and placed 50 three-year-old 30-foot buses in a non-active reserve fleet.

DART states that the fleet it provided to FTI did not differ significantly in age from the vehicles it operated directly. It had a rotation policy which circulated vehicles between the DART and FTI fleets on a regular basis. DART also points to its May 9, 2003 cure notice, which lists maintenance failures by vehicle and shows that all inspected buses were between two and four years old. The cutback in the overall size of DART's fleet, FTA rules concerning the retirement of vehicles past their useful life, and existing commitments to purchase buses may have resulted in the appearance of a reduction in the age of DART's fleet. However, DART states this was not a reason for the abrogation of the FTI contract and had no effect on FTI employees.

DART also states that no Federal capital funds were used to cure the maintenance deficiencies of FTI or to rehabilitate FTI operated vehicles after its contract was terminated. No budget line item was included in the Federal Grants provided to the Claimants that would have permitted DART to use Federal Funds, other than capital preventive maintenance, to maintain or rehabilitate FTI buses. DART points out that in FY 2002 through 2006, it spent

[6] The FTA standard for the useful life of a 35 to 40-foot transit bus is 12 years or 500,000 miles.

[7] The Claimants had alleged that DART abrogated the FTI contract so that it could operate the service with newer buses and/or that DART ended the contract so that it could bring the maintenance of its new buses in-house.

$820 million on capital expenses, only 29 percent of which was from Federal assistance. To the extent that FTI buses needed repairs over $5000, which would be considered a capital expense by DART, those repairs were made with non-Federal funds. Similarly, DART points out that no Federal funds were used to renovate DART's facilities so that it could operate the FTI service directly.

DART also states that no Federal funds were used to terminate the FTI contract. The $1.5 million payout to FTI, which terminated the operating contract "for convenience," was not eligible for Federal reimbursement. It was not a concession by DART that FTI had not defaulted on its obligations by failing to maintain DART equipment. Rather, it was a negotiated settlement that avoided litigation. The contract was not "acquired" as suggested by the Claimants. It simply ended, and there is no continuing asset represented by it. Regarding DART's financial crisis, the termination of the FTI contract was one of several options considered. While not the most cost effective option, DART estimated that it saved $14 million per year, not including the avoidance of costs that would have resulted from the continuance of FTI's maintenance deficiencies.

DISCOVERY

The Claimants requested "limited and incremental discovery ... under DOL supervision." They asked for the opportunity to examine books and records required to be kept under the terms of the protective arrangements and to make appropriate document requests related to the use of Federal funds. Additionally, they requested the authority to depose DART and FTI officials, as necessary.

In a March 26, 2007 scheduling and discovery order, the Department granted the Claimants discovery "for the purposes of examining FTA grant dispersals, DART expenditures of Federal funds, and related matters which may have affected them." The Department declined to directly supervise the discovery, but reminded the parties of their obligations for recordkeeping and the exchange of information under the protective arrangements.[8] The discovery permitted the examination of grant awards and expenditures involving operating or capital funds, but the Department reiterated and emphasized that only capital expenditures would be considered in the final arbitration of the claim.

[8] Section 11, Paragraph 16(a) of the September 1992 Addendum contains a general recordkeeping requirement, and Section 12, Paragraph 18(b) contains requirements for the exchange of information relative to a claim. The *Discussion* section of this decision reprints and discusses these provisions.

The Department advised that the discovery should be conducted with a minimum of inconvenience, disruption and expense to all parties. DART was requested to appoint one or more knowledgeable officials to assist the Claimants in their discovery, and the Claimants were allowed to select one DART official for the purposes of a written or oral deposition. Counsel for the Claimants and DART were asked to formulate and agree on a plan and schedule for discovery and communicate such to the Department within fourteen calendar days of the scheduling order. The discovery was to be completed within thirty days thereafter.

The parties did not formulate and agree on a plan and schedule for the discovery as required in the Department's scheduling order. Fifteen days into the 30-day discovery period, the Department received a letter from the Claimants' counsel alleging "stonewalling and/or discovery abuse" on the part of the Respondent. The communication requested enforcement of the Department's scheduling order as it pertained to the appointment of a knowledgeable DART official to assist the Claimants in their discovery and the identification and production of documents. The Claimants also requested an extension of the deadline for the completion of discovery, in view of the lack of any dialogue to date with DART's counsel. DART, on the other hand, blamed any delays on the Claimants.

In response to this sparring, the Department reproached the parties for not formulating and agreeing on a plan and schedule for discovery. The extension request was denied, and the Department warned the parties that failure to comply with the instructions in the scheduling order could result in an adverse inference being drawn in the arbitration against the responsible party.

During the course of discovery DART refused to answer general questions, which it characterized as "interrogatories." When the Claimants asked that DART identify certain categories of documents so that the Claimants could judge their relevancy to the discovery, DART judged the request as not specific enough for reply. Approximately five days before the end of the discovery period DART recognized an inquiry from the Claimants as specific and partially within the scope of the Department's discovery order. DART then provided the Claimants with certain records of grant dispersals and expenditures of FTA funds from 1998 through 2005. Subsequently, DART provided the Claimants with copies of its December 2001 and May 2003 maintenance cure orders, FTI's responses to the December 2001 order, maintenance work orders, and descriptions of costs incurred by DART in the repair of buses used by FTI, all of which it characterized as beyond the scope of the discovery. DART then pronounced that it had fully satisfied the document production requirements of the Department's scheduling order.[9]

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[9] Well after the discovery period, and nearly one month after the Claimants' final brief, the Respondent placed in the record a short cost-benefit analysis of several options concerning the

In a letter to DART, following the deposition of its Chief Financial Officer and shortly before the end of the discovery period, the Claimants pointed out that they had been provided with only a small portion of the documents they requested. They listed eight documents or classes of documents still needed for their final brief. Among them were general ledger entries concerning the termination of the FTI contract and repair of FTI buses; cost-benefit and planning information concerning the contract termination; bus replacement schedules and general ledger data on certain bus purchases; documents concerning improvements to DART's physical plant; and documents involved in the contract termination and settlement payment.

In their final brief, the Claimants alleged that "DART systematically failed to adhere to the Department's directives with regard to discovery, and the failure to produce documents robbed Claimants of the opportunity to do a true forensic accounting evaluation." Consequently, they petitioned the Department to sanction DART by assuming that the documents not produced would benefit the Claimants' case. The Claimants subsequently objected to the close of the record in this arbitration until DART produced the documents they had requested and they were given a second opportunity to depose a DART official based on the new documents. DART, on the other hand, stated that its participation in the discovery both exceeded the requirements of the Department's scheduling order and provided more information than the Claimants could reasonably anticipate. Following its final brief, DART filed a counter objection to the Claimants' objection and moved that the record be closed.

Following a 15-day notice to the parties, the Department closed the record in the arbitration. The objections and counter objections were noted, and it was stated that they would be dealt with in the Department's final decision.

DISCUSSION

Paragraph 16(b) of the September 1992 Addendum contains a burden of proof typical of protective arrangements under 49 U.S.C. Sec. 5333(b) of the Federal Transit law. The burden of proof is essentially a three step process that requires the Claimants, at the first step, only to identify the Federal project or use of Federal funds that affected them and state the circumstances of the project alleged to have brought about their harms. The second step of the burden of proof requires DART to prove that factors other than a Federal

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potential termination of FTI's service contract. The existence of this document had been disclosed during the Claimants' deposition of DART's Chief Financial Officer and was requested by the Claimants thereafter, during the period of discovery.

project affected the Claimants. If this is accomplished, the Claimants must prove that Federal funds affected them, at least in part, in order to prevail.

The Claimants, in this case, have satisfied their initial burden by identifying FTA Project TX-90-X582 and other Federal grants and describing how those Federal funds allegedly caused or supported DART's termination of the FTI contract and assumption of the FTI operations, which caused them to lose their jobs completely or to be terminated from FTI and rehired by DART at significantly reduced wages and benefits. As set forth more fully above in the section regarding the Claimants' position, they alleged that they were harmed because DART used Federal funds from FTA grant TX-90-X582 and others to purchase buses that replaced those formerly operated by FTI, repair and rehabilitate buses formerly operated by FTI, improve maintenance and other facilities previously used by FTI, hire and train replacement employees, and fund the closeout payment to FTI for early termination of the contract.

DART's responsibility at the second step of the burden of proof is "to establish affirmatively that such effect was not a result of the Project, by proving that factors other than the Project affected the [Claimants]." (Paragraph 16(b), September 1992 Addendum.) In this instance, DART has asserted that its termination of the FTI contract and assumption of the service was motivated by a significant reduction in sales tax revenue and deficiencies in FTI's maintenance of DART equipment. However, DART cannot meet its burden simply by articulating reasons unrelated to Federal funding; rather, DART must demonstrate that the sales tax shortfall and deficient maintenance caused it to cancel the contract with FTI and bring that operation in-house. Although the record in this arbitration is replete with documents which, on their face, show that DART faced serious financial challenges and performance problems related to FTI's maintenance of DART's equipment, it is not possible to determine whether DART has successfully supported its assertion without reviewing evidence that may counter DART's position.

The Claimants sought discovery in order to obtain evidence that would disprove DART's alleged reasons for terminating the contract, as well as prove their claim at the third step of the burden of proof that Federal funding played a role in DART's termination of the FTI contract and takeover of its service. The discovery process operates within the framework provided in the protective arrangements, which in this case is broadly stated. Section 11, Paragraph 16(a) of the September 1992 Addendum contains a general recordkeeping requirement which reads in pertinent part as follows:

> The Public Body and private transit employer (as appropriate) shall maintain and keep on file all relevant books and records in sufficient detail as to provide the basic information necessary to the determination of claims arising under these conditions.

Additionally, Section 12, Paragraph 18(b) of the September 1992 Addendum contains a general requirement for the exchange of information relative to a claim. The relevant portion of Section 12, Paragraph 18(b) reads as follows:

> [T]he parties shall exchange such relevant factual information in their possession as may be requested of them, and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual information as may be relevant.

While the determination regarding Mr. Lindsey's standing to file this claim was pending, DART displayed an extreme reluctance to provide information requested by the Claimants concerning the cancellation of the FTI contract and assumption of its service. Even after the Department affirmed the Claimants' standing in its October 11, 2005 Interim Decision, however, DART was still less than forthcoming in responding to the Claimants' initial questions and did not provide its minimal response to the Claimants until December 2005, nearly two months later. The Claimants' subsequent efforts to obtain information from DART also met with resistance.

On March 26, 2007, the Department issued a discovery and scheduling order as described in the *Discovery* section of this decision. The Department's order reflected the broad scope and cooperative spirit manifested in the requirements of the protective arrangements at Section 11, Paragraph 16(a) and Section 12, Paragraph 18(b). Unfortunately, the discovery did not proceed in an orderly fashion, despite the protective arrangements and the instructions in the Department's order.

The Department's scheduling order provided that counsel for the Claimants and DART agree on a plan and schedule for discovery within fourteen calendar days of the order. The scheduling order further required that the parties communicate their plan and schedule to the Department. This was not done, apparently because no real plan or schedule was ever concluded.

The Claimants bear some responsibility for the lack of a discovery plan, since they apparently did not contact the Respondent's counsel until at least 7 days into the 14-day planning period.[10] However, once contacted, the Respondent did not designate a knowledgeable official at DART to assist the Claimants in

[10] There appears to be some disagreement in the record as to when the Respondent was contacted. The Claimants reference telephone contact with the counsel for DART on April 2, 2007. A letter dated April 9, 2007, from Claimants' counsel to DART's counsel is on the record, as is a letter to the Department from DART's counsel referencing contact with a paralegal from the counsel for the Claimants' office on the same date. However, in an April 13, 2007 letter, DART's counsel states that the Claimants have yet to contact him to discuss a plan or schedule for discovery.

their discovery until April 24, 2007, long after the April 9 end of the planning period and the 15th day of the 30-day period the Department allotted for the actual discovery. Additionally, when requested, DART's counsel would not advise the Claimants on the appropriate DART deponent, stating, incorrectly, that the Department had mandated that the selection be made solely on the basis of the Claimants' judgment.[11] Furthermore, the Claimants' April 9 request for DART's identification of categories of documents evidencing the procurement or use Federal funds was apparently ignored in DART's reply of April 13. DART appeared to be unresponsive to all requests from the Claimants to identify classes of documents and recordkeeping procedures so that the Claimants could refine their document requests. These are all matters that the parties should have decided in the 14-day planning period mandated by the Department.

With regard to the production of documents, the Department's scheduling order gave the Claimants authority to examine "FTA grant dispersals, DART expenditures of Federal funds, and related matters which may have affected them." DART took a very narrow view of this authority and responded only to document requests it deemed adequately specific. Demanding specificity is not a substitute for the planning mandated by the Department's scheduling order. This placed too heavy a burden on the Claimants, who could not be expected to know the details of FTA's reimbursement procedures and DART's accounting system.

DART provided the Claimants with DART grant proposals and awards, Department certifications of FTA grants, records of FTA dispersals under the grants, and documents concerning FTI's failure to properly maintain DART's buses. It did not, however, provide the Claimants with many other requested records, which may have been "DART expenditures of Federal funds and related matters" included in the Department's scheduling order. Such documents included general ledger entries, cost-benefit and planning documents, bus replacement schedules, records concerning improvements to DART's physical plant, documents reflecting FTI's response to the May 2003 deficiency notice, and documents involved in the contract termination and settlement payment. Importantly, DART simply ignored these requests and presumptuously declared the Department's scheduling order satisfied. It did not take the opportunity during the planning period to reach an understanding with the Claimants on these other requests or to challenge them. DART did, in its final brief, cite the admonition in the Department's scheduling order that, "The discovery should be conducted with a minimum of inconvenience,

[11] The Department's scheduling letter read, "Claimants may select one DART official, who in the Claimants' judgment is thoroughly aware of matters involved in the discovery, for purposes of a written or oral deposition." The Department, by permitting the Claimants to select a deponent, did not relieve DART of its obligation under the 1992 Addendum to provide "such relevant factual information in their possession as may be requested of them," including the identity of individuals with knowledge of pertinent facts.

disruption and expense to all parties." Relying on this admonition, DART then stated that a complete response to the Claimants' requests would have resulted in "extreme inconvenience, disruption and expense." This may or may not have been true, but the time to surface such an allegation is in the discovery phase of the claim, not in the final brief.

DART's unilateral action of simply ignoring the Claimants' requests and running out the clock on the discovery burdened the adjudication of this claim and violated Section 12, Paragraph 18(b) of the protective arrangements. Because DART failed to provide any of the internal financial records that the Claimants requested, and thus deprived the Claimants of the ability to challenge DART's financial justifications, DART cannot defend its actions on any financial or economic basis. Therefore, the only justification that will be considered in this arbitration will be DART's argument that it terminated the FTI contract and brought the service in-house because of FTI's poor maintenance of the DART-owned equipment. All other arguments by DART are disallowed.

In support of its position, DART has shown that in November 2001 it conducted a statistical process control [SPC] inspection of 30 buses at two FTI-run facilities, revealing that every bus was in a substandard state of repair. DART notified FTI in December 2001 that the maintenance level on the buses maintained at those facilities was unsatisfactory and, if the deficiencies were not corrected, FTI was at risk of losing its contract with DART. Although FTI alleged that many of the problems identified appeared to result from unilateral changes by DART to the performance requirements of its contract and/or contract ambiguities, FTI set up a detailed work plan to address all of the defects within 60 days.

DART conducted another SPC inspection of FTI's buses in March 2003. In May 2003, DART reported that its inspection of 28 buses disclosed, by extrapolation, that 89% of the buses operated by FTI were noncompliant with the contractual standard. Further, DART stated that many of the issues identified in its December 2001 notice to FTI remained uncorrected. DART demanded that within 10 days FTI, under risk of losing its contract, complete all outstanding work orders, submit a plan to bring all buses up to the contractual standard, and submit a plan to preclude recurrences of substandard maintenance.

As acknowledged above, the Claimants sought unsuccessfully through the discovery process to obtain documents concerning FTI's response to the May 2003 maintenance deficiencies notice in order to challenge DART's position that it cancelled the FTI contract and brought the service of those routes in-house for reasons unrelated to Federal funding. However, an adverse inference will not be drawn from DART's failure to provide these documents (or to certify that no such documents exist). Whatever documents may exist regarding FTI's

response to the May 2003 cure notice would not alter the fact that DART twice (in December 2001 and May 2003) issued cure notices to FTI because of what DART judged to be substantial maintenance deficiencies. DART provided the Claimants with cure notices sent to FTI and lists of defects found in individual buses during DART inspections of its vehicles operated by FTI. Before the close of the discovery period, DART provided the Claimants additional information concerning the cure notices, responses to the 2001 notices from FTI, and a list of work order numbers and repair costs that DART associated with FTI buses. Considering both the requirements of the protective arrangements and its scheduling order, the Department finds that these materials were provided to the claimants in a timely and appropriate manner.[12] DART successfully demonstrated that FTI was unable to sustain a level of maintenance that satisfied DART, which potentially affected DART's ability to comply with FTA standards concerning the useful life of FTA funded vehicles. Thus, DART has established that the FTI contract was abrogated for performance reasons which were unrelated to any Federal funding.

Accordingly, DART having shown that it cancelled the FTI contract and brought the routes in-house for a reason unrelated to Federal funding, i.e. poor maintenance of DART's equipment, the burden has shifted to the Claimants, under the third step of the burden of proof framework, to prove that Federal funding did play a role in the harms to their employment.

In turn, the Claimants maintain that DART's failure to provide the information they requested concerning DART's expenditures of Federal funds should result in an adverse inference that the documents, had they been produced, would have supported the Claimants' position. An adverse inference will not be drawn in this instance because it does not appear that the financial records the Claimants sought could have demonstrated that Federal funds were used to facilitate cancellation of the FTI contract and assumption of the service. While general ledger data could potentially show every source of DART's revenue and every expenditure, it is unclear what this would contribute to the Claimants' case. The Claimants have made vague allegations that operating and capital funds at DART were "inexplicably intertwined," but such is improbable, with respect to Federal funds, due to FTA's grant award and reimbursement procedures.[13] Additionally, even though documents involved in the FTI contract

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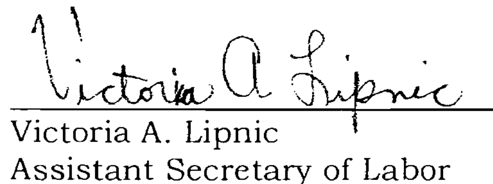
[12] Ironically, DART characterized this additional information as "as beyond the scope of discovery production requirements."

[13] FTA Circular 5010.1C, which concerns procedures for grants and reimbursements to transit agencies, states that "[a] grant obligates the grantee to undertake and complete activities defined by the scope and budget as incorporated in the grant agreement." Generally, any major reprogramming of funds permitted under these requirements results in a grant amendment or new grant and requires a new Department of Labor certification of labor protective conditions. DART has provided the Claimants with all FTA grant awards and all Department certifications for the years requested, and no such reprogramming has been alleged.

termination and settlement payment would highlight the moneys involved, such would be considered operating expenses by the Department in the context of a contract for operating service. Records concerning improvements to DART's physical plant might be instructive, but the Claimants have not described these improvements as necessary or involved in any significant way with the assumption of FTI's service by DART. Likewise, any general ledger or other information regarding the repair of DART buses previously operated by FTI would not seem to be relevant. Minor repairs to the buses would certainly be classified as an operating expense and, therefore, outside the purview of this arbitration. Major bus rehabilitations, though potentially capital in nature, would be necessary for DART's continued use of the vehicles in accordance with FTA useful life standards and do not appear to have any special significance for DART's decision to take over FTI-operated service, even if such expenditures reduced the overall savings from the abrogation of FTI's contract. Finally, bus replacement schedules would seem superfluous, because bus purchases and deliveries that actually occurred are already on the record, and the significance of the new buses is unclear. All the buses, whether operated by FTI or DART, were owned by DART, the new buses are used in the same service, and they have not changed materially in kind or character. In these circumstances, the buses seem to be a constant, whether or not they were purchased with Federal funds.[14]

DECISION

The Respondent has shown that the FTI contract was terminated for performance reasons. The Claimants, on the other hand, have been unsuccessful in proving that Federal funds were used to abrogate the contract or facilitate the resulting takeover of FTI service by DART, thereby affecting their employment. This claim is therefore denied and dismissed with prejudice.



Victoria A. Lipnic
Assistant Secretary of Labor

[14] See *Debra Fuller et al. v. Greenfield and Montague Transportation Area and Franklin Regional Transit Authority*, DEP Case No. 81-18-16, April 13, 1987, Employee Protections Digest, p. A-384, where it was ruled that buses which were purchased with Federal funds to replace worn out buses and which would be used to provide the same service previously operated by the employer of the affected employees were a constant and therefore not the cause of the employees' harms.

James Lindsey et al. v. Dallas Area Rapid Transit Authority
DSP Case No. 03-13(c)-06
October 11, 2005
Interim Decision
(Digest page no. A-606)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: The Department issued an interim decision solely on the issue of Claimant's standing to represent displaced or dismissed employees of a contractor whose service agreement was terminated for convenience. Claimant had been an Executive Board member, but not a principal officer, of the ATU local that represented the contractor. The local had been placed in trusteeship by the ATU International following termination of the contract. Claimant's appointment to handle employee protection claims had been signed, in the absence of the Local's President, by the Vice-President and four Executive Board members. In addition, bargaining unit employees and non-union employees who had authorized Claimant to represent them were found to have satisfied local claims procedures authorized by the Protective Agreement. The Department found that Claimant had standing in the matter.

In the Matter of Arbitration:

James Lindsey et al. *Claimants*	DSP Case No. 03-13c-06
v.	Issued: October 11, 2005
Dallas Area Rapid Transit Authority *Respondent*	INTERIM DECISION

THE CLAIM

This claim was received by the Department of Labor (Department) following the initiation of an October 15, 2003 claim at the local level against the Dallas Area Rapid Transit Authority (DART) by Mr. James Lindsey on behalf of some 400 displaced or dismissed employees of First Transit, Incorporated. First Transit had been the operator of certain fixed route services of DART under a five-year contract, until its service agreement was terminated for convenience twenty-seven months early on October 6, 2003. DART subsequently took over the direct operation of the transit services, employing new hires and somewhat less than twenty-five percent of the former First Transit employees. Those who were rehired were employed as probationary employees without seniority and at entry level wages and benefits.

The First Transit employees had been represented by Amalgamated Transit Union Local 1635 (Local 1635). All but a very small portion of Local 1635's members were First Transit employees, while the employees who work directly for DART are represented by Amalgamated Transit Union Local 1338 (Local 1338). The termination of First Transit's contract resulted in the loss of most of Local 1635's membership at a time when its President was too ill to keep up with the operation of the Local. Mr. Lindsey filed the claim against DART as an Executive Board Member of Local 1635 on behalf of all former First Transit employees who were dismissed or rehired by DART at lower seniority, wages, and benefits.

DART immediately questioned the authority of Mr. Lindsey to file the claim, citing communications with the President of Local 1635, who indicated that the Local was closed. DART also alleged that officers of the Amalgamated Transit Union (ATU) at the international level did not support the claim and believed that the termination of the First Transit contract for convenience did not occur as a result of Federal assistance. In a November 21, 2003 letter to Mr. Lindsey, DART stated that Mr. Lindsey: 1) was not authorized to represent Local 1635 members collectively; 2) was not representing the position of the ATU International, and 3) was personally disqualified for employment because he had failed to fill out completely his DART job application form. This effectively concluded the claimants' local procedures, and Mr. Lindsey contacted the Department of Labor on November 25, 2003.

In his claim before the Department, Mr. Lindsey cited the Department's certifications of employee protections at DART under Section 5333(b) of Title 49 of the U.S. Code, Chapter 53. For operating assistance, including capitalized preventive maintenance, those protections are memorialized in the Operating Assistance Protective Arrangement dated October 22, 2003. The 2003 Operating Assistance Protective Arrangement covers employees of DART and other mass transit employees in the service area. ATU Locals 1338 and 1635, as representatives of DART and DART's contractor employees, respectively, are deemed parties to that Arrangement. For capital assistance, the employee protections can be found in three documents: 1) the Department's September 30, 1991 certification; 2) Attachments A and B of the September 30, 1991 certification; and 3) a September 1992 Addendum. The September 1992 Addendum applies to employees of private mass transportation companies in the service area of DART, such as First Transit.

PRELIMINARY ISSUE OF STANDING

After receiving the positions of the parties, it became clear that the issue of whether or not Mr. Lindsey had standing to pursue this claim on behalf of the former First Transit employees needed to be resolved as a preliminary matter. Although he served as an elected Member of the Executive Board, Mr. Lindsey was not a principal officer of Local 1635 at the time of his local claim. In addition, the Local was placed in trusteeship by the ATU International later on February 18, 2004.[1] DART challenged Mr. Lindsey's authority to file a claim on behalf of anyone other than himself, both at the local level and before the Department. DART also challenges Mr. Lindsey's right to come before the Department

[1] The Trusteeship was imposed as a result of the local's inability to manage its finances and remains in effect.

under the protections for capital assistance which provide in Paragraph 16(a) of the September 1992 Addendum that unresolved disputes may be referred to the Department of Labor for a final and binding determination. Instead, DART contends that this dispute is governed by the October 22, 2003 Operating Assistance Protective Arrangement, which, in Paragraph 15(b), calls for arbitration before a private arbitrator arranged by the American Arbitration Association.

In its initial request for information from Mr. Lindsey, the Department asked for the authority under which he represented claimants other than himself. He provided a copy of a memorandum dated September 30, 2003, from the Vice President of Local 1635. The memorandum appointed Mr. Lindsey to handle employee protection claims and was signed, in the absence of the Local's President, by the Vice President and four Local Executive Board Members. In view of the Local's entry into trusteeship on February 18, 2004, the Department later requested any authorization which Mr. Lindsey might have from the Trustee or individual affected employees. When Mr. Lindsey's counsel expressed his intention to secure signed authorizations to represent all 400 affected First Transit employees, the Department asked that the parties address the overall issue of the claimants' standing to file a claim with the Department.

The discussion below and this decision is limited to the question of the standing of the claimants to file with the Department of Labor for a final and binding resolution of their dispute. The merits of the claim will not be addressed at this time.

POSITION OF THE CLAIMANTS

In his complaint, Mr. Lindsey contends that Federal assistance was used to terminate the First Transit contract early and facilitate DART's takeover of the operation of the service. In the Claim Form included with Mr. Lindsey's complaint to the Department, he listed Federal Transit Administration (FTA) Project Number TX-90-X582 and capital preventive maintenance as the Federal assistance project that had affected the First Transit employees. However, the letter accompanying the form mentions certain new buses that were funded by the same project.

Mr. Lindsey argues that he is an appropriate representative for the affected First Transit employees. Lindsey lodged the complaint on October 15, 2003, pursuant to the September 1992 Addendum, which allows either the individual employee, or a representative, to file a complaint. He claims that he received a delegation to act on behalf of the affected First Transit employees pursuant to a September 30, 2003

memorandum signed by four Local 1635 Executive Board Members and the Local's Vice President, in the absence of the President, who was ill and unable to conduct the business of the Local.

While Lindsey claims that he is still acting on behalf of the Local, he notes that there is no requirement that the union be involved in the claim under the September 1992 Addendum because the term "representative" in those protective arrangements is undefined. Lindsey admits the local lost members rapidly following the October 6, 2003 termination of the contract, but he notes the Local was still operating when the complaint was filed on October 15, 2003. Indeed, he states that the local assessed members' dues two days later on October 17.

Mr. Lindsey also sent an updated list of individuals who had been affected by the termination of the First Transit contract along with his complaint to the Department. He claims that he is prepared to pursue this case on behalf of each of these employees individually, if necessary.

Lindsey also argues that he remains a suitable representative for the affected First Transit employees despite the trusteeship placed on Local 1635 by the ATU. The ATU imposed the trusteeship because of financial difficulties experienced by the local. According to Mr. Lindsey's counsel, the Trustee is not willing to spend the Local's dwindling resources on this matter. The ATU International has also indicated to Mr. Lindsey that it would not assist with this case and has requested that any action be approved by it. However, neither the Trustee, nor the ATU has ever taken any steps to revoke or invalidate the authority granted under the September 30, 2003 Local Executive Board memorandum. Mr. Lindsey argues the ATU's International Constitution and General Laws allow him to proceed independently based on the September 30, 2003 memorandum.

Finally, Lindsey and his counsel have been able to produce more than 370 signed individual authorizations in response to the Department's December 21, 2004 inquiry, which, in part, requested authorizations from any employees which Mr. Lindsey individually represented. Mr. Lindsey contends that this overwhelming response validates his status as the legitimate representative of these former First Transit employees, either individually or collectively as a union representative.

POSITION OF THE RESPONDENT

DART argues that the September 1992 Addendum, which provides for final determination before the Department, does not apply to Mr. Lindsey's claim. The September 1992 Addendum pertains only to capital assistance, not the capital preventive maintenance Mr. Lindsey states

was involved in the termination of the First Transit contract. Since Mr. Lindsey cited FTA Project Number TX-90-X582 and capital preventive maintenance on his claim form submitted to the Department, the October 22, 2003 Operating Assistance Protective Arrangement applies to his claim. That Arrangement provides for the selection of an arbitrator from a list provided by the American Arbitration Association from among the members of the National Academy of Arbitrators, not for arbitration before the Department of Labor.

Additionally, DART contends that Mr. Lindsey is unable to appear before the Department under the protective arrangements which apply to DART and its private contract service providers. DART interprets the October 22, 2003 Operating Assistance Protective Arrangement to require that private sector employees, such as those of First Transit, file for arbitration through their union, and that only DART employees have the option to file individually or through a representative.

Furthermore, DART contends that even if the September 1992 Addendum applied to this claim, it would not be available to Mr. Lindsey. DART argues that the September 1992 Addendum only applies through Local 1635. DART claims that the term "representative" is not unlimited but is defined by the statement in Paragraph A of the September 1992 Addendum referring to Local 1338, the predecessor of Local 1635.

In addition, DART argues that Mr. Lindsey never had standing or authority to bring this claim before it or the Department on behalf of the former First Transit employees. When Mr. Lindsey filed his local complaint, DART claims that it contacted the President of Local 1635 and was informed that the Local was closed and no longer existed. DART also claims that an ATU International Vice President had told DART that the ATU did not consider the termination of the First Transit contract to be the result of Federal assistance, and the ATU had refused to assist Mr. Lindsey in filing his claim. DART believes that this disagreement with the ATU International effectively nullified any authority which may have come from the September 30, 2003 Local Executive Board memorandum. While DART concedes that Mr. Lindsey may have been able to file a local claim on his own behalf, it states that his failure to file a claim form for each one of the other 400 employees he sought to represent made it impossible for DART to consider those claims individually.

Finally, DART contends that Mr. Lindsey needed the Trustee's authorization to pursue his claim with the Department after the ATU placed Local 1635 in trusteeship. DART stated that the Trustee had advised DART that Mr. Lindsey lacked authority to pursue his claims. Therefore, DART concluded that the September 30, 2003 Local Executive Board memorandum, if it ever was valid, no longer had any effect. It also

reiterated that an individual claim form from each of the former First Transit employees was necessary for it to evaluate the alleged adverse effects of terminating the First Transit contract.

DISCUSSION

The threshold question is whether the Department has jurisdiction to consider this claim under the protective arrangements that govern DART and the former First Transit employees. As DART points out, the October 22, 2003 Operating Assistance Protective Arrangement, which applies to Federal operating assistance, provides for final dispute resolution through private arbitration and does not contemplate a role for the Department. If the October 22, 2003 Operating Assistance Protective Arrangement applies, then Lindsey and the other employees can not come before the Department for settlement of issues which are within the purview of that Arrangement.[2]

On the other hand, the September 1992 Addendum, which applies to Federal capital assistance, clearly provides a role for the Department in the final and binding settlement of disputes should the parties be unable to agree on any other procedure. Contrary to the assertion of DART, however, the term "representative" as used in Paragraph (16)(a) of the Addendum does not refer exclusively to Local 1338, the predecessor to Local 1635. Therefore, the Department concludes that employees, individually or through a chosen representative may request a final and binding determination by the Department of issues involving capital assistance under the September 1992 Addendum.

The claimants identified FTA Project Number TX-90-X582 and "capital preventive maintenance" on the Department's Claim Information Form as the Federal assistance that allegedly harmed them. However, claimants are not limited to that designation as the sole source of their harm. As the Department explains in its letter transmitting the Form to claimants, "this form is only for the Department's convenience and cannot be used to restrict or limit the claim." Furthermore, Project Number TX-90-X582 also contains capital assistance, including replacement buses, of the type that were referenced in the letter from Mr. Lindsey which accompanies the Claim Form. Therefore, the September 1992 Addendum, and its provisions for final settlement of disputes by the Department, is applicable to this claim insofar as it relates to capital assistance.

[2] The Department has consistently ruled that where a Claimant is a member of a unit represented by a labor union and the protective agreement or arrangement, to which the union is a party, provides for a final settlement of claims without reference to the Department of Labor, the Department does not have jurisdiction to consider the claim. (See Calvin (Grimes) Muhammad v. Houston Metro, OSP Case No. DSP-97-13c-2, USDOL (1998), Digest, p. A-469.)

The next question is whether Mr. Lindsey is an appropriate representative under the September 1992 Addendum. Mr. Lindsey presented a September 30, 2003 memorandum from Local 1635's Vice President, in the absence of the President, signed by four of five of its Executive Board Members, as his authority for pursuing this claim. The Local President, in an undated letter received by DART on November 20, 2003, confirmed that he had been ill and was unable to keep up with current communications involving the Local. There is no evidence on the record that this September 30, 2003 grant of authority was in any way contrary to the Local's constitution and bylaws or that it has been subsequently withdrawn. DART, however, has presented several reasons why Lindsey should not be allowed to represent the First Transit employees.

First, DART questioned whether Local 1635 continued to operate after the First Transit service contract ended on October 6, 2003. The record, however, indicates that Local 1635 levied a dues assessment on October 17, 2003. In addition, there is no direct information on the record to indicate any change in status of the Local or its officers other than the fact that the ATU imposed a trusteeship on Local 1635 on February 18, 2004. Although the Local experienced a rapid decline in membership after the termination of the service contract, this decline does not extinguish the Local's representational role.

Second, DART claims the ATU and the current Trustee of the Local do not support the claim. There is, however, no direct statement from either of these parties on the record. More importantly, there is no evidence that either the ATU or the Trustee has taken any action to remove Lindsay's authority under the September 30, 2003 memorandum or any other action that would prevent the filing of this claim. In view of these circumstances, there is no reason to view the September 30, 2003 memorandum as anything other than a valid delegation of authority from the Local for Mr. Lindsey to file a claim under the September 1992 Addendum.

Finally, when Mr. Lindsey filed the local claim on October 15, 2003, there may have been some question as to his authority to act on behalf of the members of Local 1635. However, in an October 31, 2003 letter addressed to the Senior Assistant General Counsel of DART, Mr. Lindsey clarified his position and included a list of some 400 individuals who he claimed were affected by the termination of the First Transit contract. Mr. Lindsey also announced his intention to file claims on behalf of each of these individuals separately, if DART would not consider them as a unit. The Department concludes that this October 31, 2003 communication, specifically identifying the affected employees, satisfied

the local claims procedures for each of the approximately 400 former employees on the list. These procedures are a prerequisite for filing a claim with the Department under Paragraph (16)(a) of the September 1992 Addendum.

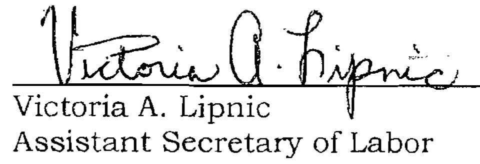
Most recently, Mr. Lindsey, through counsel, presented the Department and DART with more than 370 individual claim authorizations and forms. This was in response to the Department's suggestion that he might be able to represent former employees who provided him with an individual authorization, irrespective of any authority from Local 1635 or its Trustee. These individual claim authorizations and forms represent over 90 percent of the former First Transit employees affected by the termination of the First Transit contract and an overwhelming majority of the membership of Local 1635 as of October 2003. These 370 plus individual claim authorizations and forms reaffirm Mr. Lindsey's authority to represent these employees either collectively or individually.

DECISION

The Department finds that Mr. Lindsey and the claimants he represents have standing, under the September 1992 Addendum, to come before the Department for a final and binding resolution of claims concerning the October 6, 2003 termination of the First Transit contract for service. Mr. Lindsey represents all the members of the former First Transit-Local 1635 bargaining unit under the September 30, 2003 authorizing memorandum from Local 1635's Vice President and Executive Board Members. Additionally, he represents any other former First Transit employee or affected service area employee who provides him or his representative with a signed authorization for purposes of participating in the resolution of this matter by the final closing of the record for this arbitration. To be considered properly before the Department claimants must have satisfied the DART local claims procedures. All individuals who are either members of the former First Transit-Local 1635 bargaining unit affected by the termination of the First Transit contract or who appear on the list of employees presented to DART with the October 2003 local claim are deemed to have satisfied the local procedures.

This claim is therefore continued and will receive further consideration by the Department upon arguments submitted on the merits. Initial arguments from the claimants must be received by the Department of Labor within sixty days of the date of this decision or the case will be closed. Such arguments should include a discussion of the burden of proof as described in Paragraph (16)(b) of the September 1992 Addendum and should address the determinative issue in this case, *i.e.*, the effect of Federal capital assistance and how this Federal capital

assistance may be related to the termination of the First Transit service contract.



Victoria A. Lipnic
Assistant Secretary of Labor

ATU, Local 770 v. City of Mobile
DSP Case No. 03-13(c)-1
May 28, 2003
(Digest page no. A-598)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: The Department determined that it did not have jurisdiction over the case because the applicable Section 13(c) Agreement between the parties required them to submit to arbitration procedures that had not yet been undertaken.

U.S. Department of Labor

Employment Standards Administration
Office of Labor-Management Standards
Washington, D.C. 20210

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200 Constitution Ave. NW

202/ 693-1224

05/28/2003

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Re: ATU Local 770 v. City of Mobile
DSP case no. 03-13c-1

Dear Parties:

On May 9, 2003 the City of Mobile timely filed its initial response to the above-styled claim for employee protections pursuant to Section 13(c) of the Federal Transit law, which is recodified at 49 U.S.C. § 5333(b). By letter of May 15, 2003, received here May 28, ATU Local 770 (the Union) replied to the City's response to the claim. In its response the City raised the issue of jurisdiction and argued that the Department of Labor does not have jurisdiction over this claim for employee protections. The City's argument relies on Paragraph 15(a) of the applicable Section 13(c) Agreement to which the City and the Union are parties. The Department received a complete copy of that Agreement May 6, 2003.

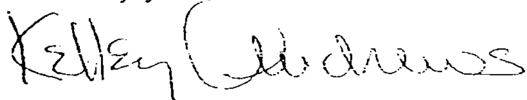
Paragraph 15(a) provides that any disputes "involving the City and the Union under the Agreement which cannot be settled by the parties thereto within thereafter (30) days...may be submitted...to a board of arbitration to be selected as hereinafter provided." The arbitration board is to be tri-partite, with the neutral arbitrator selected through the procedures of the American Arbitration Association if the two partisan arbitrators are unable to agree on a neutral arbitrator.

In its May 15 reply to the City's position, the Union addressed substantive issues of the case and the City's position but made no persuasive rebuttal of the City's challenge to the Department's jurisdiction over this claim. The arbitration procedure in Paragraph

15(a) applies to the issues disputed between the parties in this claim. The Department of Labor does not assert jurisdiction over a Section 13(c) claim where, as here, the parties have access to a neutral, final and binding arbitration procedure for resolution of their dispute.

Therefore, the Department is closing this claim effective with the date of this letter. This action is taken without prejudice to the Union's opportunity to pursue the issues in this claim through the arbitration procedure set out in Paragraph 15(a) of the Section 13(c) Agreement.

Sincerely yours,



Kelley Andrews, Director
Division of Statutory Programs

SIMONE v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

DEP Case No. 70-13c-1
March 19, 1970

Summary: The employee claimed a violation of his Section 13(c) protections when he failed to receive a job through the existing seniority system. A review by the Department of Labor revealed the job was outside the normal seniority order and that the Claimant had no right under past practice to this job. The Department determined Claimant's failure to receive a job that was not a part of the normal bid process was not protected by the existing agreement. The claim was denied.

DETERMINATION

This is in reply to your letter of January 6, 1970, in which you inquire concerning your rights to a job as "starter."

Our investigation indicates that at the time of the takeover of Eastern Massachusetts Street Railway Company by the MBTA, those Eastern Mass. employees who performed work most nearly comparable to the MBTA starter's work were considered to be performing supervisory duties and were not members of the bargaining unit on that property. There were no spare starters in or out of the bargaining unit. There was no normal line of promotion from jobs in the unit to supervisor jobs. The records show that you were an operator at that time, with no rights to supervisory status, starter status, or spare starter status.

When the MBTA took over, those Eastern Mass. employees whose work was most nearly comparable to MBTA starters were given the job title "starters" at the garages at which they worked, although there was at that time a spare starter's seniority list on the MBTA. Such action was considered to be fair and equitable and to give the employees who had done the work the protections which they were entitled to under the Urban Mass Transportation Act. In addition, openings in the job class "spare starter" were immediately made available to employees formerly employed by the Eastern Massachusetts

Street Railway Company. Such employees who qualified were put on the spare starters list in the order in which they qualified. Such order necessarily placed them behind spare starters already on the MBTA rolls. Since the takeover, spare starters have performed work at the various stations to which they were assigned in accordance with the rules which have been applicable to that job class.

Your claim arises out of the availability of jobs as starters to which spare starters are normally promoted in the order of seniority. You are apparently seeking a job outside of the seniority order as a spare starter based on the fact that the starter's vacancy is at a garage which was formerly operated by Eastern Massachusetts Street Railway.

Based on the available facts, the Department of Labor finds that this right did not exist at the time of the take-over. Consequently, the action of the Authority would not constitute a violation of the Section 13(c) agreement.

/s/
W. J. Usery, Jr.
Assistant Secretary of Labor

SAUNDERS v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

DEP Case No. 70-13c-2
May 25, 1970

Summary: The employee claimed he had been denied funeral benefits due to his transfer of unions as a result of federal assistance. A review by the Department of Labor revealed the employee could have retained his membership and funeral benefits in the former union by paying appropriate union dues. The Department determined the funeral benefits were lost by the employee's failure to pay his dues and not as a result of the federal assistance. The claim was denied.

DETERMINATION

This is in reply to your inquiry regarding the status of certain former members of ATU, Local Division 1509, with respect to the funeral benefit plan operated by the Amalgamated Transit Union.

On the basis of information made available to us the facts appear as follows:

Upon the acquisition of the Eastern Massachusetts Street Railway Company by the MBTA on or about March 30, 1968, the employees of the company involved were transferred to employment with the MBTA in accordance with the provisions of paragraph (1) of the Section 13(c) agreement.

Following the transfer of these employees to MBTA employment, a dispute arose between Local Division 589 and the Machinists Local Lodge as to the proper placement of these employees for bargaining unit and representational purposes. This jurisdictional dispute was ultimately resolved in favor of the I.A.M. in early June 1968, and thereafter the group of company employees whose rights are here in question were transferred to the I.A.M. and placed under their collective bargaining agreement with the MBTA.

By letter dated July 22, 1968, to the Business Manager of the I.A.M., an ATU General Executive Board Member stated that all such employees, who so desired could retain their

membership in the ATU and thereby "protect their funeral benefits," by continuing to pay their dues as members-at-large in the amount of "$2.40 a month, to be forwarded to the International Amalgamated Transit Union, Washington."

Under applicable provisions of the ATU constitution, the membership status of all such employees would automatically terminate no later than June 30, 1968, and such employees would cease to be eligible for reinstatement to membership no later than March 31, 1969, in the absence of a resumption of dues payments by the interested employees.

The information we have received from ATU and MBTA indicates that no check-off authority cards for funeral deductions were forwarded to the International Office of ATU until sometime after March 31, 1969.

Moreover, no dues payments were made by or on behalf of any of the 108 such employees transferred into the Machinists Union bargaining unit for any period after March 31, 1968. The dues of the deceased employee, the Claimant, whose claim for funeral benefits is here involved, were similarly unpaid for the period running from March 31, 1968 until his death on October 8, 1969.

The ATU International Secretary-Treasurer, by letter to the MBTA, dated June 26 and July 11, 1969, respectively, advised that 50 listed MBTA employees, formerly employed by Eastern Massachusetts and who were affiliated with Division 1509, were no longer eligible for reinstatement in the ATU, as they were no longer within the 12-month reinstatement period, and, in any event, were no longer under the jurisdiction of the ATU.

The unmistakable fact is that the Claimants were extended the right to continue their ATU membership and thereby to preserve their funeral benefits and that they failed to do so within the prescribed time, although they knew, or should have know, that no dues payments were being checked off from their wages for transmittal to the ATU. Under such circumstances, the loss of membership and benefits rights may not properly be said to be a result of the project.

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I find, therefore, that the loss of funeral benefits, as described above, did not constitute a violation of Section 13(c) of the Urban Mass Transportation Act.

/s/
W. J. Usery, Jr.
Assistant Secretary of Labor

LOCAL 214, AFSCME, v.
DETROIT, MICHIGAN

DEP Case No. 73-13c-2
January 19, 1973

Summary: The Petitioner alleged that the City of Detroit, Michigan had violated its Section 13(c) agreement with Local 214 of the American Federation of State, County and Municipal Employees. A review by the Department of Labor revealed Petitioner's labor organization had access to several final and binding dispute resolution procedures. The Department advised Petitioner to pursue his dispute through these procedures. The claim was denied.

DETERMINATION

This is in further reference to my letter of December 21, 1972, and your reply thereto dated January 3, 1973, with which you enclosed a copy of a 13(c) agreement executed by the City of Detroit, through its Board of Street Railway Commissioners, and your local union in connection with an UMTA project to finance the construction of an administration building and other facilities in Detroit.

Section 2 of the agreement states that "(T)he BOARD agrees that it will bargain collectively with the said union relative to all matters of employee and employer relations... pursuant to and in accordance with all applicable provisions of Act No. 379, of the Public Act of the State of Michigan for 1965, or as same may be hereafter amended."

In view of this language, you should present your grievances concerning alleged violations of the 13(c) agreement to the Board. Should your union and the Board be unable to reach agreement as to the appropriate settlement of these grievances, you may want to invoke whatever procedures are available to you, through your collective bargaining agreement or State law, for the resolution of such disputes.

/s/
W. J. Usery, Jr.
Assistant Secretary of Labor

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FRISBY v. SOUTHEASTERN MICHIGAN TRANSIT AUTHORITY

DEP Case No. 73-13c-3
March 22, 1973

Summary: The employee claimed he was entitled to a dismissal allowance from the Authority. A review by the Department of Labor revealed the employee had been terminated for a failure to comply with a regulation to supply a daily time sheet to his supervisor. The Department determined the employee had been discharged for reasons other than the result of the project. The claim was denied.

DETERMINATION

This is in reply to your letter of March 13, 1973, concerning the Claimant, a former employee of the Southeastern Michigan Transit Authority, who alleges that he was deprived of employment with SEMTA in violation of Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

I have carefully reviewed the material you enclosed with your letter, however, I can find nothing therein which would support the Claimant's position that he has been adversely affected "as a result of" the project assisted by federal funds, in this case the purchase of Lake Shore Lines, Inc. Rather, it would appear that the Claimant was dismissed for refusing to complete a daily time sheet which his supervisor had instructed him to prepare in an effort to help him improve his work performance.

You will note from Section (6) of the 13(c) agreement executed by the Authority and the Amalgamated Transit Union in connection with this project, a copy of which was furnished to you by a member of my office, that "(A)n employee shall not be regarded as deprived of employment or placed in a worse position...in case of his...dismissal for cause in accordance with applicable agreements..."

In view of this, I can find no basis for taking any action on this matter under Section 13(c) of the Urban Mass Transportation Act.

/s/
W. J. Usery, Jr.
Assistant Secretary of Labor

A-8

MAXWELL v. SANTA CRUZ METROPOLITAN TRANSIT DISTRICT

DEP Case No. 73-13c-4
May 11, 1973

Summary: The Petitioner alleged that the District had failed to offer him employment as required in the existing Section 13(c) agreement. During the Department of Labor's review of the case the parties voluntarily resolved the dispute. The Department closed the case without issuing a formal determination.

JENSEN AND BENDER v. PORT AUTHORITY OF ALLEGHENY COUNTY

DEP Case No. 73-13c-5
May 14, 1973

Summary: The employee claimed that as a result of an Urban Mass Transportation grant he had been terminated and was entitled to a dismissal allowance. A review by the Department of Labor revealed the employee had been terminated for personality conflicts with his supervisor unrelated to any Urban Mass Transportation grant. The Department of Labor determined the employee had been dismissed for just cause. The claim was denied.

DETERMINATION

This is in reference to your claims for protective benefits pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with grants made under that Act to the Port Authority of Allegheny County, Pennsylvania.

I have carefully reviewed your letter of October 13, 1972, addressed to then Secretary of Transportation John A. Volpe, in which you initially stated your claims, your letter of December 12, 1972, in response to our request for certain information, and your letter of April 24, 1973, in which you commented on the Authority's statements made in reply to our request for its views.

On the basis of the information now before us, I find nothing which would support your claims that you have been adversely affected "as a result of" a project assisted by federal funds under the Urban Mass Transportation Act. There are, to the contrary, indications that personality and other conflicts existed which led to your termination.

You will note from Section 3 of the 13(c) agreement executed by the Authority and the Amalgamated Transit Union in connection with the Authority's Early Action and Surface Capital Improvement Programs, a copy of which was furnished to you by our letters of November 24, 1972, that "(A)n employee shall not be regarded as deprived of employment or placed in a worse position...in case of his...dismissal for cause in accordance with applicable agreements..."

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Under the circumstances, I can find no basis for taking any further action on this matter under Section 13(c) of the Urban Mass Transportation Act.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

LOCAL 859, ATU v. DECATUR, ILLINOIS DEP Case No. 73-13c-7
November 5, 1973

Summary: The labor organization requested Department of Labor intervention into a dispute to settle an impasse in negotiation of new contract terms. The parties disputed the applicability of the 13(c) agreement's dispute resolution procedure to interest disputes. The Department determined that this question of scope should be submitted to arbitration under the dispute resolution procedure. The Department retained jurisdiction in the event that further efforts of the parties failed to resolve the dispute.

DETERMINATION

This is in reference to the pending dispute between the Union and the City of Decatur, Illinois, concerning interpretation, application, and enforcement of an employee protective agreement executed by the City and the Union on May 5, 1972, pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with a then-pending application filed by the City for federal assistance to finance the acquisition of Decatur City Lines.

The basic issue in dispute concerns the question of whether or not the Section 13(c) employee protective agreement provides for final and binding arbitration, at the request of either party, of collective bargaining impasses over new contract terms and conditions.

The arbitration clause of the 13(c) agreement is contained in paragraph (8) and reads in pertinent part as follows:

> *In case of any labor dispute regarding the application, interpretation, or enforcement of any of the provisions of this agreement which cannot be settled by collective bargaining within sixty (60) (sic) days after the dispute or controversy first arises hereto, such dispute or controversy may be submitted at the written request of either party hereto to a board of arbitration as hereinafter*

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provided...The term "labor dispute," as herein used,... shall be broadly construed and shall include, but not be limited to, any controversy arising concerning wages, salaries,...any differences or questions that may arise between the parties, including the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, any grievance, that may arise, and any controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

The Union takes the position that the above-cited language requires the arbitration of new contract terms if either party so requests and sought to invoke such arbitration upon an impasse in the negotiation of a new working agreement to replace the contract which expired on September 30, 1972. The American Transit Corporation, operator of the City of Decatur's transit system, takes the position that such arbitration is not required by the 13(c) agreement. The City has supported American Transit in this position.

Prior to seeking to invoke the jurisdiction of the Secretary of Labor in this matter, the Union filed a representation petition and an unfair labor practice charge with the National Labor Relations Board. In response to the Union's filings, the Officer-in-Charge for Subregion 38 of the Board found that the City of Decatur had retained such control over matters normally the subject of collective bargaining that, notwithstanding its contract with American Transit for operation of the transit system, the City constituted the "employer" of the employees involved. The Officer-in-Charge therefore took the position that the Board could not assert jurisdiction.

The Union now contends that "(T)he refusal of the City and its contractor to arbitrate under the Section 13(c) agreement, and the refusal of the National Labor Relations Board to assert jurisdiction, has rendered the Section 13(c) agreement unenforceable under Federal, State, or local law, unless the Secretary asserts jurisdiction in accordance with his statutory responsibilities under Section 3(e)4 and Section 13(c) of the Act."

I cannot agree that at this point in time it has been shown that the 13(c) agreement itself is unenforceable. The primary issue in dispute here--whether impasses over new

contract terms may be submitted to arbitration at the request of either party--is itself an arbitrable issue falling within the scope of paragraph (8) of the 13(c) agreement and is most appropriately resolved through the procedures set forth therein by the parties.

An additional issue may be presented by the NLRB ruling. Given the City's position on the question of arbitrability of new contract terms, and the finding of the NLRB that under the current arrangement for operation of the City's transit system the City constitutes the employer of the transit employees, the question may arise as to whether the collective bargaining rights of the transit employees have been continued as required by paragraph (3) of the 13(c) agreement. However, the resolution of the dispute as to the arbitrability of new contract terms could make this question moot. Further, it would appear that the parties themselves may not be in disagreement as to the status they feel these employees should have and may be able to treat this question themselves should it arise as a major factor.

Finally, the Secretary of Labor will have continuing jurisdiction over this matter and if, upon further handling of this dispute by the parties, either believes that the 13(c) agreement has become invalid or unenforceable, such party retains the rights to submit the matter for resolution through the procedures of paragraph (11) of the agreement.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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WADDELL v. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

DEP Case No. 74-13c-3
March 24, 1974

Summary: The employee claimed the Authority had failed to provide a salary increase on the basis of sex discrimination. A review by the Department of Labor revealed it lacked jurisdiction under Section 13(c) to hear a claim of sex discrimination. The employee's correspondence was returned to the Department of Transportation for further consideration.

DETERMINATION

This is in reply to the request from your Chief Counsel's office that we review a complaint received by the Department of Transportation from the Claimant, an employee of the Metropolitan Atlanta Rapid Transit Authority. Claimant alleges that she has been discriminated against in her employment with Metropolitan Atlanta Rapid Transit Authority (MARTA) on the basis of her sex and her nonunion status. The Claimant contends that this places MARTA in violation of the employee protection requirements applicable to all employees of the Authority as a result of MARTA's receipt of federal assistance under the Urban Mass Transportation Act of 1964, as amended.

On the basis of the information provided in the Claimant's letter dated August 13, 1973, to the Department of Transportation's office of civil rights, it does not appear that her claim properly falls within the scope of the employee protection arrangements required by Sections 3(e)(4) and 13(c) of the Act. Section 13(c), as you know, requires that employees be provided with a measure of protection from adverse effects upon their employment which arise as a result of federal assistance. The Claimant does not offer any information which would suggest that she has been improperly deprived of such protection or that she has been discriminated against in the application of the required protections. Rather, she contends that, for reasons of her sex and nonunion status, she has been unfairly deprived of promotions and salary increases.

The charges the Claimant makes would appear to fall more properly under any equal opportunity employment requirements applicable to her situation. Therefore, I am returning to your office for such further action as you may take in this matter the documentation, enclosed, which was provided to us for our review.

In the event we have misinterpreted the Claimant's situation, you may wish to advise her that any employee not represented by a labor organization has the right to submit a dispute as to the appropriate interpretation, application or enforcement of the applicable protective terms and conditions to the Secretary of Labor for a final and binding determination. In this regard, I have enclosed a copy of the employee protective agreement executed by MARTA and the Amalgamated Transit Union in connection with MARTA's acquisition of the Atlanta Transit Co. Under the terms of our certification of the acquisition project, employees not represented by the union must be afforded substantially the same level of protection as is afforded to union members under that agreement.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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WINTERS v. NASHVILLE METROPOLITAN TRANSIT AUTHORITY — DEP Case No. 74-13c-4, July 29, 1974

Summary: The Claimant stated he was deprived of certain medical benefits after he had been affected by an Urban Mass Transportation Act project. A review by the Department of Labor revealed the Claimant enjoyed substantially equivalent medical benefits. The claim was denied.

DETERMINATION

This is in reply to the request filed by the Claimant, a shop foreman employed by Transportation Management of Tennessee, Inc., for a determination as to whether he has been deprived of certain benefits which are protected under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as a result of a capital grant project involving the acquisition of Nashville Transit Co. by the Metropolitan Government of Nashville and Davidson County, Nashville, Tennessee.

On August 16, 1973, the United States Department of Transportation and the Metropolitan Government of Nashville and Davidson County, Nashville, Tennessee executed a capital grant contract for the purpose of providing financial assistance to the Metropolitan Government under the Urban Mass Transportation Act of 1964, as amended, to assist it in the purchase of the assets of the Nashville Transit Co., among other things. In Section 5 of the capital grant contract, the Metropolitan Government agreed to carry out the project under the terms and conditions certified by the Department of Labor for the protection of employees pursuant to sections 3(e)4 and 13(c) of the Act. Section 5 incorporated by reference an employee protective agreement executed by the Metropolitan Government and the Amalgamated Transit Union on April 6, 1973. Section 5 further provided that the Metropolitan Government would afford employees not represented by the Union "substantially the same levels of protection" as were afforded to Union members under the April 6, 1973, employee protection agreement.

The Claimant was in the position of shop foreman with the Nashville Transit Co., and, following the takeover with federal assistance, became employed in a similar capacity with Transportation Management of Tennessee, Inc., the successor operator of the transit system. In this capacity the Claimant is not represented by the union and, therefore, may seek to have the Department of Labor determine whether he has been afforded the protection he is entitled to under Section 13(c) of the Act.

In his initial correspondence to this office, the Claimant expressed concern over changes in the insurance program covering those former Nashville Transit Co. employees not in the Union following acquisition of the Company by the Metropolitan Government. The Claimant asserted that after the takeover a $12,000 accidental death and dismemberment insurance plan was eliminated and a $100,000 major medical insurance program was replaced by $10,000 major medical coverage included in a Blue Cross-Blue Shield health-care plan.

In subsequent correspondence, the Claimant stated that the accidental death and dismemberment plan had been restored and that the Nashville Metropolitan Transit Authority had secured an additional major medical insurance plan which would supplement the existing $10,000 program. The question remaining for resolution by this determination is whether the coverage under the major medical program presently being offered is equivalent to the coverage provided to employees prior to the takeover of the Nashville Transit Co.

By letter to the Department of Labor dated April 3, 1974 in response to our request for its views on the matter, the Metropolitan Transit Authority indicated that after several attempts to secure a major medical insurance program, it decided to offer a "Catastrophe Health Care Plan" carried by American Health and Life Insurance Company of Baltimore, Maryland. The Authority is of the opinion that the new policy when added to the existing $10,000 major medical policy provides comparable coverage to the $100,000 plan provided prior to takeover. The Claimant does not believe that the new major medical plan is equivalent to the old program.

Because of changes in the owning and operating entity for the Nashville transit system as a result of the Authority's takeover, it was impossible for the old major medical policy which had covered seven employees of the Nashville

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Transit Company to be continued. The major medical plan covering these employees was a "group" policy; similarly situated transit employees in certain other cities were also covered by the policy. The Nashville employees by themselves do not number enough to qualify for "group" coverage. Therefore, the Authority has had to seek coverage for these employees on an individual basis. The "Catastrophe Health Care Plan" which is being offered by the Authority is on an individual basis. Under it the employees will pay an amount equal to what they paid for insurance coverage prior to the takeover.

The plan is supplementary to the Blue Cross-Blue Shield health care plan and provides coverage for 100 percent of all eligible expenses in excess of $1,500 up to a maximum of $52,500. Under the old plan, the aggregate amount of benefits payable was $100,000; however, coverage was on the basis of an 80/20 ratio coinsurance basis. Under the new plan, medical losses under $1,500 would be covered by the basic Blue Cross-Blue Shield policy which would provide substantially the same 80/20-type protection provided under the old major medical plan.

It is apparent that coverage for catastrophic illness under the proposed plan is better than under the old plan for losses up to approximately $65,000. Coverage under the old plan would be better for losses in excess of approximately $65,000. It can be shown that in certain other respects the new plan is inferior to the old; in still others, it is superior.

After reviewing the statements made by the parties and the material submitted, it is our view that the new plan, together with the $10,000 major medical coverage included in the employees' Blue Cross-Blue Shield plan, must be considered as offering substantially equivalent coverage to the old major medical plan.

Accordingly, it is hereby determined that the employees formerly employed by the Nashville Transit Co. have not been deprived of benefits or placed in a worse position in contravention of our certification pursuant to Section 13(c) as a result of the change in their major medical coverage.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

DUFRESNE v. SANTA CRUZ METROPOLITAN TRANSIT AUTHORITY

DEP Case No. 74-13c-5
July 29, 1974

Summary: The Petitioner alleged his position had been abolished as a result of federal funds received by Santa Cruz Transit Authority. A review by the Department of Labor revealed Petitioner's employment had terminated for factors unrelated to the federal assistance. The claim was denied.

DETERMINATION

This is in reference to the request that the Secretary of Labor make a determination pursuant to paragraph 5h of a capital grant contract of assistance entered into by the United States Department of Transportation and the Santa Cruz Metropolitan Transit District (Project No. CAL-UTG-26; Contract No. DOT-UT-314) pursuant to the Urban Mass Transportation Act of 1964, as amended.

The purpose of the aforementioned contract was to provide financial assistance to the District in its purchase of certain assets of the Santa Cruz Transit Company. Pursuant to Section 13(c) of the Act, the Department of Labor, by letter dated May 23, 1969, certified the project for assistance on the condition that certain employee protective language would be set forth in the contract of assistance. That language was reproduced in section 5 of the contract of assistance and section 5h provides that controversies as to the appropriate application or interpretation of the protective terms and conditions set forth in section 5 may be submitted to the Secretary of Labor for a final and binding determination.

By letter to a member of my staff dated February 27, 1974, Petitioner requested that the Department of Labor resolve a dispute that had arisen between the Santa Cruz Metropolitan Transit District and himself, a former employee of the Santa Cruz Transit Company and its successor in the operation of the transit system, Kenny Transportation, Inc.

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We received the views of the District in this matter dated May 2, 1974 from Assistant County Counsel for the County of Santa Cruz. By letter of June 18, 1974, we received Petitioner's response to the material provided by the District.

It is Petitioner's position that he was "wrongfully discharged from employment and deprived of employment or placed in a worse position with respect to compensation as a result of the-project...". It is the District's position that Petitioner was "demoted for cause and was not arbitrarily dismissed or demoted by the Transit District or Kenny Transportation".

The correspondence we have received from the parties is somewhat confusing as to the exact nature of Petitioner's termination of employment with Kenny Transportation, Inc. It is clear that the Company demoted him from the position of manager to driver. Petitioner apparently was willing to accept that change in duties, but only so long as his previous rate of pay was continued. What is not clear is what occurred next in the sequence of events and whether Petitioner's termination was the result of his resignation or his being fired. Notwithstanding the confusion on this matter, the central issue requiring a determination here is whether Petitioner was adversely affected as a result of the project and therefore is entitled to the appropriate rights, privileges, and benefits set forth in section 5 of the contract of assistance.

In connection with an employee's entitlement to protective benefits, paragraph 5c of the contract of assistance reads as follows:

> *"No employee shall be laid off or otherwise deprived of employment or placed in a worse position with respect to compensation, hours, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during his employment as a result of the Project, including any program of efficiencies or economies directly or indirectly related thereto. An employee shall not be regarded as deprived of employment or placed in a worse position with respect to compensation, etc., in case of his resignation, death, retirement, dismissal for cause, or failure to work due to disability or discipline;". (underscoring added)*

On the basis of the information provided to us, I find nothing which would support Petitioner's claim that he was adversely affected "as a result of " the Santa Cruz Metropolitan Transit District's capital improvement project assisted by federal funds under the Urban Mass Transportation Act of 1964, as amended. The correspondence and documentation furnished to us, on the contrary, indicates that problems in interpersonal relationships and communication and other incidents led to a management decision that Petitioner was not satisfactorily performing his job duties. Whether his subsequent termination resulted from his being fired or his resignation, it was not "a result of the project".

Therefore, on the basis of the foregoing and pursuant to paragraph 5h of the contract of assistance, it is determined that Petitioner is not entitled to protective benefits under section 5 as a result of his loss of employment with Kenny Transportation, Inc.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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DOERS v. GOLDEN GATE TRANSPORTATION DISTRICT

DEP Case No. 74-13c-6
September 16, 1974

Summary: The employee claimed he had not been offered a comparable position after the District assumed the operations of a private carrier. A review by the Department of Labor revealed the Claimant was a member of a labor organization which was signatory to a negotiated Section 13(c) protective agreement that included a dispute resolution procedure. The Department determined it lacked jurisdiction and advised the Claimant to pursue his claim through his labor organization.

DETERMINATION

This is in reply to your letter, with enclosures, of August 16, 1974, in which you inquire whether the Department of Labor would pursue on behalf of the Claimant that he has been deprived of certain benefits which are protected by Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

I have enclosed a copy of a letter dated April 18, 1974, which I addressed to the Claimant in response to several letters concerning his situation forwarded to us from the Department of Labor's San Francisco area office.

You will note from my reply that we advised the Claimant of the self-governing dispute resolution procedures contained in paragraph 15 of a Section 13(c) employee protective agreement which was executed by the Golden Gate Bridge, Highway and Transportation District and the Amalgamated Transit Union on June 11, 1971. As an employee covered under that agreement, Claimant is entitled, through his union, to invoke the procedures contained in paragraph 15.

As I explained in my letter to him, the Secretary of Labor does not have the authority to intervene in disputes over the interpretation, application or enforcement of a 13(c) agreement where employees are represented by a union

and thereby have recourse to the procedures contained therein. Nor would it be appropriate for us to attempt to substitute our judgement for the final and binding determination which the parties provided for in their agreement.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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LOCAL 959, IBT v. GREATER ANCHORAGE AREA BOROUGH

DEP Case No. 74-13c-7
December 19, 1974

Summary: The petitioning union sought continuation of benefits and conditions initially bargained during a demonstration project under the Act. Those benefits were lost when the fixed-duration demonstration project terminated and the City initiated similar service with federal funds. The Department of Labor determined in this instance that Section 13(c) did not require the continuation of specific benefits and conditions following termination of the demonstration project, noting that all demonstration employees had been employed by the City when it initiated service thereafter.

DETERMINATION

This is in reference to the dispute between Local 959 of the International Brotherhood of Teamsters and the Greater Anchorage Area Borough as to the appropriate interpretation and application of employee protective terms and conditions certified by the Department of Labor pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with a federal grant thereunder to the Borough (UMTA Project No. AK-03-0003).

By telegram to the Secretary of Labor dated July 16, 1974, Teamsters Local 959 alleged that employees of the Area Bus Company had been adversely affected as a result of the federal grant to the Borough and requested that the Department of Labor make a determination in resolution of the matter. In a telegram to the Secretary of Labor dated July 22, 1974, the Borough, responding to the Union's allegations, contended that it had complied with the law and the terms of the capital grant contract it executed with the federal government.

The parties subsequently furnished to my office statements detailing their respective positions and arguments. At our request, representatives of the Union and the Borough met in Washington, D.C. on September 4, 1974 with a member of my staff so that we could solicit additional information necessary to our deliberations and determinations.

I am advised that the parties have been very cooperative during our processing of this case and I wish to compliment both of your organizations and representatives in that respect.

The federally assisted project which has led to the instant dispute involves the purchase of buses and other equipment by the Borough for the purpose of establishing an area-wide transportation system. The capital grant contract of assistance executed by the Borough and the U.S. Department of Transportation is dated June 19, 1974. Section 5 of that contract of assistance sets forth the terms and conditions for employee protection certified by the Department of Labor by letter to the Urban Mass Transportation Administration dated January 14, 1974. The employee protective terms and conditions are set forth in pertinent part, as follows:

> The Public Body agrees that the following terms and conditions shall apply for the protection of employees in the mass passenger transportation industry in the service area of the project.
>
> a. The project shall be carried out in such a manner and upon such terms and conditions as will not in any way adversely affect employees in the mass passenger transportation industry within the service area of the project.
>
> b. All rights, privileges and benefits (including pension benefits) of employees (including employees already retired) shall be preserved and continued.
>
> c. No employee shall be laid off or otherwise deprived of employment or placed in a worse position with respect to compensation, hours, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during his employment as a result of the project, including any program of efficiencies or economics directly or indirectly related thereto. An employee shall not be regarded as deprived of employment or placed in a worse position with respect to compensation, etc., in case of his resignation, retirement, death, dismissal for cause, or failure to work due to disability or discipline.

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h. The Public Body agrees that any controversy respecting project's effects upon employees, the interpretation or application of these conditions and the disposition of any claim arising thereunder may be submitted by the employees or their representative, to the determination of the Secretary of Labor, whose decision shall be final.

*
*
*

j. The Public Body will post, in a prominent and accessible place, a notice stating that the Public Body is a recipient of federal assistance under the Urban Mass Transportation Act and has agreed to comply with the provisions of Section 13(c) of the Act.

The notice shall also inform employees of their right to invoke the jurisdiction of the Secretary of Labor in accordance with item "h" above.

The Union contends that the Borough has failed to comply with subparagraph "b", "c" and "j" above. These allegations are made on behalf of eleven (11) former employees of the Area Bus Company.

For the period July 1, 1972 to June 30, 1974 the City of Anchorage contracted with the Area Bus Company to operate, maintain, and manage a demonstration transportation project which was assisted by federal funds under the Urban Mass Transportation Act of 1964, as amended. The Area Bus Company recognized Teamsters Local 959 as the sole and exclusive bargaining representative for the employees performing the demonstration transportation service it was providing under contract with the City of Anchorage. Collective bargaining agreements were executed by the Area Bus Company and Teamsters Local 959 on July 27, 1972 and June 26, 1974.

The demonstration project terminated on June 30, 1974. The Borough initiated service on July 1, 1974. The Borough service included those routes that had formerly been served by the demonstration project. The Borough also served additional area and increased the number of trips over the demonstration project routes.

Employees for the Borough's transportation service were hired through the Borough's normal civil service hiring procedures. Apparently none of the Area Bus Company employees filed for positions on the Borough system and it is unclear as to exactly what steps, if any, were taken initially by the Borough to contact and hire these people. On July 1, 1974, Teamsters Local 959 complained to the Borough Assembly about this situation and the Assembly ordered that the Borough hire the former Area Bus Company employees. Eleven (11) employees of the Area Bus Company subsequently accepted employment with the Borough. The Union contends, however, that these employees are not being provided benefits equivalent to those they enjoyed with the Area Bus Company, to include their collective bargaining rights. The Union argues that the employee protective terms and conditions of Section 5 of the grant contract of assistance requires continuation of benefits and working conditions for these employees equivalent to those set forth in the collective bargaining agreement executed by the Union and the Area Bus Company and, further, continuation of the employees' collective bargaining rights.

I cannot agree. The basic purpose of Section 13(c) of the Urban Mass Transportation Act is to provide to employees in the urban mass transportation industry a measure of protection from adverse effects which may arise as a result of federal assistance. In the instant case, the adverse effect on the employees of the Area Bus Company cannot be considered to have resulted from the federal assistance to the Greater Anchorage Area Borough. On the contrary, it was the termination of the demonstration project, of fixed duration to begin with, which resulted in the effect upon the employees.

The Union argues that the Borough, as a successor to the demonstration project operation or the prior bus service of extremely limited and specialized nature, must continue the rights, privileges, and benefits of the employees who worked on the demonstration project. To accept the Union's argument would mean that the manner in which the City chose to operate the demonstration project (i.e., by contract with the Area Bus Company which in turn entered into a collective bargaining agreement with the Union) would establish the rights and benefits applicable to the operation of the Borough's newly-formed area-wide transportation system. I do not believe that was the intent of Congress in Section 13(c).

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Although I cannot find that the Borough has an obligation under the employee protective requirements to continue the terms and conditions of employment enjoyed by the Union-represented employees who performed the demonstration service, I am concerned with the fact that for some reason these employees were not hired by the Borough until after the Borough Assembly ordered them to be hired and that this occurred after all jobs on the Borough's new system had apparently been filled. The record is not perfectly clear as to why such action was necessary. The Borough representative stated in the September 4, 1974 meeting that he thought that an effort had been made to contact these employees at the time the Borough was hiring for its operation. It would appear to me that these employees who had served the community of Anchorage for two (2) years should have been afforded some priority to the jobs on the Borough's system. It is my understanding that these employees have now all been hired and are considered for purpose of employment to have begun service on July 1, 1974. It is my further understanding that these employees will shortly all be in driver positions. Because the Borough Assembly took what I feel was appropriate action in ordering the hire of these people, I do not need to address this matter further.

Based on the foregoing and pursuant to Section 5h of the contract of assistance executed by the Greater Anchorage Area Borough with the U.S. Department of Transportation. It is hereby determined that the Borough has not violated the employee protective terms and conditions set forth in Section 5 of that contract.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

EMPLOYEES v. METROPOLITAN SUBURBAN BUS AUTHORITY

DEP Case No. 75-13c-1
March 11, 1975

Summary: The employees each claimed a loss of five days of annual vacation and requested 13(c) protection of those precise benefits. A review by the Department of Labor revealed that each Claimant had received five additional personal days, plus salary increase and (with one exception) additional paid holiday, which he did not have prior to the acquisition by the Authority. The Department determined that the substitute benefits were of equal or greater value than those benefits lost by the Claimant. The claim was denied.

DETERMINATION

This is in reference to the request filed by the Claimant's attorney on behalf of 30 salaried employees of the Metropolitan Suburban Bus Authority for a determination as to whether they have been deprived of certain benefits which are protected under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as a result of a federal urban mass transportation grant to Nassau County, New York (Project No. NY-03-0050).

The United States Department of Transportation and Nassau County, New York, executed a capital grant contract (Contract No. DOT-UT-1018) on July 10, 1973 for the purpose of providing financial assistance to the County under the Urban Mass Transportation Act of 1964, as amended, to assist it in the purchase of the assets of ten private transportation companies, among other things.

Section 5 of the capital grant contract contains the employee protection requirements pursuant to Sections 3(e)(4) and 13(c) of the Act under which the County agreed to carry out the project. That Section incorporates by reference an employee protection agreement entered into on March 23, 1973 by the County, the Amalgamated Transit Union, and the Transport Workers Union of America.

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The aforementioned Project was certified by the Department of Labor on April 20, 1973 on the condition that the March 23, 1973 agreement be incorporated in the contract of assistance by reference, and on the further condition that employees in the service area of the project not represented by the unions signatory to the March 23, 1973 agreement be afforded the same level of protection as is afforded to members of the union under that agreement.

The 30 Claimants whose case is being reviewed herein are not represented by a labor organization and, therefore, may seek to have the Department of Labor determine whether they have been afforded the protection they are entitled to under Section 13(c) of the Act.

By letter dated July 26, 1974, addressed to a member of my staff, counsel stated that some fifteen dispatchers retained by him as clients had their entitlements to annual paid vacation reduced from five weeks to four weeks following the County's takeover of the ten private bus companies. In his letter counsel requested that the Department of Labor make a determination on this matter.

In subsequent correspondence between counsel and the Deputy Nassau County Attorney, a copy of which was forwarded to the Department of Labor, Claimant's counsel stated that upon takeover a total of 30 employees, rather than the 15 he had originally indicated, had their annual paid vacation leave reduced from five weeks to four weeks.

In response to our request for its views on the matter, the County takes the position, in a letter dated November 11, 1978, that none of the employees represented by Claimant's counsel are entitled to a fifth week of vacation. The County contends that the position of the aforementioned employees was not "worsened" upon takeover as that term is used in Section 13(c) of the Act but, on the contrary, that their position was substantially improved. The County maintains that when Claimants became employees of the Metropolitan Suburban Bus Authority they became eligible for five personal leave days in addition to four weeks' paid vacation. Further, the County contends they received substantial increases in their salaries and additional paid holidays upon date of employment with the Authority. The County is of the opinion that this combination of circumstances improved the position of the 30 Claimants to the extent that they are not entitled to restoration of their fifth week of paid vacation.

The personal leave policy of the Metropolitan Suburban Bus Authority provides in pertinent part for leave for personal business including religious observance without any charge against accumulated vacation or overtime credits. An employee of the Authority is credited with five personal leave days upon date of employment and each year on the anniversary of such date. Limitations upon its use are that it is not cumulative and that it may be drawn only at a time convenient to the appointing officer and must be approved by that officer in advance.

Upon takeover, the weekly salaries of the 30 employees involved in the instant dispute increased by a range of from approximately 7 percent to 37 percent. In December of 1973, the 30 Claimants received additional salary increases. With respect to holidays, all of the Claimants became entitled to 11 holidays upon takeover. Prior to acquisition one Claimant received 11 holidays, twenty-three received 10 holidays, and six received 9 holidays and one personal leave day.

Paragraph (5) of the March 23, 1975 Section 13(c) agreement provides, among other things, that "No employee of an acquired system shall suffer a worsening of his wages, seniority, pension, sick leave, <u>vacation</u>, health and welfare insurance, or other benefits <u>by reason</u> of his transfer to a position with the County or its contractor." (Underscoring added.) The Department of Labor does not interpret this language as precluding the parties from substituting for the aforementioned benefits offsetting rights, privileges and benefits of equivalent or greater value. Indeed, with respect to employees represented by a labor organization, such rights, privileges and benefits as mentioned in paragraph (5) of the Section 13(c) agreement may be modified pursuant to collective bargaining of new contract terms or through the negotiation of implementing agreements pursuant to paragraph 6(b) of the 13(c) agreement.

The collective bargaining process is not available to the employees involved in the instant dispute; however, the Department of Labor regards the loss of the Claimants' fifth week of vacation as equitably offset by the substitution of five personal leave days. Salary increases and additional holidays also, to some extent, contribute to the finding that these employees' present terms and conditions of employment are at least equivalent to their terms and conditions of employment prior to the takeover.

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The Department of Labor recognizes the possibility that prior to the takeover certain employees whose cases have been reviewed herein may have customarily made vacation plans on the basis of five weeks of consecutive vacation leave. We would urge, therefore, that the County allow these employees to take their personal leave wherever possible as a fifth week of vacation.

Based on the foregoing, it is hereby determined that the 30 employees here involved have not been adversely affected pursuant to Section 5 of capital grant contract DOT-UT-1018 with respect to their vacation entitlement.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

STEPHENS v. TALLAHASSEE-LEON COUNTY TRANSIT SYSTEM

DEP Case No. 75-13c-3
April 14, 1975

Summary: The Petitioner alleged denial of protected bargaining rights with respect to representation and union recognition. The Department denied the claim because the alleged rights were not shown to exist prior to the project's certification. Additional claims of discrimination on the basis of union activity were not specific enough to permit a ruling.

DETERMINATION

This is in response to your claims that the Tallahassee-Leon County Transit System (TALTRAN) is in non-compliance with the employee protective terms and conditions certified by the Department of Labor pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with an application for federal urban mass transportation assistance filed by TALTRAN with the Department of Transportation (Project No. FL-03-0030). These terms and conditions were made part of the contract of assistance executed by TALTRAN and the Department of Transportation under which federal assistance was provided for purchase of the assets of a private transportation system and new buses. In your letters you request that federal funds under UMTA be suspended for the City of Tallahassee until there has been a resolution of the dispute between your union and the City, and disposition of the alleged violations of the employee protective arrangement and other alleged discriminatory acts by the City of Tallahassee.

We have carefully reviewed the contents of your correspondence and have had discussions with representatives from that office. From those discussions I understand that efforts are continuing with regard to the pending discrimination suit filed by the Department of Justice against the City of Tallahassee, Florida (Civil Act Number TCA-74-30). Copies of your correspondence have been forwarded to these offices and we have offered to assist them in any way possible with their investigations.

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As you know, the employee protective terms and conditions applicable to Project Number FL-03-0030 were set forth in a letter of certification dated December 6, 1973, from the Department of Labor to the Urban Mass Transportation Administration. A copy of that letter has previously been forwarded to you. The terms and conditions contained in that letter of certification were issued on the basis of a determination that the employees in the service area of the project were not represented by a labor organization. The non-union status of these employees was unchanged at the time of acquisition of the transit system by TALTRAN.

Therefore, we can find no basis for considering the current labor dispute as a violation of the requirement under Section 13(c) (2), UMTA, to continue collective bargaining rights. In this instance, the Department of Labor has no authority to decide questions concerning representation or union recognition disputes. If you so desire, you should continue to pursue remedies in these matters under the State of Florida or other applicable laws.

With regard to your complaints that employees were terminated for union activity and were discriminated against to the application of benefits provided in the employee protection arrangement, the Secretary of Labor cannot rule on a generalized complaint such as you raise. However, any individual employee who has a claim arising under the employee protective arrangement may submit the claim to the Secretary of Labor pursuant to item 8 of the protective terms and conditions certified by the Department of Labor on December 6, 1973. Any employee wishing to pursue such an avenue should address a letter to my office setting forth in as much detail as possible the nature of the claim. Upon receipt of such information, we will evaluate the issues raised and determine what action, if any, the Department of Labor should take in the matter.

Finally, on the basis of the information submitted in connection with the employee protection requirements of Section 13(c) of the Act, we can find no reason to request any suspension of federal assistance at this time.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

TUTTLE v. CENTRAL OHIO TRANSIT AUTHORITY

DEP Case No. 75-13c-4
June 11, 1975

Summary: The employee claimed he had not received any dismissal benefits after he had been terminated by the Authority as required in the existing Section 13(c) agreement. The Department of Labor revealed the employee had been terminated for excessive absenteeism. The claim was denied.

DETERMINATION

This is in response to your letter dated May 28, 1975, in which you refer to a possible violation of the employee protective arrangement certified by the Secretary of Labor by letter dated May 15, 1973, in connection with a grant application filed by the Central Ohio Transit Authority (COTA) under the Urban Mass Transportation Act of 1964, as amended, (Act) to finance in part the acquisition of the Columbus Transit Company (Project No. OH-03-0018). Specifically, you describe the circumstances leading to your discharge from employment by COTA as the basis for your claim.

I have enclosed a copy of the protective terms and conditions as well as a copy of the certification letter for the above cited project for your review. You will note that paragraph 2 on page two of the May 15, 1973, letter requires that employees of the Columbus Transit Company other than those represented by the union be afforded substantially the same levels of protection as are afforded to union members under the March 26, 1973 protective agreement. Section 7 of that agreement states in pertinent part:

> *No employee represented by the Union shall be laid off or otherwise deprived of employment, or placed in a worse position with respect to compensation, hours, working conditions, fringe benefits, or rights and privileges pertaining thereto, as a result of the Project. An employee shall be retained in service by the Authority unless or until laid off for reasons unrelated to the Project or until his employment terminates on account of his resignation, death, retirement or dismissal for cause in accordance with agreements then in effect.*

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After carefully reviewing the material you have provided to us, we are unable at this time to find sufficient evidence to merit considering your discharge as possibly a deprivation of employment resulting from the Project. Rather, it appears on the basis of your letter that you were dismissed for reasons of absenteeism.

If you have additional information concerning the cause for your discharge which you believe related it to the federally assisted project, we would of course give further appropriate consideration to this matter.

If you would like to discuss your situation with a representative of my office, please contact [the Division of Employee Protections].

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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PRICE v. SEATTLE, WASHINGTON

DEP Case No. 75-13c-6
August 28, 1975

Summary: The employee claimed a violation of his Section 13(c) protections when he was discharged for refusing to join the labor organization. A review by the Department of Labor revealed that he had been dismissed after he failed to join the labor organization as required by the existing collective bargaining agreement. The Department determined the employee was terminated for just cause. The claim was denied.

DETERMINATION

This letter follows a phone conversation you had with a member of my staff regarding correspondence dated February 20, 1975, addressed on behalf of your client, the Claimant, to the Administrator, Urban Mass Transportation Administration, which was subsequently forwarded to my office for review.

In your letter you claim a violation of the Claimant's rights under the employee protective arrangement certified by the Secretary of Labor on January 19, 1973 pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with a federally financed urban mass transportation project involving the acquisition of the Metropolitan Transit Corporation (MTC) by the Municipality of Metropolitan Seattle (Metro). You state that the alleged violation resulted from the Claimant's discharge from employment by Metro following his refusal to join Local Division 587 of the Amalgamated Transit Union (ATU) as required by the collective bargaining agreement then in effect between Metro and ATU Local Division 587.

According to your letter, the Claimant's refusal to join Local Division 587 after the acquisition was motivated by his concern that "his old pension plan would become worthless since no further contributions would be made to the plan, and the fact that he would receive no credit for his prior service to his former employer under the State pension plan." Claimant believed that these eventualities would constitute

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a worsening of his rights and conditions of employment in contravention of the protections afforded by the employee protective arrangement.

I have enclosed, pursuant to your request, a copy of Section 13(c) of the Urban Mass Transportation Act and the certified protective terms and conditions. You will note that Section 2 on page two of the protective arrangement reflects the requirements of Section 13(c) of the Act that protective arrangements include provisions for "the preservation of rights, privileges and benefits (including the continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise."

The protective arrangement executed by Metro and ATU Local Division 587 does not specifically detail the manner in which pension rights and benefits are to be continued. Generally, in the case of an acquisition, these matters are resolved through arrangements under which the public body, after the acquisition of a system, will guarantee the continuation of pension payments to those already retired and future pensions for those employees who are not eligible under an applicable public plan or will not be able to obtain enough years of service under such a plan to qualify for benefits equivalent to those they would have received under their previous pension plan. How these special arrangements are financed and carried out depends on local laws and conditions, but the overall result must be that the employees are not worsened as a result of the federally assisted project.

As an affected employee at the time of the acquisition by Metro, the Claimant was guaranteed pension rights and benefits equivalent to those provided under his former plan. On the basis of the information provided to us, we are unable to conclude that the issues raised by the Claimant, and the consequences of his actions taken in furtherance thereof, constitute violations of the Section 13(c) protective terms and conditions.

Rather, your client was discharged for his failure, following notification of the requirement by both Metro and the ATU, to transfer his local division membership in accordance with the collective bargaining agreement then in effect between ATU Local 587 and the Municipality of Metropolitan Seattle. Section 5 of the employee protective arrangement provides in pertinent part that:

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> *Such protections and benefits shall not be available, however, to any employee laid off in accordance with applicable agreements for reasons unrelated to the project or whose employment has terminated on account of his resignation, death, retirement, or dismissal for cause in accordance with agreements then in effect,... (emphasis added)*

As an employee dismissed for cause in accordance with the collective bargaining agreement, the Claimant would not be eligible for the protections and benefits provided by the protective arrangement.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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SALARIED EMPLOYEES v. NASSAU COUNTY DEP Case No. 75-13c-7
January 30, 1975

Summary: The employees claimed they had been denied certain protected benefits pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. The Authority argued that the Claimants were not employees within the meaning of the Act. A review by the Department of Labor revealed that some of the Claimants were eligible employees while the remaining were found not to be employees. The Department further determined that the eligible employees were entitled to certain benefits from the Authority.

DETERMINATION

This is in reference to the claims made by the Claimants that they have been deprived of certain benefits which are protected under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as a result of an urban mass transportation capital grant project involving the acquisition of ten private transportation companies by Nassau County, New York (UMTA Project No. NY-03-0050).

On July 10, 1973, the U.S. Department of Transportation and Nassau County, New York executed a capital grant contract pursuant to the Urban Mass Transportation Act of 1964, as amended (Contract No. DOT-UT-1018).

Section 5 of the capital grant contract contains the employee protective requirements pursuant to Section 3(e)4 and 13(c) of the Urban Mass Transportation Act under which the County agreed to carry out the project. That section incorporates by reference a "Section 13(c) agreement" executed on March 23, 1973, by the County, the Amalgamated Transit Union, and the Transport Workers Union of America. The project was certified by the Department of Labor on April 20, 1973, on the condition that the March 23, 1973 agreement be included in the contract of assistance, by reference, and on the further condition that employees of urban mass transportation carriers within the service area of the project not represented by a labor organization be

afforded substantially the same levels of protection as are afforded to members of the unions under the March 23, 1973 agreement. The employees here involved are not represented by a union. The Secretary of Labor, therefore, has jurisdiction to resolve disputes as to the appropriate application, interpretation, and enforcement of the protective arrangement in their situations.

The Claimants have filed claims with the County requesting payment of the difference in their earnings as employees of the private transportation carriers before the County's takeover and their earnings as employees of the Metropolitan Suburban Bus Authority subsequent to that takeover. One Claimant has filed a claim for a supplementary pension benefit which was discontinued upon the County's takeover. With respect to each of the four Claimants, the County has taken the position they do not qualify as "employees" as that term is used in Section 13(c) of the Act.

At my request, a meeting chaired by a member of my staff was held in New York City on September 6, 1974, for the purpose of ascertaining and inquiring into the respective positions of the parties to these disputes. The four Claimants and representatives of the County participated in that meeting.

Before discussing the specific facts involved in the individual cases consolidated herein, some general comments on the common issue involved in all four cases are in order.

The term "employee" is not defined in the Urban Mass Transportation Act. The legislative history of the Act as expressed in the debates prior to its enactment indicates that the omission was intentional and that the term "employee" was intended to be understood according to its meaning in other laws. Section 13(c) was in large part derived from Section 5(2)(f) of the Interstate Commerce Act. Although the Interstate Commerce Act does not include a definition of the term "employee," a limited number of cases have arisen over the years in which that term has been interpreted and applied. Because of the relationship of Section 13(c), UMTA, and Section 5(2)(f), ICA, considerable weight must be attached to the principles set forth in those cases.

Cases arising pursuant to Section 5(2)(f) of the Interstate Commerce Act indicate that "'employee' surely does not include the principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences

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of a consolidation." See, Edwards v. Southern Railway Company, 376F 2d 665, and Finance Docket No. 21510, the Supplemental Report of the Interstate Commerce Commission on the Norfolk and Western Railway Company and New York, Chicago, and St. Louis Railroad Company Merger, p. 825.

The District Court in McDow v. Louisiana Southern Railway Company 219F 2d 650, indicated that study of the legislative history of Section 5(2)(f) of the Interstate Commerce Act "leaves no doubt that the term 'employee' as used herein does not include the vice president and general manager of a railroad."

The Regional Rail Reorganization Act of 1973 provided for extensive employee protections. That Act contains a definition of the term "employee of a railroad in reorganization," as follows:

> *"'employee of a railroad in reorganization' means a person who, on the effective date of a conveyance of rail properties of a railroad, has an employment relationship with either said railroad in reorganization or any carrier...except a president, vice president, treasurer, secretary, comptroller, and any person who performs functions corresponding to those performed by the foregoing officers;"*

Although the Urban Mass Transportation Act was passed nine years prior to the Regional Rail Reorganization Act, some significance can be attached to the definition of employee set forth in the latter enactment. The protective provisions contained in both Acts derived from the same history. In both cases, the Congress wanted to afford a measure of protection to those who had worked in the transportation industry and would be affected by actions taken in furtherance of the national policy expressed in the legislation.

The Interstate Commerce Act and the Regional Rail Reorganization Act, as discussed above, have direct relevance to the question presented for determination herein. We have been unable to discover other legislation having similar relevance. On the basis of our review, we conclude that the term "employee" as used in the Urban Mass Transportation Act should be broadly construed and should be considered to encompass all but the top level individuals performing functions corresponding to cited positions cited in the definition of "employee of a railroad in reorganization" in the Regional Rail Reorganization Act.

Because job titles may vary from carrier to carrier as a result of size, administrative policy, and other factors, decisions as to whether a particular individual qualifies as an "employee" within the meaning of the Act must be based on the actual functions the individual performs.

Whenever the Department is confronted, as to the instant cases, with a dispute as to whether individuals qualify as "employees," it will be necessary to review the position, duties, and responsibilities of each Claimant separately in order to determine their relative position in the hierarchy of management. In such a review, attention will be focused on the extent to which the individual Claimants impact upon management policy and whether they exercise independent judgement and discretion of the type generally associated with top level management.

With that by way of background, I will now turn to the specific cases requiring a determination herein.

CLAIMANT #1

Upon the County's acquisition, Claimant #1 was retained as an Industrial Engineer with the successor operator, the Metropolitan Suburban Bus Authority. His beginning salary with the Authority was $14,000 annually. Effective January 1, 1974, the Claimant's salary with the Authority was increased to $15,400. His total salary from the private carriers for the year prior to the County's takeover amounted to $18,901.20 which the Claimant contends should be his protected level of earnings pursuant to Section 13(c).

From approximately 1965 until October 1970, the Claimant worked during the summers at Stage Coach Lines, Inc. while attending college. Beginning in the fall of 1970, the Claimant was hired on a full-time basis at Bee Line, Inc., Utility Lines, Inc., and Stage Coach Lines, Inc., where he held the titles of Assistant Superintendent, Assistant Treasurer, and Assistant Secretary, respectively.

As Assistant Superintendent of Bee Line, Inc., the Claimant was responsible for marketing programs. In this capacity he reported directly to the Treasurer and the President, his father, who was controlling shareholder of Bee Line, Inc. He also assisted the Superintendent of Transportation, interviewed applicants for jobs, and acted as a company spokesman along with other officers at business meetings.

As Assistant Treasurer at Utility Lines, Inc., the Claimant made on-route inspections and made route and run changes. In that capacity he reported directly to his father who was the sole shareholder in the company.

At Stage Coach Lines, Inc., the Claimant took-care of the payroll and daily receipts. He ensured that the daily deposits were made. Further, the Claimant made inspections of service and redesigned routes. In these roles, he reported directly to his father who was a principal shareholder in the company. While working for Stage Coach Lines, Inc., the Claimant also held the position of General Manager on a temporary basis.

As a company official at both Stage Coach Lines, Inc. and Utility Lines, Inc., the Claimant had the authority to suspend employees. Also, he enjoyed special privileges limited to a select few company officials.

The Department of Labor recognizes and is sympathetic to the loss of earnings which the Claimant has incurred. However, in making this determination, the Department is obligated to be consistent with the entire history of employee protective measures. The Claimant occupied the corporate officer positions in two companies of the so-called "Carter Group" and stood in a unique personal relationship to the controlling shareholders. See Edwards v. Southern Railway Company 376F 2d 668. Indeed, he was one of approximately five persons who served simultaneously in the top echelon of the three companies in the Group. He was hired without having to be interviewed and attained instant managerial status. His position was not covered by any collective bargaining agreement. While he served as somewhat of an apprentice in certain managerial tasks while learning the business operations of the companies, he exercised an unusual amount of responsibility for someone of his experience.

Based on the foregoing, it is hereby determined that Claimant #1 was not serving in a position which would qualify him as an "employee" under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, and therefore is not eligible for the protective benefits provided for pursuant to that section.

CLAIMANT #2

At the time of the County's acquisition, Claimant #2 was serving as Vice President and General Manager of the Hempstead Bus Corporation. The Claimant's salary for the year immediately prior to the June 2, 1973 acquisition of the private carriers by Nassau County was $23,283. Upon acquisition of the private systems by the County, the Claimant's annual salary as a supervisor with the successor operator, the Metropolitan Suburban Bus Authority, was reduced to $18,000 a year, which is his present annual salary.

The Claimant began his employment with the Hempstead Bus Corporation in 1939 as a bus operator. After serving in that capacity for approximately eleven years he became a cashier. In 1960 he was given the title of Vice President of the Corporation and in 1968 began serving as Vice President and General Manager.

As Vice President and General Manager of the Hempstead Bus Corporation, the Claimant was responsible for all operations of the private carrier. He reported directly to the sole owner of the Corporation. He was responsible for the annual financial reports that are required to be filed by a corporation pursuant to the Transportation Law of the State of New York. Claimant had the authority to hire and fire. He represented management during grievance proceedings and collective bargaining negotiations, and participated as a company spokesman at business meetings and conventions. During the owner's 3 to 4 month annual winter vacation, the Claimant was the official in charge of the entire operation of the Corporation.

The Claimant enjoyed a number of benefits limited to a select few company officials, including yearly membership in a local rotary club and complete automobile insurance coverage. He attended industry conventions at company expense. Examination of the record in Claimant #2's case reveals that although he progressed through the ranks to his eventual position as Vice President and General Manager, once in that capacity, he was charged with formulating and effectuating top level managerial policy and exercised extensive latitude in making independent decisions of the type required by the highest management level positions.

Based on the foregoing, it is hereby determined that Claimant #2 was not occupying a position which would qualify him as an "employee" under Section 13(c) of the Urban Mass

Transportation Act of 1964, as amended, and therefore is not eligible for the protective benefits provided for pursuant to that section.

CLAIMANT #3

Upon acquisition Claimant #3 was retained as a Senior Bookkeeper with the successor operator, the Metropolitan Suburban Bus Authority, Her beginning salary with the Authority was approximately $15,000. Since June 2, 1973, the date of takeover, Claimant #3 has received two promotions and she is presently the Manager of Accounting in which position she earns approximately $16,000 annually.

At the time of the acquisition of the ten private transportation companies in the Nassau County area, the Claimant had been working for one or more of the private carriers for 41 years. She began her career with Bee Line, Inc., as a clerk and progressed to managerial positions with Bee Line, Inc., and two other carriers beginning in 1963. Her titles just prior to takeover were Secretary of Bus Line, Inc., Secretary-Treasurer of the Rockville Centre Bus Corporation and Secretary of Utility Lines, Inc. She also worked for Stage Coach Lines, Inc., in a clerical capacity but held no corporate title with that company. She received a total remuneration of $13,665.60 from Bee Line, Inc., $1,744 from Rockville Centre Bus Corporation, $5,000 from Utility Lines, Inc., and $600 from Stage Coach Lines, Inc., or a total of $21,009.60 for the year prior to the County's acquisition of the private companies.

As Secretary at Bee Line, Inc., the Claimant was responsible for supervising 12 office employees. In this capacity she had the authority to hire, fire and plan vacations, and set wage levels for these employees.

At Bee Line, Inc., Utility Lines, Inc., and Rockville Centre Bus Corporation, the Claimant's duties entailed, among other things, compiling and maintaining complete and final statistical records, including the general ledgers, preparing diesel and withholding tax records, procuring office equipment, and general supervision of accounting. Claimant #3 also verified annual and quarterly financial reports that are required to be filed pursuant to State law.

Although Claimant #3 held varying corporate titles and was paid from an account especially set up for corporate officers, it has not been conclusively established that she had any involvement in the formulation of company policy. She did not attend Board of Trustees or Board of Directors meetings. Her authority was strictly limited to the accounting area and it appears that basic decisions in her area were reviewable by higher authority. She had no budgetary responsibilities for the office which she supervised. Claimant exercised control over 12 people out of a universe of more than 300 that worked for the companies she held positions with. Her verification of records appears to have involved only correction of errors in computation and little, if any, decisions relating to those statistics. Claimant's principal responsibility was to compile and maintain all records pertinent to the operation of the organization and she appears to have exercised little, if any, influence on managerial policy.

Although Claimant carried the title of Secretary and Secretary-Treasurer in the positions she occupied, the functions she was required to perform were not those normally associated with positions carrying those titles. Claimant's duties appear to correspond more to those of an office manager than a Secretary or Treasurer of a company.

Based on the foregoing, it is hereby determined that Claimant #3 performed functions which qualify her as an "employee" under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, and therefore is entitled to a displacement allowance as set forth in paragraphs 8(b) and (22) of the Section 13(c) agreement executed between Nassau County, the Amalgamated Transit Union, and the Transport Workers Union of America, dated March 23, 1973, and made applicable to Project No. NY-03-0050 pursuant to Section 5 of the capital grant contract.

CLAIMANT #4

Claimant #4 began his career as a bus operator with the Rockville Centre Bus Corporation in 1928. While continuing to work with the Rockville Centre Bus Corporation he was hired by Bee Line, Inc., in 1940 as an Assistant Superintendent. In 1948 he became Superintendent of Transportation of Bee Line, Inc., and in 1951 he was given the additional title of Assistant Secretary of Bee Line, Inc. while continuing to

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serve as Superintendent of Transportation for that company. For approximately two years prior to his August 31, 1972, retirement, the Claimant served as General Manager of Bee Line, Inc.

From September 1972 through May 15, 1973, the Claimant received a supplementary pension in the amount of $208.33 per month. Upon acquisition of the assets of Bee Line, Inc., and Rockville Centre Bus Corporation by Nassau County, the supplementary pension benefit was terminated. He has requested that the County restore his supplementary pension pursuant to Section 5 of the capital grant contract.

As Superintendent of Transportation with Rockville Centre Bus Corporation and Bee Line, Inc. the Claimant had responsibility over the operational phase of the companies. In that capacity he had authority over some 150 bus operators. He ensured that all schedules were adhered to and took action to rectify problems whenever they occurred. Additionally, he had supervisory responsibility over inspectors, dispatchers, and supervisors, and had the authority to hire, fire, and discipline personnel. He attended the working sessions of New York State Motorbus and American Transit Association conventions at company expense. His position was not included within the collective bargaining unit.

Claimant's title of Assistant Secretary at Bee Line, Inc., enabled him to sign, along with other company officials, necessary papers for the purchase of buses and to accept a summons whenever the need arose.

When the Claimant became General Manager of Bee Line, Inc., in 1970, his duties remained basically the same as they were when he was Superintendent of Transportation; however, he also began to serve as the company representative in grievance proceedings in addition to his other duties. He was responsible for no more persons as General Manager than he was as Superintendent of Transportation.

The circumstances surrounding the supplementary pension are somewhat unclear from the record. What is known is that there was no written agreement relating to receipt of the supplementary pension; that the Claimant received the supplementary pension for some 21 months prior to its termination; and that since the County takeover, a supplementary pension benefit is being continued in the case of one individual formerly in the employ of Utility Line, Inc. Nevertheless, the

threshold issue which remains for determination in the instant dispute is whether the Claimant qualifies as an "employee" under Section 13(c) of the Urban Mass Transportation Act.

Although the Claimant played an instrumental role in the day-to-day operations of the companies he worked for, it was never conclusively established that he had any participation in or responsibility for the formulation of managerial policy. He did not attend Board of Directors or Board of Trustees meetings and had no budgetary responsibilities in any of the positions he held.

The record indicates that the County never challenged or questioned the Claimant's contention that, besides handling occasional grievances, his duties as General Manager did not differ from his duties as Superintendent of Transportation.

Based on the foregoing, it is hereby determined that Claimant #4 performed functions which qualify him as an "employee" under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, and therefore is entitled to continuation of his supplementary pension pursuant to paragraphs (2) and (5) of the Section 13(c) agreement executed between Nassau County, the Amalgamated Transit Union, and the Transport Workers Union of America, dated March 23, 1973, and Section 5 of the capital grant contract.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

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KING v. DALLAS, TEXAS

DEP Case No. 75-13c-8
October 2, 1975

Summary: The Petitioner alleged that his job had been abolished as a result of federal funds received by the City of Dallas. A review by the Department of Labor revealed that the Petitioner's job had been abolished for economic reasons unrelated to the federal funds. When the Petitioner requested that the Department of Labor take no further action, the case was closed without issuing a formal determination.

BROWN v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

DEP Case No. 75-13c-9
October 8, 1975

Summary: The employee claimed his labor organization had mishandled his workmans' compensation award and requested Department of Labor intervention. The Department determined it lacked jurisdiction to hear the claim because of the Claimant's membership in a labor organization signatory to a protective agreement pursuant to Section 13(c). The Department advised the Claimant to pursue his claim through his union.

DETERMINATION

This letter follows your September 23, 1975, telephone conversation with a member of my staff concerning the issues you raised during your recent visit to the office of Transportation Employee Protections. You expressed particular concern with the manner in which the Amalgamated Transit Union represented you in efforts to resolve several of your workingmen's compensation claims filed during your employment with the former D.C. Transit Company and the Washington Metropolitan Area Transit Authority (WMATA).

In addition, you alleged that certain promises made by your union regarding the calculation of your pension benefits were not adhered to upon your retirement from WMATA, and you requested resolution of these matters by the Secretary of Labor.

We have carefully reviewed the issues you have raised and the contents of the material you have submitted and find that the Secretary of Labor does not have jurisdiction to consider your claims.

As you know, the acquisition of D.C. Transit and two other Washington area bus companies was financed partially with federal funds granted by the Department of Transportation under the Urban Mass Transportation Act of 1964, as amended. In accordance with the Department of Labor's responsibility under Sections 3(e) (4) and 13(c) of the Act, and pursuant to

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the provisions of the National Capital Transportation Act of 1972 (Public Law 92-349), the Secretary of Labor certified on January 5, 1973, an employee protective arrangement on the basis of an agreement executed by your union and WMATA. The purpose of that agreement is to protect the interests of employees against a worsening of their rights and benefits with respect to their employment as a result of the federally assisted project. That protective arrangement provides a procedure for the arbitration of disputes as to its interpretation, application, or enforcement that is available to union members such as yourself.

The Secretary of Labor does not have authority to intervene in disputes arising under the protective arrangement where procedures are available to the parties for the resolution of such disputes. Nor would it be appropriate for the Secretary of Labor to attempt to substitute his judgement for the final and binding determinations provided for in those procedures. Should you decide to process your complaints through these channels, we suggest you contact officials of your union for assistance.

In addition, the issues you have raised may involve matters relating to the interpretation and application of the collective bargaining agreement under which you are covered and may, therefore, be processed through the grievance procedures set forth in that contract. If you wish to pursue these matters further, we again suggest that you contact officials of your union including, if necessary, officers of your international union. If after you have contacted your union you feel that you are not being represented fairly, your remedy would be through the courts.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

CRAYNE v. KANSAS CITY AREA TRANSIT AUTHORITY

DEP Case No. 76-13c-2
January 13, 1976

Summary: The employee claimed the Authority had violated his representation election rights and requested the Department of Labor to intervene. A review by the Department revealed it lacked jurisdiction to determine this claim. The claim was denied.

DETERMINATION

This is in response to your letter of September 18, 1975 addressed to Mrs. Betty Ford which was forwarded to my office for review. In your letter, written on behalf of yourself and 118 other employees of the Kansas City Area Transit Authority, you requested information as to the appropriate agency that would have jurisdiction over representation elections involving these individuals and protection of their rights to join and change unions.

The Department of Labor has no jurisdiction over the issues to which you refer. We have discussed the matters you raise with officials of the Kansas Public Employee Relations Board and the Missouri State Board of Mediation to determine if either of those agencies is empowered to resolve representation issues for employees of the Kansas City Area Transit Authority. Representatives from these Boards indicated that no such matter has been addressed by them to date. We suggest, therefore, that you consider submitting a statement to those agencies outlining your situation with a request for a ruling as to their jurisdiction in these matters. Should you pursue this avenue, it would be appropriate to attach all relevant information concerning your petition before the National Labor Relations Board. The state agencies may be contacted by writing to the following addresses:

Public Employee Relations Board
701 Jackson Street, Room 202
Topeka, Kansas 66012

State Board of Mediation
235 East High Street
Jefferson City, Missouri 65101
(314) 751-3614

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In the alternative, you may wish to seek the aid of legal counsel to assist in determining what appropriate actions you may have for appealing the decision by the National Labor Relations Board or seeking relief through the courts.

Finally, we have enclosed for your information a copy of the Urban Mass Transportation Act of 1964, as amended, and the employee protective arrangement executed pursuant to Section 13(c) of the Act in connection with a federal transportation grant involving the Kansas City Area Transportation Authority.

/s/
Paul J. Fasser, Jr.
Assistant Secretary of Labor

INLANDBOATMEN'S UNION v. GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT

DEP Case No. 76-13c-6
June 21, 1976

Summary: A labor organization sought to withdraw its agreement to the negotiated and certified 13(c) protective provisions. The Department denied the request to withdraw the agreement. The Secretary of Labor's determinations under Section 13(c) are discretionary and not within the scope of the Administrative Procedures Act.

DETERMINATION

This is in reference to your letter of October 29, 1975, addressed to former Secretary of Labor John T. Dunlop, with which you enclosed a letter dated October 22, 1975, to the Secretary from the President of the Inlandboatmen's Union of the Pacific. In that letter he comments on action on our part to certify a grant of federal assistance under the Urban Mass Transportation Act of 1964, as amended, to the Golden Gate Bridge, Highway and Transportation District.

He states that he received a request from the Department of Labor for the views of the Inlandboatmen's Union (IBU) relative to the application for operating assistance filed by the Golden Gate Bridge, Highway and Transportation District, at a time when the IBU was party to a collective bargaining agreement with the District. That agreement expired on July 31, 1975. He further states that representatives of the District urged the IBU to inform the Department of Labor of its support for the grant due to the District's urgent need, and assured IBU Vice President Seccombe that a new contract would render complete protection of the employees against a worsening of their positions with respect to their employment and that receipt of federal funds would not have an adverse impact. On the basis of those assurances the President of IBU prepared a letter dated July 15, 1975, giving IBU support for approval of the grant.

He states that he has since learned that the Marine Engineer's Beneficial Association (MEBA) declined to approve or support any UMTA grant while it was negotiating a

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collective bargaining agreement. He maintains that as a result of the MEBA refusal the Department of Labor withheld its certification of the application. Subsequent to the signing of a collective bargaining agreement, the MEBA acceded to certification of the project, which the Department did shortly thereafter. Negotiations between IBU and the District then stalemated.

Counsel for the Claimants alleges that the IBU was misled by the District, and that the receipt of federal funds permitted the District to operate in a manner which would have been prohibited without such funds. He also contends that the federal funds strengthened the District's position relative to the collective bargaining negotiations with the IBU. Counsel for Claimant implies that had the IBU withheld its approval for the grant, as did the MEBA, the District's approach to its collective bargaining negotiations with the IBU would have been different.

Finally, Claimant's counsel contends that the issues over which the District and the IBU became stalemated in their collective bargaining negotiations are "directly relative to the protective provisions of Section 13(c)." Those issues concern the wage differentials between ticket agents and deck hands and the pay differential for evening and night duty.

On the basis of these circumstances, counsel states that the IBU is withdrawing its letter of July 15, 1975, "as having been made in reliance upon misrepresentation of fact and intention and, therefore, not binding in any manner ..." He further requests withdrawal of the Department of Labor's certification, recapture of any funds dispersed, and suspension of further funds "until the misrepresentations upon which your certification has been based have been remedied." In the event the Department of Labor "does not wish to take such action as requested by the IBU," a hearing under the Administrative Procedure Act is requested.

The Golden Gate Bridge, Highway and Transportation District filed an application for operating assistance under Section 5 of the Urban Mass Transportation Act of 1964, as amended, on April 7, 1975, which was forwarded by the Department of Transportation on June 5, 1975, for certification pursuant to the requirements of Sections 5(n)1, 3(e)(4) and 13(c) of the Act. In accordance with our normal procedures, by letters dated June 12, 1979, we referred

copies of the application to labor organizations involved, including the Inlandboatmen's Union of the Pacific, to enable their participation in the development of appropriate employee protective arrangements.

The Department of Labor subsequently received proposals regarding the establishment of appropriate employee protective terms and conditions applicable to the subject grant from the Amalgamated Transit Union, International Association of Machinists and Aerospace Workers and the Transport Workers Union based on agreements between the parties relative to previous grants dated May 24, 1974, and May 30, 1974, respectively for the ATU and IAM with the TWU concurring with the May 24, 1974 agreement. By letter dated July 15, 1975, the Inlandboatmen's Union informed the Department of its approval and support of the application. The Marine Engineer's Beneficial Association, by letter dated July 1, 1975, voiced its opposition to the grant "until such time as arrangements are concluded which will protect the [MEBA represented licensed] operators as required by law and provide these members with the appropriate training program necessary to assure their continued employment on the new type of vessels intended to be used by the employer herein." MEBA maintained that, pending resolution of the impasse which had arisen over this and other issues in collective bargaining negotiations, it would oppose any grant to the District on the grounds the federal government should not subsidize one party over another in a contract dispute. Counsel for Respondent, attorney for the District, submitted a response on its behalf, by letter dated September 3, 1975, to the allegations raised by the MEBA. Counsel stated that although the two parties had reached impasse in contract negotiations the District was making an effort to reach an accord and that among the issues discussed, none addressed Section 13(c). In response to the concern raised over the provision of training counsel stated the District's intention to institute a proper training program. He also stated that he thought such a program had been agreed on previously.

Members of my staff addressed the training program issue with officials of MEBA and the District with the intention of facilitating some resolution and the expeditious certification of the project. We were subsequently advised by representatives of MEBA and the District that they had reached a voluntary resolution of their impasse and were agreeable to our certification of the pending operating assistance project on the basis of application of employee

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protective terms and conditions set forth in a Section 13(c) agreement between the parties dated June 11, 1971. The resolution of the impasse between the District and MEBA as to the existence of appropriate protective arrangements placed the Department of Labor in a position to certify the project. That certification was made by letter dated October 14, 1975, copy enclosed, from the undersigned to the Urban Mass Transportation Administrator.

Based on our review of Claimant's counsel's letter, we are unable to conclude that the certification of the District's operating assistance grant should be withdrawn.

The allegations regarding the manner in which IBU support for certification was obtained does not alter the fact that the Department's certification was made on the basis of protective terms and conditions which satisfy the requirements of the Act. The issues which emerged in the IBU's collective bargaining negotiations with the District appear to be matters not relevant to Section 13(c) considerations. Certainly we are unable to construe negotiating those issues as violative of the Section 13(c) protections. In any event, the Section 13(c) protective arrangements provide procedures for the resolution of disputes as to their appropriate interpretation, application or enforcement.

As to Claimant's counsel's request for a hearing, I do not feel that a hearing is necessary or otherwise appropriate in this case. The record appears quite clear. Moreover, determinations by the Secretary of Labor under Section 13(c) are discretionary and do not come within the provisions of the rulemaking or adjudicatory procedures of the Administrative Procedure Act for an administrative hearing.

/s/
Bernard E. DeLury
Assistant Secretary of Labor

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EMPLOYEES v. CHAPEL HILL, NORTH CAROLINA

DEP Case No. 76-13c-7
July 13, 1976

Summary: The Claimant alleged the City had failed to live up to its obligation to bargain with the labor organization and requested a determination by the Department of Labor. After numerous efforts to obtain additional information from the Claimant produced no response, the Department closed the case.

DETERMINATION

This is in further response to your letter of January 27, 1976, addressed to former Assistant Secretary of Labor Paul J. Fasser, Jr., concerning the interpretation of agreements executed pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with certain employees of Chapel Hill, North Carolina.

On February 3, 1976, a member of my staff discussed the situation in some detail with you by telephone and requested that certain additional information be provided to us. Subsequent efforts on his part to reach you, including several contacts with your answering service, have been unsuccessful. As a result, we have placed your case in our inactive files. Unless we hear otherwise from you, we will consider the circumstances described in your letter to have ameliorated and assume that you desire no further action on our part.

/s/
Bernard E. DeLury
Assistant Secretary of Labor

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UNITED STATES DEPARTMENT OF LABOR

In re:

NORMAN S. SCHAFFER
(Claimant)

and

GOLDEN GATE BRIDGE, HIGHWAY
AND TRANSPORTATION DISTRICT
(Respondent)

DEP Case No.
77-13c-1

Summary: This decision supplements the October 4, 1979 interim decision in this case, in which Claimant was generally found to be entitled to 13(c) protections. The specific details of wage rates, vacation benefits, and pension entitlements and benefits are set forth in this supplemental decision, which is essentially the result of negotiations between the parties. Claimant's request for interest and attorney's fees was not sustained.

SUPPLEMENTAL DETERMINATION

This concludes the opinion of the Secretary of Labor in the above dispute over certain employee protections to which Claimant is entitled under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). This decision supplements the October 4, 1979 interim Determination in this case. Therein it was found that the Claimant had general entitlements to employee protections in certain categories.

The record at that time was incomplete and the Department of Labor retained jurisdiction in this matter to hear the parties with respect to the specific details of wage rates, hours, vacation benefits, pension entitlements and benefits, and related facts. The hearing was held in San Francisco on October 19, 1979 by a hearing examiner appointed by the Department of Labor.

Through the cooperative efforts of the parties at the hearing a clearer picture of the disputed entitlements emerged. In some instances the facts found through the hearing may have altered certain details of the Claimant's employment conditions as they were considered in the Interim Determination. Where necessary those details have been corrected in my consideration of this Supplemental Determination. Such corrections, however, pertain only to the quantitative amount of the employee's entitlements and do not alter the general determination that he is eligible for and entitled to protections pursuant to Section 13(c) of the Act. I note the Respondent's position that it has provided considerable and diligent efforts in obtaining necessary information in this matter, which in large part was in possession of a third party, Greyhound Lines West. I also note the sincere efforts made by both parties during and following the hearing to reach a mutually agreeable settlement of this dispute. While not fully successful, such efforts did bring the parties closer together and afforded a better understanding of what remains at issue.

Wages

In a modification of his claim to three years of protected wages in testimony at the hearing, the employee agreed with Respondent that he is not entitled to wage protections beyond his first year of employment with Respondent, calendar year 1972. Claimant acknowledges that not later than January 1, 1973 he could have exercised the seniority he then held to have transferred to a position with Respondent (including shift assignment) comparable to his former position with Greyhound and which would have given him a wage rate and wages at least equal to his protected level of earnings. Claimant admits that he had chosen another position at lower pay then because he preferred the location and the earlier shift of that position. Therefore, no protections are due for wages in this case beyond 1972.

Until termination of Greyhound employment December 31, 1971 Claimant worked the night shift from midnight to 8 a.m. and held a wage rate of $5.16 per hour including shift differential. He had held this rate from July through December of 1971; his rate of pay in the same job had been $4.95½ per hour from January through June of 1971. Claimant asserts that had he not been affected by Respondent's takeover of transit operations, he would have received a wage rate of $5.27½ per hour at Greyhound for 1972. The union wage increased to $5.27½ at Greyhound at that time and there was an established practice of eleven years of adjusting the non-union Greyhound wages (including Claimant's) for similar work to conform to the union scale at approximately the same

time as the union rates changed. Respondent maintains that this was a unilateral posture on the part of Greyhound management with respect to non-union employees and subject to change or cessation by management at any time. Therefore, Respondent would not recognize Claimant's alleged right to consideration of the higher rate since he never in fact was paid at that rate by Greyhound. I am persuaded that Greyhound's practice was sufficiently established to have provided Claimant with a wage rate of $5.27½ as of January 1, 1972 had not Respondent's UMTA project intervened. Since Claimant followed the transferred work and performed essentially the same job under similar conditions for the succeeding employer (Respondent) as he had for the preceding employer (Greyhound), he qualifies as a dismissed employee. There is no doubt that he was affected by the project. I find that the rate of $5.27½ incorporated a subsequent general wage increase to which Claimant is entitled as part of his dismissal allowance under the employee protection provisions.[1/] Since this rate would have been effective January 1, 1972, the increase of 17½ cents per hour is to be applied to his basic dismissal allowance as of January 1, 1972.

As to his basic dismissal allowance, the applicable protective provisions require that it be determined in the following manner:

1/ The Secretary's June 22, 1971 letter of certification of the pertinent UMTA project, CAL-UTG-36, incorporated, by reference Appendix C-1 provisions previously certified under the Rail Passenger Service Act of 1970 as amended. Appendix C-1, Section 6(a) requires that a protected employee's dismissal allowance will include subsequent general wage increases.

6. DISMISSAL ALLOWANCES - *(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall be adjusted to reflect on an annual basis the reduction, if any, which would have occurred during the specified twelve month period had Public Law 91-169, amending Hours of Service Act of 1907 been in effect throughout such period (i.e., 14 hours limit for any allowance paid during the period between December 1970 and December 25, 1972 and 12 hours limit for any allowances paid thereafter); provided further that such allowance shall also be adjusted to reflect subsequent general wage increases.*

* * *

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based.

The parties stipulated at the hearing that Claimant worked 40 hours per week. During the 12 months preceding the project's effect upon him, Claimant worked the earlier six months at $4.95½ per hour and the latter six months at $5.16 per hour (all for night shift work). This produces an average wage rate of $5.05-3/4 per hour for a standard year of 2080 compensated hours (no claim is made with respect to overtime) and twelve-month compensation total of $10,519.60. This represents a monthly amount of $876.63 for 173.3 hours of compensated time. This basic amount is to be increased by the subsequent general wage increase of 11½ cents per

hour, thereby adding $19.93 to the monthly level of earnings. This is comparable to a wage rate of $5.17¼ per hour for a 40-hour week including shift differential and provides a protected level of earnings of $896.56 per month.

As provided in Article I(b) of the incorporated Appendix C-1 protections, Claimant is entitled to the amount by which the protected level exceeds his actual wages. However, paragraph (b) of Article I, Section 6 provides that a dismissed employee who returns to work with the employer which is signatory to the protective arrangement shall be treated as a displaced employee while so employed:

> *(b) The dismissed allowance of any dismissed employee who returns to service with Railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of Section 5.* [*]

Article I, Section 5, paragraph (b) provides for modification of the allowance to which such employee is entitled in the event he voluntarily declines a higher rate of pay, as follows:

> *(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.*

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*The literal reference to "Railroad" in Article I(6)(b) is to be read as "Golden Gate Bridge, Highway, and Transportation District" in this fact situation.

Respondent maintains that Claimant could have exercised his seniority to obtain a job at a higher rate of pay (including shift differential) following Respondent's takeover of pertinent transit operations from Greyhound. Such possibility with respect to Greyhound employment has previously been discounted in the Interim Determination.

Upon commencing employment with Respondent January 4, 1972, Claimant testified he worked an odd shift (3:30 p.m. to midnight) but was paid at the rate of the evening shift which began at 5:30 p.m. The position was that of washer/fueler and continued from January 4 until February 27, 1972. The rate pay for this job was $4.92 per hour. On or about February 28, 1972 Claimant agreed to Respondent's request that he work a new job in San Francisco as a cleaner/janitor. The San Francisco shop had only day shift work, at a rate of $4.35 per hour. Claimant testified that he had a good relationship with his supervisor and that his job would not have been in jeopardy if he had declined the San Francisco job. He stated that Respondent was in a bind and he accepted the transfer "to help out." This agrees with Respondent's assertion that Claimant did not have to accept the day shift job. The transfer was voluntary despite the pay disparity. Therefore, the lower rate of pay for day shift work ($4.35 per hour) is not appropriate for computation of entitlements due. Claimant could have retained his wage rate of $4.92 throughout 1972. The protective provisions require that he be treated as though he had retained that rate for purposes of determining his entitlements.

Respondent further maintains that Claimant's seniority (including his prior, Greyhound service) would have enabled him to successfully bid for a night shift job which would have paid him $5.04 as a cleaner/janitor. This rate should be used as the floor of his earnings in determining his protected wage entitlements, Respondent suggests. Similarly, the employer suggests that as of July 1, 1972 Claimant could have successfully bid on a comparable job paying $5.51 per hour, which should have become his new base rate for protections applied as of that date. The record indicates, however, that Claimant was not credited with his prior service credit until November 1, 1972 when it was reinstated through a memorandum of understanding negotiated by his labor organization.[2/] Moreover, Respondent's job bidding system is opened only once each six months, and Claimant has persuasively testified that neither in January nor in June/July of 1972 did he have any choice as to job selection, except as previously discussed in the matter of the transfer to the San Francisco shop. I conclude from the testimony at the hearing that he could not have successfully bid on the higher-paying jobs at least until crediting of his past years of service November 11, 1972. Therefore, $4.92 per hour is the appropriate wage rate for purposes of calculating his dismissal allowance.

[2/] This is so, notwithstanding the fact that his union executed a collective bargaining agreement with Respondent effective July 1, 1972, which contained a generalized provision on seniority but no statement of Claimant's seniority.

The protected level of Claimant's earnings, \$5.17¼ per hour, begins January 1, 1972 and extends through December 31 1972. For the entire period his base wage is (i.e., could have been, except for his voluntary change of jobs) \$4.92 per hour. The difference between his protected wage rate and his base wage rate for purposes of computing a dismissal allowance is \$0.25¼ per hour. This produces a total amount of \$525.20 due Claimant as a dismissal allowance in this matter.

Vacation

Respondent raises a contract bar allegation with respect to this disputed benefit. Regardless of earlier entitlements, Respondent asserts, Claimant cannot receive protected benefits here because his vacation benefit while employed by Respondent has been controlled by a collective bargaining agreement. The agreement between Respondent and Claimant's labor organization, Local 624 of the International Brotherhood of Teamsters, first took effect July 1, 1972, six months after Claimant had been affected by the project. Claimant was not represented by any labor organization at the time he was affected. Local 624 was not party to the executed 13(c) protective agreement and did not later become party thereto. Therefore, I find that the terms of Local 624's collective bargaining agreement do not stand as a bar to any statutory employee protections to which this Claimant may be entitled under Section 13(c) of the Act and the protective provisions certified by the Secretary pursuant to the statute.

Respondent also has suggested that consideration be given to improved benefits in other categories as offsetting any lost vacation benefit. The record indicates, e.g., that Respondent provided two additional holidays not provided by the former employer, Columbus Day and Admissions Day. The Department has previously held[3/] that a loss of five days of annual vacation could be offset by the provision of a salary increase combined with one new holiday and five new days of personal leave. Here, however, Respondent offered only two days of new leave per year to offset a loss of five. Significantly, these two days are holidays and are not available at the employee's convenience, nor can they possibly be taken in conjunction with vacation time unless the vacation days are bent to the schedule of the holidays. The loss of the employee's control and convenience argues against the substitution of unrequested holidays for lost vacation days. Such substitution also would be inconsistent with the protective terms which provide that a protected employee is not to be deprived of benefits attached to his previous employment, under the same conditions as those benefits are accorded to other employees of the previous employer. Respondent's provision of additional holidays, insurance, or other benefits dissimilar to vacation does not affect Claimant's lost vacation benefit.

While with Greyhound Claimant was entitled to three weeks of vacation per year. Upon transfer to Golden Gate he received only two weeks per year. On and after January 4,

[3/] Employees v. Metropolitan Suburban Bus Authority, DEP Case No. 75-13c-1, March 11, 1975. EMPLOYEE PROTECTIONS DIGEST, p. A-30.

1975 Claimant received three weeks of vacation per year. Had he been able to retain his Greyhound position he would have risen to four weeks of vacation in January 1975. From January 1972 through December 1974, then, Claimant lost three weeks of vacation time (one per year). For the year 1975 he received his full vacation entitlement. For the calendar years 1976 and 1977, his vacation benefit with his former job would have been four weeks per year, so he again lost one week per year of vacation. His protective period terminates December 31, 1977. Therefore, I find that Claimant is entitled to receive five weeks more of paid vacation than he received during his protective period. He is to receive these five weeks of paid vacation under the same procedure and conditions as vacation is ordinarily requested and scheduled for this employee in his employment with Respondent. If the parties agree to a lump sum vacation payment to Claimant in lieu of paid time off, such alternative may be jointly elected in satisfaction of his entitlement to the five weeks of protected vacation benefits or portions thereof.

Pension

The disputed claim to pension benefits hinges upon the disposition of eleven and one-half years of service credit Claimant had earned toward a pension benefit while in Greyhound's employment. He would not have attained a vested benefit under Greyhound's plan, however, until accumulation of fifteen years of service. Following his December 31, 1971 separation from service he received the amount of $3,561 from

Greyhound, which represented return of the employee contributions Claimant had made to the Greyhound pension plan, plus a small, undefined amount of interest. Claimant initially sought to have the eleven and one-half years of Greyhound service credited to him under Respondent's pension plan following the takeover of mass transit services. Respondent disagrees with this request because its pension plan does not permit consideration of Claimant's prior service and because such credit would produce a windfall pension benefit by reason of the higher levels of Respondent's retirement plan. Respondent also argues that since Claimant had no vested retirement benefit and received the return of his Greyhound pension plan contributions with interest, Claimant's rights and benefits have been equitably preserved and he has been kept whole with respect to pensions.

The limiting terms of Respondent's pension plan do not have sufficient weight to bar Claimant's proper entitlement to protection of his pension rights and benefits as required by the Act. Alternatives exist, such as amending the plan or providing a separate annuity, to provide whatever pension entitlements Claimant might have. Moreover, the terms of the June 11, 1971 13(c) protective agreement covering employees represented by the Amalgamated Transit Union and executed by the Union and Respondent require that such employees who are affected by the project and who transfer to employment of Respondent shall be credited with their years of service for purposes of sick leave, seniority, vacation and pensions.

The parties stipulated during the hearing that Respondent's retirement plan provides significantly better pension benefits than did Greyhound's. Although the parties have

been unable to provide a copy of the plan documents for the former plan, Respondent has made substantial efforts to identify major benefits provided therein. While the dollar amounts have not been conclusively identifiable by either party, there is general agreement that Claimant would be permitted to retire at an earlier age under Respondent's plan, or would receive a higher benefit under Respondent's plan if he should retire at age 65 (or perhaps earlier), all without any crediting of his past Greyhound service. In retirement he would also enjoy continuation of various insurance provisions which he would not have enjoyed in retirement under Greyhound's plan. Claimant has not specified the retirement benefit he would have achieved at any age under the Greyhound plan but only asked generally that his retirement benefits be the same as if he had continued his employment with Greyhound or, alternatively, that his eleven and one-half years of Greyhound service be credited under Respondent's plan. What specific data the record does contain as to retirement benefits under the two plans is due largely to the extensive research and good faith efforts of Respondent. This has worked to the advantage of both parties to the extent that, beginning at the hearing and relying on this data, the parties have engaged in serious and extensive negotiations in hopes of resolving this pension issue. These negotiations have been productive by allowing the parties to agree in principle to approaches to this question that are feasible in the current absence of the necessary plan documents. The mutual resolution of disputed protections through discussions and negotiation between the parties is preferable to other means of dispute resolution, provided the resolution is not inconsistent with the Act. I find that both parties here have pursued these negotiations in good faith and now

are separated only by an amount of dollars. Their respective offers and positions have been submitted for the record and I will look to these in determining the disputed pension entitlements, in recognition of their efforts and desires.

The final positions of the parties for resolution of Claimant's disputed entitlement to protection of his pension rights and benefits are as follows:

Respondent offers to pay Claimant either-

1. His actual damages at the time he retires, which amount would represent the differential between retirement benefits to which he would have been entitled under the Greyhound plan and those to which he is entitled under the District plan, applying generally accepted actuarial principles with the total differential amount discounted to present values; or

2. A lump sum amount of $15,000 as soon as he executed a settlement agreement with the District.

Claimant has offered to accept as settlement of his pension entitlements sought in this dispute-

> Payment by Respondent to Claimant of the sum of $19,000 over a five-year period with 20% of the sum being paid each year on a quarterly basis and 10% interest applied to each installment payment.

Respondent's first alternative proposal has considerable merit. It would preserve the actual value of Claimant's prior service and entitlements for pension purposes without conflicting with the terms of Respondent's pension plan. However, this alternative would require postponement of final settlement of this dispute for some years and would depend upon specific data of Greyhound's pension plan which neither party has succeeded in obtaining. Respondent's second alternative would provide for a clear and final settlement of the dispute.

In analyzing the two positions that specify finite amounts, the $15,000 offer and the $19,000 offer, I have considered possible effects of inflation, the difference between a lump sum payment and an installment payment over five years, and what Claimant might be expected to realize through reasonable and secure investment of monies he would receive under each offer. I am persuaded that the values of the offers are not dissimilar, except for the potential effect of income taxes upon the two offers. As pointed out by Respondent, however, Claimant received $3,561 from Greyhound in 1972 for his pension contributions. He has had the use of that money since then and initially offered to convey it to Respondent in return for his past service credit for purposes of pension. However, that conveyance has been dropped as part of the offers negotiated between the parties. Retention of the $3,561 and the return on a reasonable and secure investment which Claimant could have realized on that amount since 1972 appear to offset much of the tax impact of Respondent's lump sum offer vis-a-vis Claimant's proposed five-year payment.

Respondent has forcefully pointed out that if Claimant continues working for Respondent until age 65 (or possibly age 63) he will receive substantially greater pension benefits without his past service credit than he could have obtained from the Greyhound plan at the same age if he had never ceased his Greyhound employment. Claimant agrees on this point and currently remains employed with Respondent. These more liberal provisions of Respondent's pension plan have received significant weight in consideration of this issue. Respondent refers to the extensive effort and research which it has devoted to resolution of this matter with Claimant and the good faith of its efforts as demonstrated by the record. Consequently, and based on the merits of its proposal(s), Respondent urges that one of its two alternative offers be deemed the appropriate resolution of this pension issue.

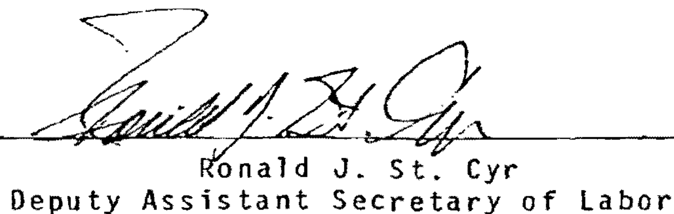
I find that either one of Respondent's offers would provide fair and equitable protection of Claimant's pension rights and entitlements in this case, the first preserving the actual benefits and the second providing a fair and equitable monetary settlement in lieu of the disputed benefits. At the Claimant's request, this decision has been considerably delayed to allow time for further negotiation of the offer and counter-offer. Settlement has not been achieved to date, however, and it appears unlikely that it will occur in the future. In order to resolve this issue, therefore, I find that Claimant's pension rights and benefits are appropriately satisfied by either of Respondent's offers. Respondent may exercise its sole discretion to choose either of its offers (the "actual damages" offer or the "$15,000 lump sum" offer) as satisfaction (except as

noted below) of this disputed pension issue, provided such choice is made and communicated to the Claimant within sixty days from the date of this decision. If Respondent does not effect and communicate its choice within the sixty days, then Claimant may choose either of Respondent's offers within an additional sixty days. If neither party makes a timely choice, Respondent's first offer (above), to pay "actual damages at the time he retires..." shall be the appropriate resolution of these disputed pension entitlements.

The above resolution notwithstanding, one additional pension right needs attention. Claimant would have been vested in Greyhound's retirement plan in approximately July of 1976 with 15 years of service. Therefore, Claimant is to be treated as being vested under Respondent's plan as of the time he would have been vested with Greyhound's pension plan.

Claimant has requested the application of interest to any amounts he may receive in this claim, and he has requested attorney's fees. In consideration of the nature of this determination and of the unusual aspects of presentation and processing of this claim, I do not find either request sustainable in this case.

Dated this 29th day of April, 1982
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

NORMAN S. SCHAFFER (Petitioner) v. GOLDEN GATE BRIDGE, HIGHWAY and TRANSPORTATION DISTRICT (Respondent)	DEP Case No. 77-13c-1

Summary: "Voluntary" waiver is not recognized. Significant wage loss cannot be offset by employer's substitution of other benefits. Wage rate, as well as number of hours, must be protected. Vacation loss may constitute a wage loss. Leisure time may not necessarily be offset by monetary amount. Pension benefits of greater value in the future do not offset adverse effects of a reduction in current or near-term benefits previously available. Past service credit cannot be ignored here even though state plan does not recognize such credit. The Department retained jurisdiction to hear the parties and to issue further and final determination on the amounts of the specific protections due.

INTERIM DETERMINATION

Jurisdiction

This constitutes the determination of certain aspects of the above dispute over employee protections provided by Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). By letter of October 16, 1974 Petitioner, through his attorney, requested the Secretary of Labor to determine the fair and equitable protections to which Petitioner is entitled. The employee herein seeking protection of rights, privileges, benefits, working conditions

and other employment interests was not represented by a labor organization prior to commencing employment with Respondent. Shortly thereafter he gained bargaining representation by Local 624 of the International Brotherhood of Teamsters. That labor organization is not party to an employee protection agreement certified under Section 13(c) of the Act and does not represent the Petitioner for purposes of such protections. He has no other labor organization representation and he is an employee in the mass transit industry in the service area of Respondent. Therefore jurisdiction over this dispute appropriately rests with the Department of Labor in accordance with Section 13(c) and the Secretary's letter of June 22, 1971 which certified Respondent's UMTA project No. CAL-UTG-36 as provided in Section 13(c).

Issues

The Petitioner seeks protection of rights and benefits in three separate areas. He alleges that certain wages, vacation, and retirement credits which he possessed with his former employer, Western Greyhound Lines, were worsened as a result of the takeover of Greyhound's transit services in the San Francisco area by the Respondent.

Position of Petitioner

The petitioning employee has identified the 1971 UMTA project No. CAL-UTG-36 as the pertinent project which resulted in the alleged adverse effects upon his rights, benefits, and other employment conditions. He states that his former job as car cleaner for Greyhound paid a wage rate of $5.16 per hour, included 120 hours of paid vacation per year, and provided him with approximately eleven and one-half years' accumulated service credit for seniority and retirement purposes. Upon transfer to employment with Respondent January 4, 1972 these benefits were allegedly reduced or denied. Petitioner alleges that his new wage rate was $4.35 per hour, that he received only 80 hours of paid vacation per year, and that no prior service was credited for purposes of seniority, retirement, or other matters. Upon termination of his Greyhound employment Petitioner received a return of his employee pension contributions in the approximate amount of $3,561.00. He

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requests compensation for lost wages and lost vacation benefits and asks that his eleven and one-half years of Greyhound service be credited for retirement purposes with Respondent. In consideration of crediting of such service Petitioner is prepared to convey to Respondent the $3,561.00 in employee contributions associated with those years.

The Petitioner has identified the Urban Mass Transportation Act project and has specified the pertinent facts relied upon, satisfying his initial burden in bringing this action. The burden now shifts to the Respondent to prove that any adverse effects or worsening of employment interests or conditions suffered by the employee resulted from cause other than the project.

Position of Respondent

Respondent denies Petitioner's entitlements to protected benefits generally and to any monetary amounts specifically. Initially, counsel for Respondent asserts that Petitioner is not intended to be covered by the protections of Section 13(c). Respondent next maintains that the employee has no right to those employee protections as a consequence of an alleged waiver which the employee signed. Finally, Respondent asserts that, the foregoing notwithstanding, the employee is not in a worse position and has not suffered any denial of Section 13(c) protections.

Waiver

The first question to be addressed in this action concerns the alleged waiver of Section 13(c) protections of the Act. The two-page document purported to serve as a waiver contains the following pertinent paragraph:

> *I, [Petitioner] hereby accept the position tendered to me by the [Respondent] on the terms and conditions as set forth above and I agree that my acceptance of this position is in complete satisfaction of the rights afforded me under Section 13(c) of the Urban Mass Transportation Act.*

The Petitioner's signature appears on a signature line immediately following this paragraph. We have reviewed the validity of the alleged waiver executed by the employee and find that it is of no legal effect. The Department finds such attempted waiver contrary to long-standing public policy and law, and that statutory rights provided, as here, not just for the benefit of the individual but in the interest of the State cannot be waived. The alleged waiver cannot serve as a defense to this petition for employee protections.

We note further that the purported waiver document contained a provision of similar wording intended for use in the event that the employee declined to accept the offer of employment. Thus, the employee was being asked to waive his statutory protections regardless of which choice he made and which rights, benefits, and employment conditions he secured, if any. He was put in the position of choosing between a job or no job, and forfeiting his rights as the price of the choice.

Applicability of 13(c)

With respect to Respondent's defense that the employee here is not covered by Section 13(c), the following is relevant. We note from information submitted by the parties that this defense is predicated, at least in part, on the fact that the employee was not a member of the labor organization which had negotiated the labor contract with Greyhound covering bus drivers and which negotiated the 13(c) protective agreement for those same employees as a condition of the project, identified above, transferring relevant Greyhound operations to Respondent. This exclusionary concept based upon labor organization membership would be inconsistent with the clear intent of Section 13(c) and would contradict the Secretary of Labor's certification of the project, which included the following condition:

> *Transportation employees in the San Francisco Bay area other than those represented by unions signatory to the prototype agreement, will be afforded substantially the same levels of protection as are afforded to members of unions under the prototype agreement.*

While the Respondent may correctly assert that Petitioner is not specifically covered under the negotiated 13(c) pro-

totype agreements, it cannot be maintained that Petitioner is excluded from substantially the same levels of protections as those contained in the negotiated agreement.

Further, Section 13(c) of the Act provides that its protective provisions:

> *shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended.*

Section 5(2)(f) of the (Interstate Commerce) Act of February 4, 1887, as amended, requires that:

> *Such arrangements shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to Section 405 of the Rail Passenger Service Act (45 U.S.C. 505).*

This incorporates the protective arrangements under the Rail Passenger Service Act of 1970, as amended, as minimum employee protections under Section 13(c) of the Urban Mass Transportation Act. The Rail Act protections, Appendix C-1 and Appendix C-2 of the "National Railroad Passenger Corporation Agreement" specifically provide that employees not represented by an appropriate labor organization for purposes of employee protections may refer disputes over the interpretation, application, or enforcement of employee protections to the Secretary of Labor for final and binding determination. Respondent's denial of the applicability of Section 13(c) to this petitioning employee is in conflict with the statute and cannot stand.

Respondent's assertion of inapplicability of protective provisions also conflicts with other components of Respondent's position. Respondent argues that it afforded the employee his appropriate protections and entitlements even though he may not have been entitled to Section 13(c) coverage. If this is true without reservation, it is of curious purpose to argue the lack of 13(c) coverage. Further, in the unsuccessful attempt to have the Petitioner waive his 13(c) rights, Respondent may be said to be estopped from maintaining that 13(c) does not apply to this employee. Moreover, the first portion of the waiver document was entitled "Notification of Employment Offer Pursuant to Section 13(c) of the Urban Mass Transportation Act." It includes the following pertinent provisions:

> *Your employer, Greyhound Lines-West, has identified you to us an an employee who is adversely affected as the result of the Golden Gate Bridge, Highway and Transportation District's proposed new bus operation. In compliance with its obligation to you required by Section 13(c) of the Urban Mass Transportation Act, the [Respondent] hereby tenders to you the job of Washer-Fueler/Cleaner-Janitor with the Transit Bus Division of the [Respondent] on the following terms and conditions. . .*

Therefore, we find untenable the Respondent's assertion that Section 13(c) protective provisions would not be applicable to this employee.

Finding of Facts

We now turn to consideration of the allegedly worsened rights, conditions, or benefits. This portion of this determination has proved particularly protracted because the parties remain in disagreement on elementary facts and, on occasion, have proferred description and information which, by itself, does not clarify the dispute. Respondent would note that it has provided a substantial amount of information in this case. This is consistent with the intent of the employee protections generally, inasmuch as an employer is understood to have greater access to, and often controls, much of the relevant information in these employee protection disputes.

There is no dispute that Petitioner worked at least eleven years with his former employer, up to the point at which he asserts that he was adversely affected by the pertinent project. Therefore, he would be eligible for the maximum protective period of six years for any employee protections to which he may be entitled.

The record indicated that Petitioner was terminated as car cleaner with Greyhound effective December 31, 1971. We find this to be so despite some Greyhound personnel records that use the term "resigned" instead of terminated. In addition to the language of the purported waiver, the employee states that he was informed by his former employer that he in no way could work for them after December 31, 1971. Further, it is clear that the employee's former job in the San Francisco Bay area was abolished shortly after the takeover of transit operations by Respondent.

The Respondent suggests in this regard that the employee might have been able to use his seniority rights with Greyhound to obtain other, comparable employment without being terminated. While this may have been possible, the Petitioner argues that such change would not have been within a reasonable distance. We are persuaded that the Petitioner's assertions are reasonable and correct in the absence of any evidence to the contrary. There is no requirement in Section 13(c) or in the applicable protective agreement negotiated by the District and its primary labor organization that would require the employee to seek or accept employment at an unreasonable distance. Further, such requirement asserted as a bar by Respondent would be inconsistent with Respondent's apparent efforts to persuade Petitioner at the point of hire that Respondent was providing the employee with all rights and other protections to which he was entitled pursuant to Section 13(c).

Wages -

In the area of wages we find that while employed by Greyhound Petitioner enjoyed a wage rate of $5.16 per hour.2/ Upon beginning employment with Respondent he was paid something less. The parties have been other than consistent on this point, but it appears that Petitioner began his new job January 4, 1972 at the rate of $4.35 per hour. $4.35 is the figure initially stated by the petitioner and is within the range of pay which was stated in the offer of new employment pursuant to Section 13(c) which Respondent tendered to Petitioner as a part of the alleged waiver:

Washer-Fueler:	*$4.45 Day*
	4.92 Eves.
	5.16 Nights
Cleaner-Janitor:	*4.35 Day*
	4.81 Eves
	5.04 Nights

2/ The Petitioner points out that his wage rate would have risen to $5.27 per hour in January 1972 if he had remained with Greyhound and had not been affected by the project. This is not relevant here unless it were shown to be the result of a general wage increase rather than, e.g., an individual increase. No such showing has been offered here.

Shifts: (as assigned)

Day:	*7:00 a.m. to 3:30 p.m.*	
Eves:	*3:30 p.m. to 12:00 midnight*	
Nights:	*11:00 p.m. to 7:30 a.m.*	

Work Locations: (as assigned)
Marin County
San Francisco County
Sonoma County

The Transportation District suggests that the higher rate of $4.45 is a more appropriate comparison figure because Petitioner voluntarily requested a transfer into the lower pay category after some six weeks in the new job. Respondent offered no support of the allegedly voluntary nature of the transfer, however, and Petitioner denies the allegation at length. Therefore, we find that the alleged voluntary change has not been demonstrated. If Petitioner in fact had been paid at a rate higher than $4.35 per hour, that would reduce any displacement allowance for that period to which Petitioner may be entitled, by the proportionate amount.

In addressing the issue of protection of wages, Respondent adopted a comprehensive concept of pay. This included in the pay comparison all other fringe benefits enjoyed by the Petitioner at his former company and those fringe benefits enjoyed while employed by Respondent. The basic theory the District urges in this is that a difference in rates of pay can be offset by an equivalent but inverse difference in another benefit. In simplified terms, Respondent would argue that an additional $800.00 per year in employer contributions to, say, a life insurance plan would provide a fair and equitable substitute for a loss of $800.00 in annual wages. To this end Respondent offers a detailed comparison of wages, benefits, and hours for the two different employment situations. The whole is converted to a cents-per-hour comparison of the pay/fringe-benefit packages by Respondent as follows:

Benefit	*Greyhound*	*Respondent*
Holiday	*$330.24 (8 days)*	*$382.80 (11 days)*
Vacation	*$619.20 (15 days)*	*$552.00 (15 days)*
Pension	*$431.00 (4% of Gross)*	*$653.27 (7% of Gross)*
Medical/Life	*$171.00 (no Life)*	*$984.00 (10K Policy)*
Dental	*-0-*	*$210.00*
Optical	*-0-*	*$ 66.00*
Pd Prescription	*-0-*	*$ 58.00*

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To find a common denominator for comparing the above figures, it is necessary to compute the hourly wage into an annual amount, by multiplying the hourly wage rate by the number of hours worked on a yearly basis -- minus vacation, holidays (which are accounted for above) and weekends.

Benefit	*Greyhound*		*Respondent*	
	Days	*Hours*	*Days*	*Hours*
Calendar Year	*365*	*2920*	*365*	*2920*
Less Weekends	*104*	*832*	*104*	*832*
	261	*2088*	*261*	*2088*
Less Holidays/	*8*	*64*	*11*	*88*
Vacation	*15*	*120*	*15*	*120*
Total Work Year	*238*	*1904*	*235*	*1880*
Annual Wages	*$5.16 x 1904= $9824.64*		*$4.45 x 1880= $8366.00*	

Total Employment Benefits (wages plus fringe benefits) then equal:

$$\frac{\$11376.08}{1904} = \$5.97 \text{ per hour} \qquad \frac{\$11272.27}{1880} = \$5.99 \text{ per hour}$$

On the basis of this comparison Respondent asserts that the petitioning employee has not been adversely affected. On the contrary, Respondent claims that the employee is in an improved situation because his hourly rate in this comparison was computed to be $5.99 as a result of Respondent's takeover of operations from Greyhound which had provided an hourly rate of $5.97. Respondent concludes that Petitioner's entitlement to protection of rights and benefits has been observed.

We recognize certain assumptions in the comparison that may not be wholly accurate, such as the disputed wage rate of $4.45 per hour and the number of vacation days Respondent claims to have afforded Petitioner. We also are aware that this comparison presumes a lower number of hours of work in the normal work year with Respondent than with Greyhound, which would have the effect of increasing the cents-per-hour value of all the stated fringe benefits, since their costs were retro-figured to a cents-per-hour basis. Conversely, the simple wage rate figure was not so computed but the lower wage with Respondent was accompanied by a reduced number of available hours of work. For Petitioner

to have maintained his former annual simple wage level of $9824.64 it would have been necessary for Respondent to pay him at the hourly rate of $5.23 for a work year of 1880 hours. The results of each of these inconsistencies works to make Respondent's position appear more favorable.

We need not perform a full analysis of the validity of the proffered comparison, however. Even if one assumed the data to be completely accurate and consistently applied, Respondent's position on this theory could not prevail. The comparison acknowledges a reduction in the employee's hourly wage rate from $5.16 to, at best, $4.45. This is a wage loss of 71 cents per hour, and represents a 14% cut in wages for a constant number of hours worked. As indicated above, the companion reduction in available regular hours of work annually exacerbated this loss and effected at least a 17% reduction in the employees's annual straight-time wages, based on the adversary figures.

Given the gravity of wages as the primary compensation for work, it is doubtful that such a wage loss could be offset by a unilateral provision of one (or even several) new or increased benefits as is suggested here. If the employee's lowest possible wage rate while employed by Respondent, $4.35 per hour, is considered the harm becomes even greater. We find that Petitioner indeed has suffered a reduction in his wages in violation of Section 13(c), other benefits notwithstanding.

Vacation -

With respect to the issue of vacation benefits, we again find the parties unable to agree upon the facts of what actually was provided. Petitioner asserts that his benefit was reduced, at the time of transfer to Respondent, from fifteen days of paid vacation to ten days annually. Respondent indicates that the employee was given three weeks of paid vacation, possibly beginning at the point of hire. In resolving this we have considered several related factors. First, there was a collective bargaining agreement effective July 1, 1972 covering Petitioner. Section 8 of that agreement provided him with only two weeks of vacation benefits until he had been employed by the Respondent for three years. Second, the Respondent has offered no records or other information to support its position on the number of vacation days. We note a copy of a statement allegedly from the maintenance department of Respondent which indicates that Petitioner received ten days paid vacation each year for 1972, 1973,

and 1974. Absent documentation of the contrary, we are pursuaded that Petitioner's clear statement of his vacation benefits is correct. We find, therefore, that he suffered a reduction in paid vacation entitlement by the amount of five paid days per year for each of the three years, 1972 through 1974.

In connection with this loss, assuming wage rates and hours available had been unchanged, the employee would have faced the necessity of working five additional days in each year in order to maintain his former level of annual straight-time wages. This would consititute a de facto cut in his rate of pay even though his nominal wage rates would have been unchanged. In maintaining his former level of annual wages by working five extra days at a lower hourly rate, however, Petitioner would also have been deprived of the five days of paid time off that he had been able to use for his own pleasure and convenience. Thus, the reduction in vacation produced: a two percent increase in the length of Petitioner's work year with no increase in earnings; a two per cent reduction in his wage rate, and a 33 percent reduction in his available discretionary paid leisure time formerly earned as a compensation for his service. Each of these results would constitute an adverse effect.

Pension -

The third issue of employee protections presented here for determination concerns the Respondent's alleged improper denial of Petitioner's prior service credit in determining his eligibility for retirement benefits. The parties are in agreement that the employee was given credit at some time after January 4, 1972, for seniority purposes based on his prior service. This credited service amounts to approximately eleven and one-half years. Petitioner asserts that Respondent is required by Section 13(c) to credit him with the same prior years in determining his pension entitlements provided that Petitioner turns over to Respondent the $3,561.00 in employee pension contributions which were refunded to him upon leaving Greyhound's employ. Petitioner also seeks the amount of the employer contributions made by his former employer for his pension plan and would transfer this amount also to the Respondent in return for recognition of his prior service credit.

On this last point Respondent states that the matter of employer contributions is beyond the scope of employee protections. Respondent maintains that this is properly a concern between itself and the former employer and is not a concern of the employee, that the employee's concerns

are limited to any adverse effects of the project. We concur with the Respondent in viewing the employer contributions as distinct from adverse effects. The question of whether the previous employer transferred or retained these particular employer contributions is a factor in the economic cost to the Respondent of the takeover of area transit operations and the attendant employee protections. This cost consideration, however, does not alter an employee's proper entitlement to protection of rights, benefits, or other employment interests under Section 13(c) of the Act.

On the past service issue Respondent believes that Petitioner has been provided with pension benefits which are better than those he enjoyed with his former employer. The two plans are far from identical but Respondent has provided narrative comparison of aspects of certain major provisions. According to Respondent these improvements would include the following, without past service credit:

- retirement at minimum age 50 instead of 55;
- continuation of major medical, dental, optical prescription and life insurances after retirement;
- greater monthly retirement benefit payment upon retirement at age 65 ($1,487 per month with Respondent, $1,066 per month if he had remained with former employer).

Petitioner acknowledges that these new retirement plan options and benefit levels in and of themselves are more generous than were the corresponding options and levels at Greyhound. Nevertheless, Petitioner maintains that he was adversely affected at, and continuing from, the point of his termination and transfer from Greyhound to the Respondent because he lost his eleven and one-half years of prior service credit, which more than offset the difference in plan benefit levels. He argues that he had to begin anew under the Respondent's plan and now must work additional years until his pension payment received upon retirement would equal what he could have received at an earlier date with his former pension plan. He does not take significant comfort in the promise of a comparatively larger potential pension at a later time in return for the necessary surrender of whatever retirement opportunities he would have otherwise enjoyed had it not been for the project.

The unsolicited opportunity to retire five years earlier (at a pension payment of only $140.00 per month)

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may not be any value to the employee. Clearly this early opportunity for a retirement income of $1,680.00 per year cannot be said absolutely to balance a 29% reduction in formerly available retirement income at age 55 (from $6,120.00 per year to $4,356.00 per year). Nor is this 29 percent loss in pension benefit at age 55 necessarily offset by the consideration that if the employee worked until age 65 his pension benefit under the new plan would be greater than under his former plan.

Respondent defends its position that the two pension plans are at least equivalent, on the basis of cost to the respective employers. This is somewhat at odds with Respondent's earlier argument that employer cost, with respect to the employer contributions for pension benefits, is no concern of the Petitioner. More importantly, however, employer cost is not a proper basis for determining whether the employee's rights, benefits, and other employment conditions have been protected. Among other things, such basis would preclude the Respondent from realizing economies of scale, if they are available, in maintaining employee protections.

An additional affirmative defense offered here by Respondent points to the new employer-paid benefit option of continuing insurance coverages into retirement. This may be a desirable benefit but does not make the two pension plans comparable. To accept this defense it would be necessary to agree that unrequested, new insurance coverage (such as optical or dental insurance) may be substituted for the basic retirement benefit, the rate of the monthly pension. As with the wage rate reduction, this is a hardship on the employee which is compatible with neither the spirit nor the provisions of Section 13(c). We find that Petitioner's pension benefits and entitlements have been reduced in contravention of Section 13(c), notwithstanding the new benefits unilaterally provided.

Respondent has recognized Petitioner's prior service for purposes of seniority, placing him at the top of his seniority list. It seems inconsistent then to deny recognition of prior service for preservation of pension entitlements, especially in view of agreements the District made as conditions of the pertinent UMTA project. The June 11, 1971 negotiated 13(c) agreement between the Respondent and the Amalgamated Transit Union provides that all affected employees transferred to employment with Respondent shall be credited with their years of service for purposes of sick leave, seniority, vacation and pensions.

It further states that no affected employee of an existing system (e.g., Greyhound) transferred, shall suffer any worsening of his wages, seniority, pension. . . or any other benefits by reason of his transfer to a position with the District. The June 22, 1971 letter of certification from the Department of Labor pursuant to Section 13(c) of the Act and incorporated in the District's contract with the federal government for the identified UMTA project, clearly states that non-union transportation employees in the Bay Area will be afforded substantially the same levels of protection as are afforded to members of unions under the negotiated 13(c) protective agreement. Considering these provisions to which the Respondent agreed as a condition of accepting these Urban Mass Transportation Act funds, we find Respondent could not properly deny the Petitioner protection and continuation of his prior service credit for retirement purposes. With respect to Respondent's concern that the employee may actually gain improvement in pension benefits over what he formerly may have achieved, we find that Respondent has provided such potential by virture of the agreements negotiated in connection with this project. Such gains are not required, so long as Petitioner's protected rights, benefits, and other employment interests can be preserved unharmed in the absence of such gains. Section 13(c) does not prevent Respondent from affording improved benefits to Petitioner, however.

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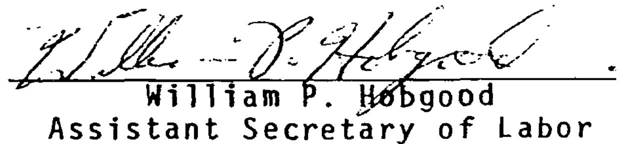
Entitlements

As stated above, we find Petitioner entitled to employee protections heretofore denied by Respondent. We are unable to determine the specific, quantative amounts of these entitlements at this time, however, due to substantial inconsistencies in written data forwarded by the parties. Therefore we retain jurisdiction over this dispute in order to hear the parties with respect to the specific details of pertinent wage rates, hours, vacation benefits, pension entitlements and benefits, and other related facts.

Dated this 4 day of OCT, 1979
at Washington, D.C.



William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

JAMES G. SUPPLE (Claimant) and THE CITY OF NORTH OLMSTED & THE CLEVELAND REGIONAL TRANSIT AUTHORITY (Respondent)	DEP Case No. 77-13c-10

Summary: Claimant alleged that he suffered a worsening of his working conditions as a result of projects undertaken by two Respondents and funded under UMTA. In the first instance, Claimant cited a project which provided operating assistance to the Regional Transit Authority which directed operations of Claimant's employer. It was determined that under the Department of Labor's certification, the Secretary did not have the authority to issue a binding decision with respect to adverse effects arising from this project. This claim was dismissed for lack of jurisdiction. The second project cited by Claimant was a capital assistance grant for the purchase of buses by his employer. Claimant failed to show a causal relationship between the purchase of buses and the adverse effects which he noted. This claim was denied.

DETERMINATION

Jurisdiction

This is in response to the Claimant's request that the Department of Labor issue a determination with respect to his rights and benefits under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. Claimant alleges that he has been adversely affected by changes in procedures

relating to seniority rights, "show-up" time prior to a shift, longevity pay, and vacation pay as a result of two projects funded by the Act.

Claim Against RTA

The first project cited by Claimant provided operating assistance for the Cleveland Transit System (CTS), predecessor to the Cleveland Regional Transit Authority (RTA), for the continuation and improvement of transit services to the public (UMTA Project No. OH-05-4002). A negotiated employee protections agreement dated June 17, 1975 was signed by the CTS and the Amalgamated Transit Union, and certified by the Department of Labor on October 1, 1975. A condition of this certification was that mass transit employees not represented by the union be afforded substantially the same levels of protection as are afforded to union members. Neither this certified agreement nor the Department's letter of certification, however, specifically provides for dispute resolution by the Secretary of Labor for employees entitled to "substantially the same levels of protection". The Department of Labor does not have the authority to issue a binding determination in a dispute arising from the operating assistance grant to RTA's predecessor under project number OH-05-4002. Therefore, the claim pertaining to the RTA is dismissed for lack of jurisdiction.

Claim Against North Olmsted

The second project cited by Claimant was a capital assistance grant (UMTA Project No. OH-03-0034) executed by the City of North Olmsted on October 1, 1975 to purchase new

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buses. The Department of Labor issued a letter of certification for this project on July 26, 1974 which provided the Secretary of Labor with the authority to make final and binding determinations with respect to employee protections disputes pertaining to the project.

In January 1976 the City of North Olmsted became affiliated with the RTA when it signed an operating agreement retroactive to October 5, 1975. Under this agreement RTA agreed to provide a financial subsidy to the City, enabling it to operate its public transit system without loss. Shortly after the City joined RTA, 17 buses, originally ordered in 1974 and purchased with Federal funds, were delivered to the City.

Subsequent to the financial arrangement between RTA and the City, all personnel remained employees of North Olmsted. RTA, however, was instrumental in establishing policies and procedures which had a direct impact on the wages and benefits of City employees. In June 1976, City ordinances were repealed which regulated "check-in" time prior to a run and seniority rights for the selection of "extra" trips. These changes were implemented as part of RTA's "Block System" for scheduling runs and allocating overtime work. Changes were also made to conform with RTA procedures for payment of longevity increases. On January 1, 1980 a change was also made in the basis for calculating vacation pay. This occurred when an audit found that the City was in violation of a 1976 state law requiring that vacation pay be calculated on the basis of a 40-hour week.

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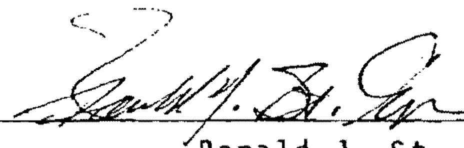
With respect to the adverse effects previously noted, there is no indication that these were a result of the purchase of buses by the City. Furthermore, the record does not indicate that the number or condition of buses owned by the City influenced the policy directives of RTA in any way. Claimant has failed to establish a plausible causal connection between the purchase of buses and the alleged effects in this case, and his claim, therefore, is denied.

Dated this 17th day of June, 1982
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

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UNITED STATES DEPARTMENT OF LABOR

In re:

EDWIN R. SWANSON (Claimant) v. DENVER REGIONAL TRANSPORTATION DISTRICT (Respondent)	DEP Case No. 77-13c-24

Summary: Claimant alleged that as a result of the takeover of his employer by Respondent his compensation was worsened, he was denied use of a comparable automobile and he was denied a first opportunity for employment for two positions. As Claimant's salary was not decreased and he was not denied any applicable general wage increase there was no worsening in compensation. The changes in some features of the automobiles assigned to Claimant did not constitute a worsening of fringe benefits. Claimant was provided continued comparable employment and consequently was not entitled to a right of first opportunity for employment for the two positions at issue.

DETERMINATION

Introduction

This claim was initially submitted to the Department of Labor by Claimant's letter dated March 30, 1977 and was supplemented by additional correspondence from Claimant. Claimant asserts that he was worsened with respect to his

compensation and fringe benefits as a result of projects under the Urban Mass Transportation Act of 1964, as amended (the Act). Claimant further asserts that, under the terms of a protective arrangement executed by Respondent and dated June 5, 1974, he was entitled to, but was denied, a first opportunity for employment for two positions with Respondent. This protective arrangement was certified by the Department of Labor for project CO-03-0007 on July 3, 1974 and for project CO-05-0001 on May 22, 1975.

By letter dated May 2, 1977 the Department of Labor advised Respondent of this claim, and requested Respondent's position with respect to the claim. Respondent replied by letter dated June 7, 1977, supplemented by letters dated June 21, 1977 and September 8, 1980. Respondent denied that Claimant's compensation or other conditions of employment had been worsened as a result of any project under the Act. Respondent made no objection to submission of this claim for determination by the Secretary of Labor.

Claimant seeks a determination by the Secretary of Labor with respect to his right to protections under Section 13(c) of the Act. Based upon the information submitted by the parties, the Secretary of Labor has reviewed this dispute and issues this determination.

Issues

1. Was Claimant placed in a worse position with respect to his compensation as a result of projects CO-03-0007 and CO-05-0001?

2. Did a change made by Respondent in the characteristics of the automobile provided by Respondent for Claimant place Claimant in a worse position with respect to fringe benefits?

3. Was Claimant entitled to a first opportunity for employment with Respondent for the position of Safety Engineer and for the position of Administrator of Claims?

Background

In 1971 the City and County of Denver acquired the assets of the Denver Tramway Corporation and contracted with the A.T.E. Management and Service Company of Cincinnati, Ohio to operate Denver Metro Transit (DMT). Prior to his employment by Respondent in 1975, Claimant was an employee of DMT with a job title of Director of Personnel and Safety. Claimant's salary while an employee of DMT increased from $1,000 per month in 1971 to $1,285 per month in May 1974.

In July 1974 Respondent purchased the assets of DMT. Effective April 1975 former employees of DMT were hired as employees of Respondent. Claimant was offered, and accepted, a position with Respondent. Claimant states that he assumed the position of Personnel Manager, Metro Division, following the purchase of DMT by Respondent. Respondent denies that Claimant ever held this position. The parties concur that Claimant's position as of October 1975 was Insurance Coordinator. Claimant's salary at the beginning of his employment with Respondent was $1,400 per month. No decrease in salary occurred subsequent to Claimant's employment by Respondent.

Claimant applied for the position of Safety Engineer in December 1975. He was considered for the position but was not hired. Claimant applied for the position of Administrator of Insurance and Claims in October 1976. He was considered for the position but was not hired. The latter position was filled by an individual who was not previously employed by Respondent.

In October 1976 Claimant was assigned to the position of Claims Adjuster at a salary of $1,508 per month. By June 1980 Claimant's salary in the position of Claims Supervisor was $2,125 per month.

Claimant was provided a new 1972 Plymouth automobile with no air conditioning by his former employer. He continued to use this automobile following his employment by Respondent. The Plymouth was retired by Respondent in June 1977, at which time it had accumulated approximately 70,000 miles. The Plymouth was replaced by a 1975 automobile with air conditioning, and with approximately 47,000 miles accumulated. Some of Respondent's employees were assigned new automobiles with air conditioning and a.m. radios at or about the time Claimant's automobile was replaced.

Decision

Compensation

Claimant asserts that he was worsened with respect to his compensation because his salary increases subsequent to his employment by Respondent were less than his salary

increases prior to that time, and because his ability to obtain merit salary increases was diminished by reason of the structure of Respondent's salary plan. Claimant reports his monthly salary from April 1971 to the date of his employment by Respondent as follows:

4-20-71	$1,000
5-01-72	1,055
9-01-72	1,105
6-01-73	1,165
10-01-73	1,200
5-01-74	1,285
2-01-75	1,400

Claimant's starting salary upon his employment by Respondent in April 1975 was $1,400 per month. In June 1980, the last date for which amounts were provided by Claimant, Claimant's monthly salary was $2,125.

Claimant did not identify what portion of his wage increases with DMT was attributable to merit increases, nor did he identify what portion was attributable to general wage increases. However, the lack of regularity in both the amount and timing of the increases indicates that they were not periodic increases to which Claimant was entitled as an automatic incident of his employment. There is no indication that Claimant, as an employee of Respondent, was ever denied a general wage increase applicable to his employment classification.

Based on the information provided by the parties, it does not appear that Claimant has been worsened with respect to his compensation. He never suffered a reduction in compensation, did not show any entitlement to periodic salary increases, and did not show any denial of an applicable

general wage increase. As no worsening of compensation resulting from a project has been shown, Claimant's request for a determination based upon the amount of his salary increases subsequent to his employment by Respondent is denied.

Automobile

Claimant asserts that Respondent assigned an automobile to him in June 1977 that was inferior to the automobile assigned to him in 1972 prior to his employment by Respondent. Claimant contends that this assignment constituted a worsening of fringe benefits protected under Section 13(c).

Section 17 of the protective arrangement of June 5, 1974 and Section 13(c) of the Act provide protection against a worsening of benefits of employees affected by a project. Prior to his employment by Respondent Claimant was provided with an automobile for business related transportation. At the beginning of his employment by Respondent in 1975 that automobile was several years old. It had no air conditioning. Respondent also has provided Claimant with an automobile for business purposes. Though not new, it does have air conditioning. No other significant details regarding the two automobiles were provided by either party. To the extent that assignment of an automobile constitutes a benefit of employment, the change in the characteristics of the automobiles provided in this case was not shown to constitute a worsening of position. The fact that some

other employees of Respondent were provided with new automobiles, equipped with radios, indicates only that Claimant's benefits are not equivalent to the benefits provided to some other employees, and does not indicate that there has been a worsening of Claimant's benefits. Claimant's request for a determination based upon vehicle assignment, therefore, is denied.

Denial of first opportunity of employment

Claimant asserts that he was entitled to a first opportunity of employment for the position of Safety Engineer and for the position of Administrator of Insurance and Claims. His assertion is based upon Section 7 of the June 5, 1975 protective arrangement executed by the Respondent and certified by the Department of Labor under Section 13(c) of the Act. The applicable portion of Section 7 is as follows:

> (7) Employees covered by this agreement will be given first opportunity for employment in any new jobs included in the bargaining unit, or comparable to those included in the bargaining unit, created as a result of the Project for which they are, or by training or retraining can become, qualified. All such jobs shall be filled in accordance with seniority and allocated on a fair and equitable basis under arrangements to be mutually determined by the operator of the transit system and the Union prior to the filling of such jobs, or by arbitration at the request of either party, if such arrangements are not agreed upon prior to such date. The operator of the transit system will not tender such jobs to any other individual or individuals so long as there are members of the bargaining unit who are qualified, or after reasonable training period can become qualified, and are willing to bid these jobs.

Claimant contends that this provision entitles him to a first opportunity for employment for any job outside the bargaining unit created as a result of the project, for which he is qualified or after reasonable training or retraining could become qualified. Claimant asserts that he was qualified for the position of Safety Engineer and Administrator of Insurance and Claims, and that he was therefore entitled to first opportunity for employment in these positions.

Respondent asserts, in its letter of June 7, 1977 to the Department of Labor, that Claimant applied for the positions in question, was considered for the positions, but found to be not adequately qualified. Respondent further asserts that Section 13(c) of the Act requires protections of employees against a worsening of their positions as a result of Federal assistance, and that Claimant's position has not been worsened.

Initially we note that Section 7 of the protective arrangement provides a first opportunity of employment only for new positions "created as a result of the Project." From the materials provided by the parties it is unclear whether or not the positions in question were created as a result of the projects for which the protective arrangement was certified. We do not, however, believe that it is necessary to address the origin of the positions. For the reasons discussed below, we find that the Claimant was provided the level of protections to which he was entitled, even assuming that the positions were created as a result of the projects.

Claimant is not a member of any bargaining unit. The positions of Safety Engineer and Administrator of Insurance and Claims were not shown to be "new jobs in the bargaining unit, or comparable to those included in the bargaining unit" (emphasis added). Further, Section 7 of the Agreement provides a mechanism, based on seniority and on concurrence between the union and the Authority, for the filling of such positions, which mechanism Claimant does not assert applies to him. Thus, Claimant is not seeking a literal application of the terms of Section 7. Claimant here seeks an interpretation of Section 7 that would entitle him, as an individual, to a right of first opportunity of employment for any new job outside the bargaining unit.

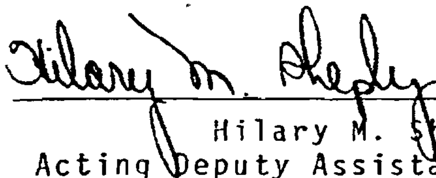
Where a provision in a protective arrangement is by its terms directly applicable to members of a bargaining unit, employees who are not members of the bargaining unit are entitled to substantially the same level of protection as provided to bargaining unit members. Provision of substantially the same level of protection does not, however, require the broad interpretation of Section 7 proposed by Claimant. The main thrust of Section 7, in this claim for Section 13(c) protections, is to help assure the continued employment of employees potentially affected by the project by requiring that positions created as a result of the project be filled first by such employees, to the extent that they are qualified or might become qualified for such positions. Section 7 provides an orderly mechanism, based on seniority, to achieve this goal of continued employment. In this case, when Respondent acquired DMT, Claimant was offered, and accepted, a position with Respondent. As discussed in the preceding sections of this determination,

Claimant was not worsened with respect to his compensation or fringe benefits as a result of the acquisition. By providing continued comparable employment with no worsening of compensation or fringe benefits, Respondent complied with the requirement that it provide to Claimant substantially the same level of protections as provided to bargaining unit members.

In summary, Claimant has not shown that he is worse off than he was before the cited projects. He has not shown any adverse effect upon a right, privilege, benefit, or other condition of employment which he previously possessed. Further, with respect to the specific question of first opportunity of employment, Claimant has suggested no other basis or combination of conditions and circumstances that would extend such provision to him as an employee protection under the Act. Therefore, the request for protection of Claimant's alleged right to first opportunity for employment in this instance is denied.

With respect to the issues of denial of first opportunity of employment, salary increases, and assignment of automobile, Claimant has failed to demonstrate any worsening of condition with respect to employment, or denial of rights, benefits, or privileges protected by Section 13(c) of the Act. Claimant's claims, therefore, are denied.

Dated this 25th day of February, 1981
at Washington, D.C.



Hilary M. Shepley
Acting Deputy Assistant Secretary

UNITED STATES DEPARTMENT OF LABOR

In re:

EDWARD GIAMPAOLI (Claimant) v. SAN MATEO COUNTY TRANSIT DISTRICT (Respondent)	DEP Case No. 77-13c-30

Summary: Claimant's position as Transit Supervisor was terminated as a result of Respondent's expansion of service and consolidation of operations in San Mateo County, assisted by several Urban Mass Transportation Act projects. Although Claimant had significant managerial responsibilities, he was not a member of top management, and did not have an ownership interest in the carrier. He therefore qualified as an "employee" for purposes of Section 13(c) protections. Claimant did not lose his entitlement to benefits by reason of his refusal of an offer of non-comparable employment. Claimant is entitled to the difference between his protected level of earnings as Transit Supervisor and his actual earnings during his protective period, together with compensation for any fringe benefits lost.

Mr. Edward Giampaoli requested, by letter dated June 21, 1977, the opinion of the Department of Labor regarding his entitlement to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (the Act). By letter of May 26, 1978 the Department of Labor advised the parties that it considered Mr. Giampaoli to be an "employee" as that term is used in the Act. The May 26, 1978 letter, a copy of which is attached, requested that each party provide a statement of its position regarding Mr. Giampaoli's

entitlements. In response to this request, San Mateo Transit Authority, by letter dated July 6, 1978, reasserted its position that Mr. Giampaoli was not an employee, asserted that Mr. Giampaoli had not made a prima facie showing that he was affected by a project and stated that Mr. Giampaoli had been offered employment with the Authority, which offer he had refused.

We have carefully reviewed the Authority's arguments regarding Mr. Giampaoli's status as an "employee" entitled to protections under Section 13(c). The description of Mr. Giampaoli's duties provided in the Authority's July 6, 1978 letter, while indicating significant managerial responsibilities, fails to show that Mr. Giampaoli was a member of the top level management of the carrier, as that term is explained in our letter of May 26, 1978. Further, the Authority's reliance on <u>Edwards v. Southern Railway</u> Company 376 F. 2d 665 (4th Cir. 1967), is not persuasive. In that case, Edwards had an ownership interest in the employing entity and was related to the General Manager and Chairman of the Board of his employer. This personal and financial relationship to the employer, coupled with very significant managerial responsibilities, placed Edwards in a unique position to protect his employment interests, and influenced the Court's finding that Edwards was not an employee entitled to protections under Section 5(2)(f) of the Interstate Commerce Act. This close relationship with the employing entity was not shown to be present in Mr. Giampaoli's case. For these reasons, and for the reasons expressed in our May 26, 1978 letter, we remain of the opinion that Mr. Giampaoli is an "employee" within the meaning of Section 13(c) of the Act.

We next address the Authority's position that Mr. Giampaoli failed to make a prima facie showing that he was affected by an Urban Mass Transportation Act project. Mr. Giampaoli showed that he was employed by ServiCar of Northern California, Inc., as a Transit Supervisor. In this capacity, Mr. Giampaoli was responsible for the supervision and day-to-day management of four transit systems in San Mateo County: Manlo Park, Redwood City, San Mateo and South San Francisco. Mr. Giampaoli identified the termination of ServiCar's contract with the Authority for the operation of these four transit systems as the reason for the elimination of his position. The contract was terminated on or about July 23, 1977, the date when Mr. Giampaoli's position was abolished. For the reasons discussed below, we believe that Mr. Giampaoli made a sufficient showing that he was affected by a project.

In 1976 and 1977 the Authority undertook the expansion of mass transit service in San Mateo County, and the consolidation into an integrated countywide system of the mass transit operations then provided for the Authority by a number of cities and private contractors. The expansion of service and consolidation of operations was assisted by several projects under the Act.[1/] In connection with this assistance, the Authority entered into an employee protective agreement dated October 27, 1976 which covered affected

[1/] See project description for UMTA Projects CA-03-0126 and CA-05-0018, and preamble to the Agreement of October 27, 1976, (footnote 2).

employees of ServiCar.[2/] Subsequently, Mr. Giampaoli's position as Transit Supervisor was abolished when ServiCar's contract to operate four transit systems in San Mateo County was terminated, and the service previously provided by ServiCar was assumed by the Authority. We believe that under the above circumstances, by identification of his employment with ServiCar, and by identification of the termination of ServiCar's contract with the Authority, Mr. Giampaoli made a sufficient showing that he was affected by a project.

The remaining issue raised by the Authority is whether Mr. Giampaoli's refusal of an offer of employment by the Authority should bar his entitlement to protections under Section 13(c). An employee, in order to remain entitled to a displacement or dismissal allowance under the Agreement, must accept a tendered offer of reasonably comparable employment. By letter dated May 20, 1977 Mr. Giampaoli was offered the position of Service Coordinator with the Authority at a salary of $18,000 per year. As Transit Supervisor of ServiCar, Mr. Giampaoli received an annual salary, including bonus, of $23,760 per year. Information sufficient to allow comparison of the specific terms of the fringe benefits associated with the two positions was not provided by the parties. It is our opinion that the large dissimilarity in compensation between Mr. Giampaoli's ServiCar position and the tendered position is sufficient to permit his refusal of the position as offered without loss of his right to protection. It is therefore not necessary to compare the

[2/] Agreement dated October 27, 1976 between the Amalgamated Transit Union and the San Matéo County Transit District. The Agreement was certified by the Department of Labor pursuant to Section 13(c) by letter dated November 3, 1976. The Agreement also covered affected employees of other mass transit providers operating in San Mateo County.

duties and responsibilities, fringe benefits and other components of the positions. As the position as offered was not comparable to his former position, Mr. Giampaoli was not required to accept the tendered position in order to retain eligibility for Section 13(c) protections.

In summary, Mr. Giampaoli made a prima facie showing that he was affected by a project under the Act. As Mr. Giampaoli is an employee entitled to protections, but is not a member of any bargaining unit, he is entitled to receive substantially the same level of protection of rights, privileges, benefits and other conditions of employment as provided to members of bargaining units under the employee protective agreement of October 27, 1976. Mr. Giampaoli did not lose entitlement to these protections by reason of his refusal of the Authority's offer of non-comparable employment. It is our opinion that Mr. Giampaoli is entitled to the difference between his protected level of earnings as a Transit Supervisor and his actual earnings during his protective period, together with compensation for any fringe benefits lost during his protective period. The parties should seek to resolve the specific amounts to which Mr. Giampaoli is entitled in accordance with the provisions of Appendix A of the Agreement.

Dated this 16th day of January, 1981
at Washington, D.C.

William P. Hobgood
Assistant Secretary of Labor

GIAMPAOLI v. SAN MATEO COUNTY TRANSIT DISTRICT

DEP Case No. 77-13c-30
May 26, 1978

Summary: The supervisory or managerial duties of the Claimant did not place him outside the scope of 13(c) protections. The Department held that Claimant is an "employee" for purposes of 13(c).

INTERIM DETERMINATION

This is in reference to the request filed by Mr. Edward Giampaoli, formerly Transit Supervisor, ServiCar of Northern California, Inc., dated June 21, 1977, that the Department of Labor determine whether he has been deprived of certain benefits under the employee protective provisions of Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, in connection with recent Urban Mass Transportation Act grants for the development and expansion of service provided by the San Mateo County Transit District (District). Mr. Giampaoli alleges that his position as Transit Supervisor was abolished as a result of the District's establishing service previously provided by contract with ServiCar. Mr. Giampaoli further claims that as a result of that assumption of service the District offered him a position, but at a substantial reduction in wages. Mr. Giampaoli claims that he is entitled to a comparable position with the District at the same wage rate and having similar benefits as the Transit Supervisor's position he held with ServiCar.

Mr. Giampaoli states that as Transit Supervisor with ServiCar his salary was $21,600 annually. By letter dated March 25, 1977, he was offered the opportunity to apply for the position of Service Coordinator with the District at an annual salary of $14,484 to $18,000. Mr. Giampaoli submitted his application by letter dated March 30, 1977; however, he requested that he be given a position commensurate in salary and responsibility with his position with ServiCar. Mr. J. A. Ruffoni, San Mateo County Transit District Executive Assistant, responded to Mr. Giampaoli by letter dated March 31, 1977, stating that no final staffing decisions had been made, nor had the District determined the liabilities under Section 13(c). By letter dated May 20, 1977, Mr. Ruffoni offered Mr. Giampaoli the position of Service Coordinator with the District at a salary of $18,000 per year. Mr. Giampaoli, by letter dated July 20, 1977, declined to accept the position offered by the District. He is presently employed by ServiCar as an administrative assistant at a salary of $17,000 per year.

David J. Miller, Esquire, attorney for the District, by letter dated July 20, 1977, states that the position of Transit Supervisor occupied by Mr. Giampaoli is managerial in nature and that positions containing such managerial responsibilities have been those "to which 13(c) protections traditionally have not applied." Mr. Miller further states that although the salary being offered by the District is somewhat lower than that which Mr. Giampaoli was being paid at ServiCar, other fringe benefits, such as medical and dental plans and increased vacation and sick leave, provided by the District, afford "a higher level of benefits than the current plan in effect at ServiCar."

The question of whether Mr. Giampaoli may have been impacted as a result of the development of the District cannot be addressed until the threshold issue of whether or not he is an "employee" under the Act is established. We have previously concluded that the term "employee" as used in the Urban Mass Transportation Act should be broadly construed and should be considered to encompass all but the top level management of a carrier. In the top level we would include individuals performing functions corresponding to those positions cited in the definition of "employee of a railroad in reorganization" in the Regional Rail Reorganization Act ("president, vice president, treasurer, secretary, comptroller, and any person who performs functions corresponding to those performed by the foregoing officers"). Because job titles may vary from carrier to carrier as a result of size, administrative policy, and other factors, decisions as to whether a particular individual qualifies as an "employee" within the meaning of the Act must be based on the actual functions the individual performs.

According to Mr. Giampaoli's position description, and statements made by Mr. Giampaoli in conversations wtih a member of our Division of Employee Protections staff, his position of Transit Supervisor included responsibility for the day to day management of the four transit systems in San Mateo County, the largest consisting of twelve routes, one with eight routes and two with five routes. His duties included managerial responsibility for a maximum of seventy employees, including hiring and firing. Mr. Giampaoli was directly responsible to the President of the Corporation, who was also the General Manager. He did not attend board meetings, nor did he have any policy or budget making

responsibilities. He is not a stockholder in the Corporation. As Transit Supervisor he was responsible for planning, scheduling and routing. Under the original contracts there was some latitude in making changes in those areas, however, under more recent contracts the Transit Supervisor served in a more strictly administrative role, serving in an advisory capacity in some matters, with no power to implement or determine new policies. Mr. Giampaoli was responsible for maintaining working relationships with all levels of transit personnel, City and other area officials. In addition to his managerial and supervisory duties, Mr. Giampaoli was responsible for training, monitoring the performance of Assistant Supervisors and the preparation of written reports and billings. Other duties included the preparation of time cards, authorization of vacations and sick leave, and stand-by arrangements. He was also responsible for general daily labor contract administration, exclusive of contract negotiations, since none were negotiated while Mr. Giampaoli was Transit Supervisor.

Although Mr. Giampaoli played an instrumental role in the day to day operations of ServiCar, it is not evident that he had any participation in or responsibility for the formulation of managerial policy, rather his position appears to have been one of an administrator. He did not have budgetary responsibilities, he did not serve as a representative of the Corporation or perform other duties usually associated with top level management.

Based on the foregoing, we conclude that Mr. Giampaoli, as Transit Supervisor, performed functions which qualify him as an "employee" under Section 13(c) of the Urban Mass

Transportation Act of 1964, as amended, and is therefore eligible for the protective benefits provided thereunder. Having determined that Mr. Giampaoli is an employee entitled to the protections provided under Section 13(c), there remains the question of what benefits, if any, he is entitled to as a result of the District's assumption of transit operations. Since the case file does not contain sufficient data for us to render a final determination on this matter, we request that the parties provide us within three weeks of the date of this letter a statement of their respective positions with supporting data on the question of Mr. Giampaoli's entitlements under Section 13(c)

Francis X. Burkhardt
Assistant Secretary of Labor

U.S. DEPARTMENT OF LABOR

In Re:

ROLAND G. BARNES (Petitioner) v. TIDEWATER TRANSPORTATION DISTRICT COMMISSION (Respondent)	DEP Case No. 77-13c-31

Summary: The Petitioner sought continuation of employment following Respondent's takeover of the private bus company. Petitioner was a major stockholder in the private company, served on its board of directors, and was the chief executive and chief fiscal officer of the company. He was found to be outside the definition of "employee" for purposes of Section 13(c) protections.

DETERMINATION

Jurisdiction

This constitutes the final and binding determination in the above dispute over employee protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). Counsel for Petitioner initiated this action by letter of July 27, 1977 requesting the Secretary of Labor's final and binding determination of this matter. Petitioner has no labor organization for purposes of resolution of disputes over interpretation, application, or enforcement of Section 13(c) protections. Therefore, jurisdiction in this matter rests with the Secretary, as provided for in Section 13(c) and in the Secretary's January 14, 1975 certification of the pertinent grant of capital assistance under the Act, UMTA project number VA-03-0007.

Issue

Petitioner alleges that he lost employment as a result of the referenced project which provided for Respondent's takeover of the passenger service assets of Petitioner's former employer, Community Motor Bus Company, Inc. Petitioner asserts that he is an affected employee entitled to reemployment with Respondent, under the employee protections required by Section 13(c).

Findings of Fact

In stating its position in this case Respondent raises a preliminary challenge to the Petitioner's alleged status as an "employee" as that term applies to Section 13(c). Respondent's challenge is plausible on its face and will be addressed before considering other aspects of this petition.

The term "employee" is not defined specifically in the Act. In previous decisions[1/] we have reviewed the history of the Act and protective provisions under related federal statutes. We find that "employee" properly has broad application, encompassing all levels of personnel except top management. In top management generally we would include such positions as president, vice president or treasurer. We recognize that titles and job functions vary considerably from one enterprise to another, however. Consequently the instant challenge to employee status is considered on a case-by-case basis.

We find the following factors of relevance. As described in the original petition, the Bus Company was established in 1927 by Petitioner's father. Petitioner began his career with the Company in 1943 (duties unspecified). Beginning approximately at the end of 1946 Petitioner went to work in the shop doing general maintenance and worked his way up to full mechanic. In 1951,

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1/ See, e.g., (Petitioner) v. Nassau County, DEP case No. 75-13c-07, January 30, 1975.

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he became shop foreman and in 1961 he became general manager. Petitioner states that his primary concern and attention before and after becoming general manager remained with the shop.

In 1968 Petitioner acquired 32.5% of the shares of stock in the Bus Company. The remaining shares were held in trust for the support of Petitioner's mother, with Petitioner named as one of three beneficiaries of the remainder of the stock in trust in the event of the demise of the primary beneficiary. The Company's founder, Petitioner's father, died in 1969 and the shareholders, including a trust company which voted the shares in trust, elected Petitioner as one of the voting directors of the Company. The directors then elected Petitioner to the additional positions of President and Treasurer.

As to duties, Petitioner continues by stating that after termination of his employment with the Company in August 1975 he negotiated, on behalf of the Company, the purchase of its inventory by Respondent in connection with the Respondent's takeover of public passenger service from the Company. Moreover, the Contract of Sale of certain assets and operations of the Company to Respondent, dated April 29, 1975, was executed for the Company by its President, the petitioner herein. Further information supplied by Petitioner in response to our investigation shows that he had authority to hire and fire mechanics when he was actually running the shop. After Petitioner became corporate President this hiring and firing was performed by another corporate officer and Petitioner gained authority to hire and fire office personnel. There is indication that he never lost ultimate authority with respect to mechanics, and probably also held ultimate authority in hiring and firing of Bus Company drivers. Petitioner also had direct charge of purchasing, marketing, the business office and the maintenance department; reviewed and adjusted cash flow reports and arranged for corporate financing; generally served as one of its two negotiators in all dealings pertaining to the takeover by Respondent. Additionally, Petitioner admits that he was one of two corporate officers authorized to sign any and all checks for the Company and that the other authorized signator reported directly to Petitioner. Finally, our inquiry reveals that Petitioner enjoyed a salary of $36,800 annually from the Company, which was nearly three times as great as its next highest-paid officer/director, the vice president.

In demonstration of his employee status, Petitioner estimates that while employed as President of the Company he spent approximately eighty percent of his time in clerical and mechanical activities. These clerical activites included signing all general checks and payroll checks for the Company, verifying daily receipts and deposits, computation of hours of work performed by shop employees and office personnel, and preparation of all state and federal reports required of the Company. The mechanical duties he cited included training of bus drivers, training of all new mechanics in such specialties as diesel engines and air conditioners, overhauling voltage regulators, supervising other mechanical overhauling, and serving as purchasing agent for all shop parts. In further support of his employee status Petitioner points to the fact that sometime subsequent to his March 1976 application for state unemployment benefits he did receive those benefits.

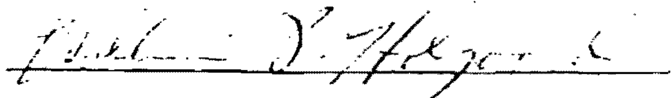
Decision

Analysis of the facts as provided by the Petitioner indicates that his sympathies and preferences may indeed have been directed toward the shop and that he may have spent much time working in the shop. The relative amount of time spent there, however, is not so critical as is the nature and effect of top level management functions and decisons he executed or had authority to effect. He negotiated major contracts on behalf of the Company, including those for cessation of operations and sale of the Company's assets. He also executed such contracts on behalf of the Company. In addition to being a voting member of the board of directors, Petitioner was chief executive officer and chief financial officer of the Company. Further, he apparently owned about one-third of all Company stock and was a potential beneficiary of the remaining stock which was in trust for his mother. No other officer or employee of the company appears to have owned any stock. He held at least a 20-percent vote and may have controlled more, on his promotion, his compensation, his authority and duties, company policy, and planning. He was responsible for preparation and execution of all fiscal and other reports for the Company, as well as computing the work hours (and, thus, actual received wages) for shop and office personnel. Even if one assumed that all of the directors exercised equal power and authority (Petitioner may well have exercised a dominant influence) one cannot deny that Petitioner

exercised substantial authority of a nature that characterizes top management. Further, Petitioner's salary at the Company was nearly three times as great as the next highest-paid company officer. It is clear that Petitioner was the chief executive officer of this corporation, notwithstanding the presence and functions of the board of directors. Nor can the control and exercise of such abundant top management authority be diminished by the time such functions did or did not require, by the fact that he may have rolled up his shirt sleeves and worked with his hands in the shop, or by the professed sympathies of the individual.

I have determined, therefore, that Petitioner indeed held a top management position with his former corporation. Consequently he cannot be considered to have status as an affected "employee" as that term is used in Section 13(c) and is not entitled to any employee protections thereunder. This petition is denied.

Dated this 28th day of January 1980, at Washington, D.C.



William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

JEFFREY BEHUNIAK (Claimant) v. CONNECTICUT TRANSIT MANAGEMENT, INC. (Respondent)	DEP Case No. 77-13c-34

Summary: Claimant's use of an employer-furnished automobile for personal travel is an employment benefit appropriate for protection under Section 13(c). As Claimant lost the personal use of such automobile as a result of an UMTA project, Claimant is entitled to the value of the benefit lost for the duration of his six-year protective period. State regulations prohibiting the personal use of state-owned automobiles do not bar the Respondent's obligation to protect the value of the benefit lost.

DETERMINATION

Introduction

The instant claim was submitted to the Department of Labor by Claimant's letter dated September 23, 1977, and supplemented by Claimant's letters dated December 9, 1977, April 5, 1978 and July 31, 1978. Claimant asserts that he was denied the use of an employer-furnished automobile for

personal travel as a result of certain capital assistance provided under the Urban Mass Transportation Act of 1964, as amended (the Act).

By letter dated November 4, 1977, the Department of Labor advised Respondent of this claim, and requested a statement of Respondent's position with respect to the claim. Respondent replied by letter dated November 17, 1977, supplemented by letters dated December 16, 1977, and January 18, 1978. Respondent denied that Claimant's use of an employer-furnished automobile for personal travel was a benefit protected by Section 13(c) of the Act. Respondent made no objection to the submission of this claim for determination by the Secretary of Labor.

Claimant seeks a determination by the Secretary of Labor with respect to his right to protections under Section 13(c) of the Act. Based upon the information submitted by the parties, the Secretary of Labor has reviewed this dispute and issues this determination.

Issue

Was the use of an employer-furnished automobile for personal travel a benefit which was protected under the applicable 13(c) agreement?

Background

Until 1976 claims agents of Connecticut Company, a private, transit entity, worked out of two divisions located in Hartford and New Haven. Each of the claims agents who worked at these two divisions, including Claimant, enjoyed the use of an employer-furnished automobile for unlimited personal travel as one of the employment conditions associated with that position. Claimant enjoyed this use of an employer-furnished automobile for his entire length of service at Connecticut Company, a period of seven years and four months. In 1973 Claimant's Connecticut Company automobile was demolished in an accident and Connecticut Company replaced this automobile with a rental automobile.

Connecticut Company was acquired by the State of Connecticut in June of 1976. The acquisition was funded, in part, by capital assistance grant CT-03-0016. The Department of Labor certified the employee protection provisions for this grant on April 29, 1976, based in part on two negotiated employee protective arrangements, executed between the International Brotherhood of Teamsters Local 559 and Connecticut Transit Management and between the Amalgamated Transit Union Locals 281, 425, and 443 and Connecticut Transit Management. Claimant is not represented by any of these labor organizations, and has no access to the final and binding dispute resolution mechanisms which are available to represented employees under these negotiated arrangements. Under the terms of the Department of Labor's certification letter, Claimant is entitled to substantially the same levels of protection as are afforded to represented employees under the negotiated arrangements.

At the time of the acquisition of Claimant's employer by the State, the State hired Connecticut Transit Management, Inc., a private management firm, to operate the acquired mass transit system. Employees of the acquired system were offered positions with Connecticut Transit Management similar to their former positions at Connecticut Company. Claimant accepted a position with Connecticut Transit as a claims agent. In that position Claimant performed duties similar to those associated with his former position. He also continued to enjoy the unlimited use of his employer-furnished rental automobile for personal travel for some 13 months subsequent to the State's acquisition of the Claimant's former employer. On July 15, 1977 Connecticut Transit replaced Claimant's rental automobile with a state-owned automobile. At that time he was informed that the Connecticut Department of Transportation's 1976 General Regulations prohibit the use of state-owned automobiles by employees for personal travel. Claimant was not compensated for the loss of use of an automobile for personal travel.

Claimant's Position

Claimant contends that the use of an employer-furnished automobile for personal travel was a benefit protected by the 13(c) agreement, which benefit he lost as a result of capital assistance grant CT-03-0016. He requests either a restoration of this benefit or reimbursement for the loss thereof.

Respondent's Position

Respondent maintains that Claimant's use of an employer-furnished automobile for personal travel is a gratuity rather than a benefit. Respondent asserts that a gratuity is not a proper subject for consideration under Section 13(c). Respondent continues its defense by noting that, even if a gratuity were a proper subject for protections, the Connecticut Department of Transportation's 1976 General Regulations prohibit any such use of a state-owned automobile by Claimant. Respondent maintains that such regulations preclude Section 13(c) protections of this employer-furnished automobile for this Claimant.

Discussion

Respondent, as a recipient of capital assistance grant CT-03-0016, agreed to provide fair and equitable arrangements for the protection of affected employees, which meet the statutory requirements expressed in Section 13(c) of the Urban Mass Transportation Act. One of those requirements is that Respondent provide protections (against adverse effects as a result of the project) for the "preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise." Paragraph 5 of the protective arrangement executed between the Amalgamated Transit Union and Respondent in connection with the cited project provides in pertinent part that:

> *[Respondent] shall assume the obligations of the acquired system with regard to wages, salaries, hours, working conditions, sick leave, health and welfare and pension or retirement provisions for employees. No employees of the acquired system shall suffer any worsening of his wages, seniority, pension, sick leave, vacation, health and welfare, insurance, or any other benefits by reason of his transfer to a position on the publicly owned system.*

If any employee of the acquired system as a result, in whole or in part, of the project, was adversely affected with respect to any employment conditions which he enjoyed prior to that acquisition with federal funds, it is Respondent's obligation to preserve and continue that former employment condition consistent with the above.

Respondent has contended that the disputed benefit is a gratuity, rather than an employment condition, inasmuch as it was subject to unilateral change at any time during Claimant's employment at Connecticut Company. During the Department's review of this dispute no other evidence or other information was offered by Respondent as to why such use of an employer-furnished automobile would more appropriately be considered a gratuity rather than an employment condition or a benefit. Nor did Respondent offer any evidence or information which would refute Claimant's position that this claimed benefit was adversely affected as a result of the cited project.

Claims agents at the Hartford and New Haven divisions had enjoyed the use of employer-furnished automobiles for personal travel since Connecticut Company first effected that policy in 1964, some five years prior to Claimant's date of hire at Connecticut Company. That policy was uniformly applied to all claims agents and constituted a normal

business expense and condition associated with that position, similar to other business costs routinely expended in connection with that position such as vacation pay, sick leave pay, medical insurance, etc. Claims agents in these divisions had good cause to identify this policy as an employment condition and right associated with that position. These agents could also reasonably expect the continuation of this policy after such an extensive period of time.

Such use of an employer-furnished automobile would not constitute a gratuity in the sense that a gratuity connotes an ad hoc favor which an employer provides for an employee on a special occasion. Nor would such use of an employer-furnished automobile connote a gratuity in the sense of being an award presented to an employee in recognition of service to a company. Rather, this use of an employer-furnished automobile had been uniformly applied to all claims agents of the company without unique purpose, motivation, or cause and had extended over such a period of time as to more appropriately constitute an established past practice and employment condition. Further, this policy had been unilaterally developed and effected by Connecticut Company for application to all employees working out of the above two divisions in that job classification. This policy application is not dissimilar from, nor unique from, other unilateral policy actions effected by employers for non-represented employees, such as salary scales, vacation leave, sick leave, office hours, and other aspects of employment. Many benefits for non-represented employees may be said to be subject to the employer's unilateral action. This does not deny, however, their status as benefits.

Acceptance of Respondent's contention that the disputed benefit is a gratuity would severely narrow the definition of "benefit" to include only such items as are provided in a collective bargaining agreement or other formal employment contract. Excluded from consideration as benefits would be any items unilaterally provided by an employer or not secured by a written contract for non-represented employees, as provided to Claimant in the instant case by Connecticut Company. In those situations where such employees as Claimant are non-represented, virtually all benefits of employment are developed and effected unilaterally by the employer unless established by statute. Such conditions may or may not have input or concurrence from those employees. Nevertheless, they constitute the rules and policies under which these employees must work. The acceptance of Respondent's contention would be contrary to the statutory provisions of Section 13(c), which require a recipient of federal funds under the Act to protect all benefits which an affected employee enjoyed prior to being affected by federal funds, irrespective of how those benefits were obtained. On the basis of the above, I determine that Claimant's use of an employer-furnished automobile for personal travel is an employment benefit appropriate for protection under Section 13(c).

As a secondary defense to the requested remedy, Respondent argues that even if Claimant's claim were held to constitute a proper subject for Section 13(c) protections, the Connecticut Department of Transportation's 1976 General Regulations prohibit the use of a state-owned automobile for personal travel.

The cited regulations do not serve to act as a bar to the above obligation which Respondent agreed to as a recipitent of federal funds. Whenever the governing regulations or other rules of a recipient of UMTA funds would result in the deprivation of a protected employee's Section 13(c) protections, that recipient must provide otherwise for the preservation of that worsened benefit, as required in the Act and as agreed upon by that recipient. To accept Respondent's proffered argument as a relief of its statutory obligations would result in less than meaningful protections.

In the instant case Claimant had enjoyed the claimed benefit for his entire length of employment at Connecticut Company. In order to maintain his position as a claims agent subsequent to the takeover, Claimant accepted employment with Respondent. Respondent, citing state regulations restricting the personal use of state-owned automobiles, eliminated the claimed benefit. There is no evidence in the record which refutes Claimant's contention that the loss of the benefit resulted from the cited project. Affirmatively the record does indicate that had it not been for that UMTA project whereby Connecticut acquired Connecticut Company and employed Respondent as operating agent for the new transit entity, Claimant would not have lost the disputed benefit. Therefore, it appears clear that Claimant's loss of the car for personal use was as a result of the cited project.

Decision

Claimant is entitled to protection of the benefit lost, the use of an employer-furnished automobile for personal travel. As Claimant had over six years of employment with his former employer, he is entitled to the maximum protective period of six years, with protection continuing through June, 1982. Claimant is entitled to a lump sum cash payment equal to the value of the benefit lost for the period beginning July 15, 1977, and continuing through December 1, 1980. Claimant is further entitled to a monthly payment equal to the value of the benefit lost for each month, or portion of a month, beginning December 1, 1980, and continuing through June, 1982. The value of the benefit lost is the reasonable value of the loss of use of a comparable employer-furnished automobile for personal travel, taking into account the cost per mile to operate such automobile in each year subsequent to and including 1977, and the estimated number of miles of personal travel driven by Claimant. Respondent may, for the period beginning December 1, 1980, provide Claimant with an automobile for personal use, comparable to the automobile provided by his former employer at the time of the takeover, in lieu of payment for the value of such benefit. In the event the parties are unable to reach an agreement as to the value of such benefit, the parties may resubmit this matter for purposes of determining the value of the benefit lost.

Dated this 17th day of [illegible], 1980
at Washington, D.C.

William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

MILLER, PETRY AND KREIDER (Claimants) and YORK AREA TRANSPORTATION AUTHORITY (Respondent)	DEP Case No. 77-13c-35

Summary: Claimants asserted that they were deprived of protected employment as a result of Respondent's acquisition of the assets of their former employer. A hearing was held by the Department of Labor. Claimants failed to attend the hearing, thereby denying Respondent the opportunity to examine them regarding matters within their knowledge and critical to their claim. The record did not contain sufficient evidence to support a finding that Claimants were affected by a project. Therefore, this claim was dismissed.

Introduction

This claim was submitted by a letter from Claimant Miller to the Department of Labor dated September 26, 1977, and joined by Claimants Petry and Kreider by letter dated February 28, 1978. Claimants seek a determination by the Department of Labor of their right to protections under Section 13(c) of the Urban Mass Transportation Act of

1964, as amended (the Act). A hearing was conducted by a representative of the Department of Labor on April 27, 1979. Claimants and Respondent are represented by counsel.

The applicable Section 13(c) employee protective arrangement of April 21, 1977, certified by the Department of Labor for Project No. PA-05-0007,[1] provides for submission of any controversy regarding protections provided under that arrangement to the Secretary of Labor for determination. This is the determination of the Secretary of Labor.

Background

Claimants are former employees of Reliance Motor Coach Company, Inc. (Reliance), a public carrier incorporated under the laws of the Commonwealth of Pennsylvania. Prior to August 1, 1977 Reliance provided both mass transit and school bus services in the York, Pennsylvania area. On or about August 1, 1977 the York Area Transportation Authority (Authority) acquired by purchase certain assets of Reliance, and assumed full responsibility for operation of the York area mass transit system. The acquisition was assisted by a grant provided under the Act (Project No. PA-05-0007). Following the acquisition Reliance continued to provide school bus service.

[1] Urban Mass Transportation Capital Grant Contract, Project No. PA-05-0007, dated July 28, 1977.

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During the six-month transition period preceding the acquisition Reliance provided mass transit service under a "Purchase of Service Agreement" with the Authority.[2/] Under the terms of this agreement, mass transit service was provided by Reliance with Reliance employees, for which service the Authority reimbursed Reliance. Claimants were hired by Reliance as bus drivers in May, 1977, less than three months prior to the acquisition.

The Authority hired, at the time of the acquisition, all former Reliance bus drivers who requested positions, with the exception of Claimants.[3/] Claimants were not offered employment with the Authority at the time of the acquisition, nor were they offered employment subsequent to the acquisition.

Section 6 of the grant contract for Project No. PA-05-0007 contains a requirement that the Authority comply with the Department of Labor's April 21, 1977 letter of certification made in connection with the grant. The certification letter specifies the terms and conditions that apply for the protection of mass transit industry employees in the service area of the project. These protective terms and conditions include benefits for any employee who is laid off or otherwise deprived of employment as a result of the project.

[2/] Purchase of Service Agreement between Reliance Motor Coach Company, Inc., and York Area Transportation Authority dated January 25, 1977.

[3/] One other former Reliance driver who was hired at about the same time as Claimants was initially not offered a position by the Authority, but was subsequently hired and is not a Claimant in this case.

Claimants' Position

Claimants assert that by showing they were employed as mass transit drivers by Reliance at the time of the acquisition, but not hired by Respondent, they are entitled to protections under the terms of the Department of Labor's certification letter.

Respondent's Position

Respondent takes the position that this claim should be dismissed, or denied, for the following reasons:

1. Respondent asserts that the Department of Labor lacks jurisdiction to process this claim.

2. Respondent asserts that the claim should be dismissed due to the unavailability of the Claimants for questioning by the Respondent at the hearing held in connection with this claim.

3. Respondent asserts that the Claimants were not placed in a worse position as a result of the project because they were improperly hired by Reliance, could have continued employment with Reliance but did not do so, failed to seek employment with the Authority following the acquisition and, in the case of two of the Claimants, were unavailable for work due to illness.

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Issue

Were Claimants deprived of employment as a result of the project?

Discussion

Jurisdiction

The Authority asserted, as a preliminary matter, that the Department of Labor lacks authority to process this claim, citing as support for this proposition the case of Local Division 1285, ATU v. Jackson Transit Authority 447 F. Supp. 88 (W.D. Tenn. 1977). In Local Division 1285 the court held that there was no basis for it to require the Department of Labor to assume a continuing responsibility under the Act.

This claim is distinguishable from Local Division 1285 because the Respondent, by acceptance of the Capital Grant Contract for Project PA-05-0007, has agreed to the submission of disputes to the Department of Labor. Section 6 of the grant contract incorporates into that contract the terms of the Department of Labor's certification letter of April 21, 1977. Paragraph 7 of the certification letter provides for dispute resolution by the Secretary of Labor. As this claim concerns an alleged denial of protections under the terms of the Department's certification letter, it is appropriate that it be resolved by the Secretary of Labor.[4/]

[4/] For a further discussion of Local Div. 1285 see Povlitz v. Maryland Mass Transit Administration, DEP Case No. 78-13c-54; USDOL

Presence of Claimants for Questioning

The Claimants failed to attend the hearing scheduled with the agreement of the parties by the Department of Labor regarding their claim to protections. Claimants' attorney had been advised in writing of the date, time and place of the hearing. Claimants' attorney attended the hearing and expected at least one of the Claimants to be present, but no Claimant attended. Attempts made by Claimants' attorney to contact Claimants immediately prior to, and during, the hearing were not successful. Although Claimants' attorney advised the hearing officer that an explanation of Claimants' absences would be forthcoming, no explanation was offered at, or subsequent to, the hearing. The hearing was delayed and finally began without the presence of Claimants. Respondent was unable to question Claimants regarding this claim and the hearing could not be completed.

Respondent asserts that in order to fairly present its defense to this claim, it must have an opportunity to question Claimants regarding their relationship with Reliance, the terms and conditions of their employment by Reliance, their availability for employment, their earnings during their protective period, and other matters. Respondent urges that the claim be dismissed by reason of the non-appearance of Claimants. Claimants have taken the position that the record as presently constituted is sufficient and they request a determination based on the record. For the reasons discussed below, I find that the presence of Claimants for examination by Respondent was essential to the resolution of this claim.

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Sections 4 and 5 of the protective arrangement provide certain protections for mass transit employees who are terminated or otherwise deprived of employment as a result of a project. The project consisted of the purchase of some, but not all, assets of Reliance, eleven new buses and related mass transit equipment, and actions taken by the Authority in anticipation of the acquisition. Claimants assert that by identification of this project, and by showing that they were employed by Reliance as mass transit drivers, they have established their entitlement to the protections provided under the terms of the protective arrangement. Ordinarily this would be sufficient where, as here, loss of employment occurs simultaneously with an acquisition. However, the Respondent has asserted that the Claimants were not affected by the project but, rather, were deprived of employment by reason of the circumstances surrounding the hiring of Claimants. The available evidence relating to the hiring of Claimants is reviewed below.

The six months prior to the August 1, 1977 acquisition was a period of transition. During this period Reliance performed mass transit services in the York area, using its facilities, equipment and employees. The Authority directed the level of service, routes and rates, and reimbursed Reliance for services provided. The respective rights and responsibilities of Reliance and the Authority were established by the Purchase of Service Agreement. Although this agreement characterized Reliance as an independent contractor, it did require Reliance to maintain a close liaison with the Authority and to cooperate with the Authority in the reasonable control of costs in the provision of the required services.

Consistent with the Authority's Application for Federal Assistance[5/] Reliance's existing routes were maintained without change for the first three months of the period covered by the Purchase of Service Agreement. On or about May 9, 1977, service levels were increased by the Authority, which action was also consistent with the Application for Federal Assistance. This increase in the level of service, mandated by the Authority but performed by Reliance, appears to have resulted in the hiring by Reliance of Claimants in the first week of May 1977.

Mr. Richard Francis was, at all times relevant to this claim, the general manager of the Authority. He testified that prior to May of 1977 he worked with Mr. Wayne Kaskey, supervisor at Reliance and brother of Reliance's President, and developed a work schedule that would have met the planned increase in service levels using existing Reliance employees. Mr. Francis further testified that the President of Reliance, Mr. Carl Kaskey, refused to use the proposed schedule. Instead, Mr. Carl Kaskey hired the Claimants herein. Mr. Francis stated that after Claimants were hired, he advised Mr. Carl Kaskey that he objected to their employment on the basis that there would be no positions for them following the acquisition because they were not needed to provide the required level of service. Mr. Francis' testimony on these points was not contradicted, nor was he examined by Claimants' attorney regarding the details of the proposed work schedule.

[5/] Application for Federal Assistance for Section 5 Captial Assistance Grant dated March 15, 1977. Exhibit C of the Application for Federal Assistance, titled "Project Justification" sets forth the intended service levels for the February 1977 through July 1977 period.

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Neither the Claimants nor any representative of Reliance was present at the hearing. Claimants' attorney introduced, over objection by Respondent, the transcript of an unfair labor practice hearing[6/] in which Claimants did testify regarding matters related to their employment with Reliance. This transcript has been reviewed and given such weight as it deserves in this claim, taking into account the lack of similarity in the matters at issue in this claim and in the unfair labor practice hearing. Testimony of Claimants at the unfair labor practice hearing indicated that they may have believed that they were entitled to continued employment with the Authority following August 1. However, this issue was not central to the issues of that hearing and as a result Claimants were not examined regarding their understanding of the terms and conditions of their employment with Reliance. Consequently, the statements made by Claimants concerning their belief that they would be employed by the Authority are not dispositive in this case. Mr. Francis' testimony at the unfair labor practice hearing was consistent with his testimony in this claim as outlined in the preceding paragraphs. No representative of Reliance testified at the unfair labor practice hearing.

The evidence and testimony presented in this case raises significant questions regarding the terms and conditions of Claimants' employment. Establishing these terms and conditions

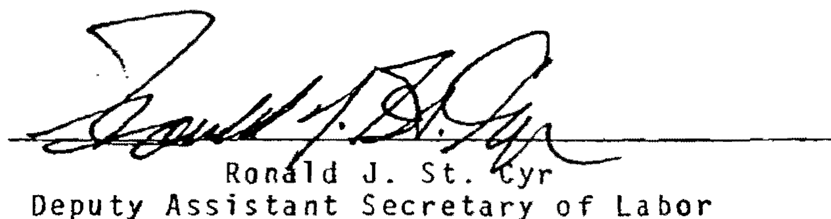
[6/] Pennsylvania Labor Relations Board vs. York Area Transportation Authority, PERA-C-11, 609-C, stenographic report of hearing of January 6, 1978.

is essential to the proper resolution of this claim. In addition, Respondent has raised as a defense Claimants' physical ability to work and availability for work following the takeover. Claimants have an obligation to make themselves available for examination regarding the terms of their employment, their ability to work and their availability for work where such matters are at issue and are necessary for resolution of their claim. By their absence Claimants denied to Respondent an opportunity to examine them regarding matters within their knowledge and critical to their claim. I am unable to sustain the claim based on the available record.

DETERMINATION

The record in this case contains insufficient evidence to support a finding that the Claimants were affected as a result of the project. The claim is therefore dismissed.

Dated this 30th day of November, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

LOCAL 103, ATU v. WHEELING, WEST VIRGINIA

DEP Case No. 77-13c-5
August 4, 1977

Summary: The employees claimed the Authority had failed to offer them jobs after a private operator ceased operations and the Authority began to run buses purchased with federal assistance over the same routes previously serviced by the private operator. A review by the Department of Labor revealed the private operator ceased operations for reasons unrelated to the federal assistance. The Department determined the Authority was not a successor employer and was not obligated under 13(c) to offer jobs to former employees of the private operator. The claim was denied.

DETERMINATION

This is in further reference to a dispute involving the Amalgamated Transit Union (ATU), Wheeling Transportation Authority (WTA) and Wheeling Rapid Transit Inc. (WRT), concerning the rights of certain transit employees of Cooperative Transit Company under a Section 13(c) agreement executed on December 13, 1972, in connection with a federal transit grant to the Wheeling Transportation Authority pursuant to the Urban Mass Transportation Act of 1964, as amended.

The questions here were first raised by letter to the Department of Labor dated May 17, 1976 from the City of Wheeling, West Virginia. The parties' positions were developed and discussed through a series of letters and a meeting that was held at the Department of Labor on August 17, 1976. After further continuing efforts by the parties to resolve this matter proved unsuccessful the issues were then presented for resolution by the Secretary of Labor.

The representatives of employees whose rights are in question here were not signatory to the December 13, 1972 agreement, which was executed by ATU Local 975 as representative of WRT's employees. However, the employees of Cooperative as employees in the service area of the project and represented by ATU Local 103 were afforded substantially the same level of protections as provided members of the signatory

union through the Department of Labor's letter of certification dated January 19, 1973. As a result, the Department of Labor is authorized to resolve the issues raised by the non-signatory employees through their collective bargaining agent, rather than require them to be submitted for private arbitration.

The dispute centers on the current and contemplated expansion of WRT service by operation over routes formerly serviced by Cooperative Bus Company. It is undisputed that WRT having secured operating rights is now servicing routes formerly operated by Cooperative. It is also undisputed that Cooperative terminated service upon declaration of bankruptcy sometime in November, 1975. This declaration and a subsequent liquidation of assets took place after a strike by ATU Local 103 beginning in October, 1975, over terms for a new labor agreement. At that time Wheeling Rapid Transit ran buses solely within the Wheeling City limits while Cooperative ran buses both within and outside of the City limits. The WRT, in expanding its service, is using some of the buses purchased under the 1973 federal grant.

The ATU contends that the operation of federally purchased buses over routes formerly serviced by Cooperative makes WRT a successor within the meaning of paragraph 8 of the parties' Section 13(c) agreement. Therefore, it alleges that these employees should be afforded the rights set forth in Section 13(c)(4) of the Act requiring "assurances of employment to employees of acquired mass transportation systems and priority of reemployment to employees terminated or laid off." The Union maintains that the language of Section 8 of the agreement, when read in conjunction with paragraphs 7 and 10 setting forth the definition of the term "project," requires a liberal interpretation of "affects as a result of the project" to include the acquisition of routes by WRT upon the bankruptcy and termination of service by Cooperative Transit. Citing other cities in which successor employees were found, including Elgin, Illinois; Amarillo, Texas; and Macon, Georgia, by the public operation of routes of formerly private companies, the Union argues that a "successor employer" may be established even though there was no direct purchase of the former company, its assets or franchise and even though there has been a cessation of service for some period of time. The Union states finally that as a successor employer both WRT and WTA are required by the Section 13(c) agreement to insure that prior employment rights are afforded to former employees of Cooperative and that affected employees unable to secure positions with WRT have the right to file claims under the Section 13(c) agreement.

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In response, the WTA while not disputing the facts of the case claims that the employees' loss of work is unrelated to the 1973 federal grant. It contends that although federal buses are being used over former Cooperative routes, the abandonment of those routes after liquidation was not a result of the federal project and therefore the employees are not entitled to the Section 13(c) protections as no "successor employer" is present here within the meaning of the December 13, 1972 agreement. It states that neither WRT nor WTA took over the management and operation of the defunct company and that the successor employer concept in the agreement refers only to instances where a transit company was purchased or taken over by some entity.

Sections (7), (8), and (10) of the December 13, 1972 agreement provide as follows:

> *(7) This agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by reason of any arrangements made by the Authority to manage and operate the System. Any person, enterprise, body, or agency, whether publicly - or privately - owned, which shall undertake the management or operation of the transit system, shall be bound by the terms of this agreement and accept the full responsibility for performance of these terms.*
>
> *(8) All employees represented by the Union shall continue to be employed on the transit system by any successor-employer in the management and operation of any system, and the employment and seniority rights of all such employees shall be maintained and continued in accordance with the seniority rosters in effect on the date of acquisition of the system by the successor-employer. All persons employed under the provisions of this paragraph shall be appointed to comparable positions on the transit system without examination, and such employees shall be credited with their years of service for purposes of sick leave, seniority, vacations and pensions in accordance with Company records and applicable collective bargaining agreements. The successor-employer shall assume, or arrange for the assumption of, the obligations of the Company with regard to wages, salaries, hours, working conditions, sick leave, health and welfare, and pension or retirement provisions for employees. No employee of the*

Company shall suffer any worsening of his wages, seniority, pension, sick leave, health and welfare insurance, or any other benefits by reason of his transfer to a position with the successor-employer.

(10) The term "Project," as used in this agreement, shall not be limited to the particular facility assisted by federal funds, but shall include any part of the transit system or facility thereof which is affected by such assistance. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during and subsequent to the Project.

The language of Sections 7 and 8 speaks directly to successors in the management and operation of the system. These sections refer to the obligations of a successor-employer to the management and operation of the transit system operated by WRT. In the instant case the termination of service by Cooperative for reasons unrelated to the federal transit grant places that action and subsequent events by WRT outside the reach of Sections 7 and 8. The Department's determination in Elgin, Amarillo, and Macon are not applicable to these circumstances where the WRT was simply able to expand into an area where service was abandoned by a company bankrupt for reasons unrelated to the federal grant. Its use of five year old federally funded buses does not serve to create a connection to the 1973 grant to establish it as a successor corporation within the meaning of Sections 7 and 8. Furthermore, no circumstances have been brought to our attention by which we could find that the Cooperative employees were adversely affected by the federal grant in 1973.

In conclusion, we hold that the WRT is not successor-employer to Cooperative Transit within the meaning of paragraphs 7 and 8 of the December 13, 1972 Section 13(c) agreement. Further, the former employees of Cooperative Transit are not affected employees within the meaning of Section 13(c). Therefore, the WTA and WRT as a result of the expansion of service described above are not required to provide former Cooperative employees the protections of the Section 13(c) agreement executed in 1972.

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At the joint meeting held on May 17, 1976, the parties discussed the possibility of jobs being offered to the former employees of Cooperative. This avenue is, of course, available to the parties although its implementation is outside the scope of Section 13(C).

/s/
Francis X. Burkhardt
Assistant Secretary of Labor

KING v. CONNECTICUT TRANSIT MANAGEMENT, INC.

DEP Case No. 78-13c-1
May 1, 1978

Summary: The Department determined that the Petitioner is an employee covered by the Act, notwithstanding his supervisory and/or management duties.

(This interim decision of certain questions in the above dispute over employee protections is incorporated in the final and binding determination of the dispute dated November 9, 1979.)

INTERIM DETERMINATION

This is in reference to the claim filed by Petitioner in which he alleged he had been denied certain benefits which are protected under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as a result of an urban mass transportation capital grant involving the acquisition of the Connecticut Company by the Department of Transportation, State of Connecticut (UMTA Project Number CT-03-0016).

Section 5 of the capital grant contract contains the employee protective requirements pursuant to Sections 3(e)4 of 13(c) of the Act under which the State agreed to carry out the project. That section incorporates by reference a "section 13(c) agreement" executed on April 20, 1976 by the Department of Transportation, State of Connecticut, Connecticut Transit Management, Inc. and the Amalgamated Transit Union. In addition, the International Brotherhood of Teamsters Locals 559, 443, and 667 executed separate agreements with the Department of Transportation, State of Connecticut dated January 13, 1976, January 29, 1976 and February 4, 1976, respectively. The project (CT-03-0016) was certified by the Department of Labor April 29, 1976, on the condition that the above cited agreements be included in the contract of assistance, by reference, and on the further condition that:

> *Employees of urban mass transportation carriers in the service area of the project, other than those represented by the unions, other than the agreements referred to above, shall be afforded substantially the same levels of protections as are afforded to union members under these agreements.*

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Petitioner is not represented by a labor organization. Therefore, the Secretary of Labor has jurisdiction to resolve a dispute as to the appropriate application, interpretation and enforcement of the protective arrangements in this situation.

Petitioner has filed a claim alleging that he was demoted and was deprived of the use of a company car and seeks restoration of benefits under Section 13(c) of the Act. At the time of the acquisition he received $14,872 annually and continued to receive that amount after he commenced employment with Respondent.

Respondent answered the complaint by alleging that Petitioner was not an employee under the meaning of the Act and that his removal from the position of Acting Superintendent was unrelated to the grant of UMTA funds but was due to his inability to satisfactorily perform his job.

The term "employee" is not defined in the Urban Mass Transportation Act. The legislative history of the Act as expressed in the debates prior to its enactment indicates that the omission was intentional and that the term "employee" was intended to be understood according to its meaning in other laws. Section 13(c) was in large part derived from Section 5(2)(f) of the Interstate Commerce Act. Although the Interstate Commerce Act does not include a definition of the term "employee," a limited number of cases have arisen over the years in which that term has been interpreted and applied. Because of the relationship of Section 13(c), UMTA, and Section 5(2)(f), ICA, considerable weight must be attached to the principles set forth in those cases.

Cases arising pursuant to Section 5(2)(f) of the Interstate Commerce Act indicate that "employee" surely does not include the principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of a consolidation. See Edwards v. Southern Railway Company, 376F 2d 665, and Finance Docket No. 21510, the Supplemental Report of the Interstate Commerce Commission on the Norfolk and Western Railway Company and New York, Chicago, and St. Louis Railroad Company Merger, p. 825.

The District Court in McDow v. Louisiana Southern Railway Company 219F 2d 650, indicated that study of the legislative history of Section 5(2)(f) of the Interstate Commerce Act "leaves no doubt that the term "employee" as used herein does not include the vice president and general manager of a railroad.

The Railroad Reorganization Act of 1973 provided for extensive employee protections. That Act contains a definition of the term "employee of a railroad in reorganization," as follows:

> *'employee of a railroad in reorganization' means a person who, on the effective date of a conveyance of rail properties of a railroad has an employment relationship with either said railroad in reorganization or any carrier... except a president, vice president, treasurer, secretary, comptroller, and any person who performs functions corresponding to those performed by the foregoing officers...*

Although the Urban Mass Transportation Act was passed years prior to the Regional Rail Reorganization Act, some significance can be attached to the definition of employee set forth in the latter enactment. The protective provisions contained in both Acts derived from the same history. In both cases, the Congress wanted to afford a measure of protection to those who had worked in the transportation industry and would be affected by actions taken in furtherance of the national policy expressed in the legislation.

The Interstate Commerce Act and the Regional Rail Reorganization Act, as discussed above, have direct relevance to the question presented for determination herein. We have been unable to discover other legislation having similar relevance. On the basis of our review, we conclude that the term "employee" as used in the Urban Mass Transportation Act should be broadly construed and should be considered to encompass all but the top level management of a carrier. In the top level we would include individuals performing functions corresponding to those positions cited in the definition of "employee of a railroad in reorganization" in the Regional Rail Reorganization Act.

Because job titles may vary from carrier to carrier as a result of size, administrative policy, and other factors, decisions as to whether a particular individual qualifies as an "employee" within the meaning of the Act must be based on the actual functions the individual performs.

Whenever the Department is confronted, as in the instant case, with a dispute as to whether an individual qualifies as an "employee", it will be necessary to review the position, duties, and responsibilities of the Claimant in order to

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determine his relative position in the hierarchy of management. In such a review, attention will be focused on the extent to which the Claimant impacts upon management policy and whether he exercises independent judgement and discretion of the type generally associated with top level management.

Petitioner began work with the predecessor Connecticut Company in 1960 as a driver. In 1964 or 1965 he started to learn the timekeeper's job and various other jobs in that area. In 1964 or 1965 he was appointed as inspector and remained in that position around four years at which time he returned to driving duties. Then in late 1972 he was also appointed to the same position in the Stamford division. Petitioner continued in that capacity of acting superintendent of the two divisions until the acquisition which took place June 1, 1976, at which time he alleges he was given the title Manager by Respondent. In August of 1976 he was designated superintendent of schedules.

During his tenure as acting superintendent Petitioner was involved in a number of functions within the New Haven and Stamford divisions. He had the authority to hire and fire, promote and demote, administered disciplinary powers over drivers, attended meetings as a representative of Connecticut Company, was involved in the first step in the grievance handling procedure, checked to see whether vehicles were on the road, assigned duties to supervisors, scheduled buses, maintained operational control over two divisions, had minimal participation in payroll functions and submitted reports on vehicle runs, the number of hours, and number of vehicle miles.

It is apparent from the record that the Petitioner held a responsible position within the Connecticut Company organization. We are concerned, however, with his impact on policy for purposes of making a determination whether he was an employee under the meaning of the Act. Even though he had the power to hire and fire, promote and demote, and attended meetings as a company representative, these were not without restrictions. The number of employees was determined by the State when it first became involved in the operation of Connecticut Company in 1973. Petitioner, therefore, did not make a decision as to how many employees were to be hired, but when informed that there were openings he would then interview and hire the requisite number of employees. As a representative of the Connecticut Company at various meetings, he did not act as spokesman. His actions in promoting and demoting were done in consultation with the individual to whom Petitioner reported.

He was not a member of the Board of Directors, which had four members. His scope of authority with respect to collective bargaining was limited, since he did not participate in the negotiation of contracts nor in the formulation of topics for bargaining talks.

In reviewing the record we understand that Petitioner was responsible for carrying out much of the day-to-day operations in two of the three divisions that made up the Connecticut Company, but we are unable to conclude that he was involved in any substantial degree with the formulation of policy. He did not exercise independent judgement and discretion of the type generally associated with top management. Once the policy directives were made his participation in a number of areas followed as an implementor of those policies. Based on the foregoing, it is our determination that Petitioner performed functions which qualify him as an employee under the meaning of the Act and accordingly is entitled to coverage pursuant to Section 13(c) of the Act.

Having determined that he is an employee, there remains the question of whether he has been affected by the acquisition of the Connecticut Company, and, if so, whether he is entitled to specific protective benefits or other relief.

/s/
Francis X. Burkhardt
Assistant Secretary of Labor

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In re:

LAWRENCE N. KING
(Petitioner)

v.

CONNECTICUT TRANSIT MANAGEMENT, INC.
(Respondent)

DEP Case No. 78-13c-1

Summary: Petitioner alleged demotion, loss of salary and loss of an employer-furnished automobile as a result of a takeover project under the Act. Respondent argued that the actions occurred not as a result of the project but for cause. Respondent failed to demonstrate cause. The claim was upheld.

DETERMINATION

Jurisdiction

This constitutes the final determination in the above matter. The instant petition was filed with the Secretary of Labor by letter dated December 3, 1976. The case was heard November 11, 1977, in New Haven, Connecticut before Lynn A. Franks, appointed by the Department. Petitioner was an employee of the Respondent (a mass transit authority) at all times material to our jurisdiction and was not represented by a labor organization signatory to an applicable protective agreement. Therefore, the Secretary of Labor has jurisdiction over this dispute pertaining to employee protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. Said jurisdiction is specified in our May 1, 1978 interim decision in this action.

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Employee Status

Respondent has alleged that the Petitioner has no standing to claim employee protections under the Act and related employee protective arrangements, by reason of Petitioner's status as a member of management of Respondent. Such status, it is argued, precludes status as an "employee" as that term is used in the Act. In an interim decision (attached hereto and incorporated herein) in this case this question received thorough consideration and we determined that Petitioner does qualify as an employee for purposes of the Act and the employee protections required therein:

> *In reviewing the record we understand that [Petitioner] was responsible for carrying out much of the day-to-day operations in two of the three divisions that made up the Connecticut Company, but we are unable to conclude that he was involved in any substantial degree with the formulation of policy. He did not exercise independent judgment and discretion of the type generally associated with top management. Once the policy directives were made [his] participation in a number of areas followed as an implementor of those policies. Based on the foregoing, it is our determination that [Petitioner] performed functions which qualify him as an employee under the meaning of the Act and accordingly is entitled to coverage pursuant to Section 13(c) of the Act.*

Issues

Petitioner alleges that he was demoted as a result of a project under the Act. He further alleges that this action resulted in his loss of salary increases that he would have received otherwise and in the loss of an automobile furnished previously by Respondent for both business and personal use. Petitioner seeks restoration of his salary increases and use of the automobile.

Petitioner has identified Urban Mass Transportation Act (UMTA) project No. CT-03-0016, certified by the Department of Labor under Section 13(c) on April 29, 1976, as the relevant grant of Federal funds under the Act. He asserts that the adverse effects of his demotion, loss of salary increases,

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and loss of the use of an employer-furnished automobile, resulted from this project. Petitioner points to the lack of any documentation of cause for the demotion and to the fact that he had performed his previous job for several years prior to the June 1, 1976 takeover of his former employer, a private bus company, occasioned by the project. He further cites his inclusion as a named principal member of two management teams that submitted bid proposals to manage Respondent's new transit operations at the time of the takeover. He argues that the takeover's proximity to his claimed adverse effects (which occurred on and after October 18, 1976) demonstrates, in the absence of a showing of other cause, that the effects were the result of the identified project. Petitioner argues that, therefore, he is entitled to protection of his former salary and benefit status.

Respondent's Position

Respondent denies that the demotion of Petitioner and the attendant effects resulted from the project. Respondent asserts that the action resulted from Petitioner's unsatisfactory performance of his former job.

Findings of Fact

We find that Petitioner served as "acting" manager for the New Haven and Stamford Divisions for a period of approximately five years prior to the takeover of June 1, 1976 and for approximately four and one-half months thereafter. He was informed in August of 1976 that he would be "moved over" to the position of Superintendent of Schedules at no reduction in salary. The parties agree that he did lose the use of a company car and did lose at least one general salary increase, benefits which he would have received in his former position.

In October of 1976, Respondent hired a new employee who was assigned Petitioner's former job. Petitioner's effective date of reassignment was October 18, 1976 and he now reported to the newly-hired manager. It is clear that Petitioner's former position was not abolished, and that his reassignment necessitated hiring a new employee to perform Petitioner's former duties.

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Discussion

Petitioner has satisfied his obligation in this action to identify the relevant UMTA project and to specify pertinent factors relied upon. The burden now falls upon Respondent who has the obligation to prove that the adverse effects resulted from factors other than the project.* The petitioning employee shall prevail if it is established that the project had an effect upon the worsened employment conditions of Petitioner, even if other factors also may have affected such worsening of conditions.

As its primary defense Respondent asserts that Petitioner was reassigned, and consequently lost certain wage benefits and the use of an automobile, for cause. Respondent identifies that cause as inability to perform the duties of the position of manager in a satisfactory manner. Respondent presented testimony in support of its position from the former supervisor of Petitioner at the predecessor transit company which was taken over June 1, 1976 by Respondent via the instant project. That witness also served as Petitioner's supervisor during the approximately two and one-half months of Respondent's employment of Petitioner prior to notifying him of his reassignment from Acting Manager to Superintendent of Schedules, for the New Haven and Stamford Divisions (and for the interim until the effective date of the reassignment, October 18, 1976).

At the hearing in this matter, that supervisor presented direct testimony as to his belief that Petitioner's performance was unsatisfactory during the period of about a year or a year and a half prior to the takeover of operations by Respondent June 1, 1976. According to this testimony the unsatisfactory performance occurred in connection with Petitioner's handling of labor contract grievances prior to the takeover.

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*See Appendix C-1 and Appendix C-2, certified by the Secretary of Labor under Section 405(b) of the Rail Passenger Service Act of 1970, as amended, and incorporated by reference in Section 13(c) of the Urban Mass Transportation Act. See also the applicable 13(c) protective arrangement negotiated and executed by the Respondent herein and the Amalgamated Transit Union, dated April 20, 1976. See further, affidavit of Secretary of Labor in Civil Action No. 825-71, U. S. District Court for the District of Columbia.

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On several occasions grievances could not be resolved at Petitioner's level and were appealed to his supervisor for resolution. The testimony suggests that the number of unresolved grievances arising from the two divisions (especially the New Haven Division) managed by Petitioner were substantially higher than the number of unresolved grievances arising from the remaining (Hartford) division of the predecessor company during that year and one-half. The testimony points to no other specific examples of unsatisfactory performance, either in the three years prior to the indicated period of dissatisfaction or in the two and one-half months after the period and before Petitioner was notified of his reassignment. The supervisor's testimony further indicated that he had intended to remove Petitioner from the acting manager's position for some time during the year and one-half prior to the takeover. The removal was not related to a specific date but was intended, according to the testimony, to occur after the takeover because the supervisor was too busy at the time with labor negotiations. He also did not wish to rock the boat with respect to the pending takeover by Respondent of the predecessor private company.

The testimony of Petitioner, on the other hand, declares that no mention had ever been made to him of unsatisfactory performance prior to the August 1976 notification of reassignment. Further, the testimony of both parties shows that he had been named as one of four key management persons by his former private company in a bid to operate the new transit system for the State of Connecticut's Department of Transportation, the primary recipient of the instant project funds. That bid lost to one submitted by Respondent, which has operated this transit system for the Department since June 1, 1976. Respondent asserts that such nomination is to be discounted, that it was done only because they had no one else to nominate and had to fill in someone's name, and that Petitioner's supervisor had become dissatisfied at that time with Petitioner's performance. However, Respondent later admitted that in presenting the bid proposal Petitioner's former employer had to detail the experience of each of the four named management persons in attempting to demonstrate the potential capability of performance of the team. Respondent made no effort to suggest that anything in the bid proposal would support its position that Petitioner's performance was incompetent or even unsatisfactory. On the contrary, the testimony indicates that the bid proposal might show a record of at least satisfactory performance on the part of Petitioner.

The testimony also shows other points of inconsistency in the purported cause for the adverse action. Petitioner's performance apparently was satisfactory as "acting" manager for approximately the first three years that he held the position, under the same supervisor who asserts the later unsatisfactory performance. During those first three years there were also some labor relations difficulties in Petitioner's division, including a strike, but this did not constitute unsatisfactory performance then. Respondent testified that Petitioner had no written job description, no written performance standards, no notification of unsatisfactory performance. Petitioner apparently had to gain knowledge of his duties, performance expectations, and labor relations as best he could through on-the-job experience after becoming acting manager and through discussions with his supervisor. The record shows, then, three years of satisfactory performance on the part of Petitioner. Petitioner testified repeatedly that he had received no indication at any time prior to August 1976 that his performance was unsatisfactory, that he was failing to meet standards, or that his position might be in jeopardy. Respondent's testimony, from Petitioner's supervisor, with regard to the unsatisfactory performance and communication of notice of such, was that there had been numerous discussions about how the discipline/grievances were being handled but that Petitioner's supervisor "never did come out and tell him I was going to replace him or move him over," and that Respondent took no other measures to correct the situation. Respondent further testified with respect to Petitioner's performance in managing the Stamford Division:

> *"He was doing the best he could down there. That was a hard situation. I know, I used to be in charge of Hartford and Stamford. [Petitioner] would try to go to Stamford once a week, but you can't manage New Haven and Stamford both at the same time. He did down there what he could do.*

The scenario, then, based upon this and further testimony of both parties, is one of an employee who had been given no clear description of his duties, no statement of standards he was expected to meet, and no periodic evaluation of his performance. By all indications available to Petitioner during the times in question he would have been justified in concluding that his performance was at least satisfactory. The testimony further indicates that any possible question of unsatisfactory performance during the year and one-half immediately prior to the takeover was not communicated to the employee. Moreover, after the takeover Respondent gave him no indication

of other than satisfactory performance. There is no documentation of any unsatisfactory performance. Respondent's purported showing of cause for the reassignment of Petitioner, then, relies entirely upon his supervisor's testimony after the fact as to what were the supervisor's private thoughts in the past and what he had intended to do at some point in the future, despite his acknowledgement that he took no action for approximately a year and one-half immediately prior to the takeover.

We find it unnecessary to reach the question of whether the Respondent's asserted belief was accurate. The testimony, at best, for Respondent's argument shows that Petitioner's performance was not deserving of reassignment or other action for cause before the June 1, 1976 takeover. At worst, it seeks to show cause on speculative grounds regarding actions not taken. We find that Respondent has failed to prove that Petitioner was adversely affected as a result of poor performance or other cause.

The only change in the employment situation of Petitioner was the project itself. His duties and performance apparently remained the same as before until the reassignment shortly after the effective date of the project. Respondent offered no other evidence or defense to show that the adverse effects did not result, at least in part, from the project. Based on the record in this case, including the testimony of both parties, I have determined that Petitioner was adversely affected as a result of the project by being reassigned from his position as manager of the New Haven and Stamford divisions to the position of Superintendent of Schedules.

Entitlements

In view of the above Petitioner is entitled to the protection of the salary, benefits, and other conditions of employment he enjoyed as "acting" manager, including the use of an automobile provided by Respondent as before. This protection is to continue for the maximum protection period of six years since Petitioner had at least six years of employment with Respondent and its predecessor prior to the adverse effects. The protective period begins October 18, 1976 and extends through October 17, 1982.

With respect to the protection of salary or wages, we note that Petitioner's protected salary level of $286.00 per week is based on a 40-hour work week. This translates to $7.15 per hour. This relationship is to be maintained in determining his protected earnings after October 18, 1976. Consequently, for any hours he worked after that date he is to receive compensation at the protected level of earnings, $7.15 per hour. The protected level of earnings and any displacement allowances hereunder are to be increased by the amount of any subsequent general wage increases effected by Respondent which Petitioner would have received were it not for the reassignment, for the protective period. These amounts are to be reduced by any compensation paid to Petitioner by Respondent during the protective period.

With respect to the use of an automobile furnished by Respondent, Petitioner has agreed to accept Respondent's figures on the cost of such a vehicle (Exhibit 2 in the hearing of November 11, 1977). For the period of October 18, 1976 through December 17, 1979, then, Respondent is to pay Petitioner an amount of money equal to 38 months' cost of the former automobile, adjusted to reflect yearly increases in vehicle operation, for personal use as before, and for business use to the extent that Petitioner was required to use his own automobile for business purposes on and after October 18, 1976. Beginning December 18, 1979, Respondent, at its option, is to either continue such monthly vehicle cost payments (adjusted accordingly) for the remainder of the protective period or, in lieu thereof, to furnish Petitioner with an appropriately comparable vehicle for the remainder of the protective period.

Dated this 9th day of November, 1979, at Washington, D.C.

/s/
William P. Hobgood
Assistant Secretary of Labor

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UNITED STATES DEPARTMENT OF LABOR

In re:

ALICE V. HADDAD
(Claimant)

v.

WORCESTER REGIONAL TRANSIT AUTHORITY
and
WORCESTER BUS COMPANY, INC.
(Respondents)

DEP Case No.
78-13c-43

Summary: Claimant alleged that she was dismissed as a result of the loss by her employer of its school bus contract due to operating assistance received by her employer. Claimant also alleged that she was dismissed in anticipation of the takeover of her employer by Respondent. Claimant's loss of employment was found to have resulted from the loss by her employer of its school bus contract. Because Claimant failed to specify facts sufficient to indicate that the loss of the school bus contract may have resulted from a project or projects, Claimant was not entitled to benefits under the applicable protective agreements.

DETERMINATION

Introduction

This claim was initially submitted to the Department of Labor by Claimant's letter dated April 4, 1978 and was supplemented by additional correspondence from Claimant and from Claimant's counsel. Claimant asserts that she was

dismissed as a result of certain capital and operating assistance provided under the Urban Mass Transportation Act of 1964, as amended (the Act). Claimant seeks a determination by the Secretary of Labor with respect to her right to protections under Section 13(c) of the Act. A hearing was conducted by a duly appointed representative of the Department of Labor on April 6, 1979. Both Claimant and Respondent were represented by counsel and participated at the hearing. This constitutes the determination of the Secretary of Labor.

Issue

Was Claimant's employment with Worcester Bus Company, Inc., terminated as a result of, or in anticipation of, a project funded, in part, by a grant of capital assistance or operating assistance made to Respondents under the Act?

Background

Claimant began her employment with the Worcester Bus Company, Inc., in June 1969. Her duties at that time consisted of typing for the schedule department. Worcester Bus Company, Inc., was a Massachusetts corporation in the business of providing contract school transportation services, contract charter services and mass transportation services. In September, 1974, the Worcester Regional Transit Authority, a body politic and corporate of the

Commonwealth of Massachusetts, was established. Following the creation of Worcester Regional Transit Authority, it contracted with the Worcester Bus Company, Inc., to provide mass transit services in its service territory.

Three operating assistance grants were approved for the Worcester Regional Transit Authority during the period of Claimant's employment with Worcester Bus Company, Inc.: MA-05-4002, MA-05-4018, and MA-05-4024.[1/] The Department of Labor certified the employee protection provisions for these grant applications on July 28, 1977 (for MA-05-4002 and MA-05-4018) and March 2, 1978 (for MA-05-4024). Both certifications were based, in part, on the "national model agreement."[2/] In addition, the certifications for MA-05-4002 and MA-05-4018 were based, in part, on a side letter dated July 8, 1977, between the Worcester Bus Company, Inc., the Worcester Regional Transit Authority, and the Amalgamated Transit Union Local Division 22.

Two capital assistance grants also were approved during the period of Claimant's employment with Worcester Bus Company, Inc.: MASS UTG-6 and MA-03-0050. MASS UTG-6 was a grant for 35 buses. The Department of Labor certified the employee protection provisions for MASS UTG-6 on February 17, 1971, based in part on an agreement dated February 4,

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1/ All grants referred to in this determination are grants for assistance under the Urban Mass Transportation Act of 1964, as amended.

2/ Agreement executed on July 23, 1975, by the American Public Transit Association and transit employee labor organizations. Worcester Bus Company, Inc., by letter dated July 8, 1977 and Amalgamated Transit Union Local Division 22, by endorsement dated March 31, 1977, became parties to the agreement.

1971 between the Worcester Bus Company, Inc., and the Amalgamated Transit Union Local Division 22, joined by the City of Worcester. MA-03-0050 was a grant for 22 buses and related equipment. The Department of Labor certified the employee protection provisions for MA-03-0050 on August 1, 1977, based in part on an agreement and side letter dated July 8, 1977, between Worcester Regional Transit Authority, Worcester Bus Company, Inc., and Amalgamated Transit Union Local Division 22. The buses and equipment purchased with this assistance were used by the Worcester Bus Company, Inc., in its mass transit operations.

The Worcester Bus Company, Inc., bid annually on its school bus contract on a competitive basis. The school bus contract was lost by the Company in 1977, and it no longer provided school bus service as of August, 1977.

Claimant's employment with Worcester Bus Company, Inc., was terminated by the President of the Company on January 4, 1978, effective January 6, 1978. At the time of the termination of her employment, Claimant's duties consisted of typing, reception and general office work. Claimant was not represented by the Amalgamated Transit Union Local Division 22 or any other labor organization.

Subsequent to the termination of Claimant's employment, Worcester Regional Transit Authority purchased the assets of Worcester Bus Company, Inc., assisted by grant MA-03-0077. The employee protection provisions for MA-03-0077 were certified by the Department of Labor on October 18, 1978, based in part on an agreement dated October 12, 1978 between

the Worcester Regional Transit Authority, the Worcester Area Transportation Company and Amalgamated Transit Union Local Division 22. Worcester Bus Company, Inc.'s contract with Worcester Regional Transit Authority terminated on or about June 30, 1978, at which time a successor transit operator assumed mass transit operations under contract with Worcester Regional Transit Authority.

Claimant's Position

Claimant asserts that her employment was terminated as a result of the foregoing operating assistance grants and capital assistance grants. Claimant advanced two alternative theories as follows:

1. Claimant's employment was terminated due to the loss by the Worcester Bus Company, Inc., of its school bus contract. The loss of the school bus contract resulted from the operating assistance grants (MA-05-4002, MA-05-4018 and MA-05-4024) and capital assistance grants (MASS UTG-6 and MA-03-0050) provided under the Act. Therefore, Claimant's employment was terminated as a result of assistance provided under the Act.

2. Claimant's employment was terminated in anticipation of the purchase of Worcester Bus Company, Inc.'s assets by the Worcester Regional Transit Authority, funded in part by capital assistance grant MA-03-0077.

Respondent's Position

Respondent asserts that Claimant is not protected by Section 13(c) of the Act for the following reasons:

1. Claimant was not a member of the Amalgamated Transit Union Local Division 22, and thus was not protected by the 13(c) agreements, nor was she specified as a protected employee under any grant contract.

2. Claimant's employment was not terminated as a result of any project, but rather resulted from Worcester Bus Company, Inc.'s loss of the school bus contract and the subsequent decline of charter business for reasons unrelated to assistance under the Act.

Discussion

A threshold issue is raised by the Respondent's contention that Claimant, as an employee not a member of a labor organization that is a party to any applicable 13(c) arrangement, and not specified as protected in any grant contract, is not in a class of employees protected by Section 13(c). This position is not supportable. Each grant contract incorporated the Secretary of Labor's certification of employee protection provisions meeting the requirements of Section 13(c) of the Act. Each certification contained a provision stating that employees of mass transportation carriers in the service

area of the project, other than those represented by the union, would be afforded substantially the same levels of protection as afforded to members of the union. Claimant, as an employee of the Worcester Bus Company, Inc., was clearly within this class of employees. Though the Department of Labor has determined that certain high level management personnel are not employees for purposes of Section 13(c),[3/] a secretary/receptionist with no management responsibilities is not even arguably within this exclusion. Therefore, we conclude that Claimant is eligible for substantially the same levels of protection as afforded to members of the Amalgamated Transit Union Local Division 22, under the applicable protective arrangements.

To be entitled to protections under Section 13(c) and any applicable protective arrangement, Claimant's employment must have been terminated as a result of a project or projects under the Act. The applicable protective arrangements provide:

> In the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be his obligation to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the Company's burden to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee (Hodgson's Affidavit in Civil Action No. 825-71).

[3/] Salaried Employees v. Nassau County, DEP Case No. 75-13c-7 (Jan. 30, 1975).

Claimant has identified six projects, and has argued two alternative theories in an attempt to show that her employment was terminated as a result of the identified project or projects. Each theory is discussed below.

Loss of school bus contract

Section 13(c) provides protections for employees affected by mass transportation projects. No protection is afforded by Section 13(c) to employees affected by assistance provided for school bus or charter bus services. In support of her first theory, Claimant identifies three operating assistance grants and two capital assistance grants.[4/] Claimant asserts that these projects placed certain unspecified restrictions on Worcester Bus Company, Inc.'s school bus division, requiring certain unspecified changes in the school bus division that may have resulted in the loss of the school bus contract. However, Claimant provided no identification of the changes alleged to have resulted from such restrictions, nor did Claimant solicit testimony at the hearing regarding such changes.

Claimant further asserts that the assistance provided under the Act allowed Worcester Bus Company, Inc., to upgrade and expand its transit system and assets, consent to higher wage demands, and generally to incur a higher cost structure than it would have incurred without the assistance. Claimant concludes that this increased cost structure prevented the Company from effectively competing for the school

[4/] MA-05-4002, MA-05-4018, MA-05-4024, MASS UTG-6 and MA-03-0050.

bus contract, resulting in the loss of the contract in 1977 to a lower bidder. Claimant's counsel, in his letter of December 1, 1978 describes the effect of the loss of the school bus contract as follows:

> The loss of the contract meant the liquidation of a major income producing division of the Bus Company. Loss of income economically translated into the elimination of jobs and layoffs... The loss of the contract and the sale of the Company obviously affected the transit division of the Company for which assistance under the Act was provided. It also affected [Claimant]...
>
> UMTA funds which were received for the Transit Division in reality affected all parts of the Company and consequently all employees due to the way the Company was organized. Therefore, the reverse would also be true, the loss of the school contract adversely affects the whole Worcester Bus Company which would include the Transit Division and also all employees affected by the Transit Division, this would include [Claimant].

Section 13(c) and the applicable protective arrangements provide protections only for employees who are affected as a result of a project. Though the term "project" is broadly defined in the applicable agreements to include "any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided," changes in character of employment brought about by causes other than a project are specifically excluded from coverage.

Claimant concedes, for purposes of this theory, that her employment was terminated as a result of the loss by Worcester Bus Company, Inc., of its school bus contract. Were there no connection between the projects relied upon by Claimant and the loss of the school bus contract, the

loss of the contract would clearly be a cause other than the project, and thus not within the perview of Section 13(c) or the applicable protective arrangements. Claimant attempts to supply the required connection between the cited projects and her loss of employment by alleging that the assistance provided for the projects resulted in the loss of the school bus contract.

The assistance relied upon by Claimant was provided under the Act for the purposes of financing mass transportation services. Mass transportation as defined in Section 12(c)(6) of the Act specifically excludes both school bus and charter service. The assistance, provided under Sections 3 and 5 of the Act, was not provided for the benefit of the Company's school bus operations, nor could it have been provided for that purpose. Though there was testimony that mass transit buses were sometimes used for charter or school work, the Administrator of the Worcester Regional Transit Authority testified that the Worcester Bus Company, Inc., was subsidized only for costs incurred in its mass transit service. His testimony was corroborated by the President of Worcester Bus Company, Inc., and by the former Comptroller of the Company. We conclude that no direct assistance was provided to the school bus or charter operations of the Company.

In effect, Claimant is alleging that the assistance that was provided to the mass transit functions of Worcester Bus Company, Inc., had a spillover effect on all operations of the Company, and therefore her termination was indirectly caused by mass transit assistance. While it is conceivable

that such a spillover effect could result from the assistance provided, such an effect is not inevitable, nor even the most probable effect of the assistance. It is equally plausible that the mass transit assistance had no effect on the school bus functions of the Company or, by increasing the viability of the Company's mass transit functions, had a beneficial effect on the school bus functions of the Company. When the direct cause of termination of an individual's employment is a cause other than a project, it is the responsibility of the Claimant to show the alleged connection between the Project and the direct cause of termination of employment. In this respect, it is necessary to review the evidence submitted by Claimant to support her first theory of causation.

Claimant submitted as support for her first theory an excerpt from the application filed by the Worcester Regional Transit Authority for capital assistance grant MA-03-0077. The excerpt stated that, "the Authority has objected to a provision in the 13(c) agreement which could provide job protection to employees of the WBC in the event the Company loses its school transportation contract." This submission indicates that the Worcester Regional Transit Authority had anxiety over possible implications of 13(c) protections. It does not support the allegation of a causal connection between the mass transit assistance and the loss of the school bus contract.

Claimant also submitted a copy of a letter of agreement, executed on July 8, 1977, by the Worcester Regional Transit Authority, the Worcester Bus Company, Inc., and the Amalgamated Transit Union Local Division 22. Claimant placed particular emphasis on paragraph 5, which states:

> The parties hereto recognize that the Company is in the business of providing contract school transportation services ("school services"), contract charter services ("charter services") and mass transportation services, which services are performed by employees represented by the Union on an integrated operation basis. In light of the foregoing, the parties hereto agree that any changes (including terminations) in the Company's business (school services, charter services or mass transportation services) causing fluctuations in volume and character of employment that are unrelated to the Federal assistance ("Project") shall not be deemed to be an event occurring "as a result of the Project" as that term is defined in Section 1 of the National 13(c) Agreement, or in any 13(c) Agreement.

This provision is inconclusive as to whether a termination of the Company's school bus business would be, in the opinion of the parties to the agreement, caused by any Federal assistance. The provision does not set forth any facts demonstrating that the loss of the school bus contract resulted from Federal mass transit assistance.

Newspaper articles were also submitted by Claimant. One article, published in the Worcester Telegram (Massachusetts) on June 17, 1977, expressed the opinion that in the absence of Federal and local government operating assistance beginning November, 1974, the Worcester Bus Company, Inc., would not have been able to bid on the city's school bus contract. In another article, published in the Worcester Gazette (Massachusetts) on June 17, 1977, there was discussion of the possible effects, including layoffs, of the potential loss of the Company's school bus service. Though newspaper articles such as these have, at best, little value as evidence, the articles proffered do not contain any facts supporting the alleged connection between the mass transit assistance and the loss of the school bus contract.

It is important to note that the President of Worcester Bus Company, Inc., the former Comptroller of Worcester Bus Company, Inc., and the Administrator of Worcester Regional Transit Authority were present at the hearing and available for questioning by Claimant. Despite their availability, no attempt was made to question them for purposes of eliciting facts relating to any possible impact of the mass transit assistance on the cost structure of Worcester Bus Company, Inc., or on the school bus functions of the Company. The only significant statement made at the hearing relating to the cost structure of Worcester Bus Company was the Administrator's observation that a large percentage of the Company's operating costs were attributable to the union scale wages of the Company's operators and mechanics. However, the payment of such wages can hardly be attributed to the assistance and cannot alone provide the needed factual support for Claimant's allegation.

The Claimant has failed to identify any pertinent facts supporting the alleged relationship between the cited mass transit assistance and the loss of the school bus contract by Worcester Bus Company, Inc. Thus, even if it could be shown that the termination of Claimant's employment resulted from loss of the school bus contract, no connection has been demonstrated between the cited assistance and her loss of employment. Therefore, we conclude that Claimant is not entitled to protections under Section 13(c) on the basis of her first theory.

Purchase of Worcester Bus Company assets

In support of her second theory, Claimant identifies capital assistance grant MA-03-0077, which grant funded, in part, the purchase of the assets of Worcester Bus Company, Inc., by Worcester Regional Transit Authority. Claimant's employment was terminated on January 4, 1978. The acquisition of the assets of Worcester Bus Company, Inc., by Worcester Regional Transit Authority, and the termination of the service contract between the two entities, occurred on or about June 30, 1978. Claimant asserts that her employment was terminated in anticipation of the acquisition.

Paragraph 7 of the applicable employee protection agreement provides that the phrase "as a result of the Project" includes "events occurring in anticipation of... the Project..." The President of Worcester Bus Company, Inc., testified that negotiations for sale of the assets of the Company were under way in October or November, 1977, several months prior to the termination of Claimant's employment. The President further testified that, due to legal restrictions, Worcester Regional Transit Authority could not purchase the Worcester Bus Company, Inc.'s charter license. Given the proximity in time between the termination of Claimant's employment and the acquisition, and the then ongoing negotiations relating to the acquisition, it is possible that the termination of Claimant's employment was, at least in part, in anticipation of the acquisition. We find that by identification of the acquisition five months subsequent to the termination of her employment, and by establishing that negotiations for that acquisition preceded

her termination by several months, Claimant has satisfied the requirement that she identify a project and specify pertinent facts to show an arguable relationship between the Project and the termination of her employment. Under paragraph 12 of the applicable employee protection agreement, Respondents have the burden of proving that factors other than this Project resulted in the termination of Claimant's employment.

To meet this burden Respondents assert that Claimant was laid off as a result of lack of work due to loss of the school bus contract and the subsequent decline of charter business. The former Comptroller of Worcester Bus Company, Inc., who served in that capacity at all times relevant to this determination, testified that Claimant was one of two clerical employees of Worcester Bus Company, Inc. He further testified that following the loss of the school bus contract in August, 1977, about half of the Company's charter business was lost, due to tie-ins between the charter business and the school bus business. In late 1977, in the opinion of the Comptroller, there was not sufficient work in the charter department for both of the Company's clerical employees. The President/General Manager of Worcester Bus Company, Inc., testified that the loss of the school bus contract had a tremendous effect, both directly and by reduction of charter work, on the amount of clerical work required in the office. He estimated that regular, routine clerical work in the office decreased by about sixty percent due to loss of the school bus contract and the decline of the charter business.

In her letter of April 4, 1978 Claimant characterized her duties as follows:

> I was transferred into the Charter Department where my duties included all the typing of intra and inter state charters, school bus charters, answering phones, taking orders for charters, taking complaints, general office work, and servicing the needs of the general public. While in the Charter Department, I also did typing for the Schedule Department for the re-ratings and bid-offs.

At the hearing, Claimant testified that her duties spanned all three divisions of the Company, and that the other clerical employee did most of the charter work. Both the Comptroller and the President testified that most of Claimant's responsibilities related to charter work, primarily the taking and typing of charter orders. The President testified that the other clerical employee, whose employment was not terminated, did the President's personal work and directed, with supervision, the charter service. Though the testimony is not without conflict, it appears that both clerical employees did a substantial amount of work related to the Company's charter business, that they each answered the phone and did general office work, and that Claimant did some mass transit work relating to scheduling.

The testimony of the President and the Comptroller regarding the decline of charter business following the loss of the school bus contract was not questioned by Claimant in cross-examination of these witnesses, nor were these witnesses cross-examined regarding their testimony relating to the reduced need for clerical work following the decline in charter business. No attempt was made to show that

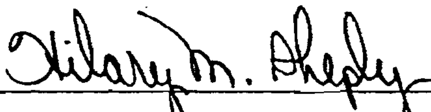
either witness was unqualified to testify regarding the decline in charter business or the reduced need for clerical support. No attempt was made to impeach the credibility of either witness. The sole evidence advanced by Claimant in opposition to Respondents' defense was the testimony of Claimant that she did not notice any reduction in the amount of work in the office following the loss of the school bus contract.

The President/General Manager of Worcester Bus Company, Inc., was the Claimant's direct supervisor. Given his position with the Company, in the absence of any challenge to his knowledge of operational details of the Company, and in the absence of any challenge to his credibility, I find in this case that the President was highly qualified to testify as to both the decline in charter business and the impact of that decline on the clerical needs of the Company. He determined that, due to the decline in charter business, the work load was not sufficient to support two clerical employees. His testimony as to both the decline in charter business and the clerical work load was corroborated by the former Comptroller of the Company. I determine, based on the testimony and exhibits presented in this case, that Claimant's employment was terminated as a result of loss of the school bus contract and subsequent decline of charter business. As this is a cause other than a project funded under the Act, Respondents have met their required burden.

Conclusion

After review of the testimony, evidence and other material submitted by the parties, I conclude that Claimant's employment was not terminated as a result of or in anticipation of any project funded by a grant of assistance under the Act. Therefore, Claimant is not entitled to benefits under the applicable protective agreements.

Dated this 20th day of March, 1981
in Washington, D.C.



Hilary M. Sheply
Acting Deputy Assistant Secretary of Labor

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UNITED STATES DEPARTMENT OF LABOR

In re:

HENRY J. COZZOLINO (Claimant) v. WORCESTER REGIONAL TRANSIT AUTHORITY and WORCESTER BUS COMPANY, INC. (Respondents)	DEP Case No. 78-13c-45

Summary: Claimant alleged that he was dismissed as a result of the loss by his employer of its school bus contract, which loss he asserted was due to operating assistance received by his employer. In the alternative, Claimant alleged that he was dismissed in anticipation of the takeover of his employer by Respondent. Claimant failed to specify facts sufficient to indicate that his loss of employment may have been a result of the cited projects.

DETERMINATION

Introduction

This claim was initially submitted to the Department of Labor by Claimant's letter dated May 17, 1978 and was supplemented by additional correspondence from Claimant's counsel. Claimant asserts that he was dismissed as a result

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of certain capital and operating assistance provided under the Urban Mass Transportation Act of 1964, as amended (the Act). Claimant seeks a determination by the Secretary of Labor with respect to his right to protections under Section 13(c) of the Act. A hearing was conducted by a duly appointed representative of the Department of Labor on April 6, 1979. Both Claimant and Respondent were represented by counsel and participated at the hearing. This constitutes the determination of the Secretary of Labor.

Issue

Has Claimant's employment with Worcester Bus Company, Inc., terminated as a result of, or in anticipation of, a project funded, in part, by a grant of capital assistance or operating assistance made to Respondents under the Act?

Background

Claimant began his employment with the Worcester Bus Company, Inc., in October 1971 as the Director of its Charter Division. In 1974, Claimant was assigned responsibility in the Company's inventory operations while retaining his position as Director of the Charter Division. Worcester Bus Company, Inc., was a Massachusetts corporation in the business of providing contract school transportation services, contract charter services and mass transportation services. In September, 1974, the Worcester Regional Transit Authority, a body politic and corporate of the Commonwealth of Massachusetts, was established. Following the creation

of Worcester Regional Transit Authority, it contracted with the Worcester Bus Company, Inc., to provide mass transit services in its service territory.

Three operating assistance grants were approved for the Worcester Regional Transit Authority during the period of Claimant's employment with Worcester Bus Company, Inc.: MA-05-4002, MA-05-4018, and MA-05-4024.[1] The Department of Labor certified the employee protection provisions for these grant applications on July 28, 1977 (for MA-05-4002 and MA-05-4018) and March 2, 1978 (for MA-05-4024). Both certifications were based, in part, on the "national model agreement."[2] In addition, the certifications for MA-05-4002 and MA-05-4018 were based, in part, on a side letter dated July 8, 1977 between the Worcester Bus Company, Inc., the Worcester Regional Transit Authority and the Amalgamated Transit Union Local Division 22.

Two capital assistance grants also were approved during the period of Claimant's employment with Worcester Bus Company, Inc.: MASS-UTG-6 and MA-03-0050. MASS UTG-6 was a grant for 35 buses. The Department of Labor certified the employee protection provisions for MASS-UTG-6 on February 17, 1971, based in part on an agreement dated February 4,

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1/ All grants referred to in this determination are grants for assistance under the Urban Mass Transportation Act of 1964, as amended.

2/ Agreement executed on July 23, 1975 by the American Public Transit Association and transit employee labor organizations. Worcester Bus Company, Inc., by letter dated July 8, 1977 and Amalgamated Transit Union Local Division 22, by endorsement dated March 31, 1977, became parties to the agreement.

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1971 between the Worcester Bus Company, Inc., and the Amalgamated Transit Union Local Division 22, joined by the City of Worcester. MA-03-0050 was a grant for 22 buses and related equipment. The Department of Labor certified the employee protection provisions for MA-03-0050 on August 1, 1977, based in part on an agreement and side letter dated July 8, 1977, between Worcester Regional Transit Authority, Worcester Bus Company, Inc., and Amalgamated Transit Union Local Division 22. The buses and equipment purchased with this assistance were used by the Worcester Bus Company, Inc., in its mass transit operations.

The Worcester Bus Company, Inc., bid annually on its school bus contract on a competitive basis. The school bus contract was lost by the Company in 1977, and it no longer provided school bus service as of August, 1977.

Claimant's employment with Worcester Bus Company, Inc., was terminated by the President of the Company on September 2, 1977. Claimant was not represented by the Amalgamated Transit Union Local Division 22 or any other labor organization.

Subsequent to the termination of Claimant's employment, Worcester Regional Transit Authority purchased the assets of Worcester Bus Company, Inc., assisted by grant MA-03-0077. The employee protection provisions for MA-03-0077 were certified by the Department of Labor on October 18, 1978, based in part on an agreement dated October 12, 1978 between the Worcester Regional Transit Authority, the Worcester Area Transportation Company and Amalgamated Transit Union Local Division 22. Worcester Bus Company, Inc.'s contract with

Worcester Regional Transit Authority terminated on or about June 30, 1978, at which time a successor transit operator assumed mass transit operations under contract with Worcester Regional Transit Authority.

Claimant's Position

Claimant asserts that his employment was terminated as a result of the foregoing operating assistance grants and capital assistance grants. Claimant advanced two alternative theories as follows:

1. Claimant's employment was terminated due to the loss by the Worcester Bus Company, Inc., of its school bus contract. The loss of the school bus contract resulted from the operating assistance grants (MA-05-4002, MA-05-4018 and MA-05-4024) and capital assistance grants (MASS-UTG-6 and MA-03-0050) provided under the Act. Therefore, Claimant's employment was terminated as a result of assistance provided under the Act.

2. Claimant's employment was terminated in anticipation of the purchase of Worcester Bus Company, Inc.'s assets by the Worcester Regional Transit Authority, funded in part by capital assistance grant MA-03-0077.

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Respondent's Position

Respondent asserts that Claimant is not protected by Section 13(c) of the Act for the following reasons:

1. Claimant was not a member of the Amalgamated Transit Union Local Division 22, and thus was not protected by the 13(c) agreements, nor was he specified as a protected employee under any grant contract.

2. Claimant's employment was terminated due to dissatisfaction of the Worcester Bus Company's President with Claimant's performance, and not as a result of any project.

Discussion

A threshold issue is raised by the Respondent's contention that Claimant, as an employee not a member of a labor organization that is a party to any applicable 13(c) arrangement, and not specified as protected in any grant contract, is not in a class of employees protected by Section 13(c). This position is not supportable. Each grant contract incorporated the Secretary of Labor's certification of employee protection provisions meeting the requirements of Section 13(c) of the Act. Each certification contained a provision stating that employees of mass transportation carriers in the service area of the project, other than those represented by the union, would be afforded

substantially the same levels of protection as afforded to members of the union. Claimant, as an employee of the Worcester Bus Company, Inc., was clearly within this class of employees. Though the Department of Labor has determined that certain high level management personnel are not employees for purposes of Section 13(c),[3/] Claimant was not shown to have any policy making authority, ownership interest or corporate office with Worcester Bus Company, Inc., and does not fall within this exclusion. Therefore, we conclude that Claimant is eligible for substantially the same levels of protection as afforded to members of the Amalgamated Transit Union Local Division 22, under the applicable protective arrangements.

To be entitled to protections under Section 13(c) or any applicable protective arrangement, Claimant's employment must have been terminated as a result of a project or projects under the Act. The applicable protective arrangements provide:

> In the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be his obligation to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the Company's burden to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee (Hodgson's Affidavit in Civil Action No. 825-71).

[1/] Salaried Employees v. Nassau County, DEP Case No. 75-13c-7 (Jan. 30, 1975).

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Claimant has identified six projects, and has argued two alternative theories in an attempt to show that his employment was terminated as a result of the identified project or projects. Each theory is discussed below.

Loss of school bus contract

Section 13(c) provides protections for employees affected by mass transportation projects. No protection is afforded by Section 13(c) to employees affected by assistance provided for school bus or charter bus services. In support of his first theory, Claimant identifies three operating assistance grants and two capital assistance grants.[4/] Claimant asserts that these projects placed certain unspecified restrictions on Worcester Bus Company, Inc.'s school bus division, requiring certain unspecified changes in the school bus division that may have resulted in the loss of the school bus contract. However, Claimant provided no identification of the changes alleged to have resulted from such restrictions, nor did Claimant solicit testimony at the hearing regarding such changes.

Claimant further asserts that the assistance provided under the Act allowed Worcester Bus Company, Inc., to upgrade and expand its transit system and assets, consent to higher wage demands, and generally to incur a higher cost structure than it would have incurred without the assistance. Claimant concludes that this increased cost structure prevented the Company from effectively competing for

[4/] MA-05-4002, MA-05-4018, MA-05-4024, MASS UTG-6 and MA-03-0050.

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the school bus contract, resulting in the loss of the contract in 1977 to a lower bidder. Claimant's counsel, in his letter of December 1, 1978 describes the effect of the loss of the school bus contract as follows:

> The loss of the contract meant the liquidation of a major income producing division of the Bus Company. Loss of income economically translated into the elimination of jobs and layoffs... The loss of the contract and the sale of the Company obviously affected the transit division of the Company for which assistance under the Act was provided. It also affected [Claimant]...
>
> UMTA funds which were received for the Transit Division in reality affected all parts of the Company and consequently all employees due to the way the Company was organized. Therefore, the reverse would also be true, the loss of the school contract adversely affects the whole Worcester Bus Company which would include the Transit Division and also all employees affected by the Transit Division, this would include [Claimant].

Section 13(c) and the applicable protective arrangements provide protections only for employees who are affected as a result of a project. Though the term "project" is broadly defined in the applicable agreements to include "any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided," changes in character of employment brought about by causes other than a project are specifically excluded from coverage.

Claimant concedes, for purposes of this theory, that his employment was terminated as a result of the loss by Worcester Bus Company, Inc., of its school bus contract. Were there no connection between the projects relied upon by Claimant and the loss of the school bus contract, the

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loss of the contract would clearly be a cause other than the project, and thus not within the perview of Section 13(c) or the applicable protective arrangements. Claimant attempts to supply the required connection between the cited projects and his loss of employment by alleging that the assistance provided for the projects resulted in the loss of the school bus contract.

The assistance relied upon by Claimant was provided under the Act for the purposes of financing mass transportation services. Mass transportation as defined in Section 12(c)(6) of the Act specifically excludes both school bus and charter service. The assistance, provided under Sections 3 and 5 of the Act, was not provided for the benefit of the Company's school bus operations, nor could it have been provided for that purpose. Though there was testimony that mass transit buses were sometimes used for charter or school work, the Administrator of the Worcester Regional Transit Authority testified that the Worcester Bus Company, Inc., was subsidized only for costs incurred in the mass transit service. His testimony was corroborated by the President of Worcester Bus Company, Inc. and by the former Comptroller of the Company. We conclude that no direct assistance was provided to the school bus or charter operations of the Company.

In effect, Claimant is alleging that the assistance that was provided to the mass transit functions of Worcester Bus Company, Inc., had a spillover effect on all operations of the Company, and therefore his termination was indirectly caused by mass transit assistance. While it is conceivable

that such a spillover effect could result from the assistance provided, such an effect is not inevitable, nor even the most probable effect of the assistance. It is equally plausible that the mass transit assistance had no effect on the school bus functions of the Company or, by increasing the viability of the Company's mass transit functions, had a beneficial effect on the school bus functions of the Company. When the direct cause of termination of an individual's employment is a cause other than a project, it is the responsibility of the Claimant to show the alleged connection between the Project and the direct cause of termination of employment. In this respect, it is necessary to review the evidence submitted by Claimant to support his first theory of causation.

Claimant submitted as support for his first theory an excerpt from the application filed by the Worcester Regional Transit Authority for capital assistance grant MA-03-0077. The excerpt stated that, "the Authority has objected to a provision in the 13(c) agreement which could provide job protection to employees of the WBC in the event the Company loses its school transportation contract." This submission indicates that the Worcester Regional Transit Authority had anxiety over possible implications of 13(c) protections. It does not support the allegation of a causal connection between the mass transit assistance and the loss of the school bus contract.

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Claimant also submitted a copy of a letter of agreement, executed on July 8, 1977 by the Worcester Regional Transit Authority, the Worcester Bus Company, Inc., and the Amalgamated Transit Union Local Division 22. Claimant placed particular emphasis on paragraph 5, which states:

> The parties hereto recognize that the Company is in the business of providing contract school transportation services ("school services"), contract charter services ("charter services") and mass transportation services, which services are performed by employees represented by the Union on an integrated operation basis. In light of the foregoing, the parties hereto agree that any changes (including terminations) in the Company's business (school services, charter services or mass transportation services) causing fluctuations in volume and character of employment that are unrelated to the Federal assistance ("Project") shall not be deemed to be an event occurring "as a result of the Project" as that term is defined in Section 1 of the National 13(c) Agreement, or in any 13(c) Agreement.

This provision is inconclusive as to whether a termination of the Company's school bus business would be, in the opinion of the parties to the agreement, caused by any Federal assistance. The provision does not set forth any facts demonstrating that the loss of the school bus contract resulted from Federal mass transit assistance.

Newspaper articles were also submitted by Claimant. One article, published in the Worcester Telegram (Massachusetts) on June 17, 1977, expressed the opinion that in the absence of Federal and local government operating assistance beginning November, 1974, the Worcester Bus Company, Inc., would not have been able to bid on the city's school bus contract. In another article, published in the Worcester Gazette (Massachusetts) on June 17, 1977, there

was discussion of the possible effects, including layoffs, of the potential loss of the Company's school bus service. Though newspaper articles such as these have little value as evidence, the articles proffered do not contain any facts supporting the alleged connection between the mass transit assistance and the loss of the school bus contract.

It is important to note that the President of Worcester Bus Company, Inc., the former Comptroller of Worcester Bus Company, Inc., and the Administrator of Worcester Regional Transit Authority were present at the hearing and available for questioning by Claimant. Despite their availability, no attempt was made to question them for purposes of eliciting facts relating to any possible impact of the mass transit assistance on the cost structure of Worcester Bus Company, Inc., or on the school bus functions of the Company. The only significant statement made at the hearing relating to the cost structure of Worcester Bus Company was the Administrator's observation that a large percentage of the Company's operating costs were attributable to the union scale wages of the Company's operators and mechanics. However, the payment of such wages can hardly be attributed to the assistance and cannot alone provide the needed factual support for Claimant's allegation.

The Claimant has failed to identify any pertinent facts supporting the alleged relationship between the cited mass transit assistance and the loss of the school bus contract by Worcester Bus Company, Inc. Thus, even if it could be shown that the termination of Claimant's employment resulted from loss of the school bus contract, no connection

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has been demonstrated between the cited assistance and his loss of employment. Therefore, we conclude that Claimant is not entitled to protections under Section 13(c) on the basis of his first theory.

Purchase of Worcester Bus Company assets

In support of his second theory, Claimant identifies capital assistance grant MA-03-0077, which grant funded, in part, the purchase of the assets of Worcester Bus Company, Inc., by Worcester Regional Transit Authority. Claimant's employment was terminated on September 2, 1977. The acquisition of the assets of Worcester Bus Company, Inc., by Worcester Regional Transit Authority, and the termination of the service contract between the two entities, occurred on or about June 30, 1978. Claimant asserts that his employment was terminated in anticipation of the acquisition.

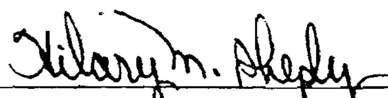
Paragraph 7 of the applicable employee protection agreement provides that the phrase "as a result of the Project" includes "events occurring in anticipation of... the Project..." The President of Worcester Bus Company, Inc., testified that negotiations for sale of the assets of the Company were under way by October or November of 1977. The President further testified that, due to legal restrictions, Worcester Regional Transit Authority could not purchase the Worcester Bus Company, Inc.'s charter license. The termination of Claimant's employment in this case occurred ten months before the effective date of the purchase of Worcester Bus Company, Inc.'s assets by Worcester Regional

Transit Authority. Further, the termination occurred prior to the period, established by testimony of the President of Worcester Bus Company, Inc., during which serious negotiations were underway relating to the acquisition. On the record available to us, we find that identification of the acquisition ten months subsequent to the termination of Claimant's employment, alone, is not sufficient to satisfy the requirement that Claimant identify a project and specify pertinent facts to show an arguable relationship between the project and the loss of his employment. As Claimant has failed to show pertinent facts indicating that his loss of employment may have resulted from the acquisition, it is not necessary to consider whether the termination of his employment was for cause, as asserted by Respondent.

Conclusion

After review of the testimony, evidence and other material submitted by the parties, we conclude that Claimant's employment was not terminated as a result of or in anticipation of any project funded by a grant of assistance under the Act. Therefore, Claimant is not entitled to benefits under the applicable protective agreements.

Dated this 20th day of March, 1981
at Washington, D.C.



Hilary M. Shepky
Acting Deputy Assistant Secretary of Labor

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UNITED STATES DEPARTMENT OF LABOR

In re:

JACK C. KARLIN
(Claimant)

v.

CAPITOL DISTRICT TRANSPORTATION AUTHORITY
(Respondent)

DEP Case No.
78-13c-51

Summary: A non-union employee claimed entitlement to pension benefits equivalent to those of the unionized employees. The claim relied upon alleged oral assurances made by the predecessor employer. No written pension document was introduced clearly pertaining to Claimant. A letter and an affidavit written after the fact, did not suffice to establish the Claimant's pension entitlement to the claimed benefit. Benefits of allegedly similarly situated employees also did not suffice. Prior existence of the claimed benefit was not established; therefore, entitlement to protection of the alleged benefit could not be determined. The claim was dismissed.

Claimant Jack C. Karlin brought this matter to the Department of Labor by letter of December 28, 1978 requesting a determination of his entitlement to certain pension benefits. Mr. Karlin claims entitlement to these pension benefits under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). Section 13(c) requires protection of pension and other benefits from being adversely affected by a project under the Act. This claim was heard in Albany, New York on May 8, 1979 by a hearing officer designated by the Department of Labor. Both parties were represented by legal counsel.

STATEMENT OF FACTS

For more than a decade prior to 1970 the Schenectady Transit Company had provided private mass transit services in the counties of Schenectady and Albany. On April 6, 1970, this private mass transit entity was purchased by the City and the County of Schenectady. Simultaneously the City and County of Schenectady employed a private management firm, National City Lines Management (NCM) to operate the newly-acquired transit services for the City-County system. Effective on or about October 2, 1970 the Capitol District Transit Authority (CDTA) took over these transit operations from the City and County and continued to employ NCM as operating agent. On August 16, 1973, the Authority replaced the private operating agent, NCM, with the Capitol District Transportation System, an integral subordinate of the Authority. Thereafter the Authority operated this mass transit system through its dependent, internal operating arm.

Claimant began employment May 14, 1956 with the original transit entity, Schenectady Transit Company. He remained on Schenectady's payroll until the April 6, 1970 purchase by the City and County of Schenectady. At that time he became an employee of NCM, the private operating agent. He remained on NCM's payroll when the CDTA purchased the transit system from the City and County in 1971. Then on January 29, 1973, he was transferred to the payroll of the Authority (CDTA).

When NCM began managing the transit system on April 6, 1970, it entered into a collective bargaining agreement effective May 18, 1970 with Local 1283 of the Amalgamated Transit Union (ATU). As an accountant, Claimant was not

considered part of the bargaining unit and was expressly excluded from coverage under Article II, Section 2.02 of the May 18th agreement. Portions of this agreement are significant here because this claim rests primarily upon the assertion that non-bargaining-unit employees, although not provided a written contract concerning working conditions, were assured of receiving the same pension benefits as those established under Article XXIV of the May 18, 1970 collective bargaining agreement. Article XXIV provides that:

> *"During the life of this agreement, employees 65 years of age and over who were on the payroll of the Company as of May 17, 1970, may retire from active service and shall be paid fifty dollars ($50.00) per month."*[1/]

This amount was increased to $60.00 per month in 1972.

As a result of his 1973 transfer from NCM, a private firm, to CDTA, a public body, Claimant was considered a public employee and therefore became eligible to, and did, join the New York State Retirement System. It was stipulated by the parties during the hearing that the monthly benefits provided by the State Plan would be significantly greater than the sixty-dollar per month benefit provided under Article XXIV of the bargaining agreement. In addition, it was stipulated that the State Plan would only take into consideration Claimant's service time as of the date he joined the Retirement System.

[1/] The entire provision reads in full: "During the life of this agreement, employees 65 years of age and over who were on the payroll of the Company as of May 17, 1970 may retire from active service and shall be paid fifty dollars ($50.00) per month. It is understood, however, that all personnel employed after May 17, 1970 must have 30 years of continuous active service and be 65 years of age before being eligible for retirement."

Respondent admits that it (CDTA) and its subordinate, Capitol District Transit System, both can be considered as bound by the 13(c) Agreement of March 5, 1970. That Agreement forms the basis for the Secretary of Labor's certification of Respondent's pertinent UMTA project No. NY-UTG-0015, with the further condition that equivalent protections shall be provided to mass transit employees not covered by that Agreement.

On July 27, 1977, Claimant requested formal confirmation from the trustees of CDTA of his rights to the $60.00 per month benefit under the NCM pension plan. Unable to obtain the sought-after confirmation, Claimant filed a petition with the Department of Labor in an attempt to establish his precise pension rights.

ISSUES

1) Did Claimant have a pension benefit with NCM at the time of the grant.

2) If Claimant had a pension benefit at the time of the October 1970 takeover, was this pension worsened after the takeover by CDTA and the federal grant.

Position of Claimant

During the years NCM managed operations for the various public bodies, the non-bargaining unit employees were not protected by a written contract concerning pension benefits. Claimant asserts that these employees were assured orally of receiving the pension benefits that were extended to union members under Article XXIV of the 1970 collective bargaining agreement. Claimant contends that his right in the disputed pension benefit attached on May 17, 1970 by virtue of his employment with NCM. In this connection Claimant asserts that he will become eligible to retire under the plan on his sixty-fifth birthday regardless of whether he remains an employee in the transportation industry.

Therefore, Claimant continues, while CDTA may not have been compelled under Section 13(c) to provide any additional pension benefits (i.e. the New York Retirement System), it is compelled by Section 13(c) to continue separately the rights and benefits that he feels had vested as of May 17, 1970. He suggests that an attempt to discontinue these rights would not only deprive him of a benefit that existed before the project but would also fail to credit and protect fourteen years of past service. This allegedly would create a worsening of his employment conditions in violation of Section 13(c) protections.

Position of Respondent

Respondent denies that the Claimant is entitled to the pension benefit which was established in the 1970 collective bargaining agreement between NCM and the ATU. Respondent maintains that this Claimant was not a beneficiary of the disputed pension rights because the collective bargaining agreement, upon which the claim initially relies, specifically excludes all clerical and office workers in all offices of the Company. According to Respondent, Claimant, as such employee, had no right to a pension benefit while employed by NCM, because of this general exclusion. Respondent argues that Claimant has not established his right to the disputed benefit and, consequently, is not entitled to any 13(c) protection of the disputed pension benefit.

DISCUSSION

Respondent raised several other objections and defenses to this claim. We need not address those points in this decision since, for the reasons discussed below, we have determined that the instant claim is not sustainable.

The initial question in this dispute is whether Claimant was entitled to a pension benefit while employed by National City Lines Management Inc. In this, Claimant has the burden of showing that he had a bona fide right to the claimed benefit prior to the alleged affect of the UMTA project. Specifically, it is Claimant's burden to prove that NCM provided him with the disputed pension benefit.

In an effort to carry his initial burden, Claimant submitted a copy of Description Amendment Form D-1A dated March 9, 1971 (Exhibit 1). This form was filed with the Secretary of Labor by NCM pursuant to the Employee Welfare and Pension Plans Disclosure Act (hereinafter the Disclosure Act). This form stated that, in addition to its welfare plan, NCM was also providing a pension plan effective May 18, 1970. Tracking directly the language of Article XXIV of the 1970 collective bargaining agreement, the amendment stated the following:

> *Addition to Plan - unfunded pension payments made from regular cash account of company from revenue derived from operations. Employees 65 years of age and over who were on payroll of the company as of May 1, 1970 may retire from active service and shall be paid fifty dollars ($50.00) per month. All personnel employed after May 1, 1970, must have 30 years of continuous active service and be 65 years of age before being eligible for pension. Plan established by bargaining agreement.*

Without more, this material does not suffice to establish the application of a collectively bargained pension plan to employees not covered by the collective bargaining agreement.

As further evidence to support the existence of his right to the disputed pension, Claimant submitted (hearing exhibit 6) the March 6, 1970 management agreement between the County of Schenectady and National City Lines Management Corporation (NCM). Employee costs are the focus of Section 9(b) of this agreement:

> *(b) All other employee costs, including but not limited to all costs and expenses under a collective bargaining agreement with Division 1283, Amalgamated Transit Union, to be assumed by Company or as subsequently modified, amended, or changed with the prior approval of County. Company shall also be reimbursed for pension payments directed by County to be made including pension payments to non-union retirees,*

> *provided, however, that any payments of pension to any retired employees or to any non-union retirees under the terms of the collective bargaining agreement shall not be interpreted as a change in or admission of liability for said pension payments by either Company or County.*

Arguing that it was NCM policy to follow through with County policy on these matters, Claimant maintains that Section 9(b) of the March management contract demonstrates that both the County and NCM anticipated two months before the "May" collective bargaining agreement that pension payments would be directed to non-union employees. While this may be a possible interpretation of Section 9(b), it is at least equally reasonable to construe that section as referring only to retirees within the bargaining unit.

The Claimant maintains that his sought pension benefit, allegedly vested in the amount of $60.00 per month and receivable upon his retirement and attainment of age 65, was verbally assured to him by the County of Schenectady prior to Respondent's 1973 takeover of transit operations. Moreover, he asserts that NCM, the private management company, was owned and controlled by the County and that it was NCM's policy to implement County policy. In support of this, Claimant submitted under protest by Respondent a letter allegedly from Mr. David Washburn, former Vice President of Schenectady Transit Corporation, stating that he and the Claimant were included in the pension plan in the 1970 collective bargaining agreement. An affidavit was also submitted over Respondent's objection from Mr. Carl Sanford, County Executive of Schenectady County from 1968 to 1977. Mr. Sanford therein states that the County's policy was to grant to all County employees including the Claimant the same fringe benefits, including pension benefits. Mr. Sanford's affidavit contains the further statement

that, at the time of the takeover, it was assumed that all employees (including the Claimant) would continue to receive the same benefits they had enjoyed with the County. Mr. Sanford states that he readily believes that the Claimant was not covered by the collective bargaining agreement but was entitled to the pension benefits provided therein.

This letter and the affidavit are of inconclusive weight in evaluating the positions of either party. Even if one were to accept the documents at face value, they suffer from some uncertainties. The affidavit, for example, states its author's disposition to believe that the Claimant was covered by the disputed plan, but does not affirm that such was the fact without question. The affidavit also indicates that it was assumed by the County Executive that the Respondent would provide the Claimant with the same benefits as he had received with the County. This assumption on behalf of the County does not approach proof of an obligation resting upon the Respondent, CDTA. Beyond this, there has been no opportunity to resolve these uncertainties, inasmuch as neither Mr. Washburn nor Mr. Sanford was available at the hearing.

The Claimant has not sufficiently demonstrated that he had a pension benefit that may be protected by Section 13(c) of the Act. Upon receipt of the request of the Claimant for a determination regarding his pension benefits in this case, we requested that the Claimant furnish specific information regarding the project and the facts upon which the claim was based. We also requested copies of plan documents and any other information which would show that the Claimant was entitled to the pension benefit and to show that this benefit was worsened as a result of the takeover. The Claimant has

not submitted plan documents, any plan records or County records or statements from the plan administrator or from County officials which would show what, if any, pension benefit the Claimant was entitled at the time of the federal grant. The Claimant relies on alleged pension payments to other employees similarily situated, the language of the collective bargaining agreement, and an affidavit regarding County policy. However, there is no record to indicate how the County policy was in fact effectuated. The parties disagree on the critical points of whether Claimant was covered by the disputed pension plan. They further disagree as to whether Respondent incurred any liability for such pension (if Claimant were covered) or whether the liability remained with NCM and/or the County. We cannot reach any conclusions regarding the merits of the position of either party in this matter. Based on the material submitted by the parties regarding this claim, we cannot determine whether or not the Claimant had an entitlement or right to the disputed pension benefit at the time of the grant. As a result, it is not possible to determine whether such alleged benefit has been worsened or whether the Claimant is entitled to any protection of that claimed pension benefit. Therefore, this claim is dismissed. This result, of course, does not prejudice the right of the Claimant to bring an action or pursue whatever other private remedies he may have to establish his right to the claimed pension benefits.

Dated this 3rd day of November, 1980
at Washington, D.C.

William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

JOSEPH LUCIDO, ET AL. (Claimants) v. THE CITY OF SIMI VALLEY and CAL-COAST CHARTER (Respondents)	DEP Case No. 78-13c-53

Summary: Claimants alleged they had been denied certain protected benefits pursuant to Section 13(c) and that one Claimant had been constructively laid off in retaliation for seeking Section 13(c) protections. In the hearing before the Department of Labor Claimants were unable to demonstrate a worsening or loss of any benefit or right within the scope of Section 13(c) protections. The claim was dismissed.

DETERMINATION

Jurisdiction

This constitutes the Secretary of Labor's final and binding determination in the above claim to employee protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). As a condition of

the UMTA project cited below, the City of Simi Valley agreed that no mass transit employees in the service area of the project would be adversely affected by it. The City further agreed that any dispute over these employee protections may be submitted to the Secretary of Labor for final determination.

The dispute was filed with the Secretary October 6, 1978. The Claimants have named two employers as Respondents in this case, the City of Simi Valley, California and a private bus company, Cal-Coast Charter of Oxnard, California. The Claimants are employed by the private company, Cal-Coast Charter, which provides bus drivers (the Claimants herein) for the municipal Simi Valley transit system as a contracted service. During the Department's consideration of this claim the employees formed a labor organization which secured collective bargaining rights for these bus drivers through an election under the National Labor Relations Act. The labor organization is not signatory to any employee protective agreement under Section 13(c), however.

The Claimants have an initial obligation to identify the pertinent project (grant of Federal funds under the Urban Mass Transportation Act). They cited UMTA project number CA-03-0068, certified by the Department of Labor June 14, 1973 as providing the fair and equitable protections required by Section 13(c). That project granted capital assistance to the City for the purchase of buses. This is the only pertinent project for this proceeding. The City has applied for additional UMTA funding but that is not relevant to this case.

A hearing on this case was held June 8, 1979 in Simi Valley, California before a hearing officer appointed by the Department. The principal Claimant attended with lay representation and both Respondents attended with legal counsel. Counsel for the private transit company raised a preliminary challenge to the naming of the company as a respondent in this dispute, on the grounds that Cal-Coast Charter does not receive Federal funds under the Act and has neither entered into any agreement nor accepted any conditions to provide Section 13(c) protections. I have found no liability on the part of Cal-Coast Charter in this claim and, thus, find it unnecessary to rule on this objection.

Issues

The principal Claimant, on behalf of himself and approximately ten other employees, alleged denial of protected wages, job security, sick leave, freedom of speech, and other benefits in contravention of Section 13(c) of the Act. He further alleged, individually, that he had been placed in a constructive layoff situation in retaliation for information he sought and/or supplied pertaining to Section 13(c) protections.

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Position of Claimants

Claimants offered the following to describe their claim for employee protections and the requested remedy. They are not, and have never been, employees of the City of Simi Valley. With respect to the alleged denial of protected wages, Claimants admit that during the period in question they did not suffer any reduction in their wage rates nor in other benefit levels. Rather, they believe that they are entitled to receive all (or most) of the difference between the wage rates paid to them by the private company and the hourly rate upon which the City bases its payment to that company for the contracted service of supplying drivers for the City's buses. In the alternative, Claimants believe they should receive the same compensation and benefits as employees of the City.

In referring to their request for protection of benefits under Section 13(c), Claimants point out that they do not have, and have not enjoyed previously, sick leave, medical coverage, hospitalization, etc. as enjoyed by employees of the City. However, they seek benefits equivalent to those City benefits. In the areas of job security and freedom of speech, the claiming employees expressed concern that they do not have protection from arbitrary actions of their employer and his agents or from such actions of the City. They also claimed that their general constitutional rights to freedom of speech have been denied.

It was asserted that one Claimant suffered a constructive layoff in that he was not given his customary number of hours of work for a period of four to five weeks in September and October of 1978. During that time he was prevented from collecting unemployment benefits because he was given certain hours of work on an "emergency only" basis. Early in the processing of this case the Claimants had suggested that this action was in retaliation for the individual's efforts to discover and pursue his rights under Section 13(c). In testimony at the hearing, however, this Claimant reversed this suggestion.

The above summarizes the testimony, evidence and argument proffered by the Claimants to establish this claim. There was no additional substantive evidence or testimony to demonstrate that their employment interests have been worsened or that they have been denied protections in their employment.

Position of Respondents

In answering these allegations Respondents deny that the Claimants' wages, benefits, privileges, rights, or other employment interests have been worsened. Counsel for the City moved for dismissal of this matter upon conclusion of the employees' presentation. The motion was based on the alleged failure of the Claimants to suggest a prima facie claim. The motion asserts that Claimants have shown no worsening of any rights, privileges, benefits, or other conditions and interests of their employment. The motion maintains that, consequently, Claimants have not pointed to any denied protections.

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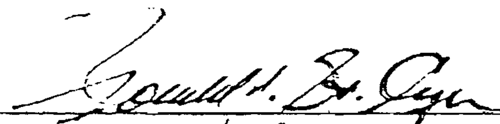
Decision

After entering the motion to dismiss, Respondents addressed the substantive issues in this case. It is not necessary to discuss that presentation here because I have determined that the Claimants have failed to state any facts to show that a Federal project could have affected the Claimants. They complain of dissatisfaction with their employment conditions, but they have not met the threshold obligation to demonstrate a worsening or loss of any benefit or right with respect to their employment conditions. Claimants seek to gain improvement in the working conditions which existed after the project but without being adversely affected by the project. The terms and conditions of the 13(c) certification protect the status quo of employment conditions from adverse effects of the project. These protections do not require the changes requested by Claimants in this case. Therefore, this complaint is dismissed for failure to show any worsening of the rights, privileges, benefits, or other conditions of employment as a result of the Federal project.

Dated this 31st day of July, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

THOMAS POVLITZ (Claimant) v. MARYLAND MASS TRANSIT ADMINISTRATION (Respondent)	DEP Case No. 78-13c-54

Summary: Claimant alleged that his position as Project Director was terminated as a result of a project. At all times during his protective period Claimant was employed and received a salary that exceeded his salary as Project Director, and fringe benefits that were similar to, or greater than, the benefits that he received as Project Director. As no worsening of salary or fringe benefits was shown, the claim was denied.

DETERMINATION

Jurisdiction

This constitutes the final and binding determination in the above case. The instant petition was filed with the Department of Labor by letter dated October 25, 1978, from the Claimant. The action requests a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of

1964, (UMTA) as amended, as to whether the Claimant's former position of Project Director was terminated by actions of the Maryland Mass Transit Administration, herein called Respondent, as a result of a federally funded project under the Act. This case was heard August 8, 1979, before Alan Nartic, appointed by the Department of Labor.

The Claimant has identified Respondent's project (MD-03-0018) as the particular project which allegedly worsened his employment conditions. The Department of Labor issued its letter of certification for the cited project on May 26, 1978, on the basis of a Section 13(c) agreement executed between the Amalgamated Transit Union and Respondent on October 17, 1972. The certification provided that mass transit employees not subject to the dispute resolution procedure contained in the parties' executed agreement may submit their disputes to the Secretary of Labor for a final and binding determination. The Claimant has no labor organization representation and, in accordance with the procedure set forth in the Department of Labor's certification for the cited project, he requested a determination of his dispute be made by the Secretary of Labor.

Issue

Claimant alleges that his position as Project Director was abolished as a result of the identified project which transferred the operation of Lutheran Social Services' Project Mobility (Mobility) to Respondent on May 27, 1978. Claimant maintains that after his position was abolished he

was without employment and lost those fringe benefits associ-ated with his former position of Project Director. Claimant requests a determination that he was entitled to a position and fringe benefits comparable to his former position and fringe benefits at Mobility, which were allegedly worsened through federal funds.

Jurisdictional Objections

Section 16(b)(2) Objection

Respondent states that Mobility was funded under Section 16(b)(2) of the Urban Mass Transportation Act and contends that no employee protective arrangements are required for Section 16(b)(2) grants. The instant case for employee pro-tections alleges a worsening of employment conditions as a result of Respondent's capital assistance grant, MD-03-0018. That grant was funded under Section 3 of the Urban Mass Transportation Act and required, as a prerequisite, appropri-ate employee protections to be certified by the Department of Labor under Section 13(c). This petition seeks relief as a result of an alleged worsening of employment as a result of Respondent's Section 3 grant. Therefore, it is not necessary to resolve Respondent's contention that 13(c) protections do not apply to grants under Section 16(b)(2).

The JACKSON Objection

Respondent contends that the Secretary of Labor lacks authority to determine petitions of employees who allege that their interests have been worsened through the use of federal assistance. Respondent argues that, in Local 1285, ATU v. Jackson Transit Authority, et al., (U.S. District Court for the Western District of Tennessee, Civil Action No. 76-104-E), the Department of Justice filed a motion to dismiss on behalf of the Secretary of Labor on the ground that the role of the Secretary is limited to determining whether or not fair and equitable arrangements have been made. Local 1285's contentions concern collective bargaining agreement actions allegedly taken by Jackson Transit Authority subsequent to entering into the employee protective agreement certified by the Secretary of Labor. Local 1285 had failed to utilize or exhaust final and binding dispute resolution procedures set forth in both the collective bargaining agreement and the Section 13(c) agreement. The Secretary of Labor declined jurisdiction inasmuch as the parties had access to a self-governing final and binding dispute resolution procedure under each contested agreement. Respondent's jurisdictional objection is not apposite to the instant case, however. The Department of Labor's letter of certification specifically provided that employees not subject to the dispute procedure provided in the parties' executed Section 13(c) agreement may petition the Secretary of Labor for a final and binding determination of such disputes. Claimant, having no recourse to that dispute procedure, appropriately requested a final and binding determination of his dispute with the Secretary of Labor. Therefore, Respondent's objection does not bar the Secretary of Labor's jurisdiction of this matter.

The Substantive Case

Respondent raised several objections concerning: (1) Claimant's employment status with Lutheran Social Services, Incorporated and, (2) Claimant's eligibility as a mass transit employee under the Urban Mass Transportation Act. It is unnecessary to address those objections here, however, since Claimant would not prevail in this action, for the reason cited below. Claimant contends his position was abolished when Respondent assumed operation of Mobility as a result of a federally funded project on May 26, 1978. Claimant maintains he is entitled to a comparable position which the Maryland Mass Transit Administration failed to offer after his position was abolished. The position of Project Director of Mobility continued from February 1, 1977, until May 26, 1978, for a period of one year, three months and three weeks. The Project Director earned an annual salary of $16,400 for the first year, which was increased to an annual salary of $17,548 on March 31, 1978. Fringe benefits included health and life insurance policies.

Contrary to his initial filing, Claimant testified at the hearing that after his position was abolished on May 26, 1978, he was employed with Klander and Associates as a Transportation Planning Consultant on June 1, 1978. At Klander, Claimant's annual salary was $22,000 and included similar fringe benefits associated with his former position at Mobility. Claimant further stated that after he was notified by Klander that his position would eventually be eliminated he sought new employment while he continued to work at Klander. On October 15, 1978, Claimant left Klander and assumed the

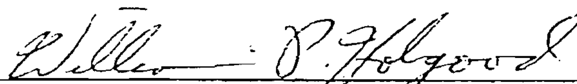
position of Director of the Howard County elderly and handicapped transportation program. In that position his annual salary was $22,000 with benefits similar to those associated with his position at Mobility. On November 17, 1978, Claimant left Howard County and began working as a Senior Employment Representative of Amtrak. As an Employment Representative, Claimant earns an annual salary of $22,300 and greater fringe benefits than those associated with his position at Mobility. Thus, Claimant's testimony established that he was continuously employed from June 1, 1978, through and including the August 1, 1979, hearing date. At all times during this period he received a salary that exceeded his salary as Project Director of Mobility, and benefits similar to or greater than the benefits that he received as Project Director of Mobility.

Based on Claimant's testimony, Respondent asserted that Claimant did not suffer any worsening of his position. I agree with Respondent that the record does not indicate any worsening of employment benefits or conditions for Claimant as a result of the project. Any monetary amounts of protection to which Claimant otherwise might have claimed entitlement in this action have been negated and rendered moot by his improved employment condition subsequent to his termination as Project Director. Claimant has indicated he does not seek employment with Respondent but desires merely a declaratory judgement as to his rights.

Based on the length of his employment with Mobility, Claimant's protective period would have expired in September 1979. As the date through which Claimant may have been

entitled to protections has passed, and no worsening of Claimant's salary or employment benefits has been shown, no purpose would be served in this instance by efforts to define what his rights might have been. Claimant's testimony at the hearing has removed the substance from his position and his alleged cause of action. Therefore, this petition for employee protections is denied.

Dated this 24th day of November, 1980
at Washington, D.C.



William P. Hobgood
Assistant Secretary of Labor

UNITES STATES DEPARTMENT OF LABOR

In re:

WILLIAM R. DALTON, ET. AL. (Petitioner) v. DALLAS TRANSIT SYSTEM (Respondent)	DEP Case No. 78-13c-56

Summary: Petitioner described the events and the harm he suffered but failed to address possible causal connection between those adverse effects and one or more projects under the Act. The claim was dismissed.

DETERMINATION

Background

This constitutes the final and binding determination in the above matter. The request for determination was filed with the U.S. Department of Labor November 9, 1978. This action requests a determination, pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, that the Petitioner is entitled to continue to receive certain health insurance on the same basis he had previously been receiving it. A hearing was held June 22, 1979 in Dallas, Texas by Paul F. Pothin, appointed by the Department of Labor.

Issue

Is the City of Dallas (The Dallas Transit System) in violation of Section 13(c) of the Urban Mass Transportation Act of 1964 as a result of its October 1, 1978 action by which it established a higher health insurance premium contribution rate for retired employees than for active employees?

Facts of the Case

The Petitioner was employed by the Dallas Transit System from May 5, 1929 to January 1, 1973 at which time he retired. (It should be noted that the City of Dallas is the owner of the Dallas Transit System. The City Council is the only legally constituted authority with binding fiscal power.) At the time of Petitioner's retirement, he was employed in the capacity of Division Superintendent. Prior to 1968 employees of the Transit System were responsible for purchasing their own health insurance. For several years up to 1968 the Transit System permitted payroll deduction for this purpose. On July 29, 1968 the Dallas City Council (Resolution #68-3959) awarded a Group Health Insurance Contract to Blue Cross, to be effective October 1, 1968. This contract provided payment by the city for the cost of health insurance for active employees. After October 1, 1968 those who retired were permitted under this plan to continue their health insurance for themselves at the same rate the City had paid for them when they were active employees. In 1970 the City changed insurance carriers but this provision was continued under the new plan. Finally, on October 1, 1977 the City became self-insured. Again no distinction was made between the active-employee rate and the retired-employee rate. The City paid the premiums for active employees and, as before, retired employees paid their own premiums.

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After a year on the self-insured system the City Council decided to revise the rate structure for employee health insurance. All rates were increased, but not uniformly. Effective October 1, 1978 the monthly rate for an active City employee (paid by the City) increased $3.14, from $20.90 to $24.04. The rate for retired employees (paid by the individuals) increased by $6.58, from $20.90 to $27.48. Since October 1, 1978 retired employees have been paying a premium which is $3.44 per month higher than the premium the City pays for active employees. These changes of rates were effective for active and retired City employees including some 800 active employees of the Transit System and approximately 212 Transit System retirees. The above facts were established at the hearing on June 22, 1979 through testimony, exhibits, and stipulations of the Petitioner, Respondent, and the City of Dallas.

The parties stipulated that the City of Dallas has received in the past, and is currently receiving, federal financial assistance under Sections 3 & 5 of the Urban Mass Transportation Act of 1964, as amended. This assistance covers both capital outlay and operating expense. It was determined through testimony at the hearing that Sections 3 & 5 monies are commingled with other state and City funds including fare receipts.

Discussion

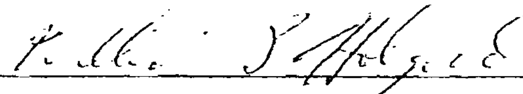
Counsel for the City and Respondent stipulated that the City's practice of allowing retired employees to continue their health insurance was an acknowleged benefit. Counsel maintained that, nevertheless, the City has retained the right to establish unilaterally the rate such retirees must pay for this benefit, and that this rate does not stand as a benefit subject to the protective provisions.

Petitioner denied this through direct testimony of former Dallas Transit System employees and officials who had been actively employed during the years in which this disputed benefit allegedly became established.

Decision

It is not necessary to determine whether the rate that the retirees must pay for their health insurance is or is not a benefit under Section 13(c). I find that neither party in this matter has addressed any possible relationship between the pertinent projects under the Act and the alleged effects which are the subject of this petition. Nor has Petitioner addressed the question of whether he (and the other retirees) were affected in any way by the projects. Petitioners have not stated a sufficient cause of action required in these proceedings for employee protections. Therefore, this claim is dismissed.

Dated this 20th day of May, 1980
at Washington, D.C.



William P. Hobgood
Assistant Secretary of Labor

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SANTINI v. GREATER CLEVELAND RAPID TRANSIT AUTHORITY

DEP Case No. 78-13c-6
October 26, 1978

Summary: The employee claimed his employment conditions had been worsened as a result of federal financial assistance to the Authority. A review by the Department of Labor revealed the employee was represented by a labor organization signatory to a Section 13(c) protective arrangement. The Department advised the employee to pursue his claim through his labor organization.

DETERMINATION

This is in reference to your claim of a worsening of your employment conditions in violation of Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. Our records indicate that a 13(c) employee protective agreement existed between your employer, the Greater Cleveland Rapid Transit Authority, and the Amalgamated Transit Union, Local 268 for the period of time in question, September 5, 1976 and following.

The law provides the Secretary of Labor with jurisdiction in such claims only when the employee is not represented by a labor organization signatory to the protective arrangement. In telephone discussions with a member of our Division of Employee Protections you stated that you were and are represented by Local 268 of the ATU. Therefore, the Secretary of Labor does not have jurisdiction in your case.

You should continue to pursue the matter with your union representatives, including the highest officers of the union if necessary. Thereafter if you believe that you have not been represented fairly you may wish to consult legal counsel.

In reference to your updated letter in mid-September to Mr. Leet, received here September 28, 1978, please be advised that there is no federal statute of limitation pertaining to

filing a claim under 13(c) of the UMTA. You are referred again to your union representatives for questions pertaining to your claim and its timeliness under the protective arrangement applicable to you. Time limits pertaining to project grants would not affect directly the filing of your claim.

/s/
Beatrice M. Burgoon, Director
Office of Labor-Management
Relations Services

UNITED STATES DEPARTMENT OF LABOR

In re:

EDWARD MCINNIS
(Petitioner)

v.

SANTA CLARA COUNTY TRANSIT DISTRICT
(Respondent)

DEP Case No.
79-13c-01

Summary: Petitioner sought protection of past-service credit towards his pension entitlement, sought coverage under a union pension plan and sought parity with other salaried employees. He also alleged his military service credit was denied and that he had been improperly forced to make employee contributions to Respondent's pension plan after the takeover of the former company. Petitioner also maintained that a voluntary settlement he had entered into with Respondent did not properly protect his rights and benefits. Respondent prevailed on all issues and the claim was denied.

DETERMINATION

Jurisdiction

This constitutes the final and binding determination in the above matter. The instant petition was filed with the Department of Labor by letter dated December 18, 1978 from the Petitioner. The action requests a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA), as to whether the Petitioner's pension entitlements were worsened by

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actions of the Santa Clara County Transit District, herein called Respondent. The case was heard June 11, 1979 before Alan Nartic, appointed by the Department of Labor.

Petitioner has identified Respondent's UMTA project number CA-03-0061 as the project which allegedly worsened his employment conditions. The Department of Labor certified that project on May 9, 1973 as providing the fair and equitable employee protections required by Section 13(c) of the Act. That certification was based on the negotiated employee protections agreement executed between Respondent and the Amalgamated Transit Union, and upon the condition that Respondent would afford substantially equivalent protections to affected employees not represented by a labor organization signatory to the negotiated protections. The certification contained the further condition that such other affected employees may petition the Secretary of Labor for determination of disputes as to the interpretation, application or enforcement of these employee protections. The right of such employees to request the Secretary to determine these disputes is set forth also in Article IV of Appendix C-1 under the Rail Passenger Service Act of 1970, as amended, which Appendix is incorporated in the negotiated protections by reference.

The Petitioner has no labor organization representation for purposes of Section 13(c) actions. Therefore, jurisdiction rests with the Secretary of Labor.

Position of Petitioner

By letter dated March 30, 1979, Petitioner states that his former employer's transit operations, San Jose City Lines, were taken over by Respondent on or about December 30, 1972. Petitioner alleges that his past twenty years and two months of service at City Lines have not been counted as credited service for pension entitlements with Respondent. He suggests, in support of this first allegation, that he should receive the pension benefits contained in a separate pension plan negotiated between Respondent and its hourly

employees' bargaining representative, the Amalgamated Transit Union. Petitioner avows that he will receive a smaller pension entitlement as a salaried employee than other salaried employees covered by Respondent under the Public Employees' Retirement System. Petitioner further alleges that he will lose four years of military time, which he purchased from Respondent's retirement system as a part of his credited service. Finally, Petitioner alleges that he is entitled to compensation for the seven percent of his annual salary which he has been "forced" to contribute towards his pension since he began working for Respondent.

Position of Respondent

Respondent, by letter dated May 7, 1979, alleges that the Petitioner is a management employee and thus not entitled to Section 13(c) protection. Respondent further asserts that although Petitioner is not entitled to Section 13(c) protection, an "Agreement and Settlement" was negotiated and executed by the parties on or about May 12, 1978, which protects Petitioner's past twenty years and two months of service for pension entitlements. Additionally, Respondent argues that Petitioner's four years of military time are continued by this Agreement and that Petitioner will receive greater pension benefits than he enjoyed at City Lines.

Discussion

The issue of whether Petitioner may have been affected as a result of the project and actions of Respondent cannot be addressed before resolving the threshold issue of whether or not he is an employee under the Urban Mass Transportation Act of 1964, as amended. We have previously concluded that the term "employee" as used in the Act should be broadly construed and should be considered to encompass all but the

top-level management of an employer.*/ That top level would include key individuals performing functions corresponding to those positions excluded from the definition of "employee of a railroad in reorganization" in Section 501(2) of the Regional Rail Reorganization Act (president, vice-president, treasurer, secretary, comptroller and any person who performs functions corresponding to those performed by the foregoing officers). Because job titles may vary from employer to employer as a result of size, administrative policy, and other factors, decisions as to whether a particular individual qualifies as an employee within the meaning of the Act must be based on the actual functions the individual performs.

According to testimony given by the Petitioner, the title of his former position at City Lines was that of Maintenance Supervisor. In that position Petitioner was responsible for the daily care and maintenance of City Lines' buses. He also had responsibility to assign mechanics to repair damaged buses and to assign the drivers to the buses for their daily routes. Finally, Petitioner was responsible for ordering parts necessary to repair damaged buses and for keeping an inventory of such parts. Petitioner did not have the authority to hire or fire employees and did not have stock holdings in City Lines. Petitioner did not sit in on board of director's meetings and did not have any role in making company policy. Additionally, Petitioner did not have fiscal or budgetary responsibilities and he did not serve as a representative of City Lines or perform other duties usually associated with top management. Respondent offered no testimony or other evidence which would dispute or challenge the testimony given by Petitioner as to his duties as Maintenance Supervisor at City Lines. Respondent appears to argue that Petitioner is not an employee because he has some first- or intermediate-level supervisory duties.

Based upon the foregoing, I conclude that Petitioner performed functions which qualify him as an employee under Section 13(c) of the Urban Mass Transportation Act of 1964,

*/ (Petitioner) v. Nassau County, DEP Case No. 75-13c-07, January 30, 1975.

as amended, and does not have those key characteristics of top management which might exclude him from the Act's coverage. Therefore, he is eligible for the protective benefits provided thereunder. Having determined that Petitioner is an employee entitled to the protections provided under Section 13(c), we now turn to the issue of whether those protections have been denied.

As previously stated, Petitioner argues that he has been adversely affected in four specific instances. Petitioner first states that he was employed at City Lines from October 30, 1952 until December 30, 1972 for a total of twenty years and two months of past service. Petitioner further states that under City Lines' pension plan an employee was not credited for any past service until his retirement, at which time his pension entitlement was paid from the general operating revenues of City Lines. Petitioner alleges that when the Respondent took over ownership of City Lines on or about December 30, 1972, he was improperly deprived of this past service for pension entitlements under the pension plan applicable to Respondent's management employees, the California Public Employees' Retirement System (PERS). Petitioner further argues in support of this first allegation that he should receive the greater pension entitlements contained in the separate pension plan negotiated between Respondent and the Amalgamated Transit Union (ATU) on behalf of hourly-paid employees represented by the ATU in Respondent's bargaining unit.

Respondent argues, in this first allegation, that upon assumption of the ownership of City Lines in 1972, it took the position that Petitioner was a management employee and therefore not entitled to or eligible for Section 13(c) protections. Respondent also points out that its management employees' pension plan, PERS, does not recognize nor allow for past service in the private sector to be credited for pension entitlements. By letter dated May 7, 1979 Respondent provided a copy of an Agreement and Settlement which the Santa Clara County Transit District entered into with Petitioner and five other former management employees of City Lines. In the Agreement and Settlement Petitioner and Respondent agreed that all of Petitioner's past years of service at City Lines will be credited and protected for pension purposes with Respondent. Petitioner is to be guaranteed the same pension credits as ATU members in Section 4(b) of the Agreement and Settlement.

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On the basis of the above testimony and documentation provided by the parties, I find that Petitioner's past twenty years and two months service at City Lines have been preserved and continued by Respondent.

Petitioner's second allegation of adverse effect is that he will receive a smaller pension entitlement under PERS than the pension entitlement enjoyed by other salaried employees of the Respondent. Petitioner argues that other salaried employees of Respondent have had all of their past years of service credited for pension entitlements under PERS. Petitioner concludes that he has been worsened in comparison to those other salaried employees. Finally, Petitioner argues that under Section 13(c) he should enjoy the identical pension entitlements as the pension entitlements enjoyed by other salaried employees of Respondent who have similar lengths of past service regardless of the nature or sources of such service.

Respondent argues that Section 13(c) only protects those benefits affected by federal funds and does not guarantee the employee any additional benefits nor benefits necessarily identical to those enjoyed by other employees. Respondent states that its other salaried employees with similar years of credited service have accrued this service under PERS. Therefore, these salaried employees have a different pension entitlement than Petitioner, whose past private sector service at City Lines cannot be recognized under the state pension legislation which created and governs PERS. Finally, Respondent argues Petitioner's pension benefits and entitlements based on creditable service at City Lines have been protected in the "Agreement and Settlement" as required under Section 13(c).

Petitioner alleges that he will receive a smaller pension than other salaried employees of Respondent. Those other salaried employees did not have previous employment similar to the Petitioner. The other employees accumulated their prior credited service through employment with the Respondent. All of this service, therefore, is creditable under PERS, which could result in providing those other employees with a greater retirement than that available to Petitioner. However, Petitioner was not formerly employed by the Respondent and therefore is not eligible to have his previous service included in PERS. Section 13(c) protects only those rights, privileges, and benefits which are

affected by federal funds. This should not be confused with necessarily providing an employee with new or improved benefits substantially equal to benefits of other employees. On the basis of the above, I conclude that Petitioner was not worsened by receiving a different pension entitlement, <u>per se</u>, than the pension entitlement received by other salaried employees of Respondent.

Petitioner's third allegation of harm is that he has been wrongfully deprived of four years of military service time which he purchased from Respondent's pension system, PERS. Petitioner states that in order to secure additional credited years for pension entitlements with Respondent, he purchased four years of military time from PERS at a cost of $1,181.00 in 1978. He further states that while in the employ of San Jose City Lines he neither purchased nor otherwise obtained any pension credits for this military time. Petitioner maintains that the military time which he purchased from Respondent will not be included as part of his credited years of service under PERS.

Respondent states that the purchase of military time through PERS is at the option of the individual employee. Respondent maintains that once this option is taken out by the individual it becomes part of his credited service under PERS. Respondent states that the actuarial firm retained by PERS has confirmed that the four years of military time have been included as credited service for the Petitioner under PERS. Finally, Respondent asserts that Section 13(c) protects only those benefits which Petitioner enjoyed prior to the use of federal funds and that the military time was purchased after the December 30, 1972 date on which Petitioner maintains he was adversely affected. Based upon the testimony and evidence provided by the parties, I conclude that the Petitioner's four years of military time, purchased at his option, are counted as credited service under PERS and that he has not been denied 13(c) protections in this allegation.

Petitioner's fourth allegation is that he has been wrongfully "forced" to contribute seven percent of his gross salary towards Respondent's pension system which is "received free" by other employees of Respondent. Petitioner states that during his last year of employment by City Lines he received an annual salary of $9,970.

Petitioner states that while other employees of Respondent, who are represented by the Amalgamated Transit Union, are not required to contribute towards the pension plan executed between the ATU and Respondent, he must contribute seven percent of his annual salary under PERS.

Respondent states that because Petitioner is a management employee he is required to participate in the PERS plan. Respondent also states that all employees included in the PERS plan were required to contribute seven percent of their annual salary through December of 1978 and are now required to contribute five percent of their salary to PERS. Respondent maintains that if Petitioner should ever withdraw from PERS he would receive his entire contribution back plus interest. Finally, Respondent argues that Petitioner enjoys a better pension entitlement under the Agreement and Settlement than he enjoyed under the City Lines' pension plan.

In determining whether Petitioner has been worsened by the contribution which he pays under PERS it is not relevant to compare the pension plan negotiated by the Amalgamated Transit Union. To determine whether Petitioner has been adversely affected by the seven percent contribution, it is necessary to compare the last annual salary he received at City Lines to the adjusted annual salary he has received since working for Respondent.

EMPLOYER	*YEAR*	*ANNUAL SALARY*	*PENSION CONTRIBUTIONS*	*ADJUSTED ANNUAL SALARY AFTER CONTRIBUTIONS*
City Lines	*1972*	*$ 9,970*	*none*	*$ 9,970*
Respondent	*1973*	*$14,177*	*$ 992*	*$13,185*
Respondent	*1974*	*$16,213*	*$1,134*	*$15,079*
Respondent	*1975*	*$18,724*	*$1,310*	*$17,414*
Respondent	*1976*	*$21,512*	*$1,505*	*$20,007*
Respondent	*1977*	*$24,126*	*$1,688*	*$22,438*

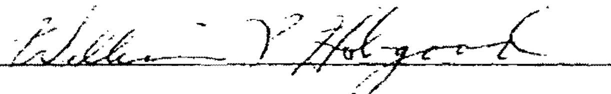
Contrary to his allegation that this contribution has resulted in a worsening of his employment conditions, Petitioner has consistently enjoyed both a greater annual salary and a greater pension entitlement with Respondent than the annual salary and pension entitlement he previously enjoyed at City Lines. Therefore, I have determined that Petitioner has not been worsened as a result of the contributions under PERS.

Decision

After reviewing the testimony, evidence and other material submitted by the parties, I conclude that the Petitioner's rights, privileges, or benefits which are protected under Section 13(c) have not been affected.

This petition for employee protections under Section 13(c) is denied.

Dated this 28th day of April 1980, at Washington, D.C.



William P. Hobgood
Assistant Secretary of Labor

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SALARIED EMPLOYEES v. TIDEWATER TRANSPORTATION DISTRICT COMMISSION

DEP Case No. 79-13c-1
March 27, 1979

Summary: The employees claimed that their employment conditions were worsened as a result of actions taken by Tidewater. The employees requested that no further action be taken by the Department. The case was closed without further investigation.

DETERMINATION

This is in response to your letter of March 7, 1978 to Secretary of Labor Ray Marshall concerning reductions and changes in several areas of employment with respect to you and other employees of the Tidewater Transportation District Commission (TTDC). In your letter you expressed the belief that such reductions and changes constituted adverse effects resulting from assistance received by the TTDC under the Urban Mass Transportation Act of 1964, as amended. Thus, you requested the Department of Labor to investigate this matter in order to determine if such actions were in violation of the protective provisions certified by the Department of Labor pursuant to Section 13(c) of the Act.

I have been advised that these matters have been discussed in telephone conversations in recent months between you and our Division of Employee Protections. Further, I am advised that on November 28, 1978, you informed our Division by telephone that none of the signatories to the March 7, 1978 letter wished to pursue this matter with the Department of Labor.

Accordingly, the Department of Labor will take no further steps in processing these claims and will close our file in this matter as of the date of this letter.

/s/
J. Vernon Ballard
Acting Deputy Assistant Secretary of Labor

In re:

LOCAL 1086, AMALGAMATED TRANSIT UNION (Petitioner) v. PORT AUTHORITY OF ALLEGHENY COUNTY AND BEAVER COUNTY (Respondents)	)	DEP Case No. 79-13c-12

Summary: Petitioning organization alleged loss of employment of its membership as a result of Respondent's competition which was subsidized by continuing grants under the Act. Petitioner alleged that Respondent's UMTA projects made it impossible for the private employer of the terminated employees to continue economically viable competition and caused the private company to close operations. The Department determined that the claim in this specific instance was too general and lacking in supporting evidence to stand as a prima facie cause of action. Respondent was not required to carry its burden of proof. The claim was dismissed.

DETERMINATION

Issues

Did the ten petitioning former employees of Beaver Valley Motor Coach Company suffer effects, including but not limited to loss of employment, as a result of Respondent's federally subsidized competition when Beaver Valley Motor Coach ceased its scheduled-service bus transit operations January 12, 1979? If so, to what protections are these employees entitled under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended?

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Jurisdiction

This action arises from a petition for employee protections filed with the Department of Labor by letter of July 3, 1979. The petition requests a determination that the ten employees represented by Petitioner are entitled to employee protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). The matter was heard August 22, 1979 by Alan Nartic, appointed by the Department of Labor. Before considering the substance of this position both respondents raised objections to the Department of Labor's jurisdiction in this action.

Beaver County As Party

Beaver County maintains that it should be dismissed as a respondent in this action because it had not received any grants of UMTA funds during the period of time in question, January 1, 1968 - January 12, 1978. Beaver County notes that it had a request for such a grant pending during 1979 but points out that a decision on its request remained unmade as late as August 22, the date of the hearing in this matter. In this action there is no claim that any Beaver County grant under the Act affected the employees except the pending Beaver County request for funds (PA-05-4081). Further, there is no claim that any employee was affected in anticipation of the pending Beaver County grant, nor is there an allegation that Beaver County served as an alter ego of, or agent of, the Port Authority with regard to this matter. No suggestion has been made that Beaver County may bear any liability in connection with any grant other than the pending one, PA-05-4081. Accordingly, I find Beaver County should be dismissed as a Respondent in this case.

The Port Authority, now the sole Respondent, raised several objections to the Department of Labor's jurisdiction over this petition. It is unnecessary to address those objections here, however, since Petitioner would not prevail in this action, for the reason stated below.

Position of Petitioner

Petitioner is a labor organization which represents the ten petitioning former transit employees of Beaver Valley Motor Coach Company (hereinafter Beaver Valley). Petitioner alleges that these ten employees suffered loss of wages, vacation rights, and other benefits or conditions of employment as a result of a series of grants of funds to Respondent under the Act between 1968 and 1979.1/ Petitioner alleges that federal funds received by Respondent between 1968 and 1979 enabled Respondent to operate buses of superior quality and efficiency and to provide additional transit services with which Beaver Valley could not compete. Petitioner maintains that Beaver Valley was economically disadvantaged thereby and lost revenue and ridership in that portion of its transit operations in which it competed with Respondent, the scheduled bus service from Ambridge to Sewickley. Beaver Valley's inability to compete with the federally subsidized public transit entity in this fixed-route service allegedly caused, at least in part, the cessation of Beaver Valley's scheduled transit operations and the loss of employment and related rights, benefits, and conditions, according to Petitioner.

Findings of Fact

Beaver Valley Motor Coach Company terminated its scheduled transit operations January 12, 1979 after fifty-four years of service. For some years prior to 1964 this private operator had provided public, scheduled bus transportation over a fixed route in competition with similar service provided along part of that same route by another private operator, Ohio River Motor Coach Company. This route began in Beaver Falls and ended in Pittsburgh. Beaver Valley Motor Coach indicated that approximately fifty percent of its ridership on this route came from the southern portion between Ambridge and Pittsburgh. Within a sub-area of that portion,

1/Petitioner identified specific UMTA GRANTS PA-03-0041; PA-03-0064: PA-03-0410: PA-03-0004 Amendment #1; PA-05-4032: PA-05-4064: and PA-05-4081 as the grants which allegedly worsened the positions of the members of Local 1086 herein seeking protections.

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Beaver Valley competed for ridership between Ambridge and Sewickley with Ohio River Motor Coach until 1964. Beaver Valley's other major transit route extended from Beaver County to East Liverpool, Ohio. Neither party offered detailed information on the East Liverpool line or any competitive effects in that area. In addition to these scheduled transit operations, Beaver Valley also had provided charter bus service, with little competition, for many years.

In 1964 the Port Authority of Allegheny County (Respondent) came into existence with federal funding under the Urban Mass Transportation Act (UMTA). No claim is made of any effect suffered by Beaver Valley employees as a result of UMTA projects in 1964, 1965, or 1967. In 1964 Respondent acquired the assets of the Ohio River Motor Coach Company and another private bus company (Schaffer Coach Lines). Respondent continued to provide the fixed-route transit service from Ambridge to Sewickley which had previously been provided by Ohio River Motor Coach. This service remained essentially unchanged except that Beaver Valley Motor Coach now competed in transit service between Ambridge and Sewickley with the public mass transit entity rather than with a private transit company. As before, all stops along this portion of the route were shared in common by the two competitors.

Respondent took over Ohio River's transit operations with the existing equipment of the former private operator in 1964. At that time Beaver Valley had a fleet of approximately twenty-two buses of comparable or better quality and mechanical condition than the Authority had acquired. From 1964 forward, however, the Respondent received federal funds to purchase and operate a variety of equipment including new buses. From 1968 to 1979 the Authority received at least 172 million dollars in UMTA funds and purchased at least 640 new buses with federal money. The Authority also received UMTA grants to provide such services as free-ride days, senior-citizen discounts, and promotional advertising.

At a 1978 hearing before the Pennsylvania Public Utility Commission,2/ the President of Beaver Valley Motor Coach testified that the Company's scheduled-service transit operations

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2/ Pennsylvania Public Utility Commission v. Beaver Valley Motor Coach Company, Docket No. C-78100577, January 29, 1979.

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began to show substantial losses in 1971. In that year the scheduled service lost $55,000; in 1972 it lost $42,603; in 1973 it lost $24,225; in 1974 it lost $14,582; and in 1975 the Company's scheduled-service transit operations showed a loss of $36,746. Beginning in 1971 profits from Beaver Valley's charter service operations were used to help offset the losses of its scheduled-service transit operations. From 1974 on, however, Beaver Valley's charter profits declined due to growing competition in that mode of service from newly certified or expanding private competitors. Beaver Valley's charter profits were as follows: $12,000 in 1971; -$13,000 (loss) in 1972; $13,000 in 1973; $15,000 in 1974; and $10,000 in 1975. During the three years from 1976 to 1978 Beaver Valley's combined operations (scheduled service and charter service) showed a loss of $200,000 even though the company received various governmental subsidies, including UMTA funds in the amount of $33,000 in 1976 and $40,000 in 1977. A 1978 UMTA grant for Beaver Valley was not approved because Beaver Valley did not complete a required audit.

Beaver Valley Motor Coach experienced two labor strikes during the 1968-1979 period. The first occurred in 1972 and lasted one month; the second occurred in 1977 and lasted five months. Beaver Valley's President has testified that these strikes contributed to loss of ridership and revenue in its transit operations that did not compete with Respondent's operations. Respondent also had labor strikes during this period. Each one lasted a week, the first occurring in 1973 and the second occurring in 1978.

In December of 1978, the County of Beaver authorized a stop-gap subsidy for Beaver Valley Motor Coach in the amount of $17,500 to enable it to continue operations until January 12, 1979. At that point, with authorization from the Public Utility Commission, Beaver Valley terminated its scheduled transit service. The County of Beaver and Respondent had made arrangements to, and did, assume and continue the scheduled-service transit operations provided by Beaver Valley as of January 15, 1979.3/ For this purpose the Respondent was to receive a combined subsidy of $300,000 in county, state and UMTA funds. On January 15, 1979 Respondent instituted expanded and improved transit service over all of Beaver Valley's former routes, including the Ambridge-Sewickley portion which is the focus of this dispute.

3/Respondent is not subject to the authority of the Pennsylvania Public Utility Commission.

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Discussion

In an action for employee protections under Section 13(c) of the Urban Mass Transportation Act, a petitioner has the burden to identify the relevant project (grant of funds) under the Act and to specify the pertinent facts upon which the petitioner relies in claiming that he was affected by the project. Petitioner herein asserts that Beaver Valley, a private bus company, was economically and competitively disadvantaged as a result of continuing federal assistance received from 1968 through 1978 by Respondent. Petitioner has identified several projects, satisfying the first part of its burden.

In addressing the second part of its burden, Petitioner specified[4] that all of Beaver Valley bus transit operations had sustained significant financial losses beginning in 1971, and that some of these losses occurred on that portion of one of its transit lines in which it competed with Respondent. Petitioner also testified that at least one petitioning bus driver had observed an unspecified number of potential riders decline to board Beaver Valley's buses in favor of waiting for a bus operated by Respondent to make the identical trip. The record shows, however, that Beaver Valley also lost significant monies during the period on the remainder of that service line, wherein it did not compete with Respondent. The private operator lost still more economic viability on its other major line of mass transit service, which competed not at all with Respondent. Moreover, the record shows that Beaver Valley's charter bus service began showing reduced profits in the mid 1970's. Beaver Valley's charter bus profits experienced further decline in the last three years of the subject 1968-1978 period, with no relationship to Respondent or any projects under the Act. Finally, Petitioner produced evidence to show that Beaver Valley's ridership in the competitive service increased substantially during two brief labor strikes by Respondent's drivers and then declined to pre-strike levels upon conclusion of the strikes.

In this action Petitioner makes a claim of adverse effect resulting from the several projects by virtue of economic disadvantage and harm to the private operator. The facts specified by Petitioner do show economic loss but, in this particular situation, do not suffice to describe a plausible theory

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[4] See note 2, supra

of cause and effect with respect to the project(s). The private bus company's profits were in general decline during this period but no facts were specified to show why such decline might have occurred as a result of the projects, other than the assertion of Petitioner's belief and the fact that Respondent purchased new buses for its entire system. A reasonable presumption of cause in this situation equally might suggest that the decline resulted from increased operating costs and inflation, or from capital investment decisions of Beaver Valley, or from other possibilities. Nor has Petitioner addressed the question of why the economic hardship allegedly caused in a portion of one of the company's three major, separate components of activity required termination of all of that company's operations and the termination of all of the employees represented by Petitioner.

In this instance I find a strong presumption of factors other than the project(s) (and action related thereto) as the cause of the alleged adverse effects. In such situation Petitioner would need to provide a more persuasive marshalling of facts and evidence in support of its position than might otherwise be necessary, to establish a plausible claim. In this case a plausible claim has not been established with respect to the identified project(s). Therefore Respondent is not obligated to carry its burden of proof.

This petition is dismissed for failure to state a sufficient cause of action.

Dated this 7th day of March, 1980, at Washington, D.C.

/s/
William P. Hobgood
Assistant Secretary of Labor

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U.S. DEPARTMENT OF LABOR

In re:

LUTHER C. TYSON (Petitioner) v. BI-STATE COMMISSION (Respondent)	)	DEP Case No. 79-13c-19

Summary: The Department deferred to the certified dispute resolution procedure negotiated by the labor organization which represents Petitioner for purposes of Section 13(c). The claim was dismissed.

DETERMINATION

This constitutes the final and binding determination in the above captioned matter. The instant petition was filed with the Department of Labor on August 14, 1979. The petition requests a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as to whether Petitioner has been denied certain seniority rights.

The preliminary investigation in this matter revealed that Petitioner was part of a bargaining unit represented by Local 788 of the Amalgamated Transit Union at the times in question. On April 15, 1974 Local 788 and Respondent entered into a Section 13(c) protective agreement which the Department of Labor certified on June 27, 1978 as providing

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fair and equitable protections required by Section 13(c) of the Act. Article IX of the agreement establishes an appropriate mechanism for resolution of certain disputes which arise under the agreement. That procedure is applicable to the instant dispute. Therefore, the parties are referred to Article IX for resolution of this matter.

This petition for employee protections is hereby dismissed.

Dated this 11th day of April 1980
at Washington, D.C.

/S/

William P. Hobgood
Assistant Secretary of Labor

In re:

PUBLIC SERVICE EMPLOYEES, LOCAL 45 (Petitioner) v. COLUMBIA, MISSOURI (Respondent)	DEP Case No. 79-13c-2

Summary: Petitioner alleged a worsening of the hourly wage rates of the bargaining unit employees. Petitioner also alleged unfair, unilateral changes in the wage schedule, reneging on a negotiated wage package, and a denial of Petitioner's bargaining rights by Respondent. The Department's analysis revealed that the actual wage rates paid to the employees were worse than Petitioner had expected but not worse than prior wage rates for those employees. The allegations pertaining to bargaining rights presumed a traditional, private sector bargaining environment. Petitioner here represents public employees and has only meet-and-confer rights under state law. Petitioner did not indicate any pre-existing right to full collective bargaining status. Further, the dispute resolution procedure in the employee protective agreement was determined to be distinquishable from the parties' procedures for resolving negotiations impasse and therefore not applicable to such interest disputes that do not involve the employee protections required by the Act. The claim was denied.

DETERMINATION

Jurisdiction

This constitutes the final and binding determination of the above petition for employee protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA).

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As a condition of the Secretary of Labor's certification of the federally funded UMTA Project number MO-05-4005, Respondent, the City of Columbia, agreed that no mass transit employee in the service area of the project would be adversely affected by the project. As a further condition Respondent agreed, as stated in City Council Bill 31-77 adopted January 17, 1977, that in the event the parties to a 13(c) dispute could not agree on a final and binding dispute resolution procedure for questions of employee protections either party may submit the dispute to the Secretary of Labor. In accordance with this procedure Petitioner (the labor organization), by letter dated January 10, 1979, has filed a request for the Secretary's final and binding determination of this dispute.

Issues

Petitioner alleges that its members' conditions of employment have been worsened as a result of City Council action which changed the number of steps in the disputed pay plan. The Petitioner further alleges that its collective bargaining rights have been denied by the City's unilateral implementation of this change.

Findings of Fact

These issues arise from an interest dispute which occurred during the parties' most recent meet and confer* discussions relating to new wages, benefits, and working conditions. A procedure for the resolution of meet and confer impasses with employee groups was established in Council Bill No. 491-77, adopted November 21, 1977 by the City Council. In accordance with this procedure a hearing was held by an impartial fact-finder to whom the parties presented their positions. The

*Missouri law does not provide full bargaining rights nor binding dispute resolution procedures for these municipal employees.

factfinder recommended that employees represented by this labor organization be given a six and one-half percent across-the-board wage increase with no additional dependent health benefits. The City administrators, serving as negotiators for the City, and the Petitioner agreed to abide by this recommendation.

The City's impasse procedure further provides that any recommendation of a factfinder or any agreement between the City Administrators and the employee groups shall be submitted to the City Council for adoption, modification, or rejection by the Council. When the factfinder's recommendation was submitted to the City Council, the City passed a resolution to increase the number of steps in the pay plan from five to six. The new step was added to the beginning of the plan as the entry-level first step, to be followed by the five steps of the former plan. This new step increased the starting wage rate from $4.017 to $4.086 per hour effective October 1, 1978. The initial wage rate of this new, six-step plan was one-and-one-half percent higher than the initial rate of the former five-step plan. The previous five steps, now steps two through six, are equivalent to their former rates plus the factfinder's recommended six-and-one-half percent wage increase.

Discussion

Wages

In its letter of January 10, 1979 the Petitioner argues: "while new employees hired after October 1, 1978 would come to work with one and one-half percent increase, it would take them twelve months longer to reach the top of the pay plan." The Union further argues: "This worsens the conditions of employment in wages five percent from the beginning to the top of the pay plan for a period of one (1) year."

The Union suggests that the new, six-step plan would require one more year for an employee to reach the top step than would have the old, five-step plan. This is true as far as it goes. Although it is correct that the new plan requires an additional year to reach the top step, this by itself does not constitute a worsening. If, in addition, the rates of pay at

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the top step of both plans were the same, then the Union's argument might be correct. Here, however, the rates of pay are not the same. The top (step six) of the new plan pays $5.23 per hour while the top (step five) of the old plan paid $4.91 per hour. In fact, the second highest step of the new plan, (step five) pays more ($4.98) than the top step of the old plan. Thus, under the new plan all employees represented by the Petitioner would get a higher rate of pay in the same length of time (five years) than it took to reach the top of the old pay plan. Further, those employees who were hired by the City during the year before the new pay plan took effect apparently would receive a greater pay gain over those same five years under the new plan.

The Petitioner's argument, then, appears to be that, although all employees will receive higher rates of pay under the new plan, the employees' conditions have been worsened solely because more time is required to advance from step one to step six than was required under the old plan to advance from step one to step five. While we understand the Petitioner's desire for the more favorable wage rates in a shorter period of time, we cannot support the position that the new pay plan worsens the pay of the affected employees.

The addition of the step in no way adversely affects the rights, benefits or privileges of any employee protected by the 13(c) provision. Those workers hired before October 1, 1978 would retain at least the same level of wages and other employment benefits and privileges as they held on the five-step plan, plus at least the additional six and one-half percent wage rate increase as approved by the City Council. The length of time required to reach the top of the pay scale in this case is of no consequence since no employee suffered any actual reduction in wages. Workers hired anew on or after October 1, 1978 would not possess prior rights to wage rates and therefore could not be entitled to protection of such alleged rights.

Bargaining Rights

With respect to the alleged denial of Petitioner's bargaining rights, we find that Council Bill No. 31-77, which sets forth the 13(c) protective provisions, does not prevent

City Council modification of a factfinder's recommendation. The agreement between the City negotiators and the Union negotiators to abide by the factfinder's recommendation does not alter this finding. Such agreement appears to be a tentative agreement subject to radification or other action by the respective principal party.

In this case the distinct and separate final and binding dispute resolution procedure as provided in paragraph (11) of the 13(c) protective provisions is intended to determine the proper interpretation, application or enforcement of the 13(c) provisions. As noted in the factfinder's recommendation, the City Council has established a separate impasse procedure for the resolution of disputes with employee groups (Council Bill No. 491-77). These procedures as established are consistent with the Public Employment Relations Law of Missouri which provides in pertinent part:

> *Sec. 105.520. Public bodies shall confer with labor organizations. -Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and disucss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection. (Am. L. 1967, p. 192.)*

Petitioner has not suggested any law or practice indicating that the labor organization had ever enjoyed private sector bargaining rights, a right to strike, or a procedure for binding arbitration (or binding factfinding) of disputes over new wages and conditions of employment. Nor has it been shown that the dispute resolution procedure in the 13(c) protective arrangement is intended to supersede other specific procedures for resolution of impasses between the parties in their meet and confer proceedings. Without such evidence the preservation and enforcement of the tentative agreement would constitute a creation of a bargaining right, rather than protection of such a right. This would contradict the intent of Section 13(c). We find that the meet and confer rights Petitioner previously had have not been diminished.

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We find in this petition no indication of a possible adverse effect or of a worsening of conditions which could be protected by Section 13(c), on the basis of the information provided with the petition. It has not been necessary, therefore, to contact the Respondent for its position. This petition for employee protections under Section 13(c) is denied.

Dated this 18th day of October, 1979, at Washington, D.C.

/s/
William P. Hobgood
Assistant Secretary of Labor

U.S. DEPARTMENT OF LABOR

In re:

ED HODOWUD (Petitioner) v. DADE COUNTY METROPOLITAN TRANSIT AUTHORITY (Respondent)	)	DEP Case No. 79-13c-20

Summary: Although Petitioner was not a member of the union, he was in the bargaining unit which the unit represented. The Secretary declined jurisdiction because that union was signatory to a certified protective agreement which contained an applicable disputes resolution procedure.

DETERMINATION

This constitutes the Secretary of Labor's determination in the above matter. The instant petition was filed with the Department of Labor on December 5, 1978. Petitioner seeks a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as to whether he is entitled to certain employee retirement benefits.

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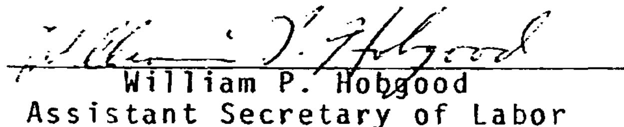
Although Petitioner is not a dues paying member of Local 291 of the Transportation Workers Union, he is a part of the bus drivers' bargaining unit which is represented by Local 291 for employee protections purposes. Local 291 and Respondent entered into an employee protections agreement pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. This agreement has been certified by the Department of Labor at various times beginning on June 11, 1974 and continuing through the certifications of July 11, 1978 and August 22, 1979. Article X of the agreement sets forth an appropriate self-governing dispute resolution procedure applicable to this dispute. The parties are referred to Article X of their agreement for resolution of this dispute.

This petition for employee protections is dismissed.

Dated this 12th day of June 1980
at Washington, D.C.



William P. Hobgood
Assistant Secretary of Labor

U.S. DEPARTMENT OF LABOR

In re:

FRANK VALDEZ (Petitioner) v. HOUSTON METROPOLITAN TRANSIT AUTHORITY (Respondent)	DEP Case No. 79-13c-20

Summary: The Department deferred to the arbitration procedure negotiated by the employee's labor organization and certified by the Secretary. The case was dismissed.

DETERMINATION

This constitutes the final and binding determination in the above matter. The instant claim was filed with the Department of Labor on August 11, 1979. Petitioner seeks a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as to whether he is entitled to employee protections.

During our examination of this claim Petitioner acknowledged that he is represented for purposes of employee protections by Local 260 of the Transportation Workers Union. Local 260 has executed an applicable Section 13(c) employee protections agreement with

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Respondent. This employee protections agreement has been certified by the Secretary of Labor as providing the fair and equitable protections required by Section 13(c). Article IV of that agreement provides that disputes under that agreement are to be submitted to arbitration as specified therein. Therefore, the parties are referred to Article IV of their agreement for resolution of the dispute.

This petition for employee protections is dismissed.

Dated this 21st day of April 1980
at Washington, D.C.

/S/

William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

BRANTLEY, ET AL. (Claimants) and CITY OF AUGUSTA, GEORGIA (Respondent)	DEP Case No. 79-13c-22

Summary: Claimants alleged they had been deprived of protected pension benefits following the purchase of private transit operations by Respondent in 1973. The Respondent had an obligation to provide pension benefits equivalent to those that would have been provided under the previous employer's annuity contract had it been continued. It was not sufficient to merely preserve Claimants' accrued rights up to the point when the takeover occurred in 1973. A wage increase, granted unilaterally by Respondent, was found not to be an equitable substitution for Claimants' lost pension entitlements. This claim was upheld.

Introduction

This claim was submitted to the Department of Labor by letter dated August 13, 1979. Claimants are twelve employees of the City of Augusta, Georgia, who seek a determination by the Department of Labor with respect to their right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (the Act). A hearing was conducted by a representative of the Department of Labor on October 8, 1980. The applicable Section 13(c) employee

protective agreement of October 3, 1974 provides for submission of disputes arising under the provisions of that agreement to the Secretary of Labor for consideration and determination. This is the determination of the Secretary of Labor.

Background

Claimants are former employees of the Augusta Coach Company, Inc., a privately owned corporation that operated local bus service in Augusta, Georgia, from 1950 to October 1973. The City of Augusta purchased the assets of the Augusta Coach Company and began operation of the Augusta Transit Department in November, 1973. At the time of the acquisition, Claimants were employed by the Augusta Coach Company as bus drivers. The City of Augusta retained the Augusta Coach Company's bus drivers, and each Claimant became an employee of the City of Augusta effective October 1, 1973.

The City's acquisition of the assets of Augusta Coach Company was assisted by a grant provided under the Act.[1/] Section 5 of the grant contract contains an agreement by the City to comply with the terms and conditions of the Department of Labor's October 18, 1974 letter of certification made in connection with the grant. The certification

[1/] Urban Mass Transportation Authority Capital Grant Contract, Project GA-03-0004, dated January 30, 1975.

letter, and Section 5 of the grant contract, incorporate by reference the terms of an employee protective agreement[2/] of October 3, 1974.

The employees of the Augusta Transit System, and employees of any other mass transportation carriers in the service area of the system, are covered by the employee protective agreement. Claimants, as former employees of the Augusta Coach Company and as transit system employees of the City of Augusta, are covered by the agreement. Paragraph 2 of the agreement reads as follows:

> All rights, privileges and benefits (including pension rights and benefits) of employees covered by this agreement (including future retirees) under existing collective bargaining agreements or otherwise, shall be preserved and continued, unless by collective bargaining and agreement of the parties hereto other arrangements are made; provided, however, that any such agreement or arrangements shall not be inconsistent with this agreement or with the requirements of Section 13(c) of the Act. (emphasis added).

Augusta Coach Company maintained a pension plan for its employees by means of a group annuity contract.[3/] No contributions were made by employees to this plan. Augusta Coach Company made annual contributions to the plan on behalf of each eligible employee. As of the date they became City employees, eleven of the twelve Claimants had met the

[2/] Agreement dated October 3, 1974, executed on behalf of the City of Augusta, Georgia, the Municipal Employees' Association, and the Amalgamated Transit Union.

[3/] Group Annuity Contract No. GA 138 between Massachusetts Mutual Life Insurance Company and Augusta Coach Company, dated December 1, 1949,

plan's eligibility requirements. Claimant Edwards met neither the minimum age nor time in service requirements of the plan.[4/] The Company made social security contributions on behalf of all employees, regardless of plan participation.

When Augusta Coach Company discontinued business and sold its assets to the City of Augusta, it cancelled the group annuity contract, effective October 1, 1973. By letters dated November 14, 1973 each Claimant was advised of the termination of the group annuity contract, and of the estimated annual and monthly benefit to which the Claimant would be entitled upon retirement at age 65.

Under the terms of the City's retirement plan, only those employees who are less than 35 years of age at the time they begin employment with the City are eligible to participate. No social security contributions are made by the City on behalf of plan participants. Such contributions are made on behalf of employees who do not participate in the City's retirement plan. Eleven of the twelve Claimants failed to meet the eligibility requirements of the City's retirement plan when they became City employees on October 1, 1973. These Claimants are thus not covered by the City's retirement plan. Social security contributions are made by the City on their behalf. Claimant Edwards was under age 35 when he became a City employee, and is therefore a participant in the City's retirement plan. No social security contributions are made on his behalf.

4/ The minimum age and time in service requirements are found in Section 1(B) of the group annuity contract.

Claimants' Position

Claimants who were denied coverage under the City's retirement plan assert that they are entitled, under Paragraph 2 of the employee protective agreement, to pension benefits equivalent to the benefits that they would have been entitled to had the Augusta Coach Company's group annuity contract not been cancelled.

Respondent's Position

Respondent asserts that Claimants are not entitled to the pension benefits claimed for the following reasons:

1. Lack of contractual obligation

The City notes that the group annuity contract was subject to termination by the Augusta Coach Company at any time, and the Company did in fact terminate the contract upon discontinuance of business in October, 1973. The City argues that, as it did not purchase the intangible assets of the Company, it neither received the benefits of nor assumed obligations under the group annuity contract. The City concludes that its sole obligation was to take no action that would worsen the pension rights of Claimants under the group annuity contract as those rights existed when the contract was unilaterally cancelled by the Company effective October 1, 1973. As Claimants' accrued rights

under the contract vested when the contract was cancelled, the City maintains that Claimants' pension rights have been preserved and continued, and the City has no further pension obligation to Claimants under paragraph 2 of the employee protective agreement.

2. Equitable substitution of benefits

When Claimants became City employees they were given a 55-cents-per-hour wage increase that they would not have received had they remained employees of the Augusta Coach Company. The City states that the value of this wage increase exceeded the value of the pension benefits to which Claimants would have been entitled had the group annuity contract not been cancelled. The City asserts that this wage increase should be considered as a fair and equitable substitute for the discontinuance of coverage under the group annuity contract.

Issues

Does the employee protective agreement require Respondent to provide pension benefits for Claimants equal in value to the pension benefits that they would have been entitled to had the Augusta Coach Company's group annuity contract not been cancelled? If so, has the Respondent met its obligation by providing increased wages to Claimants in lieu of such pension benefits?

Discussion

The City's obligation to preserve and continue pension rights

The City of Augusta has an obligation under the terms of the employee protective agreement to assure that Claimants, as former employees of Augusta Coach Company, are not adversely affected by the City's acquisition of Augusta Coach Company. This obligation is embodied in the requirements, found in the first paragraph of the employee protective agreement, that the project not be carried out in any way that would adversely affect covered employees. The project included the purchase by the City of the tangible assets of Augusta Coach Company. Because Claimants became employees of the City as a direct result of the project, it follows that the City was responsible for assuring that Claimants were not adversely affected by their transition from Augusta Coach Company employees to City employees. The City's obligation to preserve and continue Claimants' pension rights and benefits must be considered within the context of its obligation to assure that Claimants not be adversely affected by the acquisition.

The City asserts that it has no contractual duty to maintain the Augusta Coach Company pension plan because the City did not purchase the group annuity contract or in any way obligate itself to carry out the terms of that contract. Though it is true that the City did not become a party to the group annuity contract, and is not bound by the terms of that contract, it does not follow that the City has no obligation to provide pension benefits equivalent to those

that would have been provided under the annuity contract had it been continued. The obligation to preserve and continue pension benefits arises not from the group annuity contract, but rather from the terms of the employee protection agreement, the Secretary's certification pursuant to Section 13(c), and the grant contract. The group annuity contract constitutes a means of determining what the pension entitlements of Claimants would have been had the contract not been cancelled. It has no other bearing on the City's obligations to the Claimants in this case.

The City points out that the group annuity contract could, by its terms, be terminated by the Augusta Bus Company at any time, and was in fact terminated when the Company sold its assets to the City and discontinued business. Though the City does not explicitly make the argument, the implication is that the City has no obligation to continue a plan that could have been terminated at will by the Company. We do not find this line of reasoning persuasive. The plan was a firmly established employment benefit of the Augusta Coach Company, having been created in 1949 and continued with little change through October, 1973. The plan was terminated in October, 1973 due to the discontinuance of Augusta Coach Company's business, which discontinuance was a direct result of the project. In the context of the City's obligation not to adversely affect covered employees, it is clear that the phrase "shall be preserved and continued" means that rights and benefits that would have continued had the project not occurred must be preserved and continued. The City's obligation to preserve and continue pension rights is not eliminated by reason of the cancellation of the underlying group contract immediately prior to

the acquisition of the assets of Augusta Coach Company by the City, as that cancellation was a direct result of the project. Nor is the City's obligation eliminated because these rights were terminable at will, for there is no indication that these rights would have been terminated had the acquisition not occurred. Thus the City's obligation is to preserve, and to continue, those pension benefits that existed at the time of the acquisition.

The City's final argument with respect to its obligation under paragraph 2 of the employee protective agreement is that Claimants' pension rights were in fact preserved and continued. The City points out that when the group annuity contract was cancelled effective October 1, 1973, each Claimant received a Paid-Up Normal Retirement Annuity equal in yearly amount to the sum of the Normal Future Service Retirement Annuities provided for the employee during his years of service with Augusta Coach Company. Thus pension rights and benefits for past service were preserved and continued.

Preservation of pension benefits that have accrued for past service is not sufficient to preserve and continue the Claimants' total retirement benefits package, as such preservation ignores the increases in retirement benefits to which Claimants would have been entitled if the group annuity contract had not been cancelled. Under the terms of the group annuity contract, an eligible employee accrued a

"Normal Future Service Annuity"[5/] each year, based on a percentage of the employee's basic earnings in the preceding year. Thus, as a benefit of employment, each employee received an increment to his accrued pension benefit for each year that he remained an employee of the Company. As noted at the outset of this discussion, the basic obligation of the City under the protective agreement is to assure that employees are not adversely affected by the project. Were the City's interpretation of its obligation accepted, employees formerly entitled to the accrual of annual increments to their retirement annuity would no longer be so entitled. This would adversely affect them as it would constitute a reduction of a benefit to which they were previously entitled. Thus we interpret paragraph 2 of the protective agreement to require the City to preserve and continue each Claimant's accrual of annual increments to his "Normal Retirement Annuity" for each year from October, 1973, through the end of each Claimant's protective period.

We find, under the particular circumstances of this case, that the City has an obligation to provide each Claimant, during the Claimant's protective period, with benefits equivalent to those that the Claimant would have received

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[5/] Section 3 of Article IV of the group annuity contract provides for a "Normal Future Service Annuity" each year in an amount equal to $24 plus 1½ percent of basic earnings in excess of $3,000. Thus, an employee earning $2.00 per hour on a 40 hour week for one year would accrue an annual "Normal Future Service Annuity" of $41.40 ($24 + .015 X $1,160) as a result of services performed in the year. An employees "Normal Future Services Annuities" are summed at the time of his retirement to calculate the annual amount of the "Normal Retirement Annuity" to which the employee is entitled.

had the group annuity contract not been cancelled. It should be emphasized that in this case we are concerned with a substantial benefit of long duration which was terminated as a result of the transition of Augusta's mass transit system from private ownership to public ownership. It should not be inferred that under other circumstances the City of Augusta might not have been able to modify or terminate this or any other employee benefit.[6/] Having established the City's obligation to Claimants, we now turn to the question of whether the City has met this obligation.

Equitable substitution of benefits

The City argues that, assuming it had an obligation to continue the equivalent of the group annuity contract, it satisfied this obligation by providing a 55-cents-per-hour wage increase to all transit employees at the time they became city employees. The City asserts that the annual amount of this wage increase for each Claimant exceeded the annual contribution which would have been made by the Company to the group annuity contract on behalf of each Claimant. The City argues that the wage increase more than offsets the value of the pension benefit lost by each Claimant, and should be viewed as satisfying the City's obligations under paragraph 2 of the employee protective agreement.

[6/] See Local 1338, Amalgamated Transit Union and Dallas Transit System, DEP Case No. 80-13c-2 (September 9, 1981) for an example of circumstances under which certain employee benefits may be modified.

The protective agreement is explicit in its requirement that pension rights and benefits be preserved and continued. Similarly, Section 13(c)(1) of the Act makes the preservation of pension rights a specific requirement for protective arrangements meeting the minimum requirements of that Section. We believe that this evidences an intent in both the agreement and the statute that pension benefits should be considered as a separate and distinct element of the total compensation and benefit package for which protections are provided. It follows that, absent very compelling circumstances, a failure to preserve and continue pension rights and benefits cannot be offset by an increase in wages or other benefits. For the reasons discussed below, we do not believe that the circumstances of this case are sufficient to allow the offset suggested by the City.

The salary increase did not bear any relationship to the pension benefits lost by Claimants. When the City began transit operations, the City increased the wages of all transit employees from $2.00 per hour to $2.55 per hour. The wage increase thus applied both to employees who were eligible to participate in the City's pension plan and to those who were not eligible. The fact that the wage increase was not targeted at employees who would no longer be participants in any pension plan indicates that the wage increase was provided for reasons unrelated to pension benefits lost, and further indicates that the City did not intend the wage increase as a substitute for pension benefits.

There is no indication that any notice was given to employees advising them that the wage increase was intended to offset lost pension benefits. Further, there is no indication that the Claimants were provided a copy of the protective agreement or otherwise advised of their rights under that agreement. Claimants were simply told that they would not, if age 35 or older, be included in the City's plan. This lack of notice is important, for if the Claimants were in fact provided a wage increase in lieu of pension rights it was essential that they be so advised to enable them to adjust their individual retirement plans accordingly.

Paragraph 2 of the protective agreement contains a mechanism for adjusting various employment rights and benefits subsequent to the date of the agreement. It provides that all rights and benefits, including pension rights and benefits, shall be preserved and continued "unless by collective bargaining and agreement of the parties hereto other arrangements are made; provided, however, that any such agreement or arrangements shall not be inconsistent with this agreement or with the requirements of Section 13(c) of the Act." No evidence was provided by the City indicating any agreement that the wage increase would be a substitute for lost pension benefits. All indications are that the wage increase was given unilaterally by the City for reasons unrelated to the preservation and continuation of Claimants' pension rights and benefits.

The City's equitable substitution argument would require that we abrogate a specific right to pension entitlements absent any showing that the City intended to substitute the wage increase for such rights, absent any showing that Claimants were notified of their right to continued pension benefits or notified that the wage increases were provided in lieu of such pension rights, and absent any indication of an agreement to make the substitution. As a result, Claimants, not being aware of their entitlements to protection of pension rights and benefits, and not being aware that their wage increase was provided as a substitute for their pension benefits, were unable to arrange their retirement plans accordingly. Under these circumstances, we do not believe that the City satisfied its obligation to preserve and continue Claimants' pension rights and benefits by means of the across the board wage increase given to transit employees in October, 1973.

Remedy

The City asserts that the remedy sought by Claimants is too vague. As to Claimant Edwards we agree. Claimant Edwards was first employed by the Augusta Coach Company on March 12, 1973, six and one-half months prior to the acquisition of the Company by the City. He was never covered by the Company's pension plan, though social security contributions were made on his behalf. When Edwards became a City employee, he was eligible to participate in the City's pension plan, though no social security contributions were made on his behalf. No specific remedy has been suggested

with respect to Claimant Edwards, and from the record available to us we are unable to determine that Edwards' overall retirement package was worsened as a result of the Project. Therefore, Edwards' claim is denied.

The remedy sought by the eleven Claimants who were unable to participate in the pension plan is an annuity equal to that which Claimants would have received had the group annuity contract been continued. Claimants provided no assistance or insight regarding how the amount of this annuity ought to be calculated beyond provision of a copy of the group annuity contract to the Department of Labor. We believe that the requested remedy is sufficiently definite to put the City on notice as to the remedy sought by Claimants. However, as neither party has provided us with sufficient wage and hour information for Claimants, we are unable to calculate the specific annuity to which each Claimant is entitled. In order to provide guidance to the parties, we suggest that each Claimant's annual retirement annuity be calculated as follows:

1. Determine the Claimant's protective period

The protective agreement makes the provisions of Appendix C-1[7/] applicable to the parties. Each Claimant is thus entitled to protection under the terms of the protective agreement for his

[7/] Appendix C-1 to the National Railroad Passenger Agreement is the "decision of the Secretary of Labor on April 16, 1971" referred to in paragraph 4 of the protective agreement.

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"protective period" as defined in Appendix C-1.[8/] The protective period begins on October 1, 1973, the effective date of employment with the City, and is based on the Claimant's years of service with Augusta Coach Company, with a maximum protective period of six years. Claimants' protective periods are as follows:

Claimant	Protective Period	Last day of Protective Period
Brantley	6 yrs.	Sept. 30, 1979
Harris	6 yrs.	Sept. 30, 1979
Jones	4 yrs. & 6 mths.	March 31, 1978
Lewis	6 yrs.	Sept. 30, 1979
Major	6 yrs	Sept. 30, 1979
Manning	6 yrs.	Sept. 30, 1979
McKie	1 yr. & 10 mths.	July 31, 1975
Prather	3 yrs. & 10 mths.	July 31, 1979
Smith	6 yrs.	Sept. 30, 1979
Usry	6 yrs.	Sept. 30, 1979
Woods	6 yrs.	Sept. 30, 1979

2. Compute Normal Future Service Retirement Annuities

For each year of the Claimant's protective period, or fraction of a year, an annual Normal Future Service Retirement Annuity should be

[8/] See Section 1(d) of Article I, Appendix C-1 for the definition of "protective period."

computed. The method of computation is based upon the employee's basic earnings, and should be computed in accordance with Section 3 of Article IV of the group annuity contract, as amended April 23, 1952.

3. Compute the Normal Retirement Annuity

The yearly amount of the retirement annuity to which the Claimant is entitled for his years of service with the City during his protective period is equal to the sum of the annual Normal Future Service Retirement Annuities computed in step 2 above.

4. Purchase of Annuity

The City should provide to each Claimant a paid-up retirement annuity providing an annual benefit in the amount computed in step 3 above. The terms and options of the retirement annuity provided should be substantially the same as those provided under Article V of the group annuity contract.

Determination

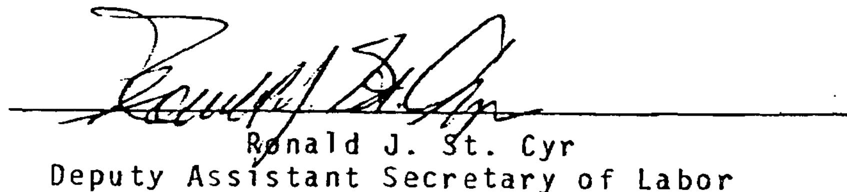
1. It is the determination of the Department of Labor that the eleven Claimants who were formerly eligible to participate in the August Coach Company pension plan are entitled, under the terms of the protective agreement, to

a fully paid annuity calculated in accordance with the preceding section. The parties should meet for the purpose of determining the amount of each Claimant's annuity. Should any question arise regarding computation of the individual annuities, or regarding the terms of the annuities, the services of this office will be made available for technical assistance supplemental to this determination.

2. It is the determination of the Department of Labor that no worsening of pension rights or benefits has been demonstrated with respect to Claimant Edwards. Claimant Edwards' claim is therefore denied.

3. This is the determination of the Secretary of Labor made pursuant to paragraph 8 of the protective agreement.

Dated this ____ day of ____________, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

Final 2/16/05

George E. Sponsky and Golden Gate Bridge, Highway and
Transportation District
DEP Case No. 79-13c-4
June 11, 1989
(Page A-399)

Summary: The Claimant alleged that his benefits were adversely affected as a result of Golden Gate Bridge, Highway and Transportation District's federally-funded partial takeover of mass transit operations from Greyhound Lines West. The record showed that the Claimant could have retained employment at Greyhound with no loss in wages or benefits, despite the cut back in operations; however, the Claimant chose to take a higher paying position with the Respondent. The Department determined that the Claimant's employment with Greyhound was not terminated as a result of the Federal grant, but as a result of his voluntary decision to take a position with the Respondent. Therefore, his claim was denied.

UNITED STATES DEPARTMENT OF LABOR

In re: JUN 11 1989

GEORGE E. SPONSKY
(Claimant)

and

GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT
(Respondent)

DEP Case No. 79-13c-4

DETERMINATION

Jurisdiction

This constitutes the decision of the Secretary of Labor in the above dispute over employee protections provided pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). The Claimant has requested the Secretary to determine the fair and equitable protections to which he is entitled. Claimant alleges that he has been adversely affected with respect to his wages, vacation, sick leave, and pension benefits as a result of Respondent's UMTA Project No. CAL-UTG-36 which provided Federal financial assistance to Respondent in taking over mass transit operations from Greyhound Lines West in the San Francisco area.

The Claimant was not represented by a labor organization at the time he went to work for Respondent. Although Local 624 of the International Brotherhood of Teamsters subsequently became his bargaining representative, that labor organization was not party to an employee protective agreement certified under Section 13(c) of UMTA and does not represent the Claimant for purposes of such protections. He has no other labor organization representation and he was an employee in the mass transit industry in the service area of Respondent. Therefore, he is entitled to

protections substantially equivalent to the levels of protection as those provided to "members of unions under the [13(c) agreement referenced in the Secretary's letter of June 22, 1971 which certified Respondent's UMTA Project No. CAL-UTG-36 as provided in Section 13(c) of the Act]."

Background

Claimant worked for Greyhound Lines West from 1956 until December 1971, accumulating some 15 years of seniority in the San Francisco shop as a mechanic. During his last year with Greyhound he transferred to their San Rafael shop to work closer to his home. In late 1971 when Claimant heard that Greyhound would soon be closing its San Rafael shop, he spoke to representatives of the Respondent and was told that they were in need of mechanics. The claimant was offered a position as foreman on the night shift effective January 6, 1972.

The record indicates that Claimant could have retained a position as a mechanic with Greyhound by "bumping" back into the San Francisco shop where he had previously worked. Claimant would have retained all previously accrued benefits and his wage rate at that time would have increased from $5.63 per hour to $6.27 per hour. Claimant's position with Respondent began at $7.75 per hour, with some variations in pension and fringe benefits from those he received in his Greyhound position.

Position of Claimant

Claimant asserts that he is entitled to protections under Section 13(c) as a result of adverse effects arising from the 1971 UMTA Project No. CAL-UTG-36. This project subsidized Respondent's takeover of public transportation between Marin, Sanoma and San Francisco counties, and included the transfer of some Greyhound services. Claimant alleges that he lost seven weeks' vacation, twenty-five days of sick leave, nearly $2,000.00 in foregone wages and unspecified pension entitlements following his employment by Respondent. Claimant seeks compensation for lost wages and vacation benefits, reinstatement of his sick leave, and credit for his previous years of service with Greyhound under the Respondent's pension plan.

Position of Respondent

It is the position of Respondent that Claimant is not entitled to Section 13(c) protections for several reasons. First, the Respondent asserts that the Department does not have "the authority to hear or to determine the merits of individual complaints of employees alleging violation of 13(c) which are filed after the Secretary has performed her sole statutory duty of certification that fair and equitable arrangements have been made...." Second, Respondent contends that this claim is barred by applicable statute of limitations, having been filed some

eight years after Claimant changed jobs. Third, Respondent states that Claimant is not entitled to 13(c) protections because he has not established that his position of employment was affected by a grant of Federal assistance under UMTA. Rather, it is suggested, Claimant voluntarily resigned from Greyhound to work for Respondent because he was offered a better employment opportunity. We consider the third ground dispositive; therefore, we do not address the others.

The issue raised by Respondent in its third argument is similar to the issue addressed by the Secretary of Labor in Walls v. Penn Central Railroad, DEP Case No. 76-C1-12, November 16, 1976.* Claimants in both cases allege loss of protected benefits following their employment by a new employer. Claimants in both cases could have retained their positions, but voluntarily resigned and accepted an offer of employment with a new entity. In Walls the Secretary determined that:

> ...the Claimant voluntarily requested a leave of absence from his position with Penn Central, which he could have retained, in order to accept a position with Amtrak. We are unable to conclude on the basis of these facts that the Claimant's position was affected by the transaction of May 1, 1971, or of September 1, 1973 within the meaning of Section 405(a) of the Rail Passenger Service Act of 1970, or within the meaning of Appendix C-1.

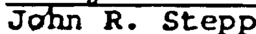
The Claimant's employment with Greyhound was not terminated as result of the Federal grant to the Respondent. Neither was he forced to transfer to Respondent to avoid the loss of his job. The Claimant voluntarily accepted employment with Respondent, motivated, at least in part, by his desires for a higher-paid position located closer to his residence. The claimant could have remained with Greyhound with no loss of wages or benefits. Consequently, any loss suffered by the claimant resulted from his own voluntary actions.

*Employee protective arrangements under Appendices C-1 and C-2 to the National Railroad Passenger Agreement parallel the requirements of 13(c). The principles set forth in these decisions, therefore, are generally applicable to 13(c) determinations.

Decision

The claimant has identified UMTA Project No. CAL-UTG-36 as the applicable project in this claim for employee protections. However, the claimant has failed to establish a causal connection between the project identified and the alleged adverse affects which are the subject of the petitions. Claimant has not stated a cause of action which would give rise to a claim under the Act. His claim, therefore, is denied.

Dated this 11th day of June 1989 at Washington, D.C.



John R. Stepp

UNITED STATES DEPARTMENT OF LABOR

In re:

LUIS MANCILLA (Claimant) and GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT (Respondent)	DEP Case No. 79-13c-7

Summary: The Claimant alleged that he had been denied protected wages, fringe benefits and seniority rights following Respondent's takeover of mass transit operations in December 1971. Claimant had delayed pursuit of his claim more than six years after the event allegedly causing the adverse effects. The lack of diligence in filing this claim caused prejudice to the Respondent and would cause injustice to the Respondent in carrying out a remedy. This claim was dismissed.

DETERMINATION

By undated letter received April 11, 1979 Claimant filed this request for protection of certain of his employment conditions under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). Claimant seeks entitlement to specific protections in the area of seniority, wages, and fringe benefits. He alleges that

these conditions were adversely affected by Respondent's UMTA project No. CAL-UTG-36 which provided Federal financial assistance to Respondent in taking over mass transit operations from Greyhound Lines West in the San Francisco area. This claim was heard June 19, 1980 in San Francisco before a hearing examiner appointed by the Department of Labor.

In this case I find that this claim is barred by the equitable theory of laches. Claimant has delayed so long in filing the initial claim that any remedy on the merits would cause inequities to the Respondent and other employees.

Findings of Fact

Claimant asserts that he was adversely affected December 31, 1971 when his former Greyhound employment was terminated due to the above project. He began employment with Respondent January 6, 1972. On or before that January date Claimant signed a notification-of-employment offer containing a purported waiver of Section 13(c) rights and protections. While the Department of Labor has previously declared such alleged waiver invalid,[1/] Claimant was on notice at that time of the existence of 13(c) protections. Respondent incorrectly advised Claimant that he was not entitled to 13(c) protections beyond those contained in the notification of employment offer. Claimant

[1/] Schaffer v. Golden Gate, Interim Decision, October 4, 1979. DIGEST OF EMPLOYEE PROTECTIONS, page A-119; USDOL.

had attempted unsuccessfully to obtain a copy of the pertinent 13(c) agreement from Respondent December 2, 1971 according to his testimony at the hearing, in connection with Respondent's employment offer. Claimant further stated that about a week after commencing his employment with Respondent on January 6, 1972, a fellow employee showed him the 13(c) agreement. Thereupon Claimant discussed the seniority matter with his foreman but did not receive a clear answer to his inquiries until April 13, 1973. At that time he again inquired as to 13(c) protection of his wages.

By the terms of the applicable protective arrangement Claimant's 13(c) protective period would have covered the period January 1, 1972 through January 31, 1973. Even if he were to have filed this case in a timely manner, Claimant would not have been entitled to protection under the 13(c) arrangement beyond January 31, 1973 for the matters complained of herein. However, Claimant did not file his claim until April 11, 1979, more than seven years after he knew of the available 13(c) protections and knew or reasonably could have learned of the procedures and obligations thereunder. While Respondent may have caused some delay by taking 13 months to respond to Claimant's seniority inquiry, no allegation is made that Claimant was bound to postpone pursuit of his 13(c) claim until receipt of Respondent's answer. Even if that full 13-month response period were discounted, however, Claimant still has delayed six years beyond that response and more than six years beyond the expiration of his protective period January 31, 1973.

In explanation of his delay in filing a claim with the Department, Claimant herein has stated that he was waiting to see what happened in the 13(c) claim filed by his co-worker, Mr. Norman Schaffer. At approximately the same time in December 1971 Mr. Schaffer was similarly terminated by Greyhound and hired by Respondent. Mr. Schaffer, however, pursued his 13(c) claim promptly with Respondent, with other government agencies, and with his new labor organization. He then filed a 13(c) claim with the Department of Labor October 16, 1974.

Decision

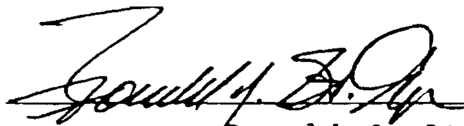
I recognize that these UMTA protections are not always ready knowledge for employees, especially those employees not represented by a labor organization which is party to negotiated 13(c) protections. This may require certain flexibility in consideration of a charge of untimely filing of a claim for protections. Time requirements also may be mitigated by the absence of any clear notice to Claimant of the substance and procedure of available employee protections. Other factors, such as consideration of equity or protracted local efforts may also justify delay in filing a claim with the Department of Labor.

In this claim, however, the mitigating and extenuating circumstances together do not sufficiently justify Claimant's excessive delay in pursuing his 13(c) rights or in at least making initial procedural inquiries as to possible filing and delay thereof. The evidence shows that Claimant

knew that he was possibly affected by Respondent's project on or before January 6, 1972. He also knew of the existence of Section 13(c) protections before that time, and he had actually seen a copy of the protective provisions not later than January 13, 1972. His delay in pursuing his 13(c) rights based upon the filing of a separate claim by a co-worker, in which claim he made no attempt to participate, carries no weight as to the timeliness of this claim now before me.

Claimant has caused harm to Respondent by his lack of diligence, which has made pertinent evidence difficult if not impossible to ascertain. While Claimants are not necessarily bound by a specific statute of limitation, I hold that this claim is barred by the equitable theory of laches. Accordingly, I find that the lack of diligence in filing this claim has caused prejudice to the Respondent and would cause injustice to the Respondent in carrying out a remedy. Therefore, this claim is dismissed.

Dated this 26th day of August, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

U. S. DEPARTMENT OF LABOR

In re:

DAVID FIGLEY AND HAROLD HOENIG
(Petitioners)

v.

PORT AUTHORITY OF ALLEGHENY COUNTY
(Respondent)

DEP CASE NO.
79-13c-8

Summary: Claimants alleged loss of employment as a result of Respondent's competition which was subsidized by continuing grants under the Act. Claimants alleged that Respondent's UMTA projects made it impossible for Claimants' employer, a private bus company, to continue economically viable competition and caused the employer to close operations. The Department determined that the claim in this specific instance was too general and lacking in supporting evidence to stand as a prima facie cause of action. Respondent was not required to carry its burden of proof. The claim was dismissed.

DETERMINATION

This action arises from a petition for employee protections filed with the Department of Labor by letter dated March 30, 1979. The petition requests a determination that two, former, salaried employees of the Beaver Valley Motor Coach Company are entitled to employee protections under

Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). A joint hearing was conducted in the instant action and in the companion case of Local 1086, Amalgamated Transit Union v. Port Authority of Allegheny County and Beaver County[1] on August 22, 1979, before Alan Nartic, appointed by the Department of Labor. Our determination in Local 1086 is attached hereto and incorporated into this determination.

Both Local 1086 and the instant case alleged that the loss of employment resulted from identical action taken by Respondent in the period between 1968 and 1979. In Local 1086 the Department of Labor determined that Petitioner relied upon information that did not describe a sufficient theory of cause and effect with respect to the worsening of employment conditions allegedly caused by the projects. In the instant case Petitioners attempted to support their claim by reliance upon the same material presented by the

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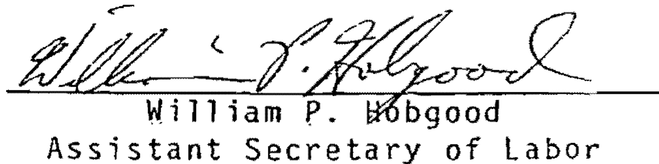
1/ Local 1086, DEP Case No. 79-13c-12, determined by the Assistant Secretary of Labor March 7, 1980, involved a loss of employment for ten former, hourly employees of the Beaver Valley Motor Coach Company. The instant petition involves a loss of employment for two former, salaried employees of Beaver Valley Motor Coach Company.

claiming employees in Local 1086. I find that Petitioners here have not described a plausible cause of action, for the reasons discussed in the decision in Local 1086. Therefore, in this petition for employee protections, as in Local 1086, Respondent is not obligated to carry its burden of proof.

This petition is dismissed for failure to state a sufficient cause of action.

Dated this 23rd day of June 1980
at Washington, D. C.



William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

A. L. PERKINS & AUBREY WEBB (Claimants) and THE CITY OF EL PASO (Respondent)	DEP Case No. 80-13c-9

and

LOCAL 1256, ATU (Claimant) and THE CITY OF EL PASO (Respondent)	DEP Case No. 80-13c-7

Summary: These claims are companion cases to Davis and the City of El Paso which determined that the claimant, as a retiree, was entitled to continuation of certain benefits after the City took over direct operation of its transit system from its operating agent. The City here agreed to provide medical health care insurance coverage, life insurance coverage, and bus passes for former employees and their spouses in the manner set forth in the Davis case. These claims were sustained and the agreements of the parties in settling the specific issues were noted.

DETERMINATION

The above named cases present claims for employee protections required under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). These claims are companions to the case of Ohmer E. Davis and the City of

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El Paso, determined by the Department of Labor May 29, 1981 (attached hereto and incorporated herein). Claimant Davis and all instant claimants are retired employees of El Paso Transit Services, Inc. The alleged adverse effects and the purported cause in all cases are virtually the same. The only differences lie in the particular dollar amounts expended by each claimant to offset the adverse effects. As in Davis, the Respondent has made indications of its recognition of the entitlements of the instant claimants to the benefits which were interrupted by the organizational transition of the transit operations. This transition, from El Paso Transit Services, Inc. (the former operating agent) to the City as direct operator, occurred on or about January 15, 1980. Implementation of the restoration of interrupted benefits has been delayed, prompting the filing of these claims. These cases were heard July 24 and 25, 1980. By April of 1981, the claim of Mr. Davis had been resolved by the parties, with the exception noted in our determination of May 29, 1981.

In May of 1981 the Respondent advised the Department's representative that the instant claims also had been resolved along the lines of the Davis settlement. Such resolution generally would satisfy the requirements of the 13(c) protective arrangement as well as the remedies sought here by the Claimants. I find it unnecessary to recite the facts or the discussion of the issues in the instant cases, in light of the mutual agreements of the parties.

Mr. Davis had made out-of-pocket payment of premiums, and had received no reimbursement for such payments, for other health insurance coverage when his was interrupted. He now has been reimbursed by Respondent for those amounts. Such amounts are not applicable in the instant claims, however, because no other individual in this case alleges to have made similar, unreimbursed, out-of-pocket payments. One or more of the Claimants herein indicated, however, that they incurred expenses during the period of interrupted health insurance coverage for medical/health care for themselves or their spouses. If a claimant did pay such bona fide expenses following the transition in January of 1980 and prior to restoration by Respondent of equivalent insurance coverage, such claimant is entitled to reimbursement for the portion thereof that would have been covered had his medical/health insurance coverage not been interrupted.

The life insurance benefit ("death benefit") is to be resolved consistent with the disposition of this item in Davis. Again, if any claimant here incurred costs during the period of uncertain life insurance coverage as a consequence of such uncertainty, such claimant is entitled to reimbursement for those amounts which would have been covered under the former insurance.

Bus passes are to be issued, if such has not already been done, to each Claimant herein. Passes for spouses of these Claimants also are to be issued, consistent with the Respondent's agreement as indicated in Davis.

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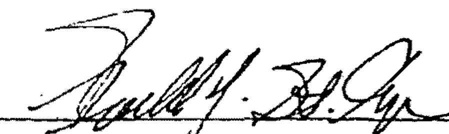
Finally, the matter of possible incomparability in health insurance coverage prior to and following the January 1980 transition is not properly before the Department of Labor in the instant claims, for the reasons set forth in Davis. Any Claimant herein who desires to pursue this issue may do so consistent with the procedures set forth in Davis.

These claims are sustained and the agreements of the parties are noted in settlement thereof.

Dated this 27th day of May, 1982
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

U.S. DEPARTMENT OF LABOR

In re:

SAMUEL A. PALAMA (Petitioner) v. METRO TRANSIT LINES (Hawaii) (Respondent)	DEP Case No. 80-13c-1

Summary: The employee was referred to his available local arbitration procedures which the Secretary had certified. The case was dismissed.

DETERMINATION

This constitutes the final and binding determination in the above matter. The instant petition was filed with the Department of Labor on October 11, 1979. Petitioner seeks a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, as to whether he is entitled to certain vacation benefits and promotion rights.

Based upon evidence ascertained during the initial filing of this action, Petitioner is represented by Local 996 of the Teamsters Union. On March 15, 1974 Local 996 and Respondent entered into a Section 13(c) protective agreement, which the Department of Labor certified on

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April 10, 1979 as providing fair and equitable protections required by Section 13(c) of the Act. Article VI of the agreement establishes an appropriate mechanism for resolution of disputes which arise under the agreement. Therefore, Petitioner is referred to Article VI of the agreement for resolution of this matter.

This petition for employee protections is hereby dismissed.

Dated this 28th day of April 1980 at Washington, D.C.

/S/

William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

FRANCISCO AVALOS (Claimant) and THE CITY OF EL PASO (Respondent)	DEP Case No. 80-13c-15

Summary: Claimant sought continuation of his previous employer's policies on vacation leave and discipline for late arrival or failure to report for work. Claimant failed to demonstrate that either his vacation entitlement or his susceptibility to discipline would be worsened during his protective period as a result of Respondent's policy changes in these two areas. These claims were denied.

DETERMINATION

Jurisdiction

This claim was submitted to the Department of Labor by letter dated July 22, 1980. Claimant is an employee of the City of El Paso, Texas, who seeks a determination of his right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

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In 1979, the City applied for four operating assistance grants for fiscal years 1977 through 1980 (UMTA Project Numbers TX-05-4072, TX-05-4073, TX-05-4074 and TX-05-4075). In connection with these applications, the Department of Labor certified, on February 3, 1980, an employee protective arrangement dated January 3, 1980. That arrangement provides for submission of disputes arising under the provisions of the arrangement to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor.

The decision is only an interpretation of the particular terms of the employer's 1980 Protective Arrangement. That arrangement may be somewhat broader than would be necessary to satisfy the minimum protective requirements under Section 13(c) of the Urban Mass Transportation Act.

Issue

A dispute has arisen with respect to the claimant's entitlement to protections, under the 13(c) protective arrangement entered into by the City. Claimant seeks protections in two areas. First, he requests continuation of the vacation schedule utilized by his previous employer or, if such remedy cannot be granted, he seeks credit under the City of El Paso's vacation schedule for past service with his previous employer. Claimant also requests reinstatement of the "miss-out" policy, pertaining to discipline for late arrival to work, which was utilized by his former employer.

Background

Claimant first worked as a mass transit employee of the private bus company, Lower Valley Lines, in May 1975. In January 1977 the the City purchased the assets of the company together with the assets of two other private bus companies and contracted with El Paso Transit Services, Inc., for management services and personnel for the transit system. Claimant was hired by El Paso Transit Services at that time. In January 1980 the City ended its contractual relationship with El Paso Transit Services and, with Federal assistance, began direct operation of the transit system. On or about January 15, 1980 Claimant was employed by the City as a mass transit employee.

Vacation Policy:

With regard to the vacation policy issue, Claimant indicated that, as an employee of El Paso Transit Services he had the following vacation schedule:

Weeks of Vacation	Years of Services
1 week	after 1 year of service
2 weeks	after 2 years of service
3 weeks	after 12 years of service
4 weeks	after 25 years of service
5 weeks	after 30 years of service

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For purposes of computing vacation leave El Paso Transit Services recognized both years of service with El Paso Transit and years of service with its three predecessor mass transit companies.

As a City employee, only years of service with the City are recognized in computing vacation leave. Under the City's vacation policy Claimant is entitled to vacation leave pay according to the following schedule:

Days of Vacation	Years of Service
1 day per month or 12 days per year from anniversary date	1-14 years
1-5/12 days per month or 17 days per year from anniversary date	15 years or more

As an employee of El Paso Transit Services, Claimant received 10 days paid vacation in 1979 and would have become eligible for 15 days in 1987. Claimant now receives 12 days vacation annually and will become eligible for 17 days in 1995.

Protections are extended to an employee under the terms of the protective arrangement for the duration of the individual's protective period. In this claim, the protective period would extend from January 15, 1980 through September 15, 1984. Under the El Paso Transit Services vacation schedule, Claimant would be

eligible for only 10 vacation days in September 1984, at the end of his protective period. The City, however, will afford Claimant 12 days of paid vacation leave annually throughout this period.

Claimant has not shown that the fringe benefit in question has been worsened or will be worsened in any way during his protective period. Claimant would not have become eligible for 15 days of annual vacation until after his protective period had expired. It was not the purpose of the protective arrangement to provide anticipated benefits in such fashion as the Claimant seeks.

Claimant has not shown a worsening of his vacation leave benefit under the vacation schedule used by the City. Therefore, he has failed to state a sustainable claim with respect to vacation benefits under the terms of the protective arrangement. This claim with respect to the issue of vacation benefits is denied.

"Miss-out" Policy:

The second issue raised by Claimant was the City's revision of the "miss-out" policy which governs discipline for drivers who are late or who fail to show up for work. Claimant seeks reinstatement of the El Paso Transit Services "miss-out" policy.

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Under the old policy, a driver for El Paso Transit Services lost his assigned run and was placed on the extra board to receive any "extra" work which might be available if he did not report to work within ten minutes of his scheduled time. Arrival during this ten-minute period was classified as a "late report" rather than a "miss-out."

After ten minutes, however, drivers became subject to progressive discipline, spending one to three additional days on the extra board for each "miss-out." Following the fourth "miss-out" in any 30-day period, the operator was subject to additional unspecified discipline or to discharge.[1/]

The new "miss-out" policy implemented by the City is also one of progressive discipline. However, the driver no longer has a ten-minute late report period. When an operator is late under the City policy, he progresses through a number of similar disciplinary steps until, after the fifth

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1/ The "miss out" policy utilized by El Paso Transit Services is contained in the 1974 agreement between El Paso City Lines, Inc., and Division No. 1256 of the Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America.

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"miss-out" within a thirty-day period, (or ten "miss-outs' in a ninety-day period, or fifteen (15) "miss-outs" in a one hundred and eighty-day period) he is discharged by the City.

While both policies prescribe progressive discipline, several distinctions can be made between the two. The City's policy calls for discharge after the fifth, rather than fourth, "miss-out" but does not include a provision for late reports. The City's policy extends over 180-days, while the El Paso Transit policy forgave" miss-outs" after 30 days had passed without a transgression. The City's policy, though, allows for some additional "miss-outs" over the 180-day period, while requiring gradual improvement by the employee.

The Claimant's argument that this policy change would necessarily result in a worsening of his employment conditions is not persuasive. For instance, an employee who failed to report for work at El Paso transit on four occasions within 30 days would be subject to discharge, while the same employee would have one more "chance" under the City's policy. Furthermore, revocation of the ten-minute late report period is not a significant change in working conditions in this instance. Employees of El Paso Transit who did not arrive during this time period were denied their run and paid only if they were reached for an extra run. City employees are required to

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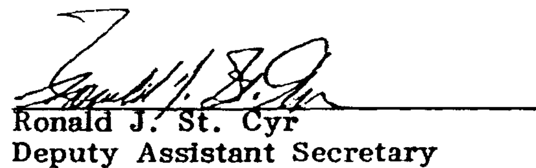
arrive when scheduled but are regularly compensated for their time. This amounts to a minor change in reporting time, and City employees may avoid discipline merely by exercising due diligence in arriving for work as scheduled.

Claimant has failed to demonstrate that he is worsened by this policy change. It is, therefore, determined that Claimant has not been placed in a worse position as a result of the change in the "miss-out" policy. This claim is denied.

Dated this 25th day of, March 1983 at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary

UNITED STATES DEPARTMENT OF LABOR

In re:

LOCAL 1338, AMALGAMATED TRANSIT UNION (Claimant) and DALLAS TRANSIT SYSTEM (Respondent)	DEP Case No. 80-13c-2

Summary: The Claimant alleged that Respondent violated the requirements of its Section 13(c) agreement by unilaterally adopting an attendance control policy over the objections of the union and thereby failing to preserve Claimant's collective bargaining rights. Claimant further stated that the new attendance policy adversely affected use of sick leave benefits by employees. The parties had preserved their bargaining practice of meeting and conferring in good faith on the new policy. Respondent's later implementation of the policy over the union's objections did not conflict with the collective bargaining rights of Claimant. Furthermore, implementation of the attendance control policy had not worsened Claimant's sick leave conditions. The claim was denied.

DETERMINATION

This constitutes the Secretary of Labor's final determination in the above dispute over certain employee protections required under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (the Act). By letter of December 15, 1979 Claimant referred the dispute to the Department of Labor for resolution in accordance with Section G of the May 31,

1974 13(c) arrangement for employee protections. The parties stipulated at the hearing that they have no objection to the authority of the Department to hear and determine this matter, except that Respondent maintains that some individual grievances (especially the single instance of discharge) are being considered through established local grievance procedures of Section 1.4 of the Personnel Policies (see below). Respondent maintains that such matters are premature for determination in the instant claim. Such grievance procedure covers questions of administration of the Personnel Policies, however, and is separate from the 13(c) dispute resolution procedure for issues of required preservation of rights, privileges, and benefits pursuant to Section 13(c). Moreover, those specific individual employee grievances did not arise as issues in this claim. Therefore, the parties have consented to the Department's authority to determine the disputed issues herein. This dispute was heard in Dallas, Texas June 5, 1980 before a hearing examiner appointed by the Department of Labor.

Issues

Was the unilateral implementation of the Attendance Control Policy a failure to continue and preserve the bargaining rights of Local 1338? Does the Attendance Control Policy implemented October 1, 1979 constitute a worsening of employment conditions for the employees?

Findings of Fact

The parties stipulated that since 1974 Respondent's subsequent projects under the Act have been certified by the Secretary of Labor on the basis of replication of the parties' 1974 employee protections arrangement. The pertinent provisions of the May 31, 1974 employee protections arrangement (Respondent's Exhibit 4) include the following:

> A. *The Project shall be carried out in such a manner and upon such terms and conditions as will not in any way adversely affect employees covered by these arrangements provided that in the case of displaced or dismissed employees, the compensation shall be that as set out in Exhibit "a" attached hereto.*
>
> B. *All rights, privileges and benefits (including pension rights and benefits) of employees covered by these arrangements (including employees already retired) which have accrued or which may hereafter accrue under their various retirement systems under the policies and working conditions in effect on the date of this Project, shall be preserved and continued, provided that any such rights, benefits and privileges may be improved, changed, or added to so long as there is no denial of accrued rights.*
>
> C. *The existing right of employees covered by these arrangements to present grievances concerning their wages, hours of work, or conditions of work, individually or through a representative, including any labor organization that does not claim the right to strike, under Article 5154(c) of Vernon's Annotated Civil Statutes of the State of Texas, as construed and applied in Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Board, No. 17097, 403 S.W. 2d 107, decided May 31, 1968, by the Texas Court of Civil Appeals for the Fifth Supreme Judicial District (69 LRRM 2177), rehearing denied June 28, 1968, writ refused N.R.E. February 26, 1969, rehearing*

denied April 16, 1969; Dallas Independent School District v. American Federation of State, County, and Municipal Employees, Local Union No. 1442, 330 S.W. 2d 702 (Tex. Civ. App., writ ref'd N.R.E.) (45 LRRM 2815); Beverly v. City of Dallas, 292 S.W. 2d 172 (Tex. Civ. App., writ ref'd N.R.E.) (38 LRRM 2187), shall be preserved and continued.

D. *The employees covered by these arrangements shall have the right to present grievances and to meet with the management of the System, either individually or with their representatives, for the purpose of discussing and conferring with respect to any matter which concerns the employees, subject to System Personnel Policies.*

E. *Any employee covered by this agreement who is laid off or otherwise deprived of employment, or placed in a worse position with respect to compensation, hours, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during his employment as a result of the Project, including any program of efficiencies or economies directly or indirectly related thereto, shall be entitled to receive any applicable rights, privileges and benefits as specified in the employee protective arrangements (attached hereto and made a part hereof as Exhibit "A"); provided, however, that nothing in Exhibit "A" shall be deemed to supersede or displace any other provisions of this agreement, and in the event of any conflict or inconsistency between them, the other provisions of this agreement shall control.*

Texas law prohibits collective bargaining by municipal employees. The employees represented by Local 1338 are employees of the Dallas Transit System (Respondent) which is a department of the City of Dallas. The City of Dallas has the ultimate fiscal authority for the budget for Respondent. Authority for administrative procedures, employment, compensation, and personnel functions have been delegated by the City to the Dallas Public Transit Board. Claimant acknowledged that it does not possess ordinary,

private-sector rights to collective bargaining. No claim was made to any bargaining rights which may have existed prior to the instant 13(c) projects nor to such rights that might have existed prior to the takeover of transit services by the City and/or Respondent.

The Dallas Public Transit Board (hereinafter the Transit Board) has had authority for all times relevant herein to approve and implement personnel policies for the employees of Respondent Transit System. The parties have an established practice of meeting and conferring, generally upon request, with respect to new, or proposed changes in, personnel policies and employee benefits. The current personnel policies were adopted by the Transit Board October 1, 1979 (Respondent's Exhibit I).

The Personnel Policies, Section I, General Provisions, subsection 1.3, "Conduct and Discipline," include a pertinent paragraph entitled "Rules of Conduct." The parties stipulated that this paragraph and Section (a) thereunder have existed in present form at least since October 1, 1977 (see Claimant's Exhibit 2, "1977 Personnel Policies"):

Rules of Conduct

> *The following are offenses which apply to all employees and which are grounds for discharge, or depending on the facts and circumstances of the particular case, may result in demotion (reduction in grade), suspension or written reprimand:*
>
> *(a) Unsatisfactory attendance. Excessive absence and/or tardiness. Note: An employee who is absent without leave for five or more consecutive working days shall be deemed to have abandoned his job and shall be removed from the payroll.*

Both parties admit that Section 1.3, "Rules of Conduct," Section (a), has, and has had, broad application at the discretion of management although exercise of this authority has been infrequent. With respect to the wording of sub-paragraph (a) the parties agreed that the first sentence is to be read as a continuation of the preceding paragraph and that discipline (from reprimand to dismissal) could arise from excessive absences (and/or tardiness) of any kind, whether excused or unexcused, paid or unpaid, with or without leave, etc. The parties recognize that the second sentence of sub-paragraph (a) provides for a specific application of a pre-determined disciplinary measure for cases of absence without leave for five or more consecutive days. It was agreed that this specification, however, does not limit or restrict disciplinary measures for any other situations of excessive absence and/or tardiness.

Beginning approximately in 1967 Respondent instituted a sick leave program which contained a waiting period of five days per occurrence before paid sick leave could be used by the employee. During this five-day period absence due to sickness was uncompensated. Over the years, the unpaid waiting period was gradually reduced from five days to one day per occurrence. In 1979 the waiting period was eliminated with the October 1 implementation of the new attendance control policy[1/]:

1/ The material quoted above represents the current version of Section 1.16A as contained in Respondent's Exhibit I. This incorporates revisions effective November 29, 1979 (Respondent Exhibit 2). The original Section 1.16A is contained in Claimant's Exhibit I. These changes are not noted herein since they are not at issue and do not bear upon the issues of this action.

1.16A <u>Attendance Control</u>

> *NOTE: Effective October 1, 1979 all employees will start with a clean attendance record under this program. Any absenteeism prior to this effective date will not be counted.*
>
> *All employees who fail to report for work or fail to complete their work assignment because of sickness or other personal reasons more than six (6) times in any six (6) month period shall be subject to progressive discipline. The progressive disciplinary procedure in any six (6) month period is as follows: The first (1st), second (2nd), third (3rd) and fourth (4th) occurrences will be recorded; the fifth (5th) occurrence will result in a written reprimand; the sixth (6h) occurrence will result in a one day suspension, and the seventh (7th) occurrence will result in employee being subject to further progressive disciplinary action including possible termination.*
>
> *It should be noted that in the event of absence, the length of absence is incidental (except as defined in Section 1.3 of the Personnel Policies and Employee Benefits manual <u>Rules of Conduct</u> (a) <u>Unsatisfactory Attendance</u>) with the number of absences computed by individual occurrence. The following employee absences will not be counted against an employee as outlined above: Vacation, Paid Holidays, Jury Duty, Death Leave or Military Leave.*

This policy (Respondent's Exhibit I, p. 24) was the subject of several meetings between the parties prior to its adoption by the Transit Board. The parties stated that they failed to reach agreement on the policy during this meeting and conferring, and that the parties still disagree with respect to the impact, effect, and desirability of this policy. Despite November 29, 1979 modifications in this policy the Claimant labor organization continues to oppose the policy and its application to the employees represented by that organization.

Disputes over administration of this or other personnel policies are subject to the Grievance Procedure specified in Section 1.4 of the Personnel Policies. This procedure has, as a final step, review and decision by the Transit Board's Employee Relations Committee or, if the grievance pertains to discharge, suspension or reduction in grade as a result of disciplinary action, the decision of the Employee Relations Committee may be appealed to the Council Committee of the City of Dallas.

Position of Claimant

Local 1338, Claimant on behalf of all employees of Respondent, asserts that the letter and spirit of Section 13(c) of the Urban Mass Transportation Act have been broken and that paragraphs A, B, C and D of the May 31, 1974 13(c) arrangement involving these parties have been breached. Claimant alleges that Respondent's unilateral imposition of an attendance control policy and failure to follow "the grievance procedure arrived at through negotiations at the U.S. Department of Labor" constitute the alleged violations. Specifically, Claimant claims that the actions of Respondent in unilaterally adopting the attendance control policy over the objections of the labor organization constitute a denial of Claimant's collective bargaining rights and a failure to bargain in good faith. Claimant concludes that this is a violation of the requirements of Section 13(c) of the Act because such action fails to preserve Claimant's collective bargaining rights.

As a second adverse effect Claimant asserts that the sick leave benefits of the employees have been worsened. Prior to the implementation of the attendance control policy these employees historically enjoyed unrestricted use of their accrued sick leave without the potential of incurring disciplinary action for "excessive" instances of use in any period of time. Claimant also notes that if an employee should be suspended without pay, or discharged, because of the new attendance control policy, he would also be worsened, secondarily, in his compensation as a result of the policy. This is alleged to be a potential further violation of the 13(c) "agreement," paragraph E, resulting from the implementation of the attendance control policy.

In a later and separate portion of the charges Claimant states its belief that "when an employee is suspended or discharged for public complaint or accused of improper fare collection [Respondent] should have to present complaining witnesses at hearing." At the hearing in the instant case Claimant further alleged that it believes the new attendance control policy to discriminate against two minority groups of the employees it represents, blacks and hispanics. The union also alleged that adverse effects in the form of monetary loss, beyond wages, had resulted from the new attendance control policy.

Position of Respondent

Respondent acknowledges the "unilateral" aspect of the implementation of the attendance control policy and points out that any such personnel policy, consistent with Texas

statutes, must be implemented unilaterally since collective bargaining is prohibited. Respondent then denies that any adverse effect is present in this matter. With the exception of the issue of the attendance control policy, Respondent asserts that Claimant's allegations are overbroad and undefined and, therefore, should be stricken from the complaint. Respondent would reinforce this position with the point that Claimant has failed to request any relief or remedy with respect to any issue other than the issue of the attendance control policy.

Affirmatively, Respondent asserts that when it adopted the new attendance control policy the one-day waiting period for use of paid sick leave was eliminated. In addition Respondent maintains that all accrued sick leave has been retained by these employees. This is described, on balance, as an improvement in the sick leave situation for the employees. Respondent cites Paragraph B of the 1974 13(c) protective "agreement" as authorizing such changes in benefits so long as there is no denial of accrued rights.

Finally, Respondent denies that the attendance control policy and its implementation bear any relationship to the existence or non-existence of any project under the Urban Mass Transportation Act of 1964, as amended.

Discussion

General Allegations

Respondent's motion to limit the scope of the alleged violations will be considered first. The fact that Claimant has not requested specific relief or remedy with respect to certain charges need not bar such charges from consideration in this claim. If a violation were found, an appropriate remedy could be fashioned without harm to the parties' presentations or rights.

Certain of Claimant's allegations suffer a more significant deficiency, however. With respect to the allegation of discriminatory impact of the new policy, Claimant was not able to present any statistical or comparative data to support the charge. With respect to the allegation that Respondent should be required to present complaining witnesses at hearings in the local grievance procedure, Claimant made no allegation that this condition was worsened from its previous status or that the matter had been presented for consideration through the local grievance procedure. The allegation of monetary loss beyond loss of wages pertains to an incentive policy which would provide a fifty-dollar award to employees who meet certain attendance standards. This policy is separate from the attendance control policy and Claimant offered no showing that the employees had an existing entitlement to this fifty-dollar award, as opposed to having a potential for earning the award by meeting certain conditions. No loss of an existing benefit, therefore, was shown. Any other charges beyond the two major claims considered below also lacked

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sufficient supporting treatment from Claimant to require determination in this proceeding. Therefore, all such other claims are dismissed, leaving the two general allegations: (1) a failure to preserve collective bargaining rights, and (2) a worsening of the sick leave benefits and the use of these benefits.

Bargaining Rights

With respect to the charge of a failure to continue and preserve collective bargaining rights, Claimant has the obligation to show what bargaining rights it possessed that allegedly have been denied. To this end Claimant explained that management implemented a new attendance policy without the concurrence of, and over the objection of, the designated labor organization. Claimant acknowledged that, strictly speaking, Respondent probably can take such action and has done so on certain occasions in the past. Claimant strongly maintains, however, that such action is inconsistent with good faith collective bargaining practices and obligations and therefore constitutes a failure to continue collective bargaining rights as required under Section 13(c) of the Act.

Testimony at the hearing demonstrated that Claimant had received notice of the proposed attendance control policy approximately one month prior to its implementation. On more than three occasions prior to implementation, Claimant expressed its objections to management (Respondent) and explained the reasons for such objections. Respondent then implemented the new policy October 1, 1979 over Claimant's

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objections. The parties met thereafter and had further discussions on the subject. These discussions resulted in certain modifications of the policy, which became effective November 29, 1979. However, Claimant still objected to the presence of the attendance control policy, especially the disciplinary provisions therein.

The testimony shows that Claimant does not have "collective bargaining rights" as that term is generally employed. Claimant's labor relations rights were stipulated as deriving from Texas law which prohibits collective bargaining rights for municipal employees. The parties do have an established practice of meeting and conferring as to conditions of employment. Meet and confer rights are protected by Section 13(c) as a diminutive form of collective bargaining rights. The parties here, however, have preserved their practice of meeting and conferring, on this new policy. Respondent's unilateral implementation of the policy over the employees' continued objections following their meet and confer procedures does not conflict with the rights of Claimant to the extent that they may be said to be related to collective bargaining. I find that, while the employees may not be in agreement with management's new policy, Respondent acted within its authority in unilaterally implementing the attendance control policy. Such implementation in this case does not constitute a denial of bargaining rights nor any other violation of the employee protections required under Section 13(c).

Sick Leave Benefits

In addressing the remaining issue of a worsening of the sick leave benefit, Claimant maintains that the attendance control policy "gives with one hand and takes away with the other." This refers to Respondent's provision for employees generally to accumulate entitlement to one day of paid sick leave per month up to 150 days total, and the seemingly conflicting provision in the new policy which provides for progressive disciplinary measures against an employee if he is absent from work due to sickness or certain other reasons more than six different times in a six-month period. The duration of each absence is irrelevant. Absences not chargeable under the attendance control policy are those for vacation, paid holidays, jury duty, death leave, or military leave.

Claimant explains that the employees' sick leave benefit has been adversely affected in two ways by this disciplinary provision. First, the employees formerly could have been absent more than six times in a six-month period and would not have been subject to discipline thereby. Whether they received compensation would have depended upon the previous waiting period and their accumulated, "banked" sick leave. Secondly, if an employee is absent for other reasons (car failure, weather, family emergency, etc.) during a six-month period, then the employee cannot even use the full number of six sick leave days he earns during that period even if he is absent only one day for each occurrence), without incurring disciplinary action.

This description of the operation of the policy is accurate but requires some additional consideration to fully describe the situation. Prior to October 1, 1979 an employee could have been absent from work on six separate days during a six-month period and, because of the one-day waiting requirement, would not have received any compensation even if each absence were for bona fide sick leave. As Respondent argues, elimination of this waiting period could mitigate, at least in part, the new provision for control of absences. Elimination of the waiting period has been urged by the union consistently over the years.

Another consideration to fully explain the new policy is the length of absences during each six-month period. As Respondent explained, an employee could be absent an unspecified number of days in each instance up to a maximum of six separate instances, and not incur disciplinary measures under the attendance control policy. An employee conceivably could use fifty or more consecutive days of accrued sick leave without penalty under this control policy.

Comparing the attendance control policy to the provision for use of accrued sick leave raises speculation of some adverse effect if the components of those policies are considered in isolation. However, the "Rules of Conduct" sub-section and paragraph (a) thereunder (supra) have remained in existence as personnel policies without change prior to, during, and following proposal and implementation of the attendance control policy. Paragraph (a) provides that "[e]xcessive absence and/or tardiness" are grounds for discharge, demotion, suspension, or written reprimand. Respondent stated that this includes absences for sick leave,

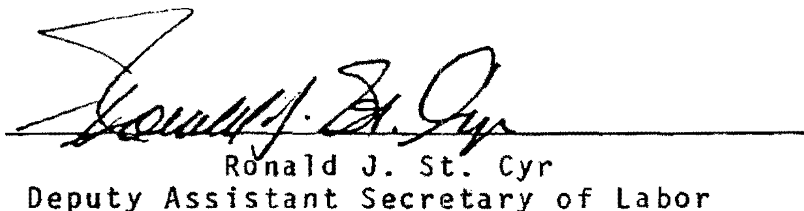
funerals, etc. and has been broadly discretionary with supervisors as to the employees they supervise. Claimant concurs in this, with the observation that this power was used infrequently. Respondent describes the attendance control policy, then, as specification of conditions and standards under which Respondent's general disciplinary authority under "Rules of Conduct" will be exercised. Therefore, Respondent concludes that this is not a worsening of conditions.

This is persuasive and I find that the sick leave conditions have not been worsened by the implementation of the attendance control policy. Respondent has had the right prior to October 1, 1979, to take such action at its discretion as the new policy provides, or to take even more severe action, for excessive absences. Respondent now has established specific conditions under which it will take disciplinary measures for excessive chargeable absences. Respondent has defined absences which are not chargeable and has specified the progressive discipline applicable to various degrees of excessive absenteeism. While Respondent might now exercise its authority in this disciplinary area more frequently, which would be less desirable from the employees point of view, Respondent has always had the authority to do so. Exercise of existent discretionary authority, with appropriate prior notice of change given, as Respondent gave, does not constitute an adverse effect in this case.

Decision

Claimant has not shown a worsening of previously existing rights or benefits in this action. Management's authority to apply such provisions as are contained in the attendance control policy has existed at all time material to this claim. Proper exercise of available authority cannot be considered a worsening in this instance. Nor has there been a showing of adverse effect, in consideration of the past practice of management's discretionary authority in cases of discipline for excessive absence or tardiness under the "Rules of Conduct." Therefore this claim is denied.

Dated this 9th day of September, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

DARRELL A. BEARD (Claimant) v. TOWN OF HUNTINGTON (Respondent)	DEP Case No. 80-13c-3

Summary: Claimant alleged that his employment was terminated due to a change in the political composition of the Respondent's governing body, and that the termination was motivated, in part, by Claimant's actions relating to a pending Section 13(c) certification. Claimant failed to specify facts sufficient to indicate that the termination of his employment may have been a result of the cited project. The claim was denied.

DETERMINATION

The instant claim was filed with the Department of Labor by letter dated January 10, 1980, and supplemented by letters dated February 7, 1980, and June 2, 1980. The Claimant requests a determination in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA), as to whether Claimant is entitled to benefits as a dismissed employee.

The initial burden rests with the Claimant and requires that he identify the pertinent UMTA project and describe how he was affected by the project. Claimant has identified the project as NY-03-0079 (the Project), consisting of the purchase by the Town of Huntington of buses and additional equipment. The Project was certified by the Department of Labor on October 6, 1975, based in part on an agreement dated July 29, 1975[1/] (the Agreement).

Claimant's Civil Service title both before and during the Project was Public Transportation Analyst II. In addition, Claimant assumed the position of manager of the Town of Huntington's mass transit system (HART) in January, 1978. His employment as Public Transportation Analyst II and as manager was terminated by the City of Huntington effective February 1, 1980. No reason was given by the City for the termination. Claimant has requested the protection of paragraph 7(a) of the Agreement, which provides in part:

> Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, he shall be considered a "dismissed employee", and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph (emphasis added).

Section 13(c) and paragraph 7(a) of the Agreement do not provide protections for Claimant solely because he worked on the Project. Claimant is protected only if the termination of his employment was a result, at least in part,

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[1/] Agreement pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, dated July 29, 1975, and addendum dated September 12, 1975 between the Town of Huntington and the United Steelworkers, CIO-AFL Local 14753.

of the Project. Therefore, to be protected by Section 13(c) and by paragraph 7(a) of the Agreement, Claimant must identify some arguable connection between the Project and the termination of his employment. Claimant identifies two possible reasons for the termination of his employment. For the reasons discussed below, I find that neither is sufficient to supply the required connection.

First, Claimant asserts that his employment was terminated due to a change in political party composition of the Huntington Town Board. In his letter of January 10, 1980, Claimant states:

> On November 6, 1979, the Town of Huntington experienced an unforeseen predicament in which a drastic change in political parties was involved. As evidenced by the attached Town Board Resolution the incoming political party has resolved to replace those individuals in management positions with their own party.

Similarly, in his letter of June 2, 1980, Claimant states:

> The UMTA project which resulted in my loss of employment was Project NY-03-0079. After having worked on the Project from its original beginning, and had been funded under the above Project for the last four years, my services were terminated on February 1, 1980. (Town Board Resolution attached, Ref. I). No reason was given for the termination. As of January 1, 1980, the Town Board balance of political voting power changed from a majority of Democratic rule (4 to 1) to a Republican majority (3 to 2) and as a result several department heads were changed and terminated.

This allegation that the termination of Claimant's employment followed a change in the political composition of the Town Board does not, alone, indicate any connection between the Project and Claimant's loss of employment. Therefore, this first allegation is not sufficient to show any violation of the Agreement.

The second assertion made by Claimant related to the motivation of the Town Board. Claimant states in his letter dated February 7, 1980:

> As the manager of the HART system [Claimant] was in favor of recognizing the PERB litigation and eventual 13(c) agreement with this union, he was dismissed without cause, so that the continual requests to have a viable 13(c) agreement with 1181 and the eligibility to receive Federal funds, would be eliminated.

The "requests to have a viable 13(c) agreement" to which Claimant refers related to certain UMTA applications that were pending at the time of the termination of Claimant's employment.[2/] While these applications were pending, a representational dispute arose between Local 1181-1061 of the Amalgamated Transit Union (Local 1181) and Local 342 of the United Marine Division, International Longshoremen's Association. Claimant asserts that a reason for the termination of his employment was his support for developing protective arrangements with Local 1181. The development of these protective arrangements did not, however, relate to the Project. As the Agreement provides protection only with respect to the cited Project, the assertion that Claimant's employment was terminated because of the stance he took regarding protective arrangements for pending projects is not sufficient to show a connection between the termination of his employment and the cited Project.

[2/] Department of Labor files show that two UMTA applications were pending: NY-03-0079, Amendment #3 (capital grant application) and NY-03-4083 (operating assistance).

As Claimant has failed to show any facts indicating that the termination of his employment was a result of Project NY-03-0079, no further action can be taken on this claim by the Department of Labor.

Dated this 10th day of December, 1980
at Washington, D. C.

William P. Hobgood
Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

PHILIP FOX (Claimant) v. DALLAS TRANSIT SYSTEM (Respondent)	DEP Case No. 80-13c-6

Summary: Claimant alleged that his retirement benefits were less than he had expected to receive. No change was made in either the terms of the retirement plan or the interpretation of those terms during the period relevant to the claim. As there was no worsening of a benefit to which Claimant was entitled, the claim was dismissed.

DETERMINATION

Claimant requested, by letters dated December 1, 1979, June 8, 1980 and July 13, 1980, the opinion of the Department of Labor regarding his entitlement to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (the Act). For the reasons set forth below, we do not believe that Claimant has stated facts sufficient to constitute a claim under Section 13(c) of the Act.

Claimant advised the Department of Labor that on April 1, 1973 he retired from his position as Comptroller of the Dallas Transit System. At that time, he elected the leveling option contained in Section 4.06 of the Dallas Transit System Retirement Plan A. The leveling option provided for increased benefits (over the monthly standard benefit) from age 55 to age 62, with a reduction of benefits following the 62nd birthday. Under Section 7.01 of the plan, cost of living adjustments were made each year, from 1973 through 1979. In 1979, when Claimant reached age 62, his monthly benefit was reduced downward by an amount equal to $225 plus the cost of living increases from 1973 through 1979 computed on the $225. Claimant had expected the reduction to be $225, without downward adjustment for cost of living increases computed on that amount. The amount of the reduction is governed by Sections 4.06 and 7.01 of the plan. Claimant appealed the interpretation of these plan provisions to the DTS Retirement Committee. The Committee upheld the plan administrator's interpretation.[1/]

The excerpts of the applicable provisions of Retirement Plan A, provided by Claimant, indicate an effective date of January 1, 1968 with an amendment effective January 1, 1972.

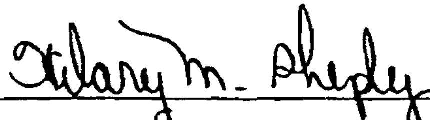
[1/] Claimant indicated in his letter of December 1, 1979 that he was told at retirement that his monthly benefit would be decreased by $225 at age 62. However, it does not appear that the interaction of the Section 4.06 leveling option and the Section 7.01 cost of living provision was discussed. We note that, absent any cost of living adjustment, the reduction to Claimant's monthly benefit at age 62 would have been $225. Whether or not it was fully accurate, we do not believe that this informal advice given to Claimant indicates that any change was made in the benefit to which Claimant was entitled under the plan between the time the advice was given and the time the reduction in Claimant's monthly benefit was made.

Based on this information, it appears that there was no change in the applicable provisions of the plan between the date of Claimant's retirement, and the benefit reduction that was made when he attained age 62. In a letter from the Secretary of the DTS Retirement Committee to Claimant dated October 23, 1979 the Secretary stated that the applicable plan provisions had been consistently applied since the effective date of the plan. Nothing in Claimant's correspondence to this office questions the consistency of interpretation of the plan. Thus, it appears that neither the pension plan itself, nor the interpretation of that plan, was altered in any way during the periods relevant to this claim.

In order to state a claim under Section 13(c), an employee who asserts that he has been affected by an Urban Mass Transportation Act project or projects must state facts sufficient to show that he was worsened in some way by such project or projects. Claimant has cited a number of projects, and has shown that the monthly benefit he received at age 62 was less than the monthly benefit that he had expected to receive at age 62. However, this alone is not sufficient to show that a benefit to which Claimant is actually entitled has been worsened as a result of a project. The benefit to which Claimant is entitled is a monthly retirement annuity calculated in accordance with Sections 7.01 and 4.06 of the Dallas Transit System Retirement Plan A. Claimant received a monthly benefit calculated in accordance with these plan provisions. Further, neither the plan provisions nor the interpretation of these plan provisions was shown to have changed in any way during the period relevant to this claim. As Claimant is in fact receiving a benefit

calculated in accordance with these provisions, there was no worsening of the benefit to which Claimant is entitled. The only "worsening" occurred in relation to Claimant's expectations of what pension benefit he was to have received, not in the actual benefit to which he was and is entitled under the plan. This expectation, unsupported by the plan documents or other evidence of actual entitlement, lies beyond the reach of the Act's protections. Because Claimant has alleged no facts sufficient to indicate any project under the Act resulted in a worsening of any benefit to which he is entitled, he has failed to state a claim under Section 13(c) of the Act.

Dated this 9th day of February, 1981
at Washington, D.C.



HILARY M. SHEPLY
Acting Deputy Assistant Secretary

UNITED STATES DEPARTMENT OF LABOR

In re:

OHMER E. DAVIS (Claimant) and CITY OF EL PASO (Respondent)	DEP Case No. 80-13c-7

Summary: The City took over direct operation of its transit system from its operating agent and discontinued certain benefits for this retiree. The parties thereafter agreed on restoration of these benefits and reimbursement for actual monetary loss during the period of consideration. The Department sustained the claim and accepted the specific settlement of the parties as remedy. An additional issue raised for the first time during the hearing was held not ripe for determination by the Department.

DETERMINATION

The parties named above disputed certain aspects of employee protections sought here by Claimant pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended (UMTA). As required by Section 13(c) the Secretary of Labor has certified fair and equitable arrangements to protect the interests of employees affected by each of Respondent's mass transit projects under the Act. These

projects include a capital assistance grant (TX-03-0029, for the City's takeover of the three predecessor, private bus companies in 1977) and at least seven operating assistance grants through fiscal year 1980. This dispute was filed wtih the Department of Labor March 13, 1980 by letter dated February 11, 1980 from the Claimant. This matter was heard July 24 and 25, 1980 in El Paso, Texas by a hearing examiner appointed by the Department of Labor. This is the Secretary of Labor's determination of this claim, which has been postponed to allow the parties to pursue settlement of the dispute.

Issues

The Claimant states that he has lost employer-paid group health insurance coverage, life insurance coverage, and free bus passes for himself and his wife, as a result of the City's takeover of direct operations of its mass transit services on or about January 15, 1980. He seeks group health insurance coverage paid for by the Respondent, with the option of additional coverage therein for his spouse at his own expense. He also seeks life insurance coverage provided by Respondent in the amount of $2,500 and the reissuance of free bus passes for himself and his wife. Finally, Claimant seeks reimbursement for his cost of providing his own health insurance coverage for the months during which the Respondent had not continued his insurance coverage.

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Discussion

In 1977 the City of El Paso acquired the mass transit operations and assets of three private bus companies formerly servicing the El Paso area. The City then provided mass transit services through El Paso Transit Services, Inc., a private corporation which served as operating agent on behalf of the City. Then in January 1980 the City discontinued use of the operating agent and assumed direct operation of transit services, with the continuing assistance of Federal projects under the Act.

On or about January 15, 1980 the Claimant (who retired October 1, 1977) ceased to enjoy the benefits at issue herein. The Respondent maintains that the benefits were not terminated and that Section 13(c) employee protections were not denied; rather, the interruption of benefits allegedly was a consequence of the administrative complexities of the January 1980 change in transit management and organization. Nevertheless, thereafter the Claimant lost free bus travel privileges, did not have life insurance protection, and had to obtain separate health insurance coverage at his own expense for approximately seven months.

Through communication with each other and with the Department of Labor since this claim was filed, the parties have resolved the major issues. As stated in the Respondent's letter of June 4, 1980 to the Claimant (Exhibit 3) from the City of El Paso Claims Committee:

HEALTH INSURANCE: The City of El Paso will provide to you the same level of health insurance benefits which you enjoyed from El Paso Transit Services, Inc. The City of El Paso will pay for said benefit. In order for you to receive this benefit, it will be necessary for you to go to the City Comptroller's Office located on the second floor of the new City building and talk to the City's insurance representative. You may go to this office during normal business hours on any date of your convenience. You should bring with you this letter and some recognizable form of identification, such as a driver's license.

LIFE INSURANCE: The City of El Paso will continue providing you with $2500 life insurance on yourself. In order to receive such benefit, you must follow the same procedures outlined in the paragraph above concerning going to the City Comptroller's Office.

BUS PASSES: The City of El Paso will continue providing you with free bus passes for yourself and your wife. You may obtain these bus passes immediately by contacting Mr. Luis Lujan at the SCAT offices at 130 N. Cotton.

During the July 24, 1980 hearing the parties were in general agreement as to the above terms for restoration of the benefits interrupted on or about January 15, 1980. The parties also were in general agreement on the matter of reimbursement of health insurance premiums paid by the Claimant for his individual insurance coverage during the period in question, January through July 1980. However, these terms had not yet been implemented by Respondent, despite City approval of a motion April 15, 1980 directing such terms as required formal action. Further, Respondent could not affirm during the two hearing days a date certain for implementation of the agreed-upon terms.

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By letter of March 5, 1981 the Claimant has stated that these terms have finally been implemented, with one area of exception. He had not been able to obtain a copy of the plan description setting forth benefits, provisions, and conditions of the health insurance coverage. He also has not yet received a certificate or other written verification of the existence and terms of the life insurance (also referred to as "death benefit") which the City has agreed to provide. By letter of April 20, 1981, the City now has provided the Claimant with a copy of "the only document which Blue Cross provides to the City employees." The Blue Cross plan of the City now covers the Claimant. The City also provided the Claimant with a letter dated April 20, 1981 from the Mayor specifying the City's continuation and the terms of the life insurance benefit previously enjoyed by the Claimant, through the City of El Paso's self-insurance program. With such documentation provided, I find the above agreements of the parties to be consistent with the fair and equitable protections required by Section 13(c) and to comprise an appropriate settlement of these specific issues and the remedies requested in this claim.

During the joint hearings on this and other claims, this Claimant and others raised for the first time the question of comparability of health insurance coverage. Several allegations were voiced to suggest that the group health insurance coverage provided by the Respondent (as stated above) was inferior to the health insurance coverage formerly enjoyed by this Claimant and others. Both parties discussed this question at some length and considerable

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detail was provided by Respondent. Based upon the testimony and evidence presented by both parties, I find that this question is not ripe for determination by the Department of Labor. The Claimants were not entirely certain as to which of two prior health insurance plans[1/] had provided allegedly better benefits. Nor was the desired remedy stated by the Claimants in sufficient detail. Further, the terms and provisions of the earlier of the two prior plans were not available for comparison in this particular Claimant's case. The testimony also shows that the Claimant had not raised this question as a 13(c) claim through the local dispute resolution procedures provided for in Sections 14 and 15 of the certified employee protections. In the event that the issue would be covered by an earlier version of 13(c) protections applicable to El Paso projects, the matter still would not be ripe for determination by the Department of Labor.

A major reason for the Claimant's failure to pursue local administrative resolution of this dispute over comparability of health insurance benefits lies in the Respondent's failure to provide the Claimant with a copy of the terms and provisions of the group health insurance (and life insurance) under which Respondent is covering the Claimant.

[1/] Blue Cross/Blue Shield's "Custon Coverage" plan for El Paso Transit Services, Inc. employees, 1977-1980; and/or Metropolitan Life Insurance Company's group policy #23874 for employees of El Paso City Lines, which expired 1-31-77.

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In addition, the testimony indicates that the Claimant, through no fault of his own, had no knowledge of the claims resolution procedure in Sections 14 and 15[2/] of the protective arrangements. Prior to the hearing the terms of the protective arrangements had not been adequately posted, nor had they been distributed to retired employees including this Claimant. Further, the Claimant and other employees (retired or active) had not been given notice of their rights to appeal claims to the City and then to the Secretary, and of the procedure for doing so. These conditions would justify Claimant's delay in bringing a claim as to the comparability of health insurance plans.

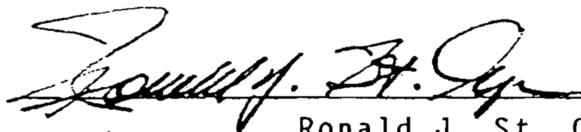
The provisions of Sections 14 and 15 of the certified protective arrangements place no greater burden on the Claimant than upon the Respondent. While the Claimant should not be prejudiced by inadequate notice of protections and procedures on Respondent's part, the Respondent has shown a substantial interest in resolution of this issue through the local 13(c) claims procedures. In consideration of the potentially large impact of this benefit question, it is appropriate to allow further opportunity for the parties to pursue the matter through local procedures. Therefore, if the Claimant now desires to pursue the matter of comparability of health insurance benefits, he should raise the issue with the City at the first step

[2/] The 13(c) arrangement (Exhibit 1) refers to part of the dispute resolution procedures as "Section 16." Respondent testified that that numbering is incorrect and that it correctly should be referred to as "Section 15(b)" at the end of Section 15(a).

of the appropriate 13(c) claim resolution procedures. The City is to provide Claimant, upon request, with a clear and specific statement of the local steps to be followed in such claim.

This claim is sustained, except as noted above, and the settlement of the parties is affirmed as noted in satisfaction of the issues properly raised herein.

Dated this 29th day of May, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

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In re:

CAMPOS, et al. (Claimants)	)	
and	)	DEP Case No. 81-13c-10
THE CITY OF EL PASO (Respondent)	)	

Summary: Claimants previously had been subject to possible suspension or discharge for their damage to buses they drove. A new policy provided that drivers reimburse the City for a portion of such damage. The Claimants alleged that this worsened their employment conditions. The Secretary found no adverse effect on employment conditions, provided that reimbursement was not required in addition to suspension or dismissal for the same instance of damage. Reimbursement constitutes a lesser discipline than that which previously existed, if not applied in combination with other discipline.

DETERMINATION

JURISDICTION

This claim was submitted to the Department of Labor by letter dated September 15, 1980. Claimants are employees of the City of El Paso, Texas who seek a determination of their right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

In 1979, the City applied for four operating assistance grants for fiscal years 1977 through 1980 (UMTA Project numbers TX-05-4072, TX-05-4073, TX-05-4074 and TX-05-4075). In connection with these applications, the Department of Labor certified, on February 13, 1980, an employee protective arrangement dated January 3, 1980. The applicable Section 13(c) agreement provides for submission of disputes arising under the provisions of that arrangement to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor, under that agreement. This decision is only an interpretation of the particular terms of the employer's 1980 Protective Arrangement. That arrangement may be somewhat broader than would be necessary to satisfy the minimum protective requirements under Section 13(c) of the Urban Mass Transportation Act.

Background

Prior to January 1980, the Claimants were employed by El Paso Transit Services Company, Inc., a private corporation which provided management services and personnel for the operation of the City's mass transit system between 1977 and 1980. In January 1980 the City ended its contractual relationship with El Paso Transit Services and began direct operation of the mass transit system. At that time, the City

hired most El Paso Transit System employees as City employees. Each claimant in this case became a City employee in January 1980, and was an employee of El Paso Transit System previously.

Claimants contend that they have been adversely affected by the introduction of a new policy covering damage to buses. Before the City of El Paso took over direct operations of the bus system, employees were subject to discipline or dismissal for damage that they cause to buses. In January 1980, however, the City informed bus operators that they would be required to reimburse the City for damage to buses caused by their negligence. In September 1980, this policy was revised to require payment for only a percentage of those damages.

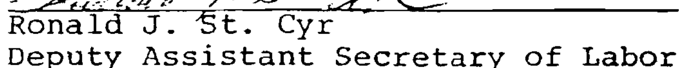
The City maintains that it is management's prerogative to require employees to pay for damage to buses which is caused through their negligence. Moreover, the City believes that such a policy does not constitute a reduction in benefits or a worsening of working conditions.

Decision

Although employees were not explicitly required by El Paso Transit Services Company to pay for damages to buses, they were subject to disciplinary action, including penalties of suspension and discharge, for accidents or damage caused by

their carelessness, negligence, or the violation of the Company's rules. Similarly, City transit employees may now be suspended or discharged for accidents or damage resulting from their negligence. The City's present policy of assessing an employee for a percentage of damages is a penalty less adverse to the employee than discharge, even in economic consequences, and may be less severe than suspension. As such, it falls within the purview of the El Paso Transit system's general policy, in that the financial impact on the employee of dismissal or other discipline could easily equal or exceed that arising from a simple reimbursement requirement. The City has merely added a lesser, alternative penalty to the disciplinary structure already in place, provided that the reimbursement alternative is not applied in conjunction with dismissal or other disciplinary action for an instance of bus damage. If this provision is followed by the City (there is no evidence to the contrary), then the working conditions have not been worsened and this complaint is denied.

Dated this 24th day of June, 1983
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

LILY FLORES
(Claimant)

and

THE CITY OF EL PASO
(Respondent)

DEP Case No.
81-13c-20

Summary: The employee sought dental and life insurance benefits comparable to those received before Respondent took over direct control of transit operations from her former employer. Respondent made a cash payment in lieu of the lost dental and life insurance benefits. Claimant failed to demonstrate that the reimbursement was insufficient to purchase comparable insurance. The lost benefits had a readily ascertainable economic value and reimbursement was a fair and equitable substitute for the benefits.

DETERMINATION

This claim was submitted to the Department of Labor by letter dated September 15, 1980. Claimant is an employee of the City of El Paso, Texas who seeks a determination of her right to protections under a Section 13(c) employee protective arrangement. She is represented in this matter by Local 1256, Amalgamated Transit Union. The applicable Section 13(c) employee protective arrangement of January 3, 1980 provides for submission of disputes arising under the provisions

of that protective arrangement to the City of El Paso Claims Committee with provision for appeal to the El Paso Civil Service Commission. The protective arrangement further provides for appeal of the Commission's decision to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor.

As an employee of El Paso Transit Services, Inc., from July 1978 to January 1980 Claimant received dental insurance and $32,000 in term life insurance, paid for by her employer. When the City of El Paso assumed the transit functions of El Paso Transit Services, Inc., in January 1980, Claimant was employed by the City of El Paso. As a City employee Claimant receives $6,000 in term life insurance, paid for by the City. No dental insurance is provided for Claimant by the City.

By letter of March 27, 1980 the City of El Paso Claims Committee advised Claimant that she would be reimbursed by the City for the lost dental and life insurance benefits. The Claims Committee reaffirmed its decision by letter dated July 29, 1980. Claimant appealed the decision to the El Paso Civil Service Commission. By letter of September 5, 1980 the Commission affirmed the decision of the Claims Committee. Claimant then made the instant appeal to the Secretary of Labor for final and binding determination.

A hearing was held on Claimant's appeal by a representative of the Department of Labor on June 1, 1981. At the hearing the City's attorney represented, and Claimant confirmed, that payment for the lost benefits has been made by the City and accepted by Claimant. Claimant, however, stated

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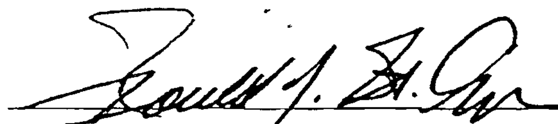
that she did not want the cash payment, which she was willing to return, but rather wanted the City to provide insurance substantially the same as that which she received as an employee of El Paso Transit Services, Inc. In her written claim she stated that she could not buy dental insurance for the amount paid to her by the City as reimbursement for the loss of such insurance. However, no attempt was made by Claimant or her representative to demonstrate that the reimbursement was insufficient.

In Behuniak & Connecticut Transit Management, Inc., (DEP Case No. 77-13c-34, November 14, 1980) the Department of Labor determined that Connecticut Transit Management had the option of either providing to Claimant an employer-furnished automobile or reimbursing Claimant for the loss of that fringe benefit. In the instant case, as in Behuniak, the lost benefit has readily ascertainable economic value, and reimbursement is a fair and equitable substitute for the benefit lost. I find that the City of El Paso had the option of either providing Claimant with insurance or compensating her for the loss of such insurance. As reimbursement has been made to Claimant, and as Claimant has not demonstrated that the reimbursement was insufficient to compensate her for the benefit lost, the decisions of the City of El Paso Claims Committee and the Civil Service Commission are affirmed.

Dated this 15th day of December, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

LOURDES PENA (Claimant) and THE CITY OF EL PASO (Respondent)	DEP Case No. 81-13c-21

Summary: Claimant alleged she was improperly denied a dismissal allowance when she refused a job which was not comparable to her previous employment. It was found that Claimant failed to exercise due diligence in obtaining other employment with the City by refusing the temporary position offered to her. Her defense that the refused job was not comparable to her previous job was not factually supported. This claim was denied.

DETERMINATION

This claim was filed with the Department of Labor by letter dated January 26, 1981 from Local 1256, Amalgamated Transit Union, on behalf of the Claimant, Lourdes Pena. The claim seeks a determination of disputed entitlement to employee protections under the provisions of "Protective Arrangement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended" (Protective Arrangement)

executed January 3, 1980 by the City of El Paso. This Protective Arrangement was certified by the Department of Labor on February 13, 1980 as providing the protection required by Section 13(c) for Department of Transportation grant number TX-05-4075, among others, under the Urban Mass Transportation Act.

Section 15 of the Protective Arrangement provides a procedure for resolution of disputes arising thereunder. The claim had been initially filed February 21, 1980 at the first step of this dispute resolution procedure, the 13(c) Claims Committee of El Paso. The Claims Committee denied the claim by letter of June 4, 1980. The matter was then appealed to the second step of the procedure, the City's Civil Service Commission. Following denial at this level, the claim was referred to the Secretary of Labor, the third and final step of the dispute resolution procedure. The Department heard the case June 2, 1981 in El Paso.

Issue

Was the Claimant's refusal of an employment offer justified on the basis of non-comparability of employment? Was the Claimant improperly denied a dismissal allowance and other benefits under the Protective Arrangement following termination of her employment February 15, 1980?

Findings of Fact

The Claimant was hired as a maintenance clerk August 28, 1978 by the El Paso Transit Services Company, Inc. (the Company), a private Texas corporation. This private corporation had full responsibility for operation of El Paso's transit system, including the hiring and firing of personnel. The Company employees were not subject to the City's Civil Service system nor to other State or municipal personnel rules and regulations. When the City took over operation of the transit system from the Company on or about January 15, 1980, all Company employees were employed ("transitioned") by the City, except this Claimant. Section II(1) of the City's Protective Arrangement states the City's intent to employ or otherwise protect those employees of the Company:

> *The El Paso Transit Company employees shall be transitioned into employment with the City of El Paso utilizing the City's Civil Service procedures. It is the intent of the City to assure, and it does hereby assure the continued employment of the El Paso Transit employees covered by this agreement. However, should the transition result in dismissal or displacement of any said employee, the employee shall be entitled to compensation under the terms and conditions set out below.*

As with all other office personnel of the Company, the Claimant was continued in the Company's employ until February 15, 1980. Shortly prior to her loss of employment she was given several municipal Civil Service tests. She did not obtain a passing score on any of these tests. The City's Civil Service Rules required that all employees pass a Civil Service test before being hired.

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The City had arranged interim employment for the Claimant when her job with the Company terminated on February 15, 1980. The interim job was that of toll collector on an international bridge between El Paso, Texas and Juarez, Mexico. The Claimant testified that she had initially accepted the temporary job but declined it the following day prior to the time she was scheduled to report for work. On February 21, 1980 the Claimant filed her request for employee protections with the City's 13(c) Claims Committee in accordance with the dispute resolution procedures of the 13(c) Protective Arrangement. The Claims Committee based its June 4, 1980 denial of this claim on the Claimant's refusal of employment as a toll collector:

> *The Claims Committee, having reviewed and conferred with you on your claim, is of the opinion that your claim must be denied because you have failed to comply with the provisions of the City's §13(c) Protective Arrangement §9(b), a copy of which is attached, by refusing to exercise "due diligence" in obtaining another position with the City.*
>
> *As you will recall, the Committee arranged a temporary position as toll collector for you at the same wage as you formerly had received with El Paso Transit Services, Inc. This position was to be temporary until you successfully passed an examination for a permanent City position. However, you refused to accept said employment. By your refusal, you failed to exercise "due diligence". You were advised repeatedly by this Committee that your refusal to accept this position would result in violation of the §13(c) Protective Arrangement and that the City would have no obligation to compensate you for your loss of your job.*
>
> *Therefore, based on these facts, your claim is denied.*

The denial was upheld by the Civil Service Commission at step two of the claims procedure and the claim then was filed with the Department of Labor.

Discussion

Among the terms and conditions of the Protective Arrangement, Section II(9)(b) imposes a requirement that an employee exercise due diligence in obtaining other employment in order to become eligible for a dismissal allowance:

> *(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position he holds is either abolished as a result of the Project and he is unable to obtain another position by the exercise of his seniority rights within the City or the Company or by due diligence (at a minimum, due diligence shall mean that the employee must apply for any position within the City's Civil Service for which he is qualified and which pays an equal or better compensation). Further, with the Company, an employee shall be regarded as dismissed when the position he holds is not abolished but he loses that position as a result of the exercise of seniority rights by other employees brought about as a result of the Project. An employee shall not be regarded as dismissed, however, if he is dismissed for cause, or voluntarily resigns or retires.*

At the hearing the Claimant testified in a general manner that she refused the offered employment because it required working outdoors, shift work, and the handling of money which she believed could lead to robbery attempts endangering her safety. She believed the job was not comparable to her former job as a maintenance clerk and that she was not required to accept employment which was not comparable.

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The Protective Arrangement does refer to comparable employment in reference to an employee's obligation thereunder. Section II(9)(d) provides that:

> *(d) An employee receiving a dismissal allowance shall be subject to call to return to service by the Company or City after being notified by the Company or by the City in accordance with the terms of Civil Service procedures; and such employee may be required to return to service of the Company or City for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, as hereinafter defined, if his return does not infringe upon the employment rights of other employees of the Company or City.*

Whereas paragraph (9)(b) pertains to establishing eligibility for a dismissal allowance, paragraph (9)(d) pertains to continuation of a dismissal allowance already in effect. Moreover, paragraph (9)(d) represents a standard condition contained in many protective arrangements and whose substance is included in the Model 13(c) Agreement. This standard condition is only one of several conditions an employee must meet under El Paso's Protective Arrangement, however. There is nothing to indicate that the matter of comparability is to be read into paragraph (9)(b) where it does not appear. Since paragraph (9)(b) contains conditions which have been specifically developed for the El Paso Protective Arrangement, it should be given at least equal weight, if not preferred weight, in comparison to the more standard provisions of paragraph (9)(d). Therefore, I find that the defense that the

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refused job was not comparable to the Claimant's previous job does not apply to paragraph (9)(b) and does not excuse the refusal of the job as toll collector.[1/]

The City has endeavored in good faith to protect this Claimant according to the terms of its Protective Arrangement which requires substantial compliance with Civil Service procedures. While not raised as a defense by the Claimant, testimony at the hearing brought out the fact that the toll-collector job is not strictly a "position within the City's Civil Service" as referred to in Section (9)(b)'s description of minimal due diligence. The job of toll collector is filled through a private company which provides toll collectors for the City under contract. As such, the job does not require Civil Service standing as do positions in the employ of the City. The City was able to arrange a job offer with the subcontractor, however, in order to keep the Claimant employed at her same salary following termination of her former job, until she could achieve a satisfactory score on a Civil Service examination. The City had administered at least four examinations to the Claimant prior to February 15, 1980 and had indicated that she could take additional examinations as soon as they were available, while continuing temporary employment as a toll collector.

[1/] While a rule of reason may suggest that an employee need not exercise "due diligence" under paragraph (9)(b) to the point of accepting a clearly dissimilar job, the Claimant's former job of maintenance clerk and the refused job of toll collector have not been shown to be dissimilar, even though they were alleged not to be comparable in some respects.

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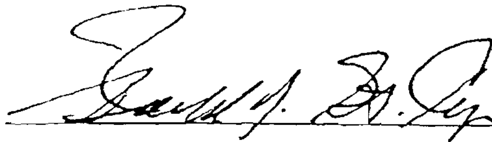
The Claimant's only comment on the examination process was that one of the examinations she had taken was for the position of information clerk which was not the same job as her former position of maintenance clerk.

The obligation of due diligence imposed by Section (9)(b) has a primary purpose of minimizing the City's need to make payments of dismissal allowances in lieu of continued employment of the affected employees. This reflects the general purpose of the 13(c) protections, to provide continued employment whenever possible and to provide cash allowances only when continued employment is not available or is inadequate. Since Claimant had not qualified for Civil Service employment it would accomplish little here to interpret the due diligence obligation literally as applying only to Civil Service positions. This and other obligations must be read in the context of the entire Protective Arrangement. The City provided a reasonable alternative to the unattainable minimal obligation. The Claimant did not show that she was unable to perform the job nor did she factually support her allegation of noncomparable employment or the threat to her safety. While it would not be appropriate to permit Civil Service procedures to bar the protections to which an affected employee otherwise is entitled, no such bar has been shown here. Therefore, I find it incumbent upon the Claimant to have cooperated in the City's efforts to continue her employment on a temporary basis while the parties pursued compliance with Civil Service procedures.

The Claimant has failed to meet the conditions of paragraph (9)(b), as stated in the response of the Claims Committee at step one of the procedure. Therefore, this claim is denied.

Dated this 9th day of March 1982
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

A-310

UNITED STATES DEPARTMENT OF LABOR

In re:

MARVIN TYLER (Claimant) and THE CITY OF EL PASO (Respondent)	DEP Case No. 81-13c-24

Summary: Claimant sought continuation of the vacation schedule of his previous employer following Respondent's assumption of transit operations. Respondent indicated that it had fulfilled its obligations to Claimant by providing appropriate financial remuneration in lieu of the paid vacation time Claimant would have received from his former employer. It was determined that the monetary compensation provided by the City would not sufficiently compensate Claimant for the actual paid time off which he had been able to use for his own pleasure and convenience. This claim was upheld.

DETERMINATION

This claim was submitted to the Department of Labor by letter dated September 15, 1980. Claimant is an employee of the City of El Paso, Texas who seeks a determination of his right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

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In 1979, the City applied for four operating assistance grants for fiscal years 1977 through 1980 (UMTA Project Numbers TX-05-4072, TX-05-4073, TX-05-4074 and TX-05-4075). In connection with these applications, the Department of Labor certified, on February 13, 1980, an employee protective arrangement dated January 3, 1980.

The applicable Section 13(c) employee protective arrangement provides for submission of disputes to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor.

Findings of Fact

Claimant first worked as a mass transit employee of the private bus company, El Paso City Lines, in July 1949. He continued in the employ of El Paso City Lines until January 1977 at which time the City purchased the assets of El Paso City Lines together with the assets of two other private bus companies. At the time of the acquisition the City contracted with El Paso Transit Services, a private company, for management services and personnel for the City's mass transit system. Claimant was hired by El Paso Transit System in January 1977. In January 1980 the City ended its contractual relationship with El Paso Transit Services and began direct operation of the transit system. On or about January 15, 1980 Claimant was employed by the City as a mass transit employee.

As a City employee Claimant is entitled to vacation leave with pay according to the following schedule:

Years of Service	Days of Vacation
1-14 years	1 day per month or 12 days per year from anniversary date.
15 years or more	1-5/12 days per month or 17 days per year from anniversary date.

The City recognizes only years of service with the City for purposes of computing vacation leave.

As an employee of El Paso Transit Services, Claimant had the following vacation schedule:

1 week after 1 year of service
2 weeks after 2 years of service
3 weeks after 12 years of service
4 weeks after 25 years of service
5 weeks after 30 years of service

For purposes of computing vacation leave El Paso Transit Services recognized both years of service with El Paso Transit Services and years of service with its three predecessor mass transit companies.

A dispute has arisen over whether the City can provide the Claimant with monetary compensation in lieu of certain accrued vacation days. Section II(15) of the protective arrangement provides a procedure for resolution of disputes that arise under the terms and conditions of that arrangement. Using this procedure, Claimant filed a claim with the El Paso Claims Committee on January 31, 1980.

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The Claims Committee held as follows:

> *Vacation: The City's Sec. 13(c) Protective Arrangement provides that all rights, privileges and benefits shall be preserved; provide, however, that any such rights, benefits and privileges may be improved, changed, or added so long as there is no denial of accrued rights. Paid vacation is a benefit. At the time of transition, you were entitled to 25 days of paid vacation. Under the City's policies you will be entitled to 13 days of vacation (time off with pay) and to 13 extra days of pay.*
>
> *This pay shall be in addition to the salary you receive for working those days. The end result is an increase in monetary benefit over your accrued vacation benefit with El Paso Transit Service, Inc.*

Claimant appealed this decision to the El Paso Civil Service Commission which upheld the decision. Claimant then made the instant appeal to the Department of Labor.

Discussion

A hearing was held in this case by a representative of the Department of Labor on June 2, 1981. At that hearing Claimant stated that he was not satisfied with payment in lieu of paid vacation. He asserts that he is entitled to five weeks of paid vacation. The City argues that vacation is an economic benefit for which monetary compensation can be made. The City represented that it pays Claimant for the 13 extra days that he would have received under the El Paso Transit Services plan and that it will continue to do so for the duration of his six-year protective period. This, the City argues, fully discharges its obligation under the terms of the protective arrangement.

The City asserts that the Department has established a precedent in the case of Lendsey et al. v. Seaboard Coast Line Railroad, DEP Case No. 74-C1-1, which permits payment in lieu of time off. In that case, however, the claimant was no longer employed by the named respondent but by a new, separate employer. The new employer was not party to the claim nor to the protective arrangement and was under no obligation to preserve or continue that claimant's vacation benefit or any other conditions of employment. The respondent in Lendsey, as the liable employer, no longer had any control over the claimant's vacation or work schedules. When the new employer did not make the time available without pay, the respondent in Lendsey could not provide the protected vacation benefit in the form of paid time away from work. In that situation the remedy of compensation in lieu of the protected time off with pay was the most reasonable, available approach. Such is not the case here as the facts, and the obligation of the instant Respondent, are distinguishable from those in Lendsey. The City of El Paso has the ability to make the disputed vacation time available.

Decision

Under the City's vacation schedule, the Claimant is clearly worsened by the loss of 13 days each year of paid time off that he had been able to use for his own pleasure and convenience. Had he remained under the El Paso Transit Services schedule he would have received 25 days of vacation

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leave each year. During his protective period he is entitled to take vacations of the same duration and should be compensated at his protected level of pay, Civil Service regulations notwithstanding.

The Claimant's protective period is determined by his combined years of service with El Paso Transit Services and preceding mass transit companies, with a maximum length of six years. In this claim the protective period of the Claimant would run from the date of the worsening of vacation benefits in January 1980 through January 1986.

With respect to vacation days not taken in 1980 and 1981, but paid for by the Respondent, the Claimant may elect one of the following options:

1) The Claimant may recapture all or part of the 26 days of "lost" vacation time for which the City has compensated him by signing up, pursuant to City procedures, for up to 26 additional vacation days without pay over the remainder of his protective period, or

2) he may forego the "lost" days, accepting the payment already rendered by the City.

The Claimant should inform the City within 60 days of the date of this determination what his election will be with respect to vacation due in 1980 and 1981.

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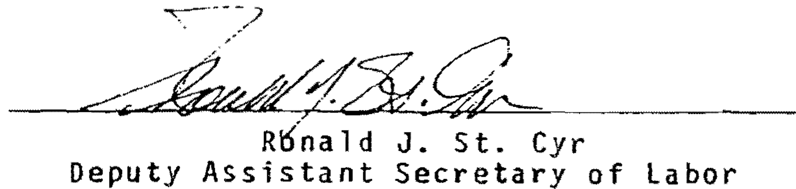
The Claimant should be permitted to sign up for 25 days of paid vacation per year throughout the remainder of his protective period. He will be compensated for these 13 additional vacation days each year at his protected level of pay at the time of the vacation. Such protected level should be adjusted to reflect any subsequent general wage increases.

Dated this 17th day of June, 1982
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

A-338

UNITED STATES DEPARTMENT OF LABOR

In re:

BUSTAMANTE ET AL. (Claimants) and THE CITY OF EL PASO (Respondent)	DEP Case No. 81-13c-4

Summary: Claimants sought continuation of the vacation schedule of their previous employer following assumption of transit operations by Respondent. The Claimants had not shown any worsening of their vacation leave entitlements during their protective period under Respondent's vacation schedule. The claim was dismissed.

DETERMINATION

This claim was submitted to the Department of Labor by letter dated September 15, 1980. Claimants are employees of the City of El Paso, Texas who seek a determination of their right to protections under a Section 13(c) protective arrangement. Claimants are represented in this matter by Local 1256, Amalgamated Transit Union. The applicable Section 13(c) employee protective arrangement of January 3,

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1980[1/] (the protective arrangement) provides for submission of disputes arising under the terms of that arrangement to the City of El Paso Claims Committee with appeal to the El Paso Civil Service Commission. The Agreement further provides for appeal of the Commission's decision to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor.

From January 1977 to January 1980 Claimants were employed by El Paso Transit Services Company, Inc., a private company that provided management services and personnel for the operation of the City of El Paso's mass transit system. As employees of El Paso Transit Services, Claimants had the following vacation schedule:

1 Week After 1 Year of Service
2 Weeks After 2 Years of Service
3 Weeks After 12 Years of Service
4 Weeks After 25 Years of Service
5 Weeks After 30 Years of Service

For purposes of computing vacation leave El Paso Transit Services recognized both years of service with El Paso Transit Services and years of service with its three predecessor mass transit companies.

[1/] Employee protective arrangement executed by the City of El Paso January 3, 1980. This arrangement was certified by the Department of Labor on February 13, 1980 for projects TX-05-4072, TX-05-4073, TX-05-4074, TX-05-4075, and TX-05-0054.

In January 1980 the City ended its contractual relationship with El Paso Transit Services and began direct operation of its mass transit system. At that time the City hired most El Paso Transit System employees as City employees. All of the Claimants in this case became City employees in January 1980.

As City employees Claimants are entitled to vacation leave with pay according to the following schedule:

Years of Service	Days of Vacation
1-14 years	1 day per month or 12 days per year from anniversary date.
15 years or more	1 5/12 days per month or 17 days per year from anniversary date.

The City recognizes only years of service with the City for purposes of computing vacation leave.

Claimants assert that they are entitled, under the terms of the protective arrangement, to continuation of the El Paso Transit Services vacation schedule. Claimants presented their claims to the City of El Paso Claims Committee in February 1980. The Claims Committee held[2/] as follows:

> *VACATION: Section 13(c) requires that all rights, privileges and benefits be preserved. As of the date of transition you are entitled to ten (10) working days vacation per annum. The*

[2/] Decision of El Paso Claims Committee, as contained in letters to individual claimants dated March 14, 1980.

> *City of El Paso not only preserved, but also increased this benefit by providing to you twelve (12) working days per annum. Any claim of prospective benefits which you may have acquired had you continued your employment with El Paso Transit Services, Inc., but which were not vested as of the date of the transition, is at best merely a speculation and is not subject to 13(c) protection.*

On appeal, the El Paso Civil Service Commission upheld the decision of the Claims Committee.[3/] The Claimants then made this appeal to the Department of Labor.

Protections are extended to an individual employee under the terms of the protective arrangement for the duration of the individual's protective period.[4/] The length of an employee's protective period is determined by his combined years of service with El Paso Transit Services and preceding mass transit companies, with a maximum length of six years. In this claim the protective period of each Claimant would run from the date of the alleged worsening of vacation benefits in January 1980. The maximum possible protective period of six years would provide protection of vacation benefits through January 1986.[5/]

[3/] Decision of Civil Service Commission, dated September 5, 1980.

[4/] See Section II(8)(b) of the January 3, 1980 protective arrangement for duration of protective period. See also Behuniak and Connecticut Transit Management, DEP Case No. 77-13c-34 for applicability of protective period to fringe benefits.

[5/] Claimants Bustamante, Chavez and Coronado each qualify for a six-year protective period. Claimants Campos and Levario qualify for less than the six-year maximum.

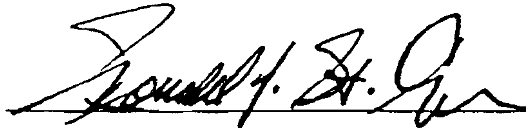
Based on their years of service as mass transit employees, each Claimant was entitled to ten days vacation leave per year under the El Paso Transit Services schedule at the time he became a City employee. Of all the Claimants, Mr. Bustamante had the greatest number of years of service as a mass transit employee. Had he remained under the El Paso Transit Services vacation schedule he would have received 10 days of vacation leave per year for 1980 through 1983, and 15 days per year for 1984 and 1985, being a total of 70 days. The other four Claimants would have each received less than 70 days vacation leave during this period, because they each had fewer years of mass transit service[6/] than Mr. Bustamante. As City employees each Claimant will receive 12 days per year vacation leave over this same six-year period, being a total of 72 days of vacation leave.

The City allows accumulation of up to 25 days of vacation leave before any leave is lost. Each Claimant can, at his option, time his use of leave to parallel the way that he would have received leave under the El Paso Transit System's leave schedule by using 10 days leave per year for 1980 through 1983 and using the accumulated 8 "extra" days together with regular annual leave to take 15 days leave per year in 1984 and 1985. Thus each Claimant has the option of receiving in each year of his protective period the same number of days vacation leave that he would have received in such year under the El Paso Transit System's vacation schedule.

[6/] Claimants began mass transit employment in El Paso on the following dates: Bustamante (9/10/71 with Lower Valley), Campos (5/10/74 with Lower Valley), Chavez (7/3/73 with Lower Valley), Coronado (11/13/73 with Lower Valley) and Laverio (8/14/78 with El Paso Transit Services).

To state a claim for loss of fringe benefits under an applicable Section 13(c) protective arrangement an employee must state facts sufficient to show that the fringe benefit or benefits in question have been worsened in some way. In this case each Claimant will receive, over the course of his protective period, more paid vacation leave than he would have received under the El Paso Transit Services plan. Furthermore, each Claimant can, at his option, allocate his use of annual leave so that he is no worse off in any given year of his protective period. Because Claimants have not shown any worsening of their vacation leave entitlements, they have failed to state a claim under the terms of the protective arrangement. The decisions of the City of El Paso Claims Committee and the El Paso Civil Service Commission are therefore affirmed.

Dated this 26th day of October, 1981
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR

In re:

GILBERT ARMENDARIZ, ET AL. (Claimants) and THE CITY OF EL PASO (Respondent)	DEP Case No.: 81-13c-7

Summary: Multiple claimants alleged worsening in several categories of wages, benefits and working conditions. Claimants sought pension benefit credit for prior service for which they had received an annuity. Respondent credited their prior service for purpose of vesting only. No worsening occurred. Respondent altered claimants' previous vacation benefits to conform to Respondent's vacation benefit schedule applicable to its other employees. Claimants were found entitled to their former level of vacation benefits for the duration of their protective periods. Claimants alleged a reduction in holiday pay rates but failed to show an actual worsening. Additionally, consideration was given to improvements in other aspects of holiday pay that may offset any potential adverse effect in this category. The final issue concerned the change in assignment from route inspector to bus operator experienced by one claimant. The wages and working conditions were found not to have been worsened, but denied of the claimant's seniority upon reassignment controvened the protective terms. These claims were denied in part and upheld in part.

DETERMINATION

JURISDICTION

These claims were submitted to the Department of Labor by letter dated January 26, 1981. The claimants are employees

and former employees of the City of El Paso, Texas who seek a determination of their right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. Claimants are represented in this matter by Local 1256 of the Amalgamated Transit Union.

The Department of Labor certified, on February 13, 1980, an employee protective arrangement dated January 3, 1980 in connection with four operating assistance grants received by the City. Claimants identified these grants for fiscal years 1977 through 1980 (UMTA projects TX-05-4072, TX-05-4073, TX-05-4074 and TX-05-4075) as supporting the transition which allegedly worsened their employment conditions.

This protective arrangement provides for submission of disputes arising under the terms of the arrangement to the City of El Paso Claims Committee, with appeal to the El Paso Civil Service Commission. This agreement further provides for appeal of the Commission's decision to the Secretary of Labor for final and binding determination. A hearing was held on June 1-2, 1981 in these matters, and this determination is now issued by the Secretary of Labor pursuant to the protective arrangement of January 3, 1980.

As a preliminary matter, the City has asserted that the Department of Labor does not have jurisdiction over the issues presented here by the claimants other than Mr. Armendariz. The City has objected to the appeal of these claims to the Secretary because they were not fully presented before the Civil Service Commission in a hearing scheduled December 16, 1980. Claimants' representative, however, notes that he requested the Civil Service Commission at that time to uphold the ruling of the Claims Committee without further discussion to avoid delays in processing the case. By letter dated December 18, 1980 from Samuel Navarro, Secretary to the Civil Service Commission, this request was granted. The letter states:

> *The Commission's decision was based on your request that it not hear any testimony on the points in question and render a decision in favor of the Committee so that you could proceed with your complaint to the Department of Labor.*

No objection to this appeal was made in the letter and further testimony on these claims was not sought by the Commission. In this specific instance only, I find that the claimants have sufficiently satisfied the requirement that they exhaust preliminary appeal procedures before appealing to the Secretary. This matter is properly before the Secretary of Labor.

Issues

A dispute has risen with respect to the Claimants' entitlement to protections, under the 13(c) protective arrangement entered into by the City. Claimants seek protections in several areas. First, they cite a loss of benefits as a result of the takeover of transit operations by the city. Second, they seek a continuation of the vacation schedule utilized by El Paso Transit Services, Incorporated to avoid loss of paid vacation time. In addition, Claimants have indicated a worsening of their financial status as a result of changes in the City's holiday pay schedule. Finally, one claimant asserts that he has been placed in a position with the city which is not comparable to his job with El Paso Transit and that, as a result.he has suffered a loss of seniority rights and wages.

Background

Prior to January 1980, Claimant's were employed by El Paso Transit Services Company, Inc., a private corporation which provided management and personnel for the operation of the City's mass transit system between 1977 and 1980. In January 1980, the City ended its contractual relationship with El Paso Transit Services and began direct operation of the mass transit system. At that time, the City hired most El Paso Transit System

employees as City employees. All of the claimants in this case became City employees in January 1980.

Pension Benefits:

With regard to the issue of pension benefits, three claimants have alleged that their transition into City employment has resulted in a reduction of their anticipated pension entitlement. Each of these claimants was over 60 years of age on January 15, 1980 and was, therefore, excluded from participating in the City's pension plan. Each Claimant was vested in the El Paso Transit Services pension plan and began receiving an annuity under that plan subsequent to the hearing of this case.

The City passed an ordinance on February.2, 1981 extending retroactive pension coverage to former employees of El Paso Transit Services, including those over age 60 years. Under this ordinance employees over age 60 are given credit for the period of time they were employed by El Paso Transit Services and its predecessor transit companies for the purpose of computing length of service for vesting in the City's pension plan. These employees, however, are not given credit for previous transit employment for purposes of determining the dollar amount of any payment from the City's pension fund.

The City has clearly met its obligation to preserve the pension rights of Claimants by passing the ordinance of February 2, 1981. Although employees over age 60 may not count previous service for purpose of determining the amount of their pension payment, they have already received payment for such prior service in the form of an annuity from the El Paso Transit Services pension plan. The City need not duplicate benefits already received by claimants.

Claimants have not shown that their pension entitlements have been worsened by the City. Therefore, they have failed to establish a sustainable claim with respect to this benefit under the terms of the protective arrangement. This claim with respect to the issue of pension benefits is denied.

Vacation Policy:

A number of claimants have also asserted that their vacation benefits have been adversely affected as a result of the City's takeover of transit management. The vacation schedule of former El Paso Transit Services employees was altered to conform with the vacation schedule in effect for all other City employees. As a result, the vacation entitlement of a number of employees was reduced under the City's schedule. This issue was discussed in our decision in Tyler and the City of El Paso, DEP Case No. 81-13(c)-24, issued June 17, 1982. The circumstances set forth

in the instant claim parallel those in the aforementioned case. I find it unnecessary to recite that facts or the discussion of this issue as they essentially duplicate those in Tyler (copy attached).

Protections are extended to an employee under the terms of the Protective Arrangement for the duration of the individual's protective period. Each claimant in this case qualifies for a protective period of six years, extending from January 15, 1980 through January 15, 1986.

The City is directed for the duration of this protective period, to apply the principles set forth in Tyler to resolve the instant claim. This claim with respect to the issue of vacation benefits is upheld.

Holiday Pay:

The third issue raised by a claimant in this case is implementation of the City's holiday pay policy for former El Paso Transit system employees. Claimant maintains that former El Paso Transit Employees have been financially worsened under the City's holiday pay schedule. With respect to this allegation, it was found that El Paso Transit Services, Inc. had designated five legally observed holidays while the City provides for three additional legal holidays. Both employers paid claimants for

eight hours at their regular hourly rate if they did not work on holidays and eight hours at twice their regular rate if they did work on holidays. Hours worked in excess of eight on holidays were paid at twice the regular hourly rate by El Paso Transit Services, but are compensated at 1½ times the regular hourly rate (for time in excess of forty hours per week) by the City.

The claimant was not able to provide documentary evidence that he had worked in excess of eight hours on holidays with El Paso Transit Services. A typical employee here is not scheduled to work on a holiday or merely works a standard eight-hour schedule implemented by the City. The three extra days of holiday pay added by the City would more than compensate, should the instance arise, for the lower rate which the City pays employees working in excess of an eight-hour day on holidays.

Moreover, the claimant has not shown that the new holiday pay schedule implemented by the City has resulted in a worsening of his financial position. Indeed, he may well have benefited from the City's additional holidays. Claimant has failed to demonstrate that he is worsened by this change and, therefore, this claim with respect to the holiday pay schedule is denied.

Job Comparability:

The final issues arising from this claim relate to the demotion of one claimant from the position of route inspector for El Paso Transit Services to the position of bus operator for the City. Claimant began work in the transit industry in April of 1969 as a bus operator. He was promoted to route inspector November 12, 1978 and this was his position with El Paso Transit Services, Inc., in January 1980 when the City took over management of the transit system.

In January 1980, when the claimant was hired by the City, it was as a bus operator at $5.33 per hour, an increase of $.14 over his wage with El Paso Transit Services. Claimant had taken Civil Service tests for positions as both route inspector and bus operator. The City indicated that the Claimant was #10 on the list for route inspectors following his exam and that he could not be reached within the guidelines and regulations of the Civil Service policy. He was, therefore, hired as a bus operator. Claimant was mistakenly used as a route inspector by the City until April 16, 1980 when he was reassigned to his correct position as bus operator. His duties and working conditions changed as a result of this move. The City contends that, although there was a change, there was no worsening of claimant's working conditions. In testimony before the Civil Service Commission on December 16, 1980 City representatives indicated

that the claimant, both as a bus operator and a route inspector "had a split shift, that he did not have Saturdays and Sundays off, that he had days off in the week instead..." (p. 7) Further, the City indicated that the route inspector job is more stressful than that of bus operator because of the added responsibility involved. Claimant, however, stated that the bus operator position involves more pressure.

In addition to general working conditions, the claimant's seniority has been affected by his transfer to the bus operator position. Claimant's seniority date with El Paso Transit Services, Inc., was November 12, 1978, the date he was promoted to his position as route inspector. Claimant retained no seniority rights as a bus operator following his promotion by El Paso Transit Services. Had he been demoted to bus operator during his tenure with El Paso Transit Services for whatever reason, he would have been placed at the bottom of the seniority roster.1/

With respect to the issues arising out of claimant's demotion to the position of bus operator, the City has met its obligation under Section II(7) of the Protective Arrangement of

1/ The seniority provisions honored by El Paso Transit services are contained in the 1974 agreement between El Paso City Lines Incorporated, and Division No. 1256 of the Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America.

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January 3, 1980 to continue claimant's compensation at a level at least equivalent to that he received with El Paso Transit Services. Moreover, the City has continued to extend those subsequent wage increases to claimant which are applicable to City employees in general. There has been no wage loss as a result of the transition. Although other individuals hired as route inspectors may have benefited more than claimant as a result of the takeover, his entitlement is to a continued level of compensation and not to parity with other employees. This claim with respect to the alleged loss of wages is denied.

Similarly, claimant is entitled to reasonably comparable working conditions but not necessarily to an equivalent position in terms of responsibility under this Protective Arrangement. Section II(1) of this arrangement states the City's responsibility to employ or otherwise protect former employees of El Paso Transit:

> *The El Paso Transit Company employees shall be transitioned into employment with the City of El Paso utilizing the City's Civil Service procedures. It is the intent of the City to assure, and it does hereby assure the continued employment of the El Paso Transit employees covered by this agreement. However, should the transition result in dismissal or displacement of any said employee, the employee shall be entitled to compensation under the terms and conditions set out below (Emphasis added.)*

Claimant did not quality for this former position under Civil Service provisions and personnel procedures. Under Section II(9)(b) of the agreement the claimant was then obligated to exercise due diligence to obtain another position with the City by applying for "any position within the City's Civil Service for which he is qualified and which pays an equal or better compensation." As a result, the City was able to hire claimant as a bus operator and thus assure him continued employment as required by the agreement. Claimant's petition for placement in his old position as route inspector is, therefore, denied.

The City's attempts to meet their obligation to preserve claimants working conditions requires some examination. Clearly the working conditions have changed. Claimant, however, has not established that his working conditions have been worsened. His hours are similar, his workdays are similar, both jobs entail some degree of pressure and responsibility and physical demand. We are not persuaded that claimant has suffered a worsening of his working conditions.

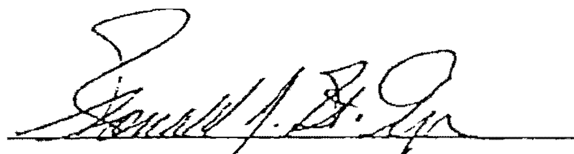
The City has an obligation to preserve seniority rights under Section II(7) of the agreement. Before transition into City employment, claimant's seniority rights were determined in accordance with his date and time of employment in his position as route inspector. His seniority date, therefore, was

established as November 12, 1978 by El Paso Transit Services, Inc. He retained this seniority date until he was placed in the position of bus operator on April 16, 1980.

The Protective Agreement does not entitle claimant to recapture seniority he had previously accumulated as a bus operator from 1969-1978. However, the City still has an obligation to preserve claimant's seniority rights existing as of January 15, 1980. To accomplish this, the City is to integrate claimant's seniority date of November 12, 1978 with the seniority roster established for bus operators. This seniority date is to be used for the selection of transit runs and the choice of vacation dates. The City shall continue to utilize the provisions in Article VI, Section 5 of the Civil Service Commission Charter Provisions and Rules and Regulations (October 28, 1977) with respect to computation of seniority credit for purposes of promotion examinations. Protections need be extended to an employee under the terms of the Protective Arrangement for the duration of the the individual's protective period. In this claim the protective period would extend from April 16, 1980 through April 16, 1986. Claimant's seniority rights must be restored for the duration of that period.

The claims presented herein are upheld in part and denied in part, as specified above.

Signed this 8th day of August, 1983
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary

Luis Lujan v. The City of El Paso
DSP Case No. 81-13c-8
April 13, 1984
(Page A-379)

Summary: The Claimant alleged that his employment position was worsened when the City denied him general cost-of-living increases granted to other employees after it acquired three private bus companies in 1977. The Claimant sought retroactive cost-of-living (COL) increases for the years 1977, 1979 and 1980, plus future COL increases. The City maintained that prior to 1980, it had no responsibility for wage increases denied the Claimant while he was in the employ of a private management company under contract to the City. Post-1980, the City asserted that the Claimant's salary had not been worsened because his salary was greater than that paid before the City became the direct operator of the transit system, and he was at the top of the civil service pay scale. The Department determined that the presence of a management agent, *per se*, did not present any basis for the transfer of the City's protective responsibilities, which in this case required the payment of COL increases until 1986. Furthermore, the Department determined that the Claimant had been worsened by the City's decision to freeze his salary after acquiring his private bus company employer. Finally, finding that the civil service pay scale could not serve as a bar to the City's obligations under the Department's certification, the Claimant was awarded the wage increases retroactively, plus all future COL increases due during his protective period.

UNITED STATES DEPARTMENT OF LABOR

In re:

LUIS LUJAN (Claimant) and THE CITY OF EL PASO (Respondent)	DEP Case No. 81-13c-8

DETERMINATION

Jurisdiction

This claim was submitted to the Department of Labor by letter dated February 2, 1981. The claimant is an employee of the City of El Paso, Texas who seeks a determination of his right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

In 1977, the City of El Paso acquired three private bus companies with Federal financial assistance (Grant No. TX-03-0028) under the Urban Mass Transportation Act of 1964, as amended. As a condition of receiving that Federal financial assistance, the City agreed to be responsible for "any deprivation of employment or other worsening of employment as a result of the project [i.e., the acquisition]." The City also agreed that any employee so worsened "shall be entitled to receive any applicable rights, privileges and benefits as specified in the employee protective arrangement certified by the Secretary of Labor under Section 405(b) of the Rail Passenger Service Act of 1970 on April 16, 1971" [Appendix C-1]. The City further agreed that any disputed claim with respect to these employee protections may be submitted to the Secretary of Labor for a final determination. These and other conditions are set forth in the Assistant Secretary's letter of April 1, 1976 wherein the project and the Federal grant were certified as providing fair and equitable employee protections, as required by Section 13(c) of the Act.

In 1979, the City applied for four operating assistance grants for fiscal years 1977 through 1980 (grant numbers TX-05-4072, TX-05-4073, TX-05-4074 and TX-05-4075). In connection with these applications, the Department of Labor certified, on February 13, 1980, an employee protection arrangement executed by the City on January 3, 1980. That employee protection arrangement provides for submission of disputes arising under the provisions of the arrangement to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor pursuant to those arrangements.

This claim is similar to that of Hector Hernandez and the City of El Paso, DEP Case Number 81-13c-9. The two cases were heard jointly and Hernandez was issued April 22, 1983. That decision is attached hereto and incorporated herein.

Issue

The claimant seeks "cost-of-living" back-pay retroactive to September 1, 1977. This includes 8% annual increases in his salary for the years 1977, 1979, and 1980 which were denied him but given to other employees. He also seeks a job reclassification in order that he may receive future cost-of-living raises beginning with 1981.

Statement of Facts

This case was heard May 8, 1981 in El Paso, Texas. The parties stipulated that the Department of Labor has jurisdiction to render a final and binding determination of this dispute. Prior to the City's 1977 acquisition of three local private bus companies, the claimant held the position of office manager with Lower Valley Bus Company. He had been employed there from 1965 until the City's acquisition in 1977. At the time of the acquisition he became an employee of El Paso Transit Services, Inc., a private Texas corporation which provided management services and personnel to operate the newly consolidated transit system recently acquired by the City. At that time the position of office manager was encumbered and the claimant was assigned to the position of payroll and information clerk. In 1978 he was reassigned by El Paso Transit Services to the position of office manager.

The claimant received a cost-of-living increase in his salary September 1, 1978, as did other El Paso Transit Services employees. In 1977 and 1979 he was denied the September 1 general cost-of-living increases granted to most other employees of the transit system management agent, El Paso Transit Services. During this period the claimant's salary remained unchanged except for the 1978 cost-of-living increase.

In January 1980, the City terminated the services of its transit management agent, and, with Federal financial assistance, began direct operation of its Sun City Area Transit system. At that time the claimant and virtually all other transit employees were placed under the City's Civil Service System. The claimant was reclassified as an accounting clerk but his salary remained unchanged. When the City implemented a general cost-of-living increase in pay for its employees, the increase was denied to the claimant because his rate of pay already was at the top of the pay range for his assigned job classification in the City's pay scale.

Discussion

The City would separate this claim into two parts: (1) before the City's January 1980 transition of the transit system into direct operation by the City, and, (2) after the 1980 transition. The City reasons that it had no responsibility for this claim prior to 1980 because it did not manage the employees. The City argues that El Paso Transit Services, the private management corporation, was responsible for personnel, pay, and related matters from 1977 to 1980 and that any claim for adverse affects must be brought solely against El Paso Transit Services. The City further asserts that there has been no worsening of the salary of the claimant because at no time was his salary during 1977-1979 less than his salary with Lower Valley Bus Lines. In fact, the City points out, his salary was increased in 1978.

With respect to the post-1980 period, the City reasserts its position that the claimant's salary has not been adversely affected (and that he therefore has not been denied benefits/protection due him under the applicable arrangement(s)) because his salary is not less than it was prior to the City's January 1980 transition of the transit system. The City further maintains that the claimant is not entitled to any general cost-of-living increase because he is at the highest step of the City's Civil Service pay scale for the position to which the claimant is assigned. The City points out that the claimant's salary with El Paso Transit Services was considerably higher than City salaries for similar work. Consequently, the City has frozen the claimant's pay until the City's salary schedule catches up with him.

The City's denial of responsibility for the pertinent and applicable requirements of the protective arrangements covering 1977-1979 cannot be sustained. The presence of a management agent, *per se*, under contract to the City does not present any basis for transfer of responsibility for the conditions to which the City agreed in return for the Federal grants of financial assistance under the Act in 1976. There has been no presentation of any contractual agreement nor of any other evidence to support the proffered transfer of responsibility from the City. To the

extent that the claimant may be entitled to any protections in this claim, the City is the responsible party.

The City's position that it cannot pay certain wage or salary increases because they would not conform to the City's Civil Service Commission's system of salary administration also fails. A separate salary scale cannot serve to bar fulfillment of the City's agreement with the Federal Government to provide specific protective conditions to affected employees. The City has the ability to make the necessary accommodations to, or adjustment in, the claimant's classification, the salary schedule, and the claimant's method of payment to reconcile whatever conflict there may be.

Finally, the City argued that the claimant's salary had not been worsened because it is not less than it was before. One can see how this argument on its face could seem persuasive. Additional pertinent considerations, however, suggest otherwise. If no general wage increases had been granted, the claim would fail. Here, however, general, across-the-board wage increases were granted to virtually all other transit system employees in 1977, 1979, and 1980. Failure to receive these increases certainly adversely affects this employee's conditions of employment, since he had not had his salary frozen prior to the City's 1977 acquisition of Lower Valley Bus Lines. He had a right to general wage/salary increases as did other members of the general work force. There is no indication that the claimant was exempt from general pay increases by virtue of being top management or for any other reason, except for the City's preferred salary schedule. Further, the City specifically agreed to include subsequent wage increases in the calculation of salary protections to which employees would be entitled under both the 1976 and 1980 protection arrangements. Clearly the claimant is in a lesser position salary-wise and has been denied protections to which he is entitled under both protective arrangements agreed to by the City.

Decision

This claim is upheld as to general cost-of-living wage/salary increases as set forth below and is denied in all other respects. The claimant is entitled to a full six-year period of protection as provided for in the respective protective arrangements for the 1977 acquisition and the 1980 transition. This combination gives the claimant entitlement to the disputed general cost-of-living wage/salary increases applicable to fellow transit employees beginning in 1977 and extending until six years after the January 15, 1980 transition, January 14, 1986. His monthly salary for the year prior to the first denied general increase was $1200.00. This becomes his base salary rate since no question of premium pay is involved and his entitlement is to be calculated as follows:

	Received Salary	Protected Salary	Denied Salary Due
9/1/77 to 8/30/78	$14,400	$15,552	$1,152
9/1/78 to 8/30/79	15,500	16,800	1,300
9/1/79 to 8/30/80	15,500	18,144	2,644
9/1/80 to 8/30/81	15,500	19,566	4,066

Total money denied from above and
due to the claimant therefrom..........................$9,162

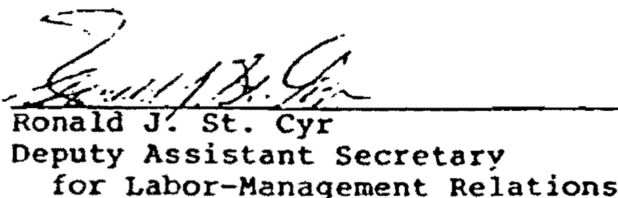
Similar calculations are to be made for any additional cost-of-living increases or other general wage/salary increases granted by the City to its transit employees or to all City employees since September 1, 1980. All amounts due to the claimant through the date of this decision are to be paid to him within thirty days after issuance of this decision.

With respect to step increases, the claimant is not entitled to such until they become available to him under the City's applicable salary schedule.

With respect to any subsequent general wage/salary increases through January 14, 1986, they are to be paid to the claimant in the same manner and at the same time as those subsequent increases are paid to other employees.

We note that both parties have demostrated good faith at all times during the consideration of this claim. We have full confidence that the necessary additional calculations will be made promptly by the City and that the repayment will be issued without delay. We retain jurisdiction in this matter to resolve any questions the parties may have with respect to calculations of increases due after the September 1, 1980 general increase. In all other respects, this decision is final and binding upon the parties.

Dated this 13th day of APRIL, 1984
at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary
for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

In re:

HECTOR HERNANDEZ
(Claimant)

and

THE CITY OF EL PASO
(Respondent)

DEP Case No.
81-13c-9

Summary: Claimant maintained that his being placed in a "frozen" pay position by the City had the effect of denying him certain entitlements. He sought annual cost-of-living raises and raise in grade which would make him eligible for merit pay increments. The Department of Labor (DOL) determined that Claimant was entitled to annual cost-of-living wage increases. As to Claimant's other asserted entitlement DOL found that the City had met its obligation to offer Claimant comparable employment and had placed him in an appropriate job. His claim for change in grade was denied.

DETERMINATION

Jurisdiction

This claim was submitted to the Department of Labor by letter dated February 2, 1981. Claimant is an employee of the City of El Paso, Texas who seeks a determination of his

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right to protections under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

In 1979, the City applied for four operating assistance grants for fiscal years 1977 through 1980 (UMTA Project numbers TX-05-4072, TX-05-4073, TX-05-4074 and TX-05-4075). In connection with these applications, the Department of Labor certified, on February 13, 1980, an employee protective arrangement dated January 3, 1980. The employee protective arrangement provides for submission of disputes arising under the provisions of the arrangement to the Secretary of Labor for final and binding determination. This is the determination of the Secretary of Labor pursuant to that arrangement.

This decision is only an interpretation of the particular terms of the employer's 1980 Protective Arrangement. That arrangement may be somewhat broader than would be necessary to satisfy the minimum protective requirements under Section 13(c) of the Urban Mass Transportation Act.

Issue

Claimant maintains that his being placed in a "frozen" pay position by the City has the effect of denying him

cost-of-living increases, "merit" increases, and a change in grade, to all of which he claims entitlement. Claimant contends that these changes contravene the Secretary's 13(c) certification. He seeks annual cost-of-living raises as afforded other City employees and he seeks a raise in grade from Accounting Clerk II - CG 15 (frozen) to Accounting Clerk III - CG 19. The grade change would have the effect of placing him at a grade on the City pay schedule which has the same pay rate as his previous pay level with El Paso Transit Services. He would then be eligible for merit pay increments in addition to cost-of-living adjustments, rather than being frozen at a level which was administratively determined.

Background

Claimant first worked as a mass transit employee when he joined El Paso Transit Services, Inc. in September 1977. El Paso Transit Services was a private company which contracted to provide management services and personnel to the City from 1977 to 1980. In January 1980 the City ended its contractual relationship with El Paso Transit Services and, with Federal assistance, began direct operation of its mass transit system.

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After passing the required Civil Service exam, Claimant was hired by the City of El Paso in January 1980 as a Transit Project Fare Coordinator, Class Grade 15 (frozen). His biweekly rate of pay was administratively set at $538.40. Claimant's position with the City was later reevaluated based upon the duties he performed and he was reclassified at the highest step of an Accounting Clerk II, CG-15 (frozen). His rate of pay remained at $538.40 biweekly. Claimant has been afforded no pay raises since he began working for the City because his pay rate was administratively established at a level approximately equivalent to his earnings with El Paso Transit Services and above the maximum for a CG-15 on the City's pay schedule. Other employees of the City, however, were granted general, annual, cost-of-living increases.

Decision

Protections are extended to an employee under the terms of the protective arrangement only for the duration of the individual's protective period. In this claim, the protective period extends from the date of the City's takeover of Transit operations on January 15, 1980 through

May 31, 1982, a period equivalent to the two years and five months which Claimant worked for El Paso Transit Services.

During this protective period Claimant was entitled to a displacement allowance during any month when his compensation fell below his protected level of earnings. The protective arrangement signed by the City defines "displacement allowance" in Section II, 8(b):

> *The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service for at least fifty percent of the month immediately preceding the date of his displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation and the average monthly time paid for. Such allowance shall be further adjusted to reflect any subsequent wage adjustments increasing employee compensation. If the displaced employee's compensation in his current position is less in any month in which he performs work then the aforesaid average compensation (adjusted to reflect subsequent wage adjustments), he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time, but he shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for...*

Claimant is entitled to general cost-of-living wage increases as these are "subsequent wage adjustments increasing employee compensation." These annual increases were

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applicable to City employees in general and were not based on employee performance. The displacement allowance for the Claimant, therefore, reflects these cost-of-living increases.

Claimant's average monthly compensation during his last 12 months with El Paso Transit Services was calculated as being $1,108.88.[1/] This was his protected level from 1/1/80 until 9/1/80, at which time an 8.0% general wage increase was granted other City employees and Claimant's protected level correspondingly rose to $1,197.59. During the period 1/1/80-8/31/80, Claimant's actual wage exceeded his protected level of $1,108.88. For the period 9/1/80-8/31/81, however, Claimant is entitled to a monthly displacement allowance of $31.06, the difference between his protected level of $1,197.59 and his actual wages frozen at $1,166.53. His total displacement allowance for the period 1/1/79-8/31/81 would be $372.72.

In addition, during each month from 9/1/81-5/31/82, Claimant is entitled to a displacement allowance to the extent that his adjusted protected level of earnings exceeded his actual compensation from the City. Respondent is directed to calculate Claimant's adjusted protective level for this 9-month period by revising the

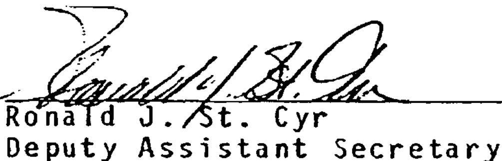
1/ Over the period, from 1/1/79-12/31/79, Claimant was paid for 8 months at $1,080.00 per month and 4 months at $1,166.50 per month for an average monthly compensation of $1,108.88.

previous level of $1,197.59 to reflect the cost-of-living increase granted to City employees in September 1981. The displacement allowance for these nine months will equal the sum of the differences between the adjusted protective level and Claimant's actual monthly compensation.

With respect to Claimant's other suggested remedies, we do not find that he is entitled to annual step increases, nor would any employee be so entitled who had reached the top pay step in his grade classification. We find that the City has met its obligation to offer Claimant comparable employment and has placed him in an appropriate job. Further, Claimant's job function and duties have been reviewed and found to be consistent with his grade classification.

The City's obligations to Claimant under 13(c) will, therefore, be fully satisfied through payment of the aforementioned displacement allowances.

Signed this 22nd day of April 1983 at Washington, D.C.



Ronald J. St. Cyr
Deputy Assistant Secretary

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UNITED STATES DEPARTMENT OF LABOR

In re:

DEBRA FULLER, et al., (Petitioners) v. GREENFIELD AND MONTAGUE TRANSPORTATION AREA AND FRANKLIN REGIONAL TRANSIT AUTHORITY, (Respondents)	)	DEP Case No. 81-18-16 et seq.

DETERMINATION

This determination, issued after four days of testimony and upon review of briefs filed by the parties, decides the petition of sixteen claimants who are employed or were formerly employed by the Mt. Grace Regional Transportation Corporation (Mt. Grace) for a determination pursuant to Section 18 of the Urban Mass Transportation Act of 1964, as amended (UMTA).

As stated in the Section I, INTRODUCTION, of the Rural Transportation Employee Protection Guidebook:

> Section 313 of the Surface Transportation Assistance Act of 1978 added a new Section 18 "Public Transportation for Non-urbanized Areas" Program to the Urban Mass Transportation Act of 1964, as amended.
>
> Section 18(f) of the UMTA of 1964, as amended, makes Sections 3(e)4 and 13(c) of that Act applicable to assistance authorized under Section 18. Sections 3(e)4 and 13(c) of the UMTA provide, in general, that it shall be a condition of any Federal assistance by the Department of Transportation to state or other public bodies in financing mass transportation, that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees who may be affected by such assistance.

In an effort to eliminate the administrative case by case processing, a "special warranty" arrangement was developed for application to the Section 18 program. The Warranty was designed to meet rural program needs while providing the employee protections required under the UMTA Act.

The claimants alleged that their employment positions had been worsened as a result of the receipt of federal funds from the UMTA program by the Greenfield and Montague Transportation Area (GMTA) and Franklin Regional Transportation Authority (FRTA).

BACKGROUND

Beginning in December 1979, GMTA and FRTA applied for and received federal assistance under Section 18 of the UMTA Act of 1964, as amended. According to testimony, GMTA and FRTA depended, in part, on the availability of local, state, and federal funds to provide their services. To meet one of the conditions for federal funding, GMTA and FRTA in separate, limited year-long contracts, agreed to use Mt. Grace to provide demand-response service.

Mt. Grace received UMTA funds to purchase buses for use in its demand-response service. Until then, it relied principally on the availability of transit vehicles owned by other public agencies to provide demand-response service. Mt. Grace also depended on CETA funding and local tax revenues for the operation of its transit system.

The contract service continued to be provided by Mt. Grace for GMTA until April 1981. At that time, GMTA announced that it was going to provide its own demand-response service and that it would not renew its contract with Mt. Grace. In July of 1981, through the bid process, Mt. Grace also lost to GMTA its contract with FRTA for the demand-response service.

After these contracts expired and were not renewed, Mt. Grace laid off or reduced the work hours of sixteen (16) of its employees. The employees then filed with the Department of Labor a claim under Section 18 of the Urban Mass Transportation Act, as amended, alleging adverse effects as a result of certain federally funded projects.

CONTENTION OF THE RESPONDENTS

1. The terms of the contracts with Mt. Grace were not intended to prohibit or prevent FRTA and GMTA from contracting with another transportation organization for demand-response service.

2. The termination of the contracts was due to Mt. Grace's inability to live up to its contracted obligation (i.e., incomplete financial documents, untimely reports).
3. The change in the employment status of the sixteen (16) claimants was due to Mt. Grace's failure to retain its service contracts with GMTA and FRTA and was not the result of the Section 18 projects.

CONTENTION OF THE PETITIONERS

1. The respondents do have the right to contract with another demand-response service provider, but the respondents are nevertheless financially accountable to all employees adversely affected by such actions.

2. The claimants were adversely affected by federal funding provided under UMTA and are entitled to Section 13(c) employee protections set forth under Section 18.

OPINION

With respect to respondents' first contention, the petitioners agreed that the respondents do have the right to contract with another demand-response service provider. The issue upon which their positions diverge is whether GMTA and FRTA, after having exercised that right, are financially accountable to the affected Mt. Grace employees. Key to this issue is whether the change in the sixteen claimants' employment status falls within the scope of employee protections provided by Section 18.

As set forth in the burden of proof clause in the Special Section 13(c) Warranty, if a dispute arises regarding the effect of a project on particular employees, it shall be the obligation of the employee to explain how he or she attributes that effect to the project.

The burden of proof clause recognizes that individual employees may not have ready access to information required to establish whether a particular effect upon the employee was "as a result of the Project". Therefore, after the employee explains how he or she has been affected and how he or she attributes that effect to the Project, the burden of proof then is placed on the recipient or legally responsible party under the arrangements to show that factors other than the Project affected the employee.

The respondents testified that FRTA and GMTA applied for federal funds to purchase new "rolling stock." The respondents stated that the new buses applied for by FRTA were to be used to replace worn out buses and that the buses would not be used, nor were they, to provide parallel or competitive service with Mt. Grace while Mt. Grace was under contract to provide the demand-response service. They also stated that the buses purchased with UMTA funds would be used for demand-response service when not being used for fixed route or feeder service. Mt. Grace was advised that any vehicle owned by FRTA would be made available to any transportation provider, including Mt. Grace, which contracted with FRTA to perform the demand-response service.

The respondents also testified that GMTA's contract with Mt. Grace provided that GMTA would not be prohibited from contracting with any other transportation provider for operating part of GMTA's system. In addition, this contract included a provision that allowed GMTA to terminate the contract for any reason, provided that Mt. Grace be given thirty days written notice. (Cl. Ex.9, p.6).

Adverse affect on an employee after an UMTA grant has been awarded does not establish that the adverse affect was caused by the grant. There must be a nexus between the project and the direct cause of termination of employment.

The respondents established that the vehicles applied for by FRTA with UMTA funds would be at the disposal of any company which was the successful bidder for the demand-response service. Therefore, because the buses would be made available to the successful bidder, whether it was Mt. Grace or GMTA, the bus purchase had no impact on the selection of the service provider. The selection of the service provider was based on which company could provide the most on board vehicle miles (max. OBVM) and satisfactory service at a fixed price after the termination of the contract period with Mt. Grace.

The fact that the new buses purchased would be made available to any company which became the successful bidder, whether Mt. Grace or GMTA, makes the bus purchase a constant, not a variable, factor; no one was advantaged by the bus purchase application in the bidding process and the grant application had no effect on the employment status of Mt. Grace's transit employees. It was not clearly established that there was a direct connection between the grant application and the impact on the transit employees at Mt. Grace.

According to testimony, Mt. Grace provided service for GMTA under a contract that had definite conditions regarding the termination of that contract. According to the testimony, the conditions agreed to by the parties were met at the time of termination. It is also apparent from the testimony that GMTA operated neither parallel nor competitive service during its contract term with Mt. Grace.

Part B(1) of the Special Section 13(c) Warranty, set forth at p. 23 of the Rural Transportation Guidebook, states in pertinent part:

> The phrase "as a result of the Project," shall when used in this arrangement, include events related to the Project occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this arrangement. [Emphasis added.]

Thus, it is clearly not the intent of Section 13(c) to provide protections in cases where adverse effects were caused by factors other than the project; but rather, the intent is to protect employees from being adversely affected as a result of the project.

The record shows that in 1980 Mt. Grace had encountered cutbacks in the availability of CETA funding, which caused it to raise its charges for services rendered to FRTA and GMTA. That same year, the Massachusetts legislature enacted Proposition 2 1/2, which limited the amount of tax that municipalities could levy in a given year. This in turn reduced FRTA's and GMTA's ability to meet Mt. Grace's demands for increased funds to sustain its current operation. These factors contributed to Mt. Grace's inability to provide financial and statistical reports required by the contracts with GMTA and FRTA, resulting in GMTA's eventual termination of its contract with Mt. Grace and in the FRTA opening its contract for bid, which was ultimately awarded to GMTA. Obviously, the loss of these contracts had a negative impact on Mt. Grace's economic viability. Although it is clear that the claimants' employment status was affected, it was sufficiently established by the respondents that there was not a cause and effect relationship with respect to the Small Urban and Rural Program. From the facts provided, the impact on the sixteen claimants appears to have resulted from Mt. Grace's unsuccessful attempt to extend their contract terms with GMTA and FRTA, which appears to be the result of Mt. Grace's own internal problems and factors outside the UMTA project applications.

Therefore, the facts provided by the respondents support the position that the impact on the claimants' employment status was caused by factors that were not related to the granting of federal funds under Section 18 of UMTA. Petitioners' evidence does not defeat these findings.

Since the petitioners do not prevail in this case, under the evidence and facts presented before the hearing examiner, there is no need to address the respondent's motion for dismissal.

Therefore, in this case, from the facts provided, there is no remedy under the Section 13(c) Warranty. This petition is denied.

Date this 13th day of April, 1987
at Washington, D.C.

Stephen I. Schlossberg
Deputy Under Secretary
for Labor-Managment Relations
and Cooperative Programs

A-389

UNITED STATES DEPARTMENT OF LABOR

In re:

HUBERT L. STEPHENS & STANLEY W. STEPHENS (Claimants) and MONTEREY SALINAS TRANSIT (Respondent)	DEP Case Nos. 82-13c-6 & 82-13c-4

Summary: Claimants alleged loss of certain benefits following the merger of their former employer with Respondent. It was determined that, although the predecessor transit systems involved in the merger had received operating assistance under UMTA, no Federal funds were utilized for a project to merge or plan the merger which allegedly affected Claimants' benefits. The Claimants failed to identify a causal connection between any projects funded under UMTA and the adverse effects they suffered. These claims were dismissed.

DETERMINATION

This is in response to Claimants' allegations that as a result of funding for public transit by the Federal Government they have been deprived of certain benefits which are protected under Section 13(c) of the Urban Mass Transportation Act (UMTA) of 1964, as amended. Claimants have indicated that they suffered a loss of seniority rights, loss of mileage allowances,

and an increase in insurance premiums following the merger of their former employer, Salinas Transit, with Monterey Peninsula Transit in September 1981.

Both the Salinas Transit System and Monterey Peninsula Transit have received annual operating assistance grants under the Urban Mass Transportation Act for the last several years, most recently for the period 7/1/80 through 6/30/81. Subsequent to the merger, the new Monterey Salinas Transit System also applied for operating assistance for the period 7/1/81 through 6/30/82. These grants, however, were solely for the purpose of providing continued bus service to the public on the existing systems. No funds were designated for a project to merge or plan a merger of the two transit systems.

Prior to the merger, an agreement was reached between the Service Employees International Union (SEIU), Local 415, representing employees of the Salinas Transit System, and the Amalgamated Transit Union (ATU)) Division 1225, representing Monterey Peninsula Transit Employees. This agreement was designed to achieve an orderly merger between the two groups with ATU Local 1225 ultimately retaining representation rights for the combined entity. The terms of this merger agreement have resulted in the allegedly worsened conditions of employment described by the Claimants in this case.

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The Claimants have described the events which occurred and the adverse effects which they suffered as a result of the merger between the Monterey Peninsula and the Salinas Transit Systems. However, no project funded through the Act subsidized merger activities between these two transit systems or the unions described above. Furthermore, the Claimants have failed to identify a causal connection between any projects under the Act and the alleged effects which are the subject of their petition. It is not sufficient to merely indicate that the Respondent has, at some time, received a Federal grant or funds under the Act. The Claimants have not stated a cause of action to give rise to a claim under the Act. These claims, therefore, are dismissed.

Dated this 10th day of November 1982
at Washington, D.C.

Ronald J St Cyr

Ronald J. St. Cyr

Deputy Assistant Secretary of Labor

Laborers' International Union of North America, Local 1137
and City of Augusta, Georgia
DEP Case No. 87-13(c)-01
May 19, 1988
(Page A-390)

The Laborers' International Union of North America (LIUNA) claimed that the City had refused to bargain and had fostered an effort to decertify it as a bargaining representative. At the time of the complaint, and previously at the time of the acquisition of the private carrier which formed the transit system, the union status of the transit provider was unclear. The Department ruled that the City and LIUNA must comply with the representation election procedures included in a 13(c) Protective Agreement signed in 1974 by the City, the Amalgamated Transit Union, and the Municipal Employees Association. The Agreement was subsequently incorporated into a Department of Labor interim certification issued in 1985 which applied to LIUNA for the current grant. Consequently, the Department ordered that a representation election be held under the terms of the 1974 Agreement. The Department also ruled that LIUNA had the right, under the Department's 1985 interim certification, to negotiate a new protective agreement to replace the interim certification, if it won the election. The Department determined that the employees of the private carrier acquired by the City had not been represented by a union and had not exercised private sector collective bargaining rights. The Department rejected LIUNA's assertion that the Urban Mass Transit Act provides for the continuation of private sector collective bargaining rights that had never been exercised, and ruled that the employees were entitled only to the continuation of those collective bargaining rights afforded them as public employees under Georgia statutes, not those afforded to employees in the private sector.

UNITED STATES DEPARTMENT OF LABOR

In re:

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1137

and

CITY OF AUGUSTA, GEORGIA

DEP Case No. 87-13(c)-01

INTRODUCTION

The issues in this dispute have been brought to the Department of Labor by the Laborers' International Union of North America, Local 1137 (LIUNA) and the City of Augusta, Georgia. By letter dated November 4, 1987, LIUNA has stated that the City "refused to bargain" with the union and "fostered an effort to decertify that Union." By letter dated July 2, 1987 the City asserted that the union no longer represents employees of the Augusta Transit System and that employees of the Augusta Transit System are entitled only to public sector collective bargaining rights. Paragraph (8) of a 13(c) protective agreement dated October 3, 1974 provides a procedure for the resolution of disputes arising as a result of Federally funded transit assistance to the City of Augusta. The terms and conditions of this agreement have served as the basis for the Department of Labor's certification of all grants for the City of Augusta, Georgia, including the Department's most recent certification on September 26, 1985. The 13(c) agreement stipulates that disputes over the application, interpretation, or enforcement of the provisions of the agreement may be submitted, at the written request of either party, for the consideration and determination of the Secretary of Labor. This is the Secretary of Labor's final and binding determination.

ISSUES

The issues before the Secretary are:

(1) Was a petition for decertification of the union, circulated by transit management, the appropriate procedure for resolution of the question of representation rights of LIUNA?

(2) Does the City of Augusta have an obligation to negotiate a new Section 13(c) agreement with the union under the Department of Labor's September 26, 1985 Interim Certification?

(3) Are the employees of the Augusta Transit System entitled to private sector collective bargaining rights or are they entitled only to the same public sector collective bargaining rights as other municipal employees in the state of Georgia?

(4) If employees are entitled to private sector collective bargaining rights, has the City of Augusta breached its obligation to negotiate collective bargaining agreements with the union?

BACKGROUND

The City of Augusta acquired the assets of the Augusta Coach Company and, in November 1973, began operation of the Augusta Transit Department on an iterim basis pending a decision on final acquisition. At the time, the City retained the Augusta Coach Company's bus drivers who became employees of the City of Augusta effective October 1, 1973. The City's acquisition of the assets of Augusta Coach Company was assisted by a grant provided under the Act (UMTA Capital grant contract for project GA-03-0004, dated January 30, 1975). The 13(c) protective agreement dated October 3, 1974 served as the basis for the Department of Labor's certification of that grant and all subsequent grants to the City of Augusta. In each instance, the City of Augusta has executed a grant contract with the United States Department of Transportation which contained a provision under which they agreed to comply with the terms of Department of Labor certifications referencing the October 3, 1974 agreement.

The Laborers' International Union, Local 1137 has represented employees of the Augusta Transit System since 1983. LIUNA and the City of Augusta have agreed to utilize the terms of the October 3, 1974 protective agreement for a number of grants, including our most recent certification on September 26, 1985 of

a grant for operating assistance. The October 3, 1974 agreement was originally negotiated and executed with the City by the Amalgamated Transit Union (ATU) and the Municipal Employees Association (MEA). At the time of the original grant of Federal assistance, it was not clear which, if either, of these unions represented employees of the system. The Section 13(c) agreement was thus structured to provide appropriate protections if it were determined that employees were represented prior to the acquisition. In addition, a procedure for the resolution of questions of representation was included in the protective agreement.

At the time of the September 26, 1985 certification, as now, the City and LIUNA were in dispute over representation rights of the union. Because the parties' 13(c) protective agreement specifically provides in Section 6, paragraph 3, that questions of representation will be decided by an election, the Department issued an interim certification and directed the parties to arrange for such an election. If the union won that election, the parties were to begin negotiations over a new Section 13(c) protective agreement to replace that referenced in the interim certification and for application to future UMTA grants.

The October 3, 1974 agreement provides, in pertinent part, in Section 6 thereof:

> The Public Body agrees to preserve and continue any such collective bargaining rights of such employees which existed or were otherwise available to such employee, as provided by any laws, policies and/or labor agreements, which were applicable to such employees in their private employment relationship...

This paragraph further provides:

> ...the Public Body agrees that it will bargain collectively with the duly designated representatives of the employees of the transit system or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with such representatives or arrange for such agreements to be entered into, relative to all subjects of collective bargaining which are, or may be, proper subjects of collective bargaining with a private employer, except the right to strike.

Further:

> In the event a question arises with respect to representation of such employee for collective bargaining purposes, the Public Body agrees that a representative

> election among such employees shall be conducted ... under the standard and regulation of the National Labor Relations Board which will be applied ... as though such employees were employed by a private employer.

The Department of Labor's September 26, 1985 certification provides that:

> The parties ... are directed to arrange for such an election to be held within 60 days of this certification letter. The final certification to be made applicable to these grants will be determined, in part, by the results of the aforementioned election. Should the union win this election, the parties will be directed to commence negotiations over the terms and conditions to be used in our subsequent certifications.

POSITION OF CLAIMANT

The Laborers' International Union has taken the position that the City of Augusta has fostered an effort to decertify the union by coercing employees to sign a decertification petition through threats of harm and promises of benefits. The union notes that the 1974 Section 13(c) agreement provides that questions of representation will be decided through an election and that the Department of Labor had directed the parties to utilize this procedure as recently as September 1985.

It is also asserted that the City has breached its obligations under the Department of Labor's September 26, 1985 Interim Certification to negotiate a new employee protective agreement with the union. Although the union won the November 1985 election which had been directed by the Department of Labor, there were only two negotiating sessions after that election.

LIUNA further asserts that the City has refused to recognize and bargain collectively with Laborers' Local 1137 since February 1987, in contravention of Section 6 of the October 3, 1974 agreement. LIUNA rejects the City's arguments that City transit workers would have bargaining rights now only if they had a union before the City took over the private transit company. Rather, the union believes that "Private sector workers in the transportation industry all have the right to bargain collectively, whether or not they are unionized, and regardless of whether they have ever exercised that right." Thus, the union concludes that in providing for the "continuation of collective bargaining rights" Section 13(c) was intended to protect rights which had never been exercised and not to limit such protections to transit systems which were unionized before their takeover by a municipality.

Moreover, the union suggests, "even if section 13(c) did so provide, the section 13(c) agreement which the City of Augusta entered into on October 3, 1974 expressly provides otherwise." Because 13(c) preserves "rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise" (emphasis added), LIUNA concludes that the October 3, 1974 Section 13(c) agreement provides specific protections which must be preserved and continued by future 13(c) arrangements.

Finally, the union argues that the City has somehow been diverting UMTA funds to the State of Georgia, which was then funneling them back to the City. It asserts that the requirements of 13(c) have been subverted by transfering the City's UMTA apportionments to the Georgia Department of Transportation and then applying to the Georgia DOT for a grant of capital assistance for the purchase of buses. 1/

POSITION OF RESPONDENT

The City of Augusta argues that Section 13(c) of the Urban Mass Transportation Act of 1964, as amended was designed to protect only the collective bargaining rights of those employees formerly employed by private transit employers. The City states that, under the statute, the employees of the transit system are entitled only to maintain a bargaining rights "status quo" if they had a union before the City took over the system. Otherwise, employees of the Augusta Transit System would be

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1/ The Department of Labor has requested that the Department of Transportation (DOT) investigate these allegations. In response to our request, DOT provided the following information and we have determined that no futher investigation is warranted. DOT stated:

1. No Federal capital funds have flowed to the City of Augusta for the purchase of buses under the referenced grants, either directly from UMTA or through the Georgia Department of Transportation. . . .

2. Only operating funds have been paid to the City under either grant.

3. To assist the City in its severe need for buses, we understand from conversations with the City and Georgia DOT that Georgia DOT has funded fifty percent of the cost of four buses with Georgia DOT funds - not Federal with the City funding the rest with local funds. There are no Federal funds in the cost of these four buses.

entitled to the same bargaining rights as other public employees under Georgia statutes. The City addresses the obligation to enter into collective bargaining agreements which is contained in Section 6 of the October 3, 1974 Section 13(c) agreement, by stating that "the former Mayor signed the 1974 13(c) agreement upon poor advice, and at a time when he knew the Transit employees had been unrepresented." The City argues that, under Georgia law, it cannot recognize any union for purposes of collective bargaining.

The City further indicates that, assuming it had an obligation to bargain with LIUNA Local 1137, that obligation was extinguished as a result of a petition for decertification signed by a majority of the transit employees.

DETERMINATION

Issue: Was a petition for decertification of the union, circulated by transit management, the appropriate procedure for resolution of the question of representation rights of LIUNA?

Having given due consideration to the petition for decertification submitted to the Department of Labor by representatives of the City of Augusta, we have concluded that the election procedures contained in the October 3, 1974 Section 13(c) agreement should have been used for resolution of disputes over representation rights. As recently as September 1985, the parties agreed to use these procedures to conduct an election which the union subsequently won. Since then, a valid question of representation has been raised by the City.

The election procedures are fair and equitable and provide for a neutral party to oversee the conduct of elections. The Department concludes that the City and LIUNA must comply with the election provisions of the October 3, 1974 agreement. The parties will arrange for such an election to be conducted within 60 days of this determination.

Issue: Does the City of Augusta have an obligation to negotiate a new Section 13(c) agreement with the union under the Department of Labor's September 26, 1985 Interim Certification?

The parties apparently had two meetings to discuss a new Section 13(c) agreement after LIUNA won an election in November 1985. Although the content of these discussions is not clear, it does

not appear that either party submitted a proposed Section 13(c) arrangement to the other. The City does have an obligation under the September 26, 1985 certification, which was included in the contract of assistance for two operating assistance projects, to negotiate a new Section 13(c) agreement with LIUNA. The union, therefore, has a right under Section 13(c) to negotiate protective arrangements with the City for application to Federally assisted projects. Representatives of the Department will be available to assist the parties, upon request, in their dicsussions over appropriate protective arrangements. Such arrangements will replace the terms and conditions applied in the Department's Interim Certification of September 26, 1985 after approval by the Department.

Issue: Are the employees of the Augusta Transit System entitled to private sector collective bargaining rights or are they entitled only to the same public sector collective bargaining rights as other municipal employees in the state of Georgia?

The documentation presented by the parties to the Department of Labor, in conjunction with information in our files, indicates that employees of Augusta Coach Company were not unionized and had not exercised collective bargaining rights under the National Labor Relations Act before the City acquired the assets of the company and began to operate the transit system. However, both the Amalgamated Transit Union and the Municipal Employees Association attempted to organize the employees after the acquisition, but before the initial Federal grant.

The uncertainty over which of the two unions, if either, would represent Augusta Transit System employees is reflected in the October 3, 1974 Agreement. The agreement was signed by the City and by the presidents of two competing unions. It provided specific procedures to resolve questions of representation and expanded in some detail on the rights which would be preserved pursuant to the Section 13(c)(2) "continuation of collective bargaining rights" requirement.

The union here asserts that in voluntarily agreeing "to preserve and continue ...rights... which existed or were otherwise available to employees..." (emphasis added) the City intended to bind itself to provide NLRA collective bargaining rights to employees regardless of whether they had ever exercised such rights when they worked for a private operator.

It is clear, however, from information submitted by the parties, and from our own files, that the issue of what collective bargaining rights were to be preserved was not resolved at the

time of the initial grant application. The lack of clarity is reflected in a March 21, 1974 letter from Assistant Secretary Paul J. Fasser, Jr. to the legal counsel for the MEA which states that "...the employee protection arrangement... would provide for the continuation of existing employee rights and benefits, including such rights as may be determined appropriate in the area of collective bargaining." We conclude that the ambiguity in Section 6 of the October 3, 1974, agreement arose because the question of whether the transit system employees were represented at the time of acquisition, and hence entitled to preservation of private sector rights, was not yet resolved at the time the October 3, 1974 agreement was executed.

Had either union shown that it represented these employees <u>prior</u> to the acquisition of the system in November 1973 the language in Section 6, of the October 3, 1974 agreement would appropriately have been interpreted to preserve existing private sector rights. However, since no union has been shown to have represented employees prior to the acquisition, employees clearly did not have private sector rights. For 13(c) purposes, the Department must conclude that NLRA rights did not "exist" and were not "otherwise available" because they were never exercised by these employees.

Employees represented by the MEA and LIUNA have been entitled only to the continuation of those collective bargaining rights afforded them under Georgia statute. There is nothing in the record to indicate that the City of Augusta, at any time since 1974, interpreted the language in Section 6, paragraph 1, as requiring that a collective bargaining agreement be signed with the union, as would be required by the NLRA but prohibited under Georgia statute. To the extent that paragraph (2) of Section 6 of the October 3, 1974 agreement conflicts with this determination and with the legal limitations of the City of Augusta, it must be renegotiated by the parties for purpose of adequate replacement under Section 13(c) of the Act in accordance with Section 5 of the October 3, 1974 agreement.

In asserting that Section 13(c) of the UMT Act provides for the continuation of collective bargaining rights which were never exercised, LIUNA interprets the language of the Act too broadly. The legislative history makes it quite clear that collective bargaining rights are not created by 13(c). In fact, the issues raised by the union here closely parallel those presented in the case of <u>United Transportation Union</u> v. <u>Brock</u>, 815 F.2d 1562 (D.C. Cir. 1987). The Court, in reviewing the legislative history, made the following observation in that case:

> Senator Morse also noted that organized labor had pressed for a broader provision which would have required collective bargaining rights whenever a new public transit authority

was established with federal assistance, and stated his objections to such a provision:

> In my judgment, the only sound policy to which [organized labor is] entitled is the maintenance of the status quo. If you have collective bargaining now, I think the bill ought to be so drawn that you will be assured of a continuance of collective bargaining, so far as the Federal Government is concerned.

109 Cong. Rec. 5672 (1963). Thus the contention that a public transit authority must grant collective bargaining rights whenever it receives federal assistance was considered and rejected by Congress and appellant's claim that federal assistance creates collective bargaining rights also fails upon a review of the legislative history.

815 F.2d at 1565.

The Department, therefore, concludes that the statute does not provide employees of the Augusta Transit System with private sector collective bargaining rights. Rather, Section 13(c)(2) of the Act here preserves the collective bargaining rights afforded public sector employees under Georgia Law.

Issue: If employees are entitled to private sector collective bargaining rights, has the City of Augusta breached its obligations to negotiate collective bargaining agreements with union?

The Department has determined that employees represented by LIUNA are not entitled to private sector collective bargaining rights. Thus, the unions' allegations that the City has breached these obligations are dismissed. The union, however, is entitled, and the City is obligated, to negotiate 13(c) protective arrangements for application to grants of Federal assistance.

Dated this 19th day of May, 1988 at Washington, D.C.

John R. Stepp
Deputy Under Secretary

In the matter of:

Cangiamila, et al. *Claimants* v. Massachusetts Bay Transportation Authority *Respondent*	)	OSP Cases no. 91-13(c)-1 through 91-13(c)-14

Notice of Withdrawal of Decision

The Department has withdrawn its decision in Cangiamila, et al. v. MBTA, OSP Case No. 93-13(c)-1 - 14, dated January 13, 1995, pursuant to a settlement between the parties and the Department of Labor. This decision has no legal effect or precedential value, cannot be relied on in any manner or cited by any party in any administrative, arbitral or judicial proceeding, and cannot be a basis for any decision, determination, certification, arbitration, adjudication, or any Departmental action.

7/17/98
Date

/s/
Charles A. Richards
Deputy Assistant Secretary

NOTE: THIS DECISION HAS BEEN WITHDRAWN

In the matter of arbitration between:

CANGIAMILA, ET AL. Claimants v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY Respondent	OSP Cases No. 91-13c-1 through 91-13c-14 January 13, 1995

DECISION

Summary: Certain non-union employees, terminated by a January 1, 1987 change in contractors, were affected as a result of a 1976, Federally-assisted project for acquisition of certain commuter rail service assets. Those claimants are eligible for benefits under the applicable protective arrangements.

ORIGIN OF THE CLAIM

These fourteen claims arise under one or more protective arrangements certified by the Secretary of Labor as satisfying the requirements of Section 13(c) of the Federal Transit Act (FTA) (formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended), 49 U.S.C. App. § 1609, as amended.[1] Each certified grant, or project, relies principally upon the December 10, 1974 Section 13(c) Agreement negotiated between MBTA and several labor organizations, and upon additional conditions as required by the Secretary under Section 13(c). Claimants were non-union, department managers in the commuter rail service of the Boston &

[1] Section 13(c) of the Federal Transit Act is recodified at 49 U.S.C. § 5333(b), by Public Law 103-272, § 1(c) (July 5, 1994), 108 Statutes 835.

Maine Railroad (B&M), which provided mass transit in the service area of the MBTA projects. Under the certified arrangements, therefore, they are mass transit employees covered by the protective arrangements.[2]

Early in 1987, Claimants presented their claims to the MBTA. On February 27, 1987, Claimants formally requested arbitration of the claims under the negotiated Section 13(c) Agreement. The MBTA refused to arbitrate these claims under the Agreement because the Claimants were not represented by one of the signatory labor organizations and because MBTA believed that Claimants were not entitled to the Section 13(c) protections. Claimants then filed suit in Massachusetts Superior Court on March 20, 1987 to compel MBTA to proceed to arbitration under the Section 13(c) Agreement. In 1990, the suit was dismissed with prejudice by stipulation of the parties based on their agreement that the claims would be submitted to the Department of Labor for decision. By letter of January 8, 1991, Claimants filed these cases with the Secretary of Labor.

JURISDICTION

The Secretary's jurisdiction to arbitrate Section 13(c) claims arises from the terms of his certification of the pertinent MBTA project(s) under Section 13(c) of the Act. In order to insure the necessary protections for all affected employees, it has been the practice of the Secretary to require in the certification that the grant recipient afford, to other covered employees, substantially the same level of protections as are afforded to employees represented by a labor organization signatory to the negotiated Section 13(c) agreement incorporated in the certification. The required protections include both substantive and procedural protections. See Congress of Railway Unions v. Hodgson, 326 F.Supp. 68 (1971), and Opinion of Assistant Attorney General Wm. H. Rehnquist, Apr. 5, 1971, cited

[2] MBTA has requested clarification as to whether these former B&M Railroad managers might be subject to the employee protections of Appendix C-1 under Section 405 of the Rail Passenger Service Act (RPSA) of 1970, 45 U.S.C. 565, instead of the employee protections required by Section 13(c). Appendix C-1 applies only to railroad employees involved in or affected by a discontinuance of railroad passenger service, authorized by the RPSA. The instant claims involve alleged effects of a grant under the Federal Transit Act pertaining to mass transit service. Therefore, these claims arise under Section 13(c) rather than under Appendix C-1.

in Congress of Railway Unions, 326 F.Supp at 76, n. 8 ("The statute provides no basis for distinguishing between 'substantive' and 'procedural' benefits.")[3]

Paragraph 13 of the 1974 Agreement provides for arbitration of employee protections disputes for employees specifically covered by the Agreement. Thus, "substantially the same level of protections" includes and requires a procedure for arbitration of disputed claims not covered by the arbitration provisions of the Agreement. Where the parties have not agreed upon any other procedure for arbitration of their Section 13(c) dispute, however, the Secretary provides that arbitration.[4] In light of this provision and its standard interpretation, the parties' stipulation to submit these claims to the Secretary for decision also provides authority to arbitrate these claims.[5]

BACKGROUND

The parties have no significant disagreement as to the facts giving rise to this claim. Prior to 1964, the B&M Railroad had owned and operated the Boston-area commuter rail service in

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[3] Although Congress of Railway Unions and the Rehnquist Opinion addressed Section 405 of the Rail Passenger Service Act, those employee protection requirements are virtually identical to the requirements of Section 13(c). See Congress of Railway Unions, 326 F.Supp. at 76, n.6 and accompanying text.

[4] See, e.g., LOCAL 103, ATU v. WHEELING, DEP case no. 77-13c-5, (1977), Employee Protections Digest (Digest), U.S. Department of Labor, p. A-61 ("substantially the same level of protections" authorizes Department of Labor to resolve Section 13(c) claims of non-signatory employees).

[5] MBTA also suggests that this arbitration of these claims falls under the scope of the Administrative Procedure Act but provides no persuasive foundation for such position. We previously considered this question and found as follows:

> *Moreover, determinations [in disputed claims for employee protections] by the Secretary are discretionary and do not come within the provisions of the rulemaking or adjudicatory procedures of the Administrative Procedure Act for an administrative hearing.*
> - INLANDBOATMEN'S UNION v. GOLDEN GATE TRANSPORTATION DISTRICT, DEP case no. 76-13c-6 (1976), Digest, p. A-57.

question. In December of 1964, MBTA had entered into an agreement with the B&M to provide funds to B&M to help defray the costs of B&M's commuter passenger service within the MBTA's jurisdiction. In 1976, MBTA purchased the facilities, property, equipment and rights of way used by B&M in providing the commuter rail service, using Federal funds (grant #MA 23-9006) certified September 23, 1976 under Section 13(c) of the Urban Mass Transportation Act. As a condition of receiving those Federal funds, MBTA agreed to the terms of the Secretary's Section 13(c) certification which relied primarily on the MBTA's 1974 Section 13(c) Agreement. MBTA continually contracted with B&M for operation of this commuter rail service from the time of the 1976 acquisition through December 31, 1986. During that time, MBTA received a series of certified capital and operating assistance grants to support this service. In November of 1986, following a public bidding process, MBTA awarded the operation of this commuter rail service to Amtrak for three years, effective January 1, 1987. On that same date, B&M terminated these fourteen Claimants. Some of them obtained employment with Amtrak or other employers, some took early retirement, and some may have been unable to obtain permanent employment. The Claimants allege they have been worsened with respect to their employment, compensation and benefits. They seek monetary protections but do not seek restoration of, or assurances of, employment.

Claimants have stated that they have encountered actual adverse effects on their employment and/or financial conditions with respect to their former B&M jobs. Claimants have not, however, provided complete, specific wage and employment data necessary to determine their individual entitlements, if any, under the protective arrangement. MBTA correctly maintains that it is unable to address these claims fully until Claimants provide such financial and employment data. MBTA also maintains, however, that regardless of such data, Claimants are not eligible for <u>any</u> protections because they were not affected by a project. As Claimants noted, it is unnecessary to collect the substantial wage and employment data if Claimants are not eligible for any protections. It is appropriate, therefore, to resolve the threshold question of Claimants' eligibility before requiring them to produce substantial information which, if MBTA's theories were to prevail, would not be necessary. This decision, therefore, addresses the question of whether Claimants are eligible for Section 13(c) employee protections. If eligible for protections, the Claimants then will need to pursue employment and wage information to establish their individual entitlements.

DISCUSSION

The parties' primary disagreement centers on whether the MBTA's 1976 project (for acquisition of the assets, equipment, and rights of way, of B&M's commuter rail service) adversely affected the Claimants on and after January 1, 1987 when MBTA changed operating contractors from B&M to Amtrak.[6] As B&M employees, Claimants were dismissed upon termination of the MBTA contract with B&M on December 31, 1986. The MBTA's 1974 Section 13(c) Agreement answers this central issue. Paragraph 1 of that Agreement reads as follows:

> *1. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project; provided, however, that fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of this Agreement. The term "Project", as used in this Agreement shall not be limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, technological or otherwise, which are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, or facilitated thereby.* (Emphasis added.)

Consistent with the statute's requirement to protect the interests of employees affected by such assistance, the Agreement defines "project" to include events occurring before, during, and/or after the project. The removal in time (from 1976 to 1987) of the alleged effects of the project would not, by itself, suggest that the effects resulted from something other than the project.[7]

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[6] Additionally, Claimants assert that grants the MBTA received for extensive capital and operating assistance to support this commuter rail service after 1976 demonstrate MBTA's heavy reliance on Federal assistance in this activity, and demonstrate the crucial role of the Federal assistance in enabling MBTA to determine who would be employed in operating the commuter service. This decision focuses only on the parties' primary disagreement.

[7] See RUNNELS v. AMTRAK, DEP case no. 83-C2-4, (1987), Digest, p. C-137. See also, "Washington Job Protection Agreement," section 2(c), which states:

> *The term "time of coordination" as used herein includes the period following the effective date of a coordination during which changes consequent upon coordination are being made effective; as*

Paragraph 1 next provides an exception to inclusion of an event within the meaning of "as a result of a project" and in the scope of the Agreement:

> *... provided, however, that fluctuations and changes in volume or character of employment brought about* _solely_ *by other causes are not within the purview of this Agreement.* (Emphasis added.)

The MBTA suggests that the change in contractors resulted exclusively from other causes, noting as follows: 1) the adverse effects resulted from the expiration of the B&M contract pursuant to its terms; 2) the termination of the Claimants was a personnel action of B&M, not of MBTA; 3) the decision to change contractors was a managerial, operational or policy decision of MBTA and there was no project specifically for the purpose of considering or making such a decision; 4) the change occurred through an objective, public bidding process. These arguments are not persuasive on the issue of whether the Claimants were affected by the project.

Even if these arguments were valid, they still would not show that the adverse effects resulted exclusively from causes other than the project. As provided in Paragraph 13(d) of the MBTA's 1974 Agreement:

> *(d). ...it shall be such employee's obligation to specify, if possible, the adverse effect which he has suffered. It shall then be the [MBTA's] burden to establish affirmatively that any such deprivation, worsening of employment, or change of residence as claimed by the employee, was not a result of the Project by proving that factors other than the Project affected the employee.* _*The claiming employee shall prevail if it is established that the Project had an effect upon his employment even if other factors may also have affected the employee.*_" (Emphasis added.)

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applying to a particular employee it means the date in said period when that employee is first adversely affected.

As contemplated under the Agreement's burden of proof, in such situations the Claimants would be eligible for employee protections.[8]

Paragraph 1 of the 1974 Agreement further describes the scope and applicability of the protections. Contrary to the MBTA's argument, "project" is not limited to the stated purpose, facility or activity assisted by the project. Thus, the Agreement's protections apply beyond the immediate scope or purpose of the particular project. In this case, the Agreement's protections apply beyond the acquisition of B&M assets, to the change in operating contractors from B&M to Amtrak. Paragraph 1 of the protective Agreement states that "project:"

> *... shall include <u>any changes, whether organizational, operational, technological or otherwise</u>, which are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, or facilitated thereby.* (Emphasis added.)

In view of this language, one cannot argue that a change in the contracted operator of the commuter service would fall beyond coverage of these protections. A change in contracted operators is undeniably an organizational and an operational change.

In defining the project, Paragraph 1 does limit "any changes" by requiring that the changes must be "traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, of facilitated thereby." The MBTA could not have changed contractors in 1987 if it had not acquired the B&M commuter rail service assets with the grant of Federal funds in 1976. The change in contractors, then, was reasonably related to, and facilitated by, the 1976 project, or, as stated in the protective Agreement, was traceable to the project.[9] Once the adverse effects occurred, MBTA became

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[8] <u>See also</u> <u>Congress of Railway Unions</u>, 326 F.Supp. at 76, n. 9 (affidavit of Secretary of Labor James D. Hodgson, available in <u>Digest</u>, p. D-41.) MBTA cites DOL decisions to argue for a higher burden of proof upon these Claimants. To the extent that such burden would be greater than that described in the Secretary's affidavit and reflected here in Paragraph 13(d) of the MBTA's 1974 Agreement, such argument is inconsistent with the Agreement and the Act.

[9] Arbitrator Arnold Zack has ruled on these same Section 13(c) projects and similar events in claims filed by the Alliance of All MBTA Unions. Although not binding here, it is noted that Arbitrator Zack also found that:

responsible for providing appropriate protections to these affected employees.[10]

CONCLUSION

Except as noted in footnote ten, we find that Claimants were affected on and after January 1, 1987 by MBTA's 1976 project for acquisition of certain B&M commuter rail service assets. They are eligible for protections provided for in the MBTA's certified protective arrangements, as of the date they were affected. Determination of the specific amounts of each Claimant's entitlement is referred to the parties. The good faith efforts of the parties should promptly resolve those quantitative determinations.

The Secretary will retain jurisdiction over the question of specific entitlements. In the event that the parties are not able to reach a prompt settlement of these claims, any Claimant herein may request a decision from the Secretary with respect to

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> *... the change in operator came about because of and was directly related to the MBTA funding and thus was not brought about "solely by other causes." The termination of B&M's contract cannot be considered in a vacuum. The contract was negotiated with the MBTA as property owner because of the MBTA's funding by the UMTA. The termination of that contract was thus traceable to, reasonably related to, and a direct consequence of the MBTA's original grant of that service contract and its decision to bring in Amtrak, both based upon the control of the right of way granted [by] the UMTA grant, i.e. "as a result of the project."*
> -MASSACHUSETTS BAY TRANSPORTATION AUTHORITY AND ALLIANCE OF ALL MBTA UNIONS, October 16, 1988, p. 19.

[10] MBTA has noted that as many as four Claimants may not have been hired by B&M until after 1976, arguing that the 1976 project could not have adversely affected those employees. The parties have not briefed this matter and it would be premature to decide this issue now. If, because of this issue, the parties are not able to resolve or settle those certain claims following this decision, any Claimant hired after 1976 may request a decision from the Secretary on this issue of eligibility. Such request must be made not earlier than 60 days, and not later than 120 days, following the date of the instant decision.

those entitlements not sooner than 60 days, and not later than 120 days, following the date of this decision.

This arbitration decision is final and binding upon the parties.[11]

1/13/95
Date

Special Assisant

[11] Effective July 2, 1994, Secretary Robert B. Reich delegated responsibility to Charles L. Smith for performing all of the duties and functions previously assigned to the Assistant Secretary for the Office of the American Workplace.

In the matter of arbitration between:

AMALGAMATED TRANSIT UNION LOCAL 691, *Claimant*	OSP Case no. 91-13c-18
v.	
CITY UTILITIES OF SPRINGFIELD, MO, *Respondent*	Issued: June 1, 1999

Summary

City Utilities' contention that Section 13(c) protections apply only when an individual employee has evinced a specific harm, which is a result of a Federally-funded project, was rejected. Relying on its incorrect interpretation of a court decision, City Utilities improperly made mid-term deletions from the ATU Joint Statement of Intent, without meeting and conferring with the Union and without complying with the terms of the Joint Statement. City Utilities subsequently pursued a pattern of additional activities which undermined the status of the union as the exclusive bargaining agent, including failure to properly handle the Union's grievance and polling members of the bargaining unit. The ATU's claim was upheld and appropriate remedies were applied.

The Claim

Amalgamated Transit Union Local 691 (ATU, or Union) brings this claim under Paragraph 15 of the 1976 Section 13(c) protective Arrangement certified for City Utilities by the Department of Labor (Department) as satisfying the requirements of Section 13(c) of the Federal Transit Act (FTA).[1] As required by the Act, the 1976 protective arrangement is part of pertinent City Utilities grant contract(s), including but not limited to the 1988

[1] What is commonly referred to as Section 13(c) of the Federal Transit Act (formerly the Urban Mass Transportation Act (UMTA) of 1964, 49 U.S.C. §1601), is recodified as part of the Federal transit law at 49 U.S.C. § 5333(b), by Public Law 103-272, § 1(c) (July 5, 1994), 108 Statutes 835. "Historical and Statutory Notes" accompanying the recodification state that the recodification does not change the substance or requirements of Section 13(c).

contract, entered into by City Utilities and the Federal government for City Utilities' receipt of Federal transit assistance.

The Union alleges several violations of the 1976 Section 13(c) Arrangement, stemming from City Utilities unilateral deletion of several provisions of the 1988 ATU Joint Statement of Intent, including improper polling of bargaining-unit members and derogation of the Union's role as the exclusive representative. Additional named violations include City Utilities' failure to honor the Union's grievance over the disputed actions, failure to respect and preserve negotiated rights, and failure to honor and continue the Union's meet and confer rights,[2] all in alleged violation of the Section 13(c)(1) and/or (2) requirements contained in Paragraphs (3) and (4), respectively, of the 1976 Section 13(c) Arrangement.

As remedy, the Union requests whatever relief is necessary and appropriate, including, but not limited to, restoration of the checkoff, reinstatement of all terms and conditions of the 1988 Joint Statement of Intent and prohibition against any applications of the merit system in conflict with such Joint Statement.

Facts

City Utilities' 1976 Section 13(c) Arrangement sets forth the protective terms and conditions applicable to the parties. Paragraphs (3) and (4) of that Arrangement, respectively, contain the protective provisions required by Section 13(c)(1) (the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise") and by Section 13(c)(2) ("the continuation of collective bargaining rights").

The ATU is the exclusive bargaining representative for a unit of approximately eighty-one mechanics and bus operators employed by City Utilities, a governmental division of the City of Springfield, Missouri. Under the Public Sector Labor Law of Missouri, Mo. Ann. Stat. §§ 105.500-.530 (Vernon 1994), and under the City of Springfield's Charter,[3] the parties meet, confer and discuss, but they are barred from entering into a collective bargaining contract. A meet and confer negotiation results in a Joint Statement of Intent, which is legislatively adopted by the Board of Public Utilities (Board) with or without modification.

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[2] Meet and confer rights are protected under Section 13(c) as a form of collective bargaining rights. ATU Local 1338 v. Dallas Transit System, DEP case no. 80-13c-2 (1981), Employee Protections Digest, U.S. DOL, p. A-248. Unless otherwise indicated, the terms "bargaining" and "negotiation," when used herein, refer to the meet and confer relationship between ATU Local 691 and City Utilities.

[3] Neither party has distinguished between Missouri Public Sector Labor Law and the Charter of the City of Springfield, for purposes of this claim.

The Union and City Utilities negotiated the terms for the 1988 ATU Joint Statement of Intent and presented the results of those negotiations to the Board. By legislative resolution, the Board adopted and initiated the Joint Statement of Intent, effective July 15, 1988 through July 15, 1991, as governing wages and working conditions of the bargaining unit represented by the Union.

Immediately prior to the events considered in this claim, City Utilities had refused to dismiss certain employees who had not paid service fees to the International Brotherhood of Electrical Workers Local 753 (IBEW). A provision in the IBEW Joint Statement at City Utilities allegedly required either payment or dismissal. IBEW sought court enforcement. On August 20, 1990, the Missouri Court of Appeals found that the union security language on which the IBEW relied did not apply to the employees in question. For that reason the Appeals Court upheld the lower court's dismissal of the case. Strunk v. Hahn, 797 S.W.2d 536 (Mo. App. 1990).

On August 31, 1990, relying on that decision, City Utilities sent the following message to all its employees:

> *The Missouri Court of Appeals of the Southern District handed down a decision on Monday, August 20, 1990, which states that City Utilities' employees ARE NO LONGER REQUIRED TO PAY UNION DUES UNDER FEAR OF TERMINATION, AND THAT ALL UTILITY EMPLOYMENT DECISIONS MUST BE BASED STRICTLY ON MERIT.*

On September 7, 1990 City Utilities sent its supervisory personnel a memorandum advising that the Strunk decision "stated that City Utilities must...base all promotion and hiring decisions 'strictly on the basis of merit.'" Bv Resolution of September 27, 1990 the Board deleted the provisions for dues checkoff and the provisions applying seniority in promotion, termination, layoff and recall decisions, from the 1988 ATU Joint Statement of Intent. The Board based its actions "on the fact that such provisions were legally suspect as violative of the Charter of the City of Springfield under the Missouri Court of Appeals decision in Strunk v. Hahn, 797 S.W.2d 536 (Mo. App. 1990)."

On October 15, 1990 the ATU and City Utilities met on the matter of these mid-term deletions from the 1988 ATU Joint Statement of Intent. The Union voiced its objection and stated the Union's intention to grieve the matter. During that meeting, City Utilities tried to present a meet and confer proposal for a new ATU Joint Statement of Intent to succeed the 1988 ATU Joint Statement. The proposal included language for new provisions to replace the deleted ones then under protest. The Union declined negotiations over new working conditions at that time. On October 25, 1990 the Union filed a grievance with City Utilities pursuant to Article XII of the Joint Statement of Intent, and simultaneously raised

the disputed matters as a Section 13(c) claim. City Utilities denied both the grievance and the Section 13(c) claim on the basis that the matters of checkoff and seniority were not actionable since they had been deleted from the Joint Statement of Intent and no longer existed.

Thereafter, City Utilities had direct discussions with individual members of the ATU bargaining unit, without the knowledge/consent of the Union. On February 2, 1991, as a result of those direct discussions, City Utilities instituted a voluntary procedure for dues checkoff. The new procedure was neither a product of the meet and confer process nor of legislative action by the Board, and differed from the provisions in the 1988 ATU Joint Statement.

In later negotiations with the Union over the 1991 Joint Statement of Intent, City Utilities agreed to reinstate the provisions on dues checkoff and seniority which it had deleted from the 1988 ATU Joint Statement as violative of the City Charter. On September 26, 1991, by legislative resolution of its Board, City Utilities adopted these results of negotiations as part of the 1991 ATU Joint Statement of Intent.[4]

Respondent's Position

City Utilities makes a preliminary challenge to the foundation of this claim, arguing that all Section 13(c) protections are "remedial" only. That is, the protections apply only if an individual employee has encountered specific harm, and only if that harm is a result of a project under the Act. City Utilities argues that because the Claimant fails to assert and establish harm to an employee, and fails to assert and establish that such harm occurred as a result of a project, the claim must be dismissed.

City Utilities affirmatively contends that it made appropriate efforts to meet and confer with the Union over changes necessitated by Strunk in the dues checkoff and seniority provisions of the 1988 ATU Joint Statement of Intent. City Utilities argues that the ATU's refusal to negotiate constituted a "waiver" of the Union's meet and confer rights. Alternatively, City Utilities defends its unilateral deletion of the disputed provisions on its

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[4] During the consideration of this case, the parties negotiated a tentative agreement on a 1991 Joint Statement of Intent to replace the ATU's 1988 Joint Statement of Intent. Nevertheless, the Department denied City Utilities' request to dismiss the case as moot. Restoration of the deleted provisions would not resolve questions herein as to whether City Utilities' actions violated the ATU Joint Statement of Intent and/or the Section 13(c) Arrangement, nor as to whether other harm may have occurred. *See, e.g.*, North Star Steel Co. v. N.L.R.B., 974 F.2d 68, 70 (8th Cir. 1992)("While the [1990] tentative agreement indicates that the union may have been amenable to [a particular term therein], it certainly cannot be viewed as an iron-clad indicator of how the union would have acted had the company bargained with it over this issue in 1987.").

conclusion that such actions are supported by Department of Labor precedent and by the 1988 ATU Joint Statement of Intent.

Issues

1. Do protections pursuant to Sections 13(c)(1) and (2) require the assertion and identification of specific harm to one or more individual employees, and that such harm be a result of a Federally funded project under the Act?

2. Did ATU waive its right to meet and confer?

3. Did City Utilities comply with its obligations under the Section 13(c) Arrangement in deleting provisions for dues checkoff and seniority from the 1988 ATU Joint Statement of Intent?

4. Did City Utilities' actions tend to undermine the Union and its status as exclusive bargaining unit representative?

Discussion

ISSUE 1. Do protections pursuant to Sections 13(c)(1) and (2) require the assertion and identification of specific harm to one or more individual employees, and that such harm be a result of a Federally funded project under the Act?

In 1982, the Supreme Court recognized the preventive and affirmative nature of Sections 13(c)(1) and (2) as mandatory preconditions for any Section 13(c) grant:

> *To prevent federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included § 13(c) in the Act....The statute lists several protective steps that must be taken before a local government may receive federal aid; among these are the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights.* (Emphasis added.)(Citation omitted.)

Jackson Transit Authority v. Local Division 1285, ATU, 457 U.S. 15, 17-18 (1982). The Court went on to state that "Section 13(c)...specifies five different varieties of protective provisions that must be included among the 13(c) arrangements; and it expressly incorporates the protective arrangements into the grant contract between the recipient and the Federal Government." (Emphasis added.) Id. at 23.

Three years after Jackson, the U.S. Court of Appeals also observed that Congress required such preventive provisions and affirmative obligations to protect the status quo. Amalgamated Transit Union v. Donovan, 767 F.2d 939 (D.C. Cir. 1985). That case addressed a change in Georgia law which removed various subjects from the transit authority's previous scope of bargaining. The case indicates no consideration of result of a project (or, causal nexus) other than a general recognition that the Metropolitan Atlanta Rapid Transit Authority (MARTA) had received, and was seeking additional, Federal assistance under the FTA. Beyond identifying the bargaining rights held by the union prior to the new legislation, the court accorded no significance to the purposes/activities of the projects, nor to the uses made of the Federal monies under past or pending grants other than that they were used to continue operation of transit activities. The Court of Appeals concluded that: "[s]ince Act 1506 prevents compliance with an express provision of section 13(c), the Secretary's certification of MARTA's labor protective agreement [and grant/ project] was improper." Id. at 953. Donovan reaffirms that protections pursuant to Sections 13(c)(1) and (2) do not require a result of a project (beyond receipt of, or application for, Federal assistance), and that these sections do not require any harm to specific employees, in order to activate and/or apply their protective requirements.

In attempting to limit all Section 13(c) provisions to only "remedial" application, City Utilities cites United Transportation Union v. Brock, 815 F.2d 1562 (D.C. Cir. 1987). However, aside from finding that a loss of bargaining rights seven years before any Federal assistance was applied for by the grantee is too remote to be protected by Section 13(c), the decision does not require any connection to the Federal assistance for the application of Sections 13(c)(1) and (2) protections. Thus, only in this sense of temporal proximity can Brock be viewed as requiring any sort of result or connection between Sections 13(c)(1) or (2) and the Federal assistance. Since Brock did not address the other prong of City Utilities' theory (the question of whether harm to an employee is required), the decision lends no support to City Utilities "remedial" theory. *See also*, Division 587, Amalgamated Transit Union v. Metro. Seattle, 663 F.2d 875, 877-80 (9th Cir. 1981)(under provisions similar to those at issue here, the court held that the requirement of "whether or not a particular employee was affected by the Project...relates to grievances of individual employees; it cannot be construed as a limitation of the collective bargaining provisions contained in [the 13(c) arrangement].").

City Utilities also cites two private arbitration decisions in Section 13(c) claims as Department of Labor decisions which support City Utilities "remedial" argument.[5] Although

[5] Smith v. Mid-mon Valley Transit Authority, OSP Case no. 91-13(c)-19 (1992), and ATU Local 1388 [*sic*] v. Dallas Transit Systems, OSP Case No. 81-13c-6 (1992). (The name of this latter arbitration decision contains a typographic error in its identification of the union, which correctly should be identified as "ATU Local 1338." Note that this arbitration award involving ATU Local 1338 in 1992 is not to be confused with the 1981 decision of the same name cited in footnote 2, *supra*, which is an arbitration decision issued by the Department of Labor.

those cases initially were filed with the Department of Labor, they were assigned to a private arbitrator who rendered the final and binding arbitration decisions independent of the Department. Consequently, those cases do not serve as precedent for the Department and need not be distinguished.

City Utilities next relies on several Section 13(c) arbitration decisions issued by the Department.[6] These decisions did not address Section 13(c) (1) and (2) protections, however, and therefore are distinguishable from the instant claim. Those cases turned upon protections required pursuant to Section 13(c)(3), recodified at 49 U.S.C. § 5333b(2)(C). Specific conditions/requirements applicable to protections under Section 13(c)(3) are not necessarily applicable to protections under Sections 13(c)(1) and (2).[7]

City Utilities' 1976 Section 13(c) Arrangement contains no suggestion of any "remedial" limitation on Section 13(c)(1) or (2) protections. The only provisions beyond the statements that the rights shall be preserved and continued are the two conditions at the end of Paragraph 3. The first condition provides that rights, privileges and benefits "may be improved, changed or added to so long as there is no denial of accrued rights, privileges and benefits." This does not include the possibility of reduction or other worsening of such terms. The accrued rights in this dispute are the provisions in the 1988 ATU Joint Statement of Intent at the time in question. Any denial or other worsening of the terms in that labor arrangement, as was the case in this claim, would need to be pursued at the appropriate time through meet and confer procedures and in conformity with applicable Section 13(c) requirements. *See* Donovan at 953.

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[6] Stephens v. Monterey-Salinas Transit, DEP Case No. 82-13c-6 (1982); ATU v. Port Authority, DEP Case No. 79-13c-2 (1980); Dufresne v. Santa Cruz MTA, DEP Case No. 74-13c-5 (1974); Swanson v. Denver Regional Transportation District, DEP Case No. 77-13c-24, U.S. DOL (1981); Winters v. Nashville MTA, DEP case no. 74-13c-4 (1974), Digest, p. A-17.

[7] *See, e.g.*, December 10, 1992, certification of City Utilities' Project No. MO-90-X079:

> *Although, Section 13(c) agreements do typically specify that provisions addressing [Section 13(c)(3) are] triggered "as a result of the project," such language has not been included with respect to 13(c)(1) and (2) rights. This is because the legislative history of the Act supports that, independent of a causal nexus with the project or tangible harm to individual claimants, Section 13(c)(1) requires the preservation of collective bargaining agreements and Section 13(c)(2) the continuation of collective bargaining rights when these rights could be affected by Federal assistance.*

See also, March 29, 1993 certification for New Jersey Transit Corporation project no. NJ-09-X037.

The second condition at the end of Paragraph 3 of the Section 13(c) Arrangement provides that City Utilities' rights in directing the working forces and in managing its business will be exercised in accordance with the working conditions which include, but are not limited to, the Joint Statement of Intent. This provision runs counter to City Utilities' claim of being able to unilaterally delete working conditions from the existing ATU Joint Statement.

The Section 13(c)(1) and (2) protections found in Paragraphs 3 and 4 of City Utilities' 1976 13(c) Arrangement, then, are primarily preventive and not exclusively remedial. They establish affirmative obligations upon the transit entity, which apply regardless of any allegation or showing of either a result of a project or harm to an individual employee. Therefore, the Union is not required to state a specific harm to an employee, nor to describe or demonstrate a direct, or indirect, connection (result, or nexus) between the alleged harm and the Federal assistance, in order to file, and/or prevail, in this claim based on Section 13(c)(1) and (2) protections. City Utilities' "remedial" theory of limitation on the scope of the protective provisions does not apply to Sections 13(c)(1) and (2).

ISSUE 2. Did ATU waive its right to meet and confer?

In October 1990, when City Utilities declined to recognize the Union's grievance over the deleted current working conditions, the Union refused to meet and confer over terms which City Utilities sought to propose for a new Joint Statement of Intent, until resolution of its grievance, of a Section 13(c) claim based on the same deletions, or of negotiations over the deleted (not the proposed new) conditions. City Utilities alleges that this refusal constituted a "waiver" of ATU's meet and confer rights. To the contrary, however, in so doing, Local 691 acted within its rights to decline negotiations when management has improperly deleted a part of accrued rights and benefits applicable to the Union and/or its bargaining unit members. A party in collective bargaining or meet and confer generally is not obliged to enter into negotiations from an inequitable and disadvantageous bargaining position resulting from unfair or improper actions of the opposite party, as long as the improper action/conditions continue. *See* Carroll Contacting & Ready-Mix, Inc., 247 NLRB 890, 103 LRRM 1232 (1980); Phelps Dodge Copper Products Corp., 101 NLRB 360, 31 LRRM 1072 (1952). *Cf.* State Ex Rel. Missey v. the City of Cabool, 441 S.W.2d 35, 44 (Mo. 1969)(the Missouri court ordered back pay and recission of the employer's action whereby, otherwise, [t]*he public employer would thus succeed in reducing the number of union affiliates in its employ and would enable it to nullify the union's ability to retain its status as majority representative.).* The requirements for equitable protections in Section 13(c)(1) and Section 13(c)(2) recognize and require this principle. Section 13(c) will not permit City Utilities to benefit from its improper activities and/or its failures to equitably preserve rights and benefits or to continue the

status quo of the meet and confer relationship by insisting on negotiating from that point. The Union did not waive its right to meet and confer.

ISSUE 3. Did City Utilities comply with its obligations under the Section 13(c) Arrangement in deleting provisions for dues checkoff and seniority from the 1988 ATU Joint Statement of Intent?

The Union contends that the meet and confer process required under the Joint Statement of Intent and under Missouri law is only applicable during defined negotiation periods and that any unilateral, mid-term alteration to the Joint Statement is outside the scope of the agreement. Under Missouri's Public Sector Labor Law, when the parties have met and conferred in good faith with respect to working conditions and the Board has adopted, by Resolution, those conditions with or without modification, the parties are entitled to rely on the continuation of those conditions until changed by appropriate action. Phipps v. School Dist. Of Kansas City, 645 S.W.2d 91, 108 (Mo. App. 1982). Section 13(c) recognizes a comparable obligation. Under Section 13(c), it is clear that changes in substantive provisions may occur but the changes must be accomplished through the appropriate process (in this case, through a meet and confer process in conformity with Missouri Public Sector Labor Law and the ATU Joint Statement of Intent). Donovan at 953.

Article VI of the 1988 ATU Joint Statement further provides that the Joint Statement would have a term of at least three years. Article XX of this Joint Statement amplifies this by requiring that "[t]his Statement of Intent may not be modified or amended except by written instrument executed by the parties."

The evidence supports the Union's statement that City Utilities did not meet and confer with the Union on the disputed provisions prior to deleting them. City Utilities may have met with the IBEW prior to September 27, 1990, but that would not satisfy City Utilities' obligation to meet and confer with the ATU. Further, efforts by City Utilities to initiate meet and confer negotiations with the ATU after the fact cannot satisfy this meet and confer obligation.

In concluding that it was authorized to, and/or obligated to, delete the provisions on dues checkoff and seniority which it had labeled "legally suspect," City Utilities misinterpreted the holding in Strunk. The court merely affirmed the dismissal of the IBEW suit on the factual basis that the disputed provisions on union security and checkoff did not apply to the employees in question, based on their dates of hire. In doing so the court stated expressly that:

This court here does not reach the issue of whether or not union security clauses are enforceable in Missouri against non-union public sector employees because the attempted union security clause in the Joint Statement does not apply to respondents. "Resolution of that issue should await a case in which a decision on it is essential to the adjudication on appeal." Fowler v. Fowler, 732 S.W.2d 235, 238 (Mo. App.1987)(Crow, C.J., concurring).

Strunk at 543. This is diametrically at odds with City Utilities' interpretation of the court's ruling on union security (checkoff). Further, as seniority was not an issue in the case, the court also made no ruling on the validity of seniority provisions. Any discussion regarding seniority was *dicta* and had no legal effect. Id. at 544-545. City Utilities' asserted legal basis for its actions does not exist. City Utilities did not fulfill its obligations under the Section 13(c) Arrangement in deleting provisions for dues checkoff and seniority from the 1988 ATU Joint Statement of Intent.

City Utilities also defends its actions as being permitted under that portion of Article IV of the Joint Statement of Intent which prescribes the responsibilities of the parties if a Joint Statement provision becomes invalid or unenforceable due to a judicial decision. Inasmuch as Strunk did not invalidate any provision of any Joint Statement of Intent, Article IV has no application to the Board's deletions. Even if the disputed provisions had been declared invalid or unenforceable, Article IV would not support the Board's mid-term actions. Rather than providing that an invalid provision will be unilaterally deleted by the Board, Article IV requires that the parties will meet and develop a proper substitute.

ISSUE 4. Did City Utilities' actions tend to undermine the Union and its status as exclusive bargaining unit representative?

Beginning with the August 31, 1990 all-employee notice, City Utilities engaged in a series of actions that misinformed and misled the Union and the members of its bargaining unit regarding their rights and status. City Utilities also circumvented the Union by failing to meet and confer over its interpretation of Strunk and the matter of what, if any, changes might have been necessary in the 1988 ATU Joint Statement of Intent. City Utilities made impermissible mid-term changes in the working conditions of the employees represented by the Union, and did so without an appropriate basis for such action. When the Union filed a proper grievance over these matters, City Utilities failed to deal with the grievance properly, instead relying on the circular reasoning that because City Utilities had deleted the grieved provisions, they did not exist and could not be grieved.

City Utilities also improperly sought to require the Union to negotiate a new set of working conditions based on the inequitable conditions and deprivation of rights that City Utilities had improperly created. Thereafter, City Utilities again circumvented the employees' bargaining representative by dealing directly with members of the ATU

bargaining unit as to what kind of checkoff provision the employees might prefer in light of City Utilities' interpretation of Strunk. On the basis of that improper polling of bargaining unit employees, City Utilities unilaterally implemented a new checkoff procedure without complying with the ATU Joint Statement, without meeting and conferring with the Union, and without a Resolution of the Board. When meet and confer negotiations finally did occur for a new ATU Joint Statement of Intent, City Utilities, with no explanation offered here, agreed to reinstate the very terms which it had deleted as being "legally suspect," and legally prohibited or invalid, under Strunk.

Even if these actions stemmed from a simple misunderstanding of Strunk in the beginning, their continuation over the next year in the absence of a sound foundation evidences a lack of good faith by City Utilities in addressing its obligations to meet and confer with the Union and to respect the rights of the Union and of the employees it represents. Each of these actions improperly derogated the union and undermined the meet and confer relationship and the Union's right to represent the employees as their bargaining agent. City Utilities' actions cast a pall on the relationship between the parties and created an inequitable status for the Union at the meet and confer table, chilling future negotiations and representation. This contravenes the Section 13(c)(2) requirement to continue and, necessarily, to respect the collective bargaining rights held by ATU and the employees it represents. Such undermining of the Union also jeopardizes the employees' rights to freely choose whether to be represented by a labor organization, again in violation of Section 13(c)(2).

The legislative history of the Federal Transit Act makes it clear that where employees are represented by a union, the Act's purpose of protecting the employees' individual and/or collective rights, privileges and benefits requires protecting the rights of the union through which the employees secure and/or exercise such rights, privileges and benefits.[8] The employees' ability to effectively exercise these rights through their Union, and their Union's right to exercise, promote, and defend the rights, privileges and benefits of the employees it represents, may extend beyond the specific rights of the individual

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[8] *Mr. Morse...*

Should the Federal Government make available to cities, States, and local governmental units Federal money to be used to strengthen their mass transit system in those communities when the use of that money would result in lessening the collective bargaining rights of existing unions?

* * * * * * *

....In my judgment, we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for the development of a transit system the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system.

88th Congress, 1st Sess., 1963 (109 Cong. Rec. 5671).

employees.[9] City Utilities' actions in this matter undermined the ATU as the employees' recognized and exclusive bargaining agent, thereby violating the required Section 13(c)(1) and (2) protections reflected in Paragraphs 3 and 4 of City Utilities' protective Arrangement.

In signing the FTA contract of assistance, City Utilities undertook the obligations of Sections 13(c)(1) and (2) as prerequisites to its receipt of Federal assistance. In the actions considered in this claim, City Utilities has obtained the benefit of its bargain, the Federal assistance, but has failed to meet its obligations. ATU's claims of City Utilities' violations of the 1976 Section 13(c) Arrangement are upheld.

Remedy

Any ATU Joint Statement provisions, or personnel provisions, adverse to employees represented by ATU, or to the Union, which resulted as a direct or indirect consequence of, or were related or traceable to, these violations of the 1976 Section 13(c) Arrangement and/or the 1988 ATU Joint Statement and/or to City Utilities' subsequent actions reviewed herein, are void and are to have no effect. Any employee affected by such actions is to be made whole. Any disputes under this remedy paragraph are to be resolved by application of the grievance procedure in the ATU Joint Statement of Intent.

As asserted by ATU in 1991, City Utilities violated its Section 13(c) commitments and obligations beginning in 1990. City Utilities now has been found to have committed such violations. Therefore, in future grant applications for Federal assistance under the Federal transit law, City Utilities must provide appropriate, additional assurances to the Union, negotiated with and agreed to by the ATU, that City Utilities is prepared to comply with, will comply with, and will honor, its contracts and agreements to provide the certified employee protections in exchange for Federal assistance. These additional assurances will include, but need not be limited to, third-party beneficiary provisions in favor of ATU and the employees it represents, which will be included in future City Utility certifications. Once the parties are agreed on the appropriate assurances, City Utilities will provide copies, executed by both parties, to the Department.

Finally, Sections 13(c)(1) and (2) require that all of the remedies directed in this decision be performed in full and in a timely manner by City Utilities. If this is not done,

[9] *See, e.g.*, Local Division 519, ATU v. LaCrosse Municipal Transit, 585 F.2d 1340, 1349 (1978) ("We agree with the Union that it has an economic interest in a new collective bargaining contract apart from that of the members' interest in the agreement's provisions concerning wages and the terms and conditions of employment"); State Ex Rel. Missey at 44("[The union] also has a stake in these actions and its interest cannot be protected by an action at law by the discharged employees for their back pay alone. It is a proper party to these suits to enforce its and its members' rights").

then in future applications by City Utilities for Federal transit assistance, an objection t certification filed by ATU as to the failure to timely perform these remedies will be deemed to present material effect(s) on employees as required under 29 C.F.R. § 215.3(b)(1) and will be deemed by the Department to constitute sufficient objection(s) under 29 C.F.R. § 215.3(d)(2) to show that City Utilities' actions and status are inconsistent with the Section 13(c) requirements of the Federal Statue. Such objection(s) will trigger Section 215.3(d)(6) under which the Department, as appropriate, will direct the parties to commence or continue negotiations. Pursuant to Section 215.3(h), "the Department retains the right to withhold certification where circumstances inconsistent with the statute so warrant until such circumstances have been resolved." City Utilities is to provide a copy of this decision to each of its employees.

This decision is final and binding upon the parties.

6/1/99
Date

/S/
Bernard E. Anderson
Assistant Secretary of Labor

ATU, Local 1146 v. Massachusetts Bay Transportation Authority
OSP Case No. 92-13c-1
April 30, 2001
(Page A-504)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimants were employees of a private carrier, Rapid Transit Inc. that provided bus service within the MBTA's service area. In the late 1960s, Rapid Transit requested financial assistance from MBTA, which MBTA provided through a series of agreements over the next 25 years. The agreements established that Rapid Transit would maintain control over management and operations of its system, and that MBTA would provide various financial subsidies. In 1991, Rapid Transit informed the MBTA that it would not bid on a new service contract because of price limitations proposed by MBTA. The contract was awarded to another private contractor, after which Rapid Transit discontinued its operations and laid off its employees. Claimants contended that they were entitled to a continuation of the collective bargaining rights they had with Rapid Transit because the MBTA had effectively acquired Rapid Transit through its original subsides in 1968 or thereafter. The Department found that Claimants did not have "Memphis Plan" rights merely because the MBTA had provided subsidies to Rapid Transit. While MBTA had some limited control over how Rapid Transit operated its contracted routes, Rapid Transit retained control over its management and operations. Claimants were not "dismissed employees" harmed "as a result of the project," but rather by Rapid Transit's decision not to bid on the new contract.

In the matter of arbitration between:

AMALGAMATED TRANSIT UNION, LOCAL 1146, Claimant	OSP Case No. 92-13(c)-1
v.	
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, Respondent	Issued: April 30, 2001

DECISION

The Claim

The claim in this case alleges a violation of the December 10, 1974 "Agreement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended," between respondent Massachusetts Bay Transportation Authority (MBTA) and certain labor organizations. Doc. 1(a); Doc. 1(b).[1] The claimant asserts that MBTA violated its obligations under the agreement by failing to protect employees of Rapid Transit, Inc. when MBTA awarded to another carrier a contract for service that Rapid Transit had provided. The claimant primarily argues that the employees are entitled to reemployment rights with the new

[1] Citations to documents and supplemental documents that are part of the record in this case are indicated by "Doc. __" or "Supp. Doc. __" followed by the numerical or alphabetical reference for the document.

carrier because MBTA had taken over Rapid Transit and was a de facto "Memphis formula" employer and operator. Doc. 1(a); Doc. 1(c); Doc. 10. Alternatively, the claimant argues that the employees are entitled to appropriate make-whole awards, including "dismissal" and "displacement" allowances under the agreement. Doc. 1(a); Doc. 1(c).

The MBTA rejected the claim, and the claimant submitted the claim to the Secretary for final and binding resolution. The parties submitted documentation and arguments in support of their positions. In 1997, the Secretary appointed Herbert L. Marx, a private arbitrator, to prepare a decision, and Mr. Marx issued decisions in 1998. Pursuant to a settlement in subsequent litigation concerning the Marx decisions, the matter was remanded to the Secretary for a de novo review of the Marx decision. The record consists of materials sent to Mr. Marx, the parties' submissions to Mr. Marx, the Marx decisions and the transcript of the hearing held by Mr. Marx in July 1998.[2]

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[2] The Department thanks the parties for their assistance in reconstructing this record.

Findings of Fact

A. <u>MBTA and the UMTA agreement</u>

MBTA was created in 1964 to provide public transportation in designated areas of Massachusetts. Supp. Doc. E, p. 3. It may provide mass transportation service "directly, jointly or under contract, on an exclusive basis" within the area of its authority. <u>Ibid</u>. (citation omitted). MBTA is also authorized to secure federal financial assistance and to bargain collectively with labor organizations representing employees of the authority. See Mass. Gen. Laws ch. 161A § 25 (2000); <u>Local Div. 589, ATU</u> v. <u>Massachusetts</u>, 666 F.2d 618, 620 n.2 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982).

One of the conditions for receiving federal financial assistance under the Urban Mass Transportation Act of 1964 (UMTA), as amended, is "that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." Pub. L. No. 88-365, § 10(c), 78 Stat. 302, 307 (1964); see 49 U.S.C. 5333(b)(1) (Supp. IV. 1998) (current recodification). These protective arrangements

> shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including

> continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs.

Pub. L. No. 88-365, § 10(c), 78 Stat. at 307 (codified as amended at 49 U.S.C. 5333(b)(2)).

Since at least 1971, MBTA has received capital grants under UMTA. See Supp. Doc. YY. MBTA has also received operating grants under UMTA. See Doc. 1(a), Notes to DOL Form, pp. 5-6; Doc. 9, p. 11; Doc. 16. In December 1974, MBTA entered into an agreement with unions representing its employees and the employees of certain private carriers to provide fair and equitable arrangements required by UMTA. Doc. 1(b). The "Project" to which the agreement applies is not "limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, technological or otherwise, which are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, or facilitated thereby." Id. ¶ 1. The Project is to "be carried out in such a manner and upon such terms and

conditions as will not in any way adversely affect employees covered by [the] agreement." Id. ¶ 2.

Under the agreement, the collectively bargained rights of employees represented by unions who signed the agreement are preserved and continued unless changed by collective bargaining. Doc. 1(b) ¶¶ 3(a), 4. MBTA must "similarly protect such rights, privileges and benefits of other employees covered by this agreement who are in the service area of [MBTA] against any worsening of such rights, privileges and benefits as a result of the Project." Id. ¶ 3(b). The phrase "as a result of the Project" includes "events occurring in anticipation of, during, and subsequent to the Project; provided, however, that fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of [the] Agreement." Id. ¶ 1.

Employees covered by the agreement who are "displaced" or "dismissed" as a result of the Project are entitled to certain monetary allowances. Doc. 1(b) ¶¶ 5-11, 15. A dismissed employee may also be granted priority of employment or reemployment to fill certain vacant positions within the jurisdiction and control of MBTA, but not in contravention of collective bargaining agreements relating thereto. Id. ¶ 14.

B. MBTA's relationship with Rapid Transit, Inc.

Rapid Transit, Inc. is a Massachusetts corporation that provided bus service between the Town of Winthrop and East Boston, within the MBTA's area. On March 5, 1968, the President of Rapid Transit asked MBTA for financial assistance so that Rapid Transit could continue operating. Supp. Doc. v Attach. C. MBTA considered providing the service itself but decided that subsidizing Rapid Transit would be more practical and economic. Id. Attach. D.

MBTA and Rapid Transit entered into a number of agreements under which Rapid Transit would continue to provide service and MBTA would provide assistance in the form of a subsidy or the lease of buses. See Supp. Docs. G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN. Under the agreements, Rapid Transit was considered an independent contractor and not an agent of MBTA. See Supp. Docs. G (Art. II.A), H (Art. II.A), I (Art. II. A), J (¶ 2), M (¶ 2), FF (¶ 2), GG (¶ 2), II (Art. II.A), JJ (Art. II.A), KK (Art. II.A), LL (Art. II.A), MM (Art. II. A). The agreements set conditions for Rapid Transit's use of equipment, route schedules, and fares, but provided that MBTA would generally not control the management, operations, and affairs of

Rapid Transit. See Supp. Docs. G (Arts. II.E, V-VII), H (Arts. II.E, F, V-VI), I (Arts. II. B-H), J (¶ 2, p. 7, ¶ 3), M (¶ 2, pp. 6-7, ¶ 3), FF (¶ 2, pp. 4-5, ¶ 3), GG (¶ 2, pp. 5-6, ¶ 3), II (Arts. II.H, VI, VII), JJ (Arts. II.H, VI, VII), KK (Arts. II.H, VI, VII), LL (Arts. II.E, F, V-VI), MM (Arts. II.E, F, V-VII). The contracts in effect between July 1, 1987, and June 30, 1991, also contain an acknowledgment by Rapid Transit and MBTA "that this Agreement is financed entirely by annual appropriation by the Commonwealth of Massachusetts." Supp. Docs. G (Art. VIII.G), H (Art. VII.H), NN (extending earlier agreement).

On February 21, 1991, Rapid Transit informed MBTA that it would not submit a bid for the Winthrop service due to limitations in the bid amount proposed by MBTA. Supp. Doc. B. In particular, Rapid Transit stated that proposed level funding for three years made the contract impracticable in light of Rapid Transit's anticipated costs. Ibid. Effective July 1, 1991, MBTA entered into an agreement with another private contractor, The Joint Venture of Alternate Concepts, Inc. and Modern Continental Construction Company d/b/a Paul Revere Transportation Company (Paul Revere), to provide the Winthrop service. Supp. Doc. SS. During the term of this contract, Paul Revere's employees were

represented by Local 379 of the International Brotherhood of Teamsters. Supp. Doc. TT.

Rapid Transit discontinued its operations and laid off its employees after it stopped providing the Winthrop service, although it remains a legal corporation. Supp. Doc. v Attach. A. In 1993, some of the laid off employees obtained jobs with MBTA. See Doc. 38, p. 21. The Claimant represented the laid off employees while they worked at Rapid Transit and seeks a continuation of the collective bargaining rights at Rapid Transit, reemployment with MBTA, and payments under MBTA's December 1974 UMTA agreement.

Discussion

The Claimant's primary argument is that employees of Rapid Transit are entitled to a continuation of collective bargaining rights they had with the Claimant and to employment with MBTA because MBTA acquired Rapid Transit, either in 1968, Doc. 10, p. 3, or over the course of time. Doc. 77, pp. 8-9.[3] The Claimant

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[3] MBTA argues that the Department should not consider whether an acquisition occurred because the Claimant failed to raise the issue in a timely manner. Supp. Doc. v, pp. 2-4 (July 1996 reply brief). The Claimant had raised the issue, however, and the MBTA had addressed it. See Doc. 9, p. 5; Doc. 10, p. 3. Whether an acquisition occurred is also relevant to the "Memphis plan" issue, which was timely raised. Accordingly, the Department will consider the acquisition issue.

argues in this regard that the employees have "Memphis plan" rights. See Doc. 1(a), Notes to DOL Form, p. 6; Doc. 1(c), p. 2.[4] Alternatively, the Claimant argues that the employees are entitled to rights as "dismissed employees" because, under paragraph 7 of the 1974 UMTA agreement, they lost their jobs as a result of federal financial assistance that MBTA received in the form of nine operating grants and five capital assistance grants. See Doc. 1(a), Notes to DOL Form, pp. 5-6, 7. Arbitrator Marx rejected the primary argument and accepted the alternative one. Upon de novo review, I conclude that neither of Claimant's arguments is persuasive and accordingly deny the claim.

A. Employment and continuation of collective bargaining rights

Sections 13(c)(1) and (2) of UMTA provide for the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise and for the

[4] A "Memphis plan" exists when a local government wants to take over a privately owned transit line but a state law prohibits the local government from bargaining collectively with the transit line's employees. See 109 Cong. Rec. 5684 (1963) (remarks of Sen. Morse). In that situation, the local government establishes a private entity, under a contract by which the private entity operates the transit line and has an agreement with the employees. Ibid.; see also, e.g., Doc. 10 (a) (May 29, 1991 determination involving City of Boise, Idaho).

continuation of collective bargaining rights. Pub. L. No. 88-365, § 10(c), 78 Stat. at 307. (codified as amended at 49 U.S.C. 5333(b)). As the Claimant recognizes, however, see Doc. 77, p. 6, Sections 13(c)(1) and (2) do not ensure a right to jobs absent the protections afforded by Section 13(c)(4), which provides "assurances of employment to employees of acquired mass transportation systems." Pub. L. No. 88-365, § 10(c), 78 Stat. at 307 (emphasis added) (codified as amended at 49 U.S.C. 5333(b)(2)(D)); see Doc. 78 Attach. (September 21, 1994 Certification of Regional Transportation Commission of Clark County (Las Vegas) Nevada) ("Las Vegas"), p. 5. Thus, the Rapid Transit employees represented by the Claimant have no right to employment with MBTA unless they are employees of a mass transportation system acquired by MBTA.[5]

The term "acquire" is not defined by statute but generally means "[t]o gain possession or control of." Black's Law Dictionary 24 (7th ed. 1999); see, e.g., Huddleston v. United

[5] Because the employees represented by the Claimant had no collective bargaining agreement with MBTA, they also have no right to a continuation of collective bargaining rights under that section. See United Transp. Union v. Brock, 815 F.2d 1562, 1564 (D.C. Cir. 1987) (continuation of collective bargaining rights provided under Sections 13(c)(1) and (2) "is required only when the transit employees had collective bargaining rights that could be affected by the federal assistance").

States, 415 U.S. 814, 820 (1974). Accordingly, in determining whether a mass transportation system has been "acquired," the Department

> considers not only the purchase of assets, but also factors affecting the extent of control exercised over transit operations. These factors include, but are not limited to: control or operation of assets through lease, contract, or other arrangement; subsidies for the purchase or operation of assets (without which service would not be provided); direct or indirect control or authority over operations by the granting of exclusive license, franchise, or charter from a government authority; the ability to determine or influence routes, schedules, headways, and equipment to be employed; and the ability to determine or influence internal management decisions, such as the allocation of financial/capital or human resources.

Doc. 78 Las Vegas Attach., pp. 5-6.

In this case, MBTA did not acquire a mass transportation system from Rapid Transit in 1968. Instead, MBTA specifically chose not to acquire Rapid Transit. Supp. Doc. v (July 1996 reply brief) Attach. D; Supp. Doc. 00. Nor did MBTA acquire such a system from Rapid Transit over the course of time because MBTA never purchased Rapid Transit's assets and lacked sufficient control over Rapid Transit's transit operations to have "acquired" them. As discussed above, MBTA's contracts with Rapid Transit assigned the primary responsibility for Rapid Transit's management, operations, and affairs to Rapid Transit. Thus,

Rapid Transit operated the Winthrop to East Boston route with its own employees under its own contracts with those employees.

MBTA had some control over how Rapid Transit would operate the Winthrop to East Boston route, but that control is too limited to establish that MBTA acquired Rapid Transit's mass transit operations. MBTA did not force Rapid Transit to service the route; instead, Rapid Transit appears to have operated this route profitably, without assistance from MBTA, under a license from Massachusetts' Department of Public Utilities, until it asked for financial assistance from MBTA. See Doc. v (July 1996 reply brief) Attach. D; Supp. Doc. OO. The record does not show that MBTA, in providing assistance, required Rapid Transit to make unwanted changes in the route, or interfered with Rapid Transit's operation of the route. MBTA also did not control Rapid Transit's operating license, or prevent Rapid Transit from providing transportation services outside the Winthrop to East Boston route. See Supp. Docs. JJ (Art. V.E), KK (Art. V.E) (contracts, expecting Rapid Transit to seek charter routes); Supp. Doc. LL, p. 1 (contract recognition that Rapid Transit provides bus service outside MBTA's area).

Rapid Transit may have become dependent on MBTA for a subsidy to continue servicing the Winthrop to East Boston route,

but that dependence does not establish that MBTA thereby acquired Rapid Transit. Local governments may depend on federal subsidies to maintain mass transportation services, see H.R. Rep. No. 88-204 (1963), reprinted in 1964 U.S.C.C.A.N. 2569, 2572-2573, and such subsidies may include conditions on how the money is to be used. But just as the federal government does not acquire the local government's transit system by providing a needed subsidy and imposing contractual conditions on how the money is to be used, MBTA's subsidy to Rapid Transit, and the conditions on how the money was to be used, similarly does not amount to an acquisition.

For similar reasons, this case does not present what the claimant calls a de facto "Memphis plan." See note 4, supra. In this case, MBTA has not acquired a private line, is not prohibited by state law from bargaining collectively with transit employees, see pp. 2-3, supra, and has not set up a private entity to enter into a collective bargaining agreement with transit employees. Accordingly, there is no basis for the

Department to find a de facto "Memphis plan" in this case, and no basis for requiring the continuation of collective bargaining rights for transit employees under a "Memphis plan". See, e.g., Doc. 10(a).[6]

B. Rights as dismissed employees

Under the December 1974 UMTA agreement, dismissed employees are entitled to certain payments. Doc. 1(b) ¶¶ 7-11, 15. Although the Claimant was not a party to the agreement, the employees it represents are entitled to similar protections if they are considered dismissed employees. See id. ¶ 3(b) (MBTA must "similarly protect such rights, privileges and benefits of other employees covered by this agreement who are in the service area

[6] The Claimant also mistakenly relies on the Department's March 29, 1993 certification of protective arrangements involving the New Jersey Transit Corporation (NJT), Doc. 32a. As discussed in an arbitration decision involving NJT, in 1979 NJT had terminated a contract with a carrier during the term of the contract and given the carrier's route to an assetless corporation formed in 1979, which then made arrangements to continue the existing labor agreement and to provide the same services as the former carrier. Doc. a (In re New Jersey Transit Corp. and Division 819, ATU, NJSBM Case No. 93-42, JS Case No. 1922 (Dec. 22, 1995)). The Department's determination that employees had rights to preferential hiring in NJT was "based on, but not limited to, such criteria as the history of the provision of service by [NJT] through noncompetitively bid contracts, and the similarity to a Memphis situation." Doc. 32a, p. 3. The history in NJT, involving a mid-term termination of a carrier's contract and continuation of the agreement by an assetless corporation, is not present in this case.

of [MBTA] against any worsening of such rights, privileges and benefits as a result of the Project").

Under the 1974 UMTA agreement, a "dismissed employee" is one who is laid off or who loses his or her job "as a result of the Project." Doc. 1(b) ¶ 7(a). The term "Project" means, essentially, any activities of MBTA that are reasonably related to or facilitated by MBTA's receipt of federal funding. See id. ¶ 1. The phrase "as a result of the Project" includes "events occurring in anticipation of, during, and subsequent to the Project; provided, however, that fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of [the] Agreement." Id. ¶ 1. Because the contract does not otherwise define "as a result of," it is appropriate to apply the normal meaning of the phrase, which imposes a causation requirement. See, e.g., Gardner v. Brown, 5 F.3d 1456, 1459 (Fed. Cir. 1993), aff'd, 513 U.S. 115, 119 (1994). Thus, employees represented by the Claimant will be considered "dismissed employees" and entitled to financial assistance if MBTA's receipt of federal financial assistance under UMTA caused them to lose their jobs with Rapid Transit.

To establish causation, an employee has the initial burden of specifying the adverse effect from a specific Project. Doc.

1(b) ¶ 13(d). MBTA must then establish affirmatively that the effect was not a result of the Project by proving that other factors caused it. Ibid. The employee will prevail if the Project had an effect but other factors also affected the employee. Ibid.

The Claimant has identified nine operating grants and five capital assistance grants that MBTA received and alleges that these grants adversely affected employees of Rapid Transit by causing them to lose their jobs. See Doc. 1(a), Notes to DOL Form, pp. 5-6; Doc. 16. The Claimant has not specified facts that would show an arguable causal relation between the grants and job loss, however, and therefore has not satisfied its burden of proof. See Haddad v. Worcester Reg'l Transit Auth., DEP Case No. 78-13c-43 (Mar. 20 1981), pp. A-196, A-202 to A-208; Local 1086, ATU v. Port Auth. of Allegheny County, DEP Case No. 79-13c-12 (Mar. 7, 1980), pp. A-88, A-90 & n.1, A-93.[7] Moreover, respondent has established that the job loss was not the result of these grants but was instead the result of Rapid Transit's

[7] Citations are to the U.S. Department of Labor, Office of Statutory Program's Section 13(c) decisions in the Employee Protections Digest; "p. A-__" refers to the page in the Digest where the decision is reported, "p. D-__" refers to the material in the Addenda to the Digest.

decision not to bid on the July 1, 1991 contract for the Winthrop to East Boston service.

In particular, MBTA established that the operating grants played no part in the employees' job loss because its contracts with Rapid Transit from 1987 until June 30, 1991, specifically state that all funding is provided by the state of Massachusetts. Supp. Docs. G (Art. VIII.G), H (Art. VII.H), NN (extending earlier agreement); see also Supp. Doc. C (MBTA's Section 15 report, Form 202: Revenue Detail, p. 3, showing that for 1990 federal operating assistance for all of MBTA's routes and other operations amounted to only about 2.9% of MBTA's total operating budget). This case is therefore akin to Clark v. Crawford Area Transportation Authority, OSP Case No. 94-18-19 (Oct 28, 1996), pp. A-455, A-462, in which the respondent demonstrated that no federal funds were applied to the program for which the claimant worked and the claim was denied. See also Stephens v. Monterey Salinas Transit, DEP Case Nos. 82-13c-6 & 82-13c-4 (Nov. 10, 1982), pp. A-343, A-344, in which a claim was denied when a job loss resulted from a merger and no federal funds were used for the merger.

MBTA admits that its capital grants were used to purchase buses and equipment and that some of those buses and equipment

may have been leased to Rapid Transit. Doc. 40, p. 9; Doc. 78, p. 15. It is not clear from the record how many buses or pieces of equipment were used or when they were used. Nevertheless, any such use did not cause Rapid Transit employees to lose their jobs. If anything, the federal funding assisted Rapid Transit employees in keeping their jobs by making it easier for MBTA to provide a subsidy to Rapid Transit. The employees lost their jobs because Rapid Transit was not financially able to bid on a three-year, level funding contract in 1991. See Supp. Doc. B. Rapid Transit was unable to bid on the contract because its costs were increasing, ibid., not because MBTA had received federal funding.

In similar circumstances, the Department of Labor has concluded that employee job loss was not a result of a Project. As in Port Authority of Allegheny County, supra, p. A-94, where "[t]he private bus company's profits were in general decline during [the relevant] period," the Claimant has presented no facts to show why the private company had financial difficulty "other than the assertion of [the Claimant's] belief and the fact that Respondent purchased new buses for its entire system." To the extent that federally subsidized buses and equipment were available to other bidders on the 1991 contract, they had "no

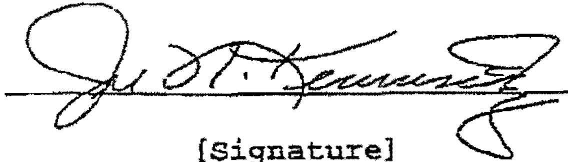
effect" on the job loss. Compare Fuller v. Greenfield & Montague Transportation Area Transit Authority, DEP Case No. 81-18-16 (Apr. 13, 1987), pp. A-384, A-387 to A-388, where a private company's unsuccessful attempt to extend its contract resulted from the company's "own internal problems and factors outside the UMTA project applications." See also Local 103, ATU v. Wheeling, W.Va., DEP Case No. 77-13c-5 (Aug. 4, 1977), p. A-61. To the extent that federally subsidized buses were available only to Rapid Transit, the withdrawal of that subsidy at the expiration of Rapid Transit's last contract also fails to establish that federal funding caused employee job loss. The Department has recognized that an employee "who is dismissed, displaced, or otherwise worsened solely because of the total or partial termination of the Project, discontinuance of Project services, or exhaustion of Project funding, shall not be deemed eligible for a dismissal or displacement allowance." Model Section 13(c) Agreement for UMTA Operating Assistance ¶ 24, pp. D-43, D-57 to D-58; see also 29 C.F.R. 215.6; Local 959, IBT v. Greater Anchorage Area Borough, DEP Case No. 74-13c-7 (Dec. 19, 1974), p. A-25. By similar reasoning, if employees of Rapid Transit lost their jobs because MBTA withdrew its subsidy, they would not be eligible for a dismissal or displacement allowance.

For these reasons, the Claimant's alternative argument is denied. Arbitrator Marx failed to explain how MBTA's change of contractors was reasonably related to or facilitated by MBTA's receipt of federal funding. Cangiamila v. MBTA, OSP Cases No. 91-13(c)-1 through 91-13(c)-14 (Jan. 13, 1995), p. A-403, on which Arbitrator Marx and the Claimant have relied, has been withdrawn and has "no legal effect or precedential value." Cangiamila v. MBTA, OSP Cases No. 91-13(c)-1 through 91-13(c)-14 (July 17, 1998). Claimant's reliance on Arbitrator Zack's award in In re MBTA and Alliance of All MBTA Unions (Oct. 26, 1988), Doc. 1(e), is also misplaced. In that case, employees covered by MBTA's December 1974 UMTA agreement were found to have been displaced as a result of a Project based on facts that are materially different from the facts of the instant case. See Doc. 1(e), pp. 18-20 (federal funding enabled MBTA to acquire rail lines, which permitted it to change operators of those lines for reasons, unlike this case, that were unrelated to the

previous operator's failures). Arbitrator Zack's award is also not precedent for the Department, see ATU Local 691 v. City Utils. of Springfield, OSP Case No. 91-13c-18, p. 7 (June 1, 1999), and will not be followed to the extent that it is inconsistent with the analysis herein.

4/30/01

Date



[Signature]

Denise Diminuco

Digitally signed by Denise Diminuco
DN: cn=Denise Diminuco, c=US, o=US Department of Labor, ou=ESA/OLMS/DSP, email=Diminuco.Denise@dol.gov
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NOTICE OF WITHDRAWAL OF DECISION

Please be advised that, as a result of a settlement between the parties, the Department of Labor has withdrawn the August 12, 1999 decision in Robert C. Brown v. Massachusetts Bay Transportation Authority, OSP Case No. 92-13(c)-17. That Decision therefore has no legal effect or precedential value, cannot be relied upon in any manner or cited by any party in any administrative, arbitral or judicial proceeding, and cannot be a basis for any decision, determination, certification, arbitration, adjudication, or any Departmental action. Accordingly, the decision has not been and will not be published in the Employee Protections Digest.

In the matter of arbitration between:

Amalgamated Transit Union Local 1363 and Amalgamated Council of Greyhound Unions *Claimants*	)	OSP case no. 92-18-6
v.	)	
Rhode Island Department of Transportation *Respondent*	)	Issued: June 13, 1996

Summary

RIDOT failed to comply with the Section 18 Warranty in the areas of: certifying acceptance to DOL; recipient's acceptance of the Warranty; providing arrangements for filing claims; posting notice of the protections; and maintaining a current list of eligible recipients. RIDOT is determined to be in noncompliance, and will need to demonstrate compliance before future grants will be approved and funds released.

Origin of the Claim

The U.S. Department of Transportation issues grants of funds for small urban and rural projects, under 49 U.S.C. §5311 (formerly Section 18) of the Federal Transit law.[1] Under 49 U.S.C. §5333(b), commonly known, and hereinafter referred to, as Section 13(c), the Department of Labor has responsibility for certifying that fair and equitable protections are made to protect the interests of employees affected by such assistance. For Section 18 grants, the Department of Labor and the Department of Transportation have developed the Special Section 13(c) Warranty for use in meeting the employee protection requirements of Section 13(c).

[1] In 1991, the Urban Mass Transportation Act (UMTA) of 1964, 49 U.S.C. App. § 1601, et seq., as amended, was renamed the Federal Transit Act. Section 13(c) of the Federal Transit Act is recodified at 49 U.S.C. § 5333(b), by Public Law 103-272, § 1(c) (July 5, 1994),108 Statutes 835.

The claims in this case arise under the Rhode Island Department of Transportation's Section 18 project (RI-18-X009), which relies on the Warranty to meet the requirements of Section 13(c). Claimant Amalgamated Transit Union Local 1363 represents Bonanza Bus Lines employees, and Claimant Amalgamated Council of Greyhound Local Unions represents Greyhound Bus Lines employees. Both Claimants are represented here by the Amalgamated Transit Union International (ATU). On April 8, 1992, ATU filed this claim with RIDOT. Having received no response from RIDOT, either to the claim or the to ATU's invitation to propose a preferred arbitration procedure for resolving the claim, ATU referred the matter to the Department of Labor on May 12, 1992, pursuant to Section B(4) of the Warranty.

The Claim

The claim alleges that the Rhode Island Department of Transportation (RIDOT) has failed to comply with the requirements of the Special Section 13(c) Warranty in the following respects:

1. failing to certify to the Department of Labor that the project recipient has executed written acceptance of the Warranty, as required in the third paragraph of Part A of the Warranty;

2. failing to condition release of RIDOT'S grant funds upon the recipient's agreement to be bound by the terms and conditions of the National Section 13(c) Agreement (the Model) referenced in Section B(3) of the Warranty;

3. failing to obligate the recipient to make the necessary arrangements for the filing of individual claims as required by Section B(5) of the Warranty;

4. failing to require that the recipient post appropriate notice concerning the applied protections as required in section B(8) of the Warranty;

5. failing to maintain an accurate, up-to-date listing of eligible recipients as required in the second paragraph of Part A of the Warranty.

The Claimants seek correction of the alleged violations, and equitable measures to ensure compliance with the Warranty.

Findings of Fact

On April 30, 1991, the U.S. Department of Transportation awarded the grant for project (RI-18-X009) to RIDOT. Among other purposes, this grant was approved to provide funds to develop and implement a paratransit broker project which would coordinate all paratransit services provided through the several State agencies. The State agencies would contract with the broker, who would, in turn, contract with the various paratransit operators to provide the services requested by the various state agencies. As described by RIDOT:

> *Since the broker was to be a contractor to RIDOT, we developed the scope of work for the broker's service. That scope...includes...the design and initial implementation of the brokerage system. In essence, the broker manages the administration of the State funded paratransit service by contracting with service operators and scheduling and overseeing the service provided.*

COMSIS, the for-profit recipient under this RIDOT grant, developed this broker system and then served as the paratransit service broker. The first brokered contracts took effect August 1, 1991.

RIDOT's grant contract with the U.S. Department of Transportation incorporates the terms and conditions of the Warranty, as required by Section 13(c) and by paragraph B(10) of the Warranty. The grant contract also includes the following condition, set forth in RIDOT's signed acceptance of the grant:

> *Sec. 5. Labor Protection - The Grantee agrees to undertake and complete the Program under the terms and conditions of the Special Section 13(c) warranty for the Section 18 Program agreed to by the Secretaries of Transportation and Labor dated May 31, 1979, or substitute comparable arrangements agreed to by the Department of Labor.*

No comparable arrangements were substituted for this grant.

ALLEGATION 1: that RIDOT failed to certify to the Department of Labor (Department) that the project recipient has executed written acceptance of the Warranty.

Section A, paragraph 3, of the Warranty provides that:

> *Certification by the Public Body to the Department of Labor that the designated Recipients have indicated in writing acceptance of the terms and conditions of the warranty arrangement will be sufficient to permit the flow of Section 18 funding in the absence of a finding of noncompliance by the Department of Labor.* (Emphasis added.)

In its February 6, 1991, application for this grant, RIDOT had given several assurances to the Federal Transit Administration (FTA), including the following:

> *9) The local recipient has complied, as applicable, with the labor protection provisions of Section 13(c) of the Urban Mass Transportation Act, as amended, and the State has certified this compliance to the Department of Labor for each project in Category A.* (Emphasis added.)

Category A lists only one local recipient, COMSIS, Inc. Responding to a Freedom of Information Act (FOIA) request from the ATU, the Department notified the ATU on July 30, 1991, that "the Department of Labor possesses no documents related to, discussing, or constituting ...[the grant]." On October 2, 1991, the ATU wrote to RIDOT and asked for copies of documents verifying that RIDOT had made the required assurances that the Warranty protections were in place. RIDOT did not respond to that letter. On March 25, 1992, the ATU again wrote to RIDOT regarding the Warranty's requirement that RIDOT provide assurance that the recipient, COMSIS, agreed in writing to the provisions of the Warranty as a condition of release of funds under the grant. The ATU asked for a dialogue with RIDOT to resolve their differences over the understandings of this requirement. On March 31 RIDOT responded that it had discussed the matter of signing the Section 13(c) Warranty with the U.S. Departments of Labor and Transportation, and that RIDOT would take no action until those agencies had met and discussed it. On April 23, 1992, in response to another FOIA request from the ATU, the Department advised the ATU that RIDOT had not provided the letter of assurance required for the Section 18 funding under the Warranty.

ALLEGATION 2: that RIDOT failed to condition release of RIDOT's grant upon the recipient's agreement to be bound by the terms and conditions of the National Section 13(c) Agreement (the Model) as referenced in the Warranty. The ATU also alleges that the Warranty intends that the letters of acceptance of the Warranty are to be kept on file by RIDOT. See Rural transportation Employee Protection Guidebook, U.S. Department of Labor, Labor-Management Services Administration , Division of Employee Protections, September 1979, p. 28.

Section B(3) of the Warranty requires that:

> *...the Public Body will assure as a condition of the release of funds that the recipient agrees to be bound by the terms and conditions of the National (Model) Section 13(c) Agreement... provided that other comparable arrangements may be substituted therefor, if approved by the Department of Labor and certified for inclusion in these conditions.* (Emphasis added.)

No "other comparable arrangements" were approved by the Department of Labor. On June 2, 1992, at the Department's direction, RIDOT executed written acceptance of the obligations of the Warranty protections for its April 30, 1991, Federal Transit Act grant (RI-18-X009). On November 13, 1992, RIDOT stated that COMSIS had never agreed to accept either the Warranty provisions or the Section 13(c) Model provisions.[2]

ALLEGATION 3: that RIDOT failed to obligate the recipient to make the necessary arrangements for the filing of individual claims as required by the Warranty.

Section B(5) of the Warranty requires that:

> *The Recipient or other legally responsible party designated by the Public Body will be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee covered by these arrangements, or the union representative of such employee, may file claim of violation of these arrangements with the Recipient within sixty (60) days of the date he is terminated or laid off as a result of the Project, or within eighteen (18) months of the date his position with respect to his employment is otherwise worsened as a result of the Project.* (Emphasis added.)

The recipient, COMSIS, never made any arrangements for the filing of claims. In a November 13, 1992, letter in this claim, RIDOT stated to the Department of Labor that claims against the warranty can be made to RIDOT's Director of Transportation. In 1992, RIDOT denied the ATU's assertion that procedures for filing claims had not been made. In addressing that question in a letter of January 12, 1994, to the ATU, RIDOT indicated that a claims procedure had been established in a letter of August 20, 1993, from its Administrator for Mass Transit Program, notifying transportation agencies in the area that "if anyone has questions on this labor warranty, to please contact Robert

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[2]The provisions of the Model 13(c) Agreement that are included in the Warranty protections are set forth at p. 30 of the Guidebook.

Letourneau..." That letter was not provided for the record in this case. In response to the letter, the ATU noted that the letter does not set forth procedures to be followed in the filing of claims. The parties disagree as to what, if any, procedure for filing claims RIDOT ever established and/or posted after accepting responsibility for the Warranty.

ALLEGATION 4: that RIDOT failed to require that the recipient post appropriate notice concerning the applied protections as required in the Warranty.

Section B(8) of the Warranty provides that:

The Recipient will post, in a prominent and accessible place, a notice stating that the Recipient has received federal assistance under the Urban Mass Transportation Act and has agreed to comply with the Provisions of Section 13(c) of the Act. This notice shall also specify the terms and conditions set forth herein for the protection of employees. The Recipient shall maintain and keep on file all relevant books and records in sufficient detail as to provide the basic information necessary to the proper application, administration, and enforcement of these arrangements and to the proper determination of any claims arising thereunder.

In its response to the ATU's Motion for Summary Determination, RIDOT addressed this allegation by explaining that:

...the Recipient here [COMSIS], since it is not a provider [of services], is not required to sign the 13(c) Warranty. Even if in fact it had signed such a warranty, posting in its place of business, because it is not a provider, would not have given notice to the persons contemplated under the Warranty. In addition, those who actually provide service under these Grants are not funded by Section 18 and therefore are not required to do the posting. RIDOT as the certifying agency under 13(c) could in fact post notice if such was required by the Department of Labor but again posting notice at RIDOT would not give notice as required by the Warranty.

On November 13, 1992, RIDOT stated the following:

We have not posted the warranty because we still haven't identified any employees who could be affected by the grant. Clearly Bonanza and Greyhound employees do not fall within that class.

On August 20, 1993, RIDOT informed the Department of Labor that RIDOT would post the notice at one of its facilities. By letter of January 12, 1994, RIDOT concluded that "[it is our understanding that since posting took place on or about August 20, 1993, the statute of limitations for filing claims runs from that date."

ALLEGATION 5: that RIDOT failed to maintain an accurate, up-to-date listing of eligible recipients as required in the Warranty.

Section A, paragraph 2, of the Warranty provides that:

> *The Public Body shall provide to the Department of Labor and maintain at all times during the Project an accurate, up-to-date listing of all existing transportation providers which are eligible Recipients of transportation assistance funded by the Project, in the transportation service area of the Project, and any labor organizations representing the employees of such providers.*

The Department of Labor's April 23, 1992 response to the ATU's April 9, 1992, FOIA request included a copy of RIDOT's listing of all existing transportation providers which are eligible recipients of the transportation assistance funded by the project (grant). RIDOT's list was dated April 22, 1992, and the Department noted that :

> *Through what appears to have been an administrative oversight, this document was not provided to the Department of Labor (Department), at the time the application for Section 18 funds was submitted to the Federal Transit Administration.*

Discussion

RIDOT does not deny its failures to take the alleged actions, and defends its position in this claim by offering extenuating or mitigating circumstances. In its initial response to the substance of this claim, made in reply to a Department of Labor request, RIDOT argued that no dispute exists between the ATU and RIDOT because on June 30, 1992, the Department of Labor approved RIDOT'S April 30, 1991, grant (and a subsequent grant, RI-18-X010). This reasoning fails for two reasons. First, that June 30 letter stated that the Department:

> *...has reviewed the required Section 13(c) documentation forwarded by the state and has identified no potential noncompliance problems.*

Such approval is limited to the specific (unidentified) documentation provided by RIDOT in that instance for a certification proceeding before the Department of Labor and does not necessarily have a bearing on prior (or subsequent) actions or failures of action that may be addressed in a claims proceeding. Second, a statement that this limited, certification step identified no potential problems at that later time does not equate to RIDOT's application of the statement to mean that RIDOT has not in any way failed to comply with the Warranty. Generally, questions of noncompliance are addressed in a claim proceeding rather than in a certification proceeding. Nor does the Department's certification exonerate RIDOT or necessarily ameliorate past or continuing noncompliance with the Warranty.

In arguing that RIDOT had no responsibility for the protections required by the 1991 Section 18 grant of funds it received, RIDOT alleges that the Department of Labor has decided that:

> *(I) COMSIS is a private, for profit organization and not an operator, and, therefore, not subject to the provisions of 13(c); that the actual operators of the service are not subject to 13(c); (ii) the actual operators of the service are not subject to 13(c) because they are not recipients of Section 18 money, and (iii) it is the Department of Labor's overall position that these grants are not subject to 13(c) at all. However, the Department of Labor has required that RIDOT assume the labor protection requirements of 13(c) in order to respond to claims.*

RIDOT alleges that such decisions were made in the Department's June 30, 1992, certification of the 1991 and 1992 grants (RI-18-X009 and RI-18-X010, respectively). However, that certification does not contain any semblance of such decisions and RIDOT offers no supporting evidence for its allegation that the Department made such decisions. Nor does RIDOT explain the apparent contradiction between RIDOT's item (iii) and its next sentence in this allegation. Nevertheless, RIDOT's position in this case holds that the recipient of funds under the grant (COMSIS) is not obligated to execute written acceptance of the warranty because COMSIS is not a provider of transportation service, and that the actual providers of service (the various local bus operators employed through the broker service developed under this grant) are not required to execute the Warranty because they are not recipients of Federal funds

under the grant.[3] Such a "Catch-22" rationale is untenable under the Act, as it would conclude that no one has, nor need have, responsibility for the required protections. Part A, paragraph 3, of the Warranty requires the recipients to accept the Warranty in writing, and RIDOT's grant application identified COMSIS as the recipient. The broker service which COMSIS created and provided is a mass transportation service for purposes of the employee protections required under §18, contrary to RIDOT's proposition. It is a supporting or adjunct service in the overall transportation service package, as would be a bus cleaning operation or management of a bus company. Having established this broker function as the method of coordinating and providing available bus transportation, and as the means for deciding which companies will receive contracts to operate the bus services, RIDOT has made this broker service an essential component in providing the relevant transportation services. Thus, COMSIS is a provider of transportation service in this situation and would be obligated to accept the Warranty even under RIDOT's construction.

In support of its position, RIDOT declares that Bonanza Bus Lines and Greyhound Bus Lines are not transportation providers for purposes of this grant. Yet RIDOT acknowledges that they are transportation providers for the purposes of other Federal Transit Act grants requiring employee protections. RIDOT cites no precedent for this situational definition of "transportation provider," but argues for such on the basis that the two companies do not currently provide the specific kind of transportation service (paratransit service) conducted by the entities that RIDOT would define as transportation providers for purposes of this grant. This attempt to define extenuating circumstances encounters two problems. First, Bonanza and Greyhound would be deemed transportation providers under the Warranty and under "transportation provider" in the Guidebook's Explanatory Comments to the Warranty. Second, these entities were included in RIDOT's own list of transportation providers in the service area (styled "potential operators") for the instant grant, which RIDOT provided to the Department of Labor on April 22, 1992, and under the Section 13(c) Warranty the employees of these entities are protected.

Referring to paragraph B(4) of the Warranty (Guidebook, p. 25), RIDOT objects to the Department's consideration of this claim because Claimants allegedly have not exhausted their administrative remedies, have not taken their appeal through the Department of Labor and have made no attempt to meet with RIDOT regarding this dispute. These assertions do not reflect the course and facts of this case. It is the

[3] RIDOT notes that these "actual transportation providers" are paid with state funds under the broker system developed and administered by COMSIS.

ATU that brought this case to the Department. Further, it is RIDOT which has failed to respond to the ATU, rather than any failure of the ATU to pursue informal, mutual, and/or local, resolution. Separately, RIDOT asserts that the claim also is not properly before the Department because the ATU made no attempt to negotiate with RIDOT as required by 29 C.F.R. §215.3(c).[4] However, the procedures set forth by the Department of Labor at 29 C.F.R. Part 215 do not pertain to resolving claims:

> *215.1(a). The purpose of these guidelines is to provide information concerning the Department of Labor's administrative procedures in processing applications for assistance under the [Federal Transportation Act].*

The language of Part 215.3(c) clearly pertains to the Department of Labor's certification of grant applications rather than to procedures for claims resolution. Moreover, that provision is for the purpose of case-by-case processing of grant applications under Section 3 of the Act, and says nothing with respect to grants under Section 18. Small urban and rural grant applicants under Section 18, through the availability of the Warranty, have been accorded special consideration:

> *...to eliminate the administrative unwieldiness of case by case processing...The Warranty is specially designed to meet rural program needs while affording the employee protections required under the [Federal Transit] Act.*
>
> Guidebook, p. 2.

RIDOT advantaged itself by using the Warranty's expedited approval of its grant application instead of the case-by-case procedure provided under 29 C.F.R. §215.3(c). Now, RIDOT would allege that the ATU's claim is improper because the ATU did not pursue negotiation of a protective arrangement through that very procedure which the Warranty superseded.

Additionally, RIDOT objects to the Department's jurisdiction by arguing that no claim can exist unless it alleges actual harm to an employee with respect to his position of employment. The Warranty, however, defines the scope of its dispute resolution procedure more broadly, as follows:

> *B(4) Any dispute or controversy arising regarding the application, interpretation, or enforcement of any of the provisions of this arrangement...*

[4]Guidebook, p. 41.

Thus, the ATU's claims cannot be said to fall outside the scope of the Warranty. Nor can RIDOT maintain that only an employee, not a union, can file a claim. Any claimant may have a representative of his choosing, and a union can file a claim on behalf of specified or unspecified employees and/or on behalf of its own interests in its representation of its unit. Page 18, paragraph 2, of the Guidebook, provides further clarification: "...it is not necessary that the anticipated effect upon individuals be adverse for them to be considered potentially affected." This reflects the scope of Section 13(c) of the Act, "...to protect the interests of employees affected by such assistance." (Emphasis added).

In further denial that it failed to comply with the protective requirements, RIDOT initially offered an unspecified defense in 1991 that substitute comparable arrangements had been agreed to and certified by the Department of Labor. Later, RIDOT asserted that its acceptance of the Warranty protections in June of 1992, at the Department of Labor's requirement,[5] constituted the substitute arrangements or comparable arrangements for the 1991 grant. RIDOT also indicated that the Department's 1992 approval of RIDOT's acceptance of responsibility for the Warranty constituted a waiver of any prior noncompliance with the Warranty. There is nothing to support these assertions, and the Warranty again argues against RIDOT. Section B(3) provides that "other comparable arrangements may be substituted," but only for the specifically required provisions of the Model 13(c) Agreement[6] that are included in the Warranty protections. These other comparable arrangements are not intended to substitute for the entire Warranty. On pages 13-14, the Guidebook specifies procedures for requesting approval of comparable arrangements, which the Department will process "on a case by case basis in accordance with its Section 13(c) guidelines, 29 C.F.R. Chapter II, Part 215 (contained in Appendix A [of the Guidebook])." RIDOT made no such request and, as discussed above, followed no such procedures. The Guidebook also sets out procedures for requesting a Waiver of the Warranty, at page 12. "The waiver can be requested independent of accepting the Warranty or once it has been agreed to." RIDOT failed to either request or obtain a waiver. Significantly, a request for comparable arrangements, or for waiver independent of the Warranty if the Warranty is not to be accepted, must be made before approval of the grant application by the Department of Transportation, which

[5]The Warranty already had been made part of the contract RIDOT entered into with the Department of Transportation for the grant in question, as required by paragraph B(10) of the Warranty.

[6] (National) Model Section 13(c) Agreement for UMTA Operating Assistance, 1975, *in* Employee Protections Digest, p. D-43, U.S. DOL (1995). Excerpts for Warranty *in* Guidebook, p. 22.

RIDOT did not do. Absent appropriate written acceptance of the Warranty, or approval of waiver of the Warranty, Section 18 funds cannot be made available for projects under the pending grant application. The Warranty's nationwide utility relies on its conscientious use. That procedure completely broke down here, due to RIDOT's failures. For more than a year, RIDOT maintained that it was in compliance with the Section 13(c) requirements when, in fact, it was not. Thereafter, RIDOT has continued its failure to comply with the Warranty, at least with respect to the obligations to post notice of the Warranty protections, to provide for the making of, and for the availability of, necessary arrangements for filing individual claims. The record does not support RIDOT's contention that it made the necessary arrangements, under paragraph B(5) of the Warranty, so that any covered employee, or the union representative of such employee, may file a claim.

Decision

For the above reasons, I have determined that RIDOT is in NONCOMPLIANCE with the Warranty and therefore ineligible for future Section 18 funds. RIDOT will remain in noncompliance and ineligible for Section 18 funds until RIDOT has fulfilled the conditions and requirements set forth in this Award and in the Warranty. The facts show that the ATU's claims of RIDOT's failures to comply with the Warranty are correct. In addition, RIDOT improperly ignored the ATU's efforts to explore and resolve these matters, both informally and formally, at the local level. In this case I award the following remedies:

1. With respect to RIDOT's failure to validly certify to the Department of Labor that the Project Recipient had executed written acceptance of the Warranty, RIDOT was in noncompliance with Section 13(c) for more than a year. Because of the ATU's efforts, however, this matter with respect to the 1991 grant has been corrected by RIDOT's acceptance and execution of the Warranty for that grant. See below for additional consideration.

2. RIDOT failed to comply in good faith with its assurances to the Department of Transportation and the Department of Labor that the Recipient had accepted the Warranty. In future Section 18 grant applications, RIDOT must provide to the Department of Labor a copy (or copies) of the Warranty signed and accepted by each appropriate recipient or other legally responsible party, before the Department will find RIDOT to be in compliance with the requirements of the Section 18 Warranty. Such

signed and accepted copy(ies) of the Warranty must be provided to the Department of Labor before funds for RIDOT grants will be released.

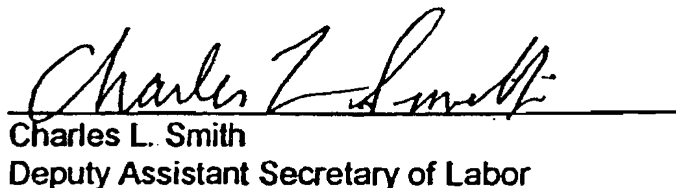
3. With respect to RIDOT's Section B(5) obligation to make arrangements for procedures for filing claims under the Warranty, and the Section B(8) requirement for posting notice of the Warranty protections, RIDOT was in noncompliance for over two years and remains so. Although the Warranty intends to avoid the general requirement for negotiation of individual Section 13(c) arrangements for each Section 18 grant, it does not remove the obligation of a public body, recipient, transportation provider and/or other legally responsible party, to otherwise deal with a labor union with respect to the Warranty. In seeking additional funds under Section 18 of the Act, RIDOT will need to demonstrate to the Department of Labor that it is no longer in noncompliance, and that it has in fact performed the requirements for use of the Warranty, including making and posting the necessary and reasonable arrangements for processing claims under the Warranty, prior to release of funds for the future grant application(s).

4. RIDOT will immediately post a copy of this decision, and the Warranty, in a place readily accessible to its employees and in places readily accessible to those employees represented by the ATU in this claim. In addition, RIDOT will post a copy of this decision, and the Warranty, at all other places where notice of the Warranty protections is to be posted.

In order to determine whether RIDOT is in compliance with this award and with the Warranty, the Department may request information from the ATU and/or other labor organizations in the service area.

This decision is final and binding upon the parties.

6/13/96
Date



Charles L. Smith
Deputy Assistant Secretary of Labor

In the matter of arbitration between:

TIMOTHY A. NEWFELL Claimant v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY Respondent	)	OSP case no. 93-13c-8 Issued: August 5, 1996

SUMMARY

The Claimant's union negotiated a settlement of Section 13(c) protections arising out of the events addressed in this claim. The Settlement Agreement provided a procedure for a covered individual to reject the settlement and to pursue his claim individually. The Claimant did not comply with that procedure and, therefore, is not entitled to pursue this claim now. The claim is dismissed with prejudice.

ORIGIN OF THE CLAIM

This claim arises under a protective arrangement certified by the Department of Labor on September 23, 1976, as satisfying the requirements of Section 13(c) of the Federal Transit Act (FTA),[1] Pub. L. 102-240, Dec. 18, 1991, as amended. The statute requires that each applicable grant between the U.S. Department of Transportation and the recipient of Federal funds under the Act include the terms and conditions of the protective arrangements certified by the Department of Labor (Department).. This claim relies upon the December 10, 1974 Section 13(c) Agreement negotiated between MBTA and one or more labor organizations, and additional conditions contained in the letter of certification. As a condition of receiving the requested Federal funds under the

[1]Formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended, 49 U.S.C. section 1601, et seq.. Section 13(c) is recodified at 49 U.S.C. § 5333(b)(2).

1976 grant, MBTA agreed to provide to covered employees who are not represented by labor unions signatory to the negotiated 13(c) Agreement, substantially the same levels of protectionsas are afforded to the employees who are represented by the signatory unions. The Claimant is represented for purposes of collective bargaining by the International Federation of Professional & Technical Engineers (IFPTE), a labor union not signatory to the Section 13(c) Agreement. Therefore, he is covered by substantially the same levels of protection as are included in the 1976 certification.

FINDINGS OF FACT

The project in the 1976 grant underlying this claim is the same project we reviewed in our January 13, 1995, decision in CANGIAMILA v. MBTA, OSP case no. 91-13c-1, and in our March 26,1996, decision in WILLIAMS v. MBTA, OSP case no. 93-13c-32. The project provided funds which MBTA used in taking over, or acquiring, certain commuter rail assets and operations of the Boston & Maine (B&M) Railroad in 1976. For ten years thereafter, MBTA contracted with B&M to continue operating those commuter rail transit services under MBTA control. In 1976 MBTA put that contract out to public bid, and subsequently replaced B&M with Amtrak as the contracted operator effective January 1, 1987. At that time, many B&M employees were converted to Amtrak employment in connection with this change in contractors. Other B&M employees were hired by MBTA, including the Claimant who was hired on January 12, 1987.

The Claimant had begun B&M employment on June 1, 1977,[2] and was represented there by Local 202 of the IFPTE. Local 105 of the IFPTE represented MBTA employees, including the Claimant after January 12, 1987. Prior to the January 1, 1987, change in contractors, Local 105 and MBTA agreed to the terms and conditions under which the provisions of Local 202's collective bargaining agreement would be applied to the Claimant and other B&M employees when they began MBTA employment and acquired Local 202 representation. Under the Local 105 collective bargaining agreement at the MBTA, the Claimant had a seniority date of January 12, 1987, his date of hire at MBTA. On or about April 5, 1993, he was laid off by MBTA. The Claimant seeks to have his MBTA seniority date adjusted to June 1, 1977, to

[2]The Claimant did not begin his employment until after the 1976 project. As such, he is an after-hired employee with respect to that project, and his eligibility and/or entitlement to Section 13(c) protections may differ from those employees on duty with B&M at the time of the project. We need not address this difference here, however, because we dismiss this claim on other grounds.

include his prior service with B&M.[3] He then would apply this adjusted seniority retroactively, which would result in voiding his 1993 layoff. MBTA has recognized the Claimant's B&M service for purposes of determining his vacation benefit, as part of the conditions negotiated with Local 105 in applying the terms of the former collective bargaining agreement to the employees who transferred from B&M to MBTA. The seniority of B&M represented by Local 202, however, was not merged (dovetailed) with the seniority of MBTA employees represented by IFPTE Local 105. Rather, the B&M seniority was endtailed, or placed at the end of the Local 105 employees' seniority list.

On February 20, 1991, the MBTA, the Railway Labor Executives Association (RLEA), and the Claimant's union, the IFPTE, entered into a procedural agreement for filing and processing Section 13(c) claims arising out of the 1987 change in commuter rail operators. On February 23, 1993, MBTA and the unions executed a Settlement Agreement to resolve all outstanding Section 13(c) claims arising out of the 1987 change in MBTA's commuter rail operators. As part of the Settlement, MBTA provided a substantial sum of money to the RLEA, which then had responsibility for determining the appropriate amount to disburse to approximately 900 individual claimants. The release provision of the Settlement Agreement is set forth at Paragraph 5 and provides in relevant part, the following:

> *5. Release. The RLEA and the Unions [including IFPTE], and each of them, on their own behalf and on behalf of their past, present, and future parent and subsidiary organizations, affiliates, officers, directors, employees, members, agents, representatives, and each of their successors and assigns, hereby release and forever discharge the MBTA...from any and all claims, promises,...liabilities, [etc.]...under the 1974 13(c) Agreement, any collective bargaining agreement, [etc.]...arising out of or in any way related to the change in 1987 of the independent contractor operating the MBTA commuter rail service from the B&M to Amtrak or any federally assisted project in connection with such change...The RLEA and the unions, and each of them, understand and agree that this release constitutes and may be asserted [by the MBTA] as a complete defense and bar to any Claim which has been or may be asserted by them or by any person or entity on their behalf...*(Emphases added.)

All covered employees had the right to reject the terms and coverage of the Settlement Agreement, under procedures specified in paragraph 3(a):

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[3]MBTA has supplied an exhibit showing the Claimant's seniority date in the engineering Department at B&M as May 6, 1985. Since we deny this claim, we need not determine the applicable seniority date.

3. Rejection of Settlement.

a. Concurrent with the final execution of this Settlement Agreement, the Unions shall provide to each Claimant a copy of the Notice Concerning Settlement under 1974 "Section 13(c)" Agreement attached hereto as Exhibit "A" and the Settlement Rejection Form attached hereto as Exhibit "B" ("Settlement Rejection Form"). Any Claimant may expressly reject this Settlement Agreement by executing the Settlement Rejection Form and providing it in its original form to the RLEA within 15 days following final execution of this Settlement Agreement, regardless of whether the RLEA and or the Unions have agreed to or have otherwise established the entitlement to, allocation of, or distribution of the Settlement amount to the Claimants. Any Claimant who fails to notify the RLEA of his or her intention to reject this Settlement Agreement as provided above shall be bound by the terms of this Settlement Agreement and may not pursue a claim arising out of or in any way related to the change in 1987 of the independent contractor operating MBTA commuter rail service from the B&M to Amtrak or any federally assisted project in connection with such change in the independent contractor. Any Claimant who rejects this Settlement Agreement may pursue his or her claim independently, but the Union of which such Claimant is a member, the RLEA and any other Union which is a party to this Settlement Agreement hereby agree not to represent or otherwise assist in any manner such Claimant in the pursuit, processing or adjudication of his or her claim. (Emphasis added.)

In this claim now under consideration by the Department of Labor, the Claimant has not signed and executed a Settlement Rejection Form.

DISCUSSION

The Department has previously reviewed this Settlement Agreement and found it appropriate under the applicable Section 13(c) protections. The Department also found that the Settlement Agreement is not limited to wage loss, but covers all employment conditions that might be protected by Section 13(c), including seniority. WILLIAMS, *supra.* This negotiated Settlement Agreement constituted part of the collective bargaining rights held by the B&M employees, and Section 13(c)(2) requires the continuation of those bargaining rights. The Claimant was represented by the IFPTE, a union which is a party to the Settlement Agreement. Therefore, the Claimant is covered by the terms of that Agreement.

The Agreement executed by the MBTA, the RLEA, and the IFPTE provided monetary relief to this group of organized employees affected by the 1987 change in

contractors, in exchange for, among other things, complete discharge of the MBTA from any further obligation towards those employees covered by the Settlement Agreement. Under the Settlement Agreement, the Claimant had an option to decline coverage by the Agreement and pursue his individual Section 13(c) claim independently. In order to exercise this option, he was required to execute a Settlement Rejection Form. That Form explained that by doing so he would retain his right to pursue his separate claim for Section 13(c) protections and benefits, but that he would have to do so individually and without payment under the Settlement Agreement. The Claimant did not exercise that option because he failed to execute the Settlement Rejection Form. He asserts that he did not receive a Settlement Rejection Form from the MBTA in a timely manner. However, the MBTA was not responsible for providing the form to the Claimant. The record indicates that, promptly upon executing the Agreement, the unions met with the employees they represent and explained the Agreement and the procedures thereunder. If the Claimant did not receive a timely Settlement Release form, he must take that matter up with hisunion. His failure to execute the Settlement Release Form cannot be read to accomplish the same end that executing the Form would have accomplished: the removal of the Settlement Agreement's preclusion of his option to pursue Section 13(c) protections independent of the negotiated Settlement Agreement. As argued by the MBTA, failure to recognize the effect of the Settlement Agreement by allowing the Claimant:

> *to assert a 13(c) claim which is based upon the change in commuter rail contractors from the B&M Railroad to Amtrak, particularly where the IFPTE, his bargaining agent, agreed to release all such claims, would severely chill the collective bargaining relationship.*

In attempting to pursue his claim here, the Claimant also relies on the fact that he has not executed the Waiver and Release form which is called for elsewhere in the Settlement Agreement. He believes that this shows that he has not waived his right to pursue his independent claim apart from the Settlement Agreement. However, that Waiver and Release form is a precondition to receiving payment under the Settlement Agreement, and is not the means by which the Claimant may reject the Settlement Agreement's terms and pursue his individual Section 13(c) protections. He has not received payment under the Settlement Agreement because he has yet to execute that Waiver and Release form. Failure to execute the Waiver and Release form, in this situation, does not mean that the Claimant retained his right to pursue his Section 13(c) claim outside of, and independent of, the Settlement Agreement.

DECISION

In view of the above, I hold that the Claimant did not preserve his option to pursue his individual Section 13(c) claim independent of the Settlement Agreement negotiated between the MBTA and its unions, including the Claimant's union. Therefore, he is not able to obtain employee protections through this claim he has filed with the Department of Labor. The claim is dismissed with prejudice. This arbitration decision is final and binding upon the parties.

8-5-96
Date

John Kotch
John Kotch
Deputy Assistant Secretary

In the matter of arbitration between:

DAVID W. MURPHY, ROBERT WHITE, & JAMES PIRAGIS *Claimants* v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY *Respondent*	OSP Cases no. 94-13c-1 94-13c-2 94-13c-3 Issued: March 26,1996

Summary

In exchange for payment under a negotiated Settlement Agreement pertaining to a specific event, Claimants executed waivers of any and all 13(c) claims arising out of the same event. Relying on WILLIAMS v. MBTA, the Department held that the waivers barred these claims for Section 13(c) protection of seniority and other benefits in connection with that event.

Origin of the Claim

These claims arise under one or more protective arrangements certified by the Department of Labor as satisfying the requirements of Section 13(c) of the Federal Transit Act (FTA),[1] Public Law 102-240, Dec. 18, 1991, as amended, recodified at 49 U.S.C. Chapter 53. The statute requires that each applicable grant between the U.S. Department of Transportation and the recipient(s) of Federal funds under the Act include the terms and conditions of the protective arrangements certified by the Secretary. Each certified project in this claim relies upon the December 10, 1974 Section 13(c) Agreement negotiated between MBTA and one or more labor

[1]Formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended, 49 U.S.C. section 1601, et seq.. Section 13(c) is recodified at 49 U.S.C. § 5333(b)(2).

organizations, and upon additional conditions as required by the Secretary under Section 13(c). As a condition of receiving the requested Federal funds in each relevant grant, MBTA agreed to provide to covered employees not represented by labor unions signatory to the negotiated 13(c) Agreement, substantially the same levels of protections as are afforded to the employees represented by the signatory unions. Claimants are covered employees represented for purposes of collective bargaining by the International Federation of Professional & Technical Engineers (IFPTE), a labor union not signatory to the 13(c) Agreement(s). Under the certified arrangements, therefore, they are covered by those substantially equivalent protections.

Background

The underlying project funded by assistance under the Federal Transit Act in these claims is the same as the project reviewed in our January 13, 1995 decision in CANGIAMILA V. MBTA. The project provided funds which MBTA used in purchasing commuter rail assets and operations of the Boston & Maine (B&M) Railroad in 1976. Thereafter, MBTA contracted with B&M to continue operating those commuter rail transit services under MBTA control, for ten years. Effective January 1, 1987, as a result of putting the contract out to public bid, MBTA replaced B&M with Amtrak as the contracted operator.

At that time many B&M employees were converted from B&M employment to Amtrak employment, in connection with this change in contractors. Other B&M employees, including these Claimants, were hired by MBTA. While with B&M, the Claimants were represented by Local 105, IFPTE. After being hired by MBTA, the Claimants were represented by Local 202, IFPTE. In their new positions, the Claimants were "end-tailed," or placed at the bottom of the seniority roster without credit for their seniority in their prior jobs. Prior to the January 1, 1987 change in contractors, and in the employers of these claimants, Local 202 and MBTA apparently agreed to the terms under which Local 105's collective bargaining agreement would be applied to the Claimants and other MBTA employees formerly represented by Local 105. The record contains no indication of any concern or objection by Local 105 on behalf of these employees, with respect to the change in employment conditions or bargaining agent representation. The Claimants seek carryover of prior seniority rights/status in their new positions, and protection of lost wages, vacation, and other benefits.

Waiver

These cases present a threshold issue of whether the Claimants have waived their rights to pursue these claims and the remedies they would obtain herein. In this matter of waiver, these Claimants are situated in a posture identical to that of the Claimant in WILLIAMS v. MBTA, OSP case no. 95-13c-6, which the Department issued March 26, 1996. That decision is incorporated in full in this decision. These Claimants executed similar Waiver and Release forms in exchange for receiving payment under the terms of the February 23, 1993 Settlement Agreement negotiated between MBTA and the Railway Labor Executives' Association and several other unions. The IFPTE is a party to that Settlement Agreement.

Decision

Nothing in the record of this case serves to distinguish these claims from the claim presented in WILLIAMS and, therefore, WILLIAMS controls these claims. The Claimants have waived their right and opportunity to pursue the substance of these claims. Consequently, for the reasons discussed in WILLIAMS, it is not appropriate to address the merits in this case and these claims are dismissed with prejudice. This decision is final and binding on the parties.

March 26, 1996
Date

Charles L. Smith
Deputy Assistant Secretary of Labor

Certain Captains and the Inlandboatmen's Union v. City of Vallejo, CA
OSP Case No. 94-13c-20
February 3, 1995
(Page A-412)

Summary: The Claimants were fourteen nonunion ferry boat captains who had been dismissed when the City purchased its own ferry and rebid the contract for its locally funded service in July 1994. The captains claimed entitlement to the same treatment as the unionized deckhands and other employees who were granted, at the City's request, comparable positions, pay and benefits by the new ferry operator. The Department determined that, although the City and the Inlandboatmen's Union had negotiated a 13(c) Protective Agreement in May of 1994, the ferry purchase and switch to a new contract operator was done with State and local funds exclusively and independent of Federal funds. Consequently, it was ruled that Vallejo had acted voluntarily with respect to the deckhands, and the 13(c) agreement had served as a simple labor contract standing apart from any result of a Federal project which might have required its application. The favorable treatment of the deckhands, by itself, generated no requirement for equivalent treatment of the captains under the Department of Labor's certification, because the requirement of similar protections for nonunion employees was not activated in the absence of any Federal funding.

In the matter of arbitration between:

CERTAIN CAPTAINS and THE INLANDBOATMEN'S UNION *Claimants* v. CITY OF VALLEJO, CA *Respondent*	OSP case no. 94-13c-20 Issued: February 3, 1995

CONFIRMATION OF BENCH DECISION

The Parties jointly requested a bench award from the arbitrator. The undersigned arbitrator, designated by the Secretary of Labor, heard the case on January 17, 1995 and issued a final and binding award orally to the parties at the end of the hearing on that day. This written decision confirms that award and reasons therefor.

AWARD

The adverse effects resulted exclusively from causes other than the Section 13(c) project. In this instance, therefore:

1. The Captains of the former contract operator, Red & White Fleet, are not entitled to bid (claim) the captain jobs on the Vallejo ferry transit service which is now operated by the Blue & Gold Fleet.

2. These Red & White Captains, who were not represented by a labor organization when the change in contractors occurred, are not entitled to recognition as a separate bargaining unit by each successive operator of the Vallejo ferry service.

3. These Red & White Captains do not have a right under the 13(c) Agreement, in this instance, to designate a bargaining agent by a showing of authorization cards to either Vallejo or the new contractor.

ORIGIN OF THE CLAIM

These fourteen claims were filed September 29, 1994 under a protective arrangement certified July 13, 1994 by the Secretary of Labor as satisfying the requirements of Section 13(c) of the Federal Transit Act[1] (FTA). Claimants are fourteen, non-union,[2] former ferry-boat captains on commuter-transit runs by ferry boat between Vallejo and San Francisco, California. Under numbered paragraph 4 of the Secretary's letter of certification, therefore, they qualify as other mass-transit employees and are covered by the protective arrangements. The Secretary has jurisdiction to arbitrate these claims pursuant to that same paragraph 4, which also requires that such other employees receive substantially the same level of protections as are afforded to employees represented by a labor organization signatory to the negotiated Section 13(c) agreement incorporated in the certification.

FINDINGS OF FACT

The parties have no significant disagreement as to the facts giving rise to this claim. In June of 1986, Marine World Africa USA relocated to Vallejo, and the Red and White Fleet (which had other ferry business in the San Francisco Bay area) began a private ferry service for tourists from San Francisco to Marine Land and return. Shortly thereafter Red & White added two commuter-transit runs to their San Francisco-Vallejo ferry service. In 1987, Red & White decided the transit runs were not profitable and sought permission from the California Public Utilities Commission to abandon the service. The City of Vallejo protested this proposed abandonment, and obtained local and state funds to support continuation of the ferry transit service. In 1987 and subsequent years Vallejo included, in its contract for providing the transit ferry boat and for operating it, a "route guarantee" to ensure a minimum amount of revenue for the contract operator. In 1987 Vallejo put this ferry service contract out to public bid. Red

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[1] Section 13(c) of the Federal Transit Act, 49 U.S.C. App. § 1609, as amended (formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended), is recodified at 49 U.S.C. § 5333(b), by Public Law 103-272, § 1(c) (July 5, 1994), 108 Statutes 835.

[2] Although represented by the Inlandboatmen's Union (IBU) in pursuing these claims, these Captains did not have representation by a labor union at the time of the adverse effects alleged herein. They previously had been represented by the Marine Engineers Beneficial Association (MEBA) in their employment with Red & White, but decertified that labor organization not later than 1985. They had no labor organization representation and no labor contract from that time through June 30, 1994. Thus, they had no collective bargaining rights July 1, 1994 that might require continuation pursuant to Section 13(c)(2). After July 1, 1994 the Captains requested recognition of the IBU as their bargaining representative. IBU's representation of the Captains in these claims neither constitutes, nor requires, recognition for purposes of collective bargaining.

& White won the contract over two other bidders, and Vallejo then renegotiated annually with Red & White for three years. In 1991, Vallejo negotiated a three-year Memorandum of Understanding with Red & White, to provide ferry boats for, and to operate, the Vallejo-San Francisco transit ferry service through June 30, 1994.

In response to the transit needs demonstrated in the aftermath of the 1989 Loma Prieta earthquake in the San Francisco region, local legislators and planning agencies prepared the San Francisco Bay And Vallejo Ferry Plan, adopted in December of 1990. In accordance with the Plan, Vallejo applied to the Federal Transit Administration on November 3, 1992 for a grant of funds for two ferry boats, one to replace the boat owned by Red & White, and the other to expand the Vallejo ferry transit service. On July 23, 1993, Red & White informed Vallejo that its ferry boat, the M.V. Dolphin, would be reassigned from the Vallejo service to the service Red & White operated from Tiburon, and that no Red & White ferry boat would be available to serve the Vallejo transit runs after mid-1994. Red & White remained interested in bidding on the next contract to operate the Vallejo service, however, if Vallejo succeeded in obtaining another ferry boat. No funds from the Federal grant application had been approved at this time, however, and Vallejo obtained state funds to purchase a used ferry boat, the Jet Cat Express, which would be ready for service July 1, 1994.[3] In April of 1994, Vallejo found the Red & White's projected operation of the ferry service following June 30, 1994 too costly, and the City put the operation of the ferry service beginning July 1, 1994 out to bid. The Jet Cat Express would be made available for use by the successful bidder in operating this service. Red & White and two other companies submitted proposals, and the Blue & Gold Fleet won the new contract.

Vallejo had required the new contractor to give the Red & White groundskeepers, ticket sellers and deckhands (hereafter, deckhands), preference in hiring for any Vallejo service positions with the new contractor that were reasonably comparable to the positions such employees had held with Red & White. Vallejo also required the new contractor to carryover the deckhands' previous wages, benefits, labor contract, bargaining rights, and bargaining agent (upon presentation of valid authorization cards). Consequently, the Red & White deckhands became employed as Blue & Gold deckhands on the Vallejo service with no loss of benefits, working conditions, or bargaining rights.

[3] Although the Secretary of Labor had certified the labor protections provisions July 13, 1994, the grant had not been approved by the Department of Transportation. Vallejo received final approval in October of 1994 for one of the two requested ferry boats, but had not drawn down any funds under this approval. Vallejo sought economies of scale and administrative efficiencies by waiting until funding for the second ferry became available so the City could contract for construction of two boats at the same time. As of the hearing date, January 17, 1995, the second ferry boat had not been approved and no Federal funds had been received by Vallejo for this ferry service.

THE 13(C) AGREEMENT

In the fall of 1993, the Inlandboatmen's Union (IBU) and Vallejo began negotiations for a 13(c) Agreement (which became effective approximately May 17, 1994), in recognition of Vallejo's pending Federal Transit Act application. The Agreement acknowledged that, if its application is approved and it receives the requested funds, Vallejo "...intends to request competitive bids for the operation of its ferry transit system...." The agreement then specifies protections and procedures to apply to the deckhands in the event of termination of Vallejo's contract with Red & White: they would receive a preference in hiring to fill any comparable position with the new contractor, with full carryover of their wages, benefits, collective bargaining rights and contract, and their bargaining agent (by presentation of valid authorization cards). The Agreement also has specific provisions that apply in the event that Red & White remains as contracted operator of the Vallejo service after the receipt of Federal assistance.

CLAIMANT'S POSITION

The Claimants, Red & White Captains who operated the Vallejo transit ferries prior to July 1, 1994, seek treatment and employment opportunities with the new contractor, equivalent to those afforded to the deckhands. Additionally, they seek recognition as a separate bargaining unit with any contractor operating Vallejo's commuter transit ferry boats, and recognition of the IBU as bargaining agent based on a showing of authorization cards. They claim entitlement to such treatment under paragraph 4 of the Department of Labor's July 13, 1994 certification:

> 4. *Employees...other than those represented by the local unions which are a party to...the protective arrangements, shall be afforded* *substantially the same levels of protection as are afforded to the employees represented by the unions...* (Emphasis added.)

The Claimants assert, therefore, that they are entitled to use their Red & White seniority status to bid (that is, to claim and obtain) the respective captain jobs in the Blue & Gold Fleet which now operate the Vallejo ferry transit service. Blue & Gold has filled those positions with its own employees. The claimants seek to replace the Blue & Gold Captains, with full pay, benefits and union recognition, retroactive to July 1, 1994.

DISCUSSION

Section 13(c) requires employee protections as a condition of assistance under the Federal Transit Act, "to protect the interests of employees affected by such assistance." Generally, in order to require application of the 13(c) protections, the alleged adverse effects upon an employee must have resulted, at least in part, from a Federal project (grant of funds) under the Act. In a claim for employee protections, the employer (or grant recipient) generally can defend against liability for such protections by showing that the alleged adverse effects, or harm, to the claimants resulted exclusively from a cause other than a Federal project under the Act. In these claims, Vallejo has made such showing. No Federal funds have been received or otherwise used[4] in connection with this change in contracted operators for the Vallejo ferry transit service. When Red & White had sought to abandon this transit service in 1987, Vallejo preserved the service by subsidizing it with state and/or local funds. Red & White continued to operate the service only because the new contract included this operating subsidy. Red & White's withdrawal of its ferry boat from the Vallejo runs in mid-1994, and Red & White's increased operating-cost proposal for future years, precipitated Vallejo's purchasing the Jet Cat Express with state and local funds and putting the contract for operating the Jet Cat effective July 1, 1994 out to public bid. This resulted in the change in contractors in 1994, prior to Vallejo's receipt of any Federal funds for its ferry transit service. All changes, contracting, and other actions in this case have been accomplished with state and/or local funds exclusively and independent of Federal funds.

Claimants assert that the change in contractors resulted from the anticipation of a project, as included in the definition of "as a result of the project," by paragraph 1 of the 13(c) Agreement. They maintain that Vallejo needed to keep its ferry transit service operating so that it would be in existence to receive the Federal funds when the pending grant became available. I do not find evidence that an existing transit service is a precondition to receipt of Federal funds. On that basis there is no anticipation of a Federal project.

IBU notes further that the 13(c) Agreement contemplates public bidding of the service if Federal funds are approved, and that Vallejo testified that there may not be additional bidding out of the service when the Federal funds are used, in consideration of the 1994 public bidding and the newly executed contract with Blue & Gold. IBU maintains that this 1994 bidding is an event intended to be covered by the 13(c) Agreement. If the City had replaced Red & White's boat with a ferry purchased with

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[4] Testimony at the hearing demonstrated that no Federal funds would be used to reimburse or otherwise compensate Vallejo for its expenditure of state and local funds prior to receipt of funds under its pending grant application.

Federal funds, then IBU's theory of adverse effects in anticipation of a Federal project might apply. However, and notwithstanding the possibility that, during 1993-94, the parties who negotiated the Section 13(c) Agreement may have contemplated that Federal funding would be in place when this operating contract was put out to bid, such did not occur. Rather, Vallejo acted with state/local funds, in anticipation of the absence of requested Federal funds. Vallejo's substantial history of supporting this transit service with state/local funds and without any Federal funds, since approximately one year after its 1986 inception, gives this consideration significant weight.

Finally, the Section 13(c) certification's requirement for "substantially the same level of protections" does not require parity for the Captains without regard to tnhe effects of the Federal assistance. When Vallejo changed contractors in 1994 the deckhands received essentially the provisions contemplated in the 13(c) Agreement. However, Vallejo testified at the hearing that the City had voluntarily effected these arrangements for the deckhands. If Vallejo had not acted voluntarily with respect to the deckhands, the terms of the 13(c) Agreement as a simple labor contract standing apart from any result of a Federal project might have required such application. Even if that were so, however, it would only apply to the employees specifically covered by the 13(c) Agreement (i.e., only the deckhands). Nothing in the 13(c) Agreement or the Secretary's certification for the requested projects would require application of those conditions to other employees. In this situation, the absence of a result of a Federal project related to these adverse effects, and the absence of Federal funds then or subsequently, leads me to conclude that Vallejo made these arrangements for the deckhands voluntarily. Vallejo may have acted to keep faith with the spirit of its negotiations with the IBU, and/or in the interests of continuing a reliable and safe workforce on its ferry system, However, the record does not show this action to have occurred, or to have been required, as a result of a Section 13(c) project. This favorable treatment of the deckhands, by itself, generates no requirement for equivalent treatment of the Captains, because the Section 13(c) protective requirements are not activated under these facts.

DECISION

For the reasons discussed above, I find that Section 13(c) does not require providing employee protections to the Claimants in this situation. The facts do not show that the identified harm was a result of a project, nor that it occurred in

anticipation of a project. Consequently, the 13(c) protections do not apply to the events in this claim. These claims are denied.

Feb. 3, 1995
Date

Bruce M. Leet
Bruce M. Leet
Arbitrator

AFSCME Local 3939 v. Spokane Transit Authority
OSP Case No. 94-13c-22
May 31, 1996
(Page A-432)

AFSCME Local 3939 claimed that the Spokane Transit Authority (STA) violated their 13(c) Protective Agreement by denying the union's request to negotiate over the decision and the effects of contracting out certain paratransit services. The Department determined that the Agreement did not require bargaining over the decision to contract out. Although paragraph 5 of the Agreement required negotiations over its application to intended changes, STA had only issued a request for proposals to operate the services. It had rejected all responses, had not contracted out the service, and had not decided whether or not to contract out its paratransit operations. Therefore, since the intended changes were not known at the time of the claim, STA was not required to negotiate their effects, and the 13(c) Agreement had not been violated.

N.B. This case number was mistakenly also given to Joanou, et at. v. Las Vegas RTC, which has now been renumbered as 94-13c-23.

In the matter of arbitration between:

AFSCME LOCAL 3939 v. SPOKANE TRANSIT AUTHORITY
OSP case no. 94-13c-22

May 31, 1996

Decision

Dear AFSCME:

On behalf of the paratransit employees represented by the American Federation of State, County and Municipal Employees (AFSCME) Local 3939 in the Special Transportation Employees bargaining unit of the Spokane Transit Authority (STA), you have filed a Section 13(c) claim with the Department of Labor. The claim indicates that STA has violated the terms of the applicable Section 13(c) Agreement by failing to negotiate with respect to contracting out paratransit services. Specifically, STA has denied AFSCME's request to negotiate both the decision to contract out some or all of the paratransit service, and the effects of that contracting out.

You rely on paragraph 5 of the (1981) Section 13(c) Agreement, which states, in pertinent part:

> *...the Recipient and the Union shall meet for the purpose of reaching agreement with respect to the application of the terms and conditions of this agreement to the intended changes...*

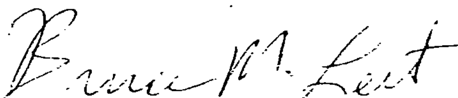
This does not require bargaining over the decision to contract out. Consequently, that portion of your claim seeking bargaining over the decision to contract out lies beyond the scope of the Section 13(c) Agreement.

With respect to your interest in bargaining over the effects of contracting out, STA points out that when you requested bargaining, the STA had merely issued a request for proposals. When you filed this claim, STA had evaluated and rejected the responses. STA has not contracted out the service, nor have they decided to do so. As noted above, the requirement in paragraph 5 of the Section 13(c) Agreement is for the parties to negotiate the application of that Agreement's terms to the intended changes. Since the intended changes are not known at the time of this claim, STA is not required to negotiate their effects and, thus, has not violated the Agreement

With respect to your references to STA's obligation to bargain under Washington State Statutes, the information submitted by the parties indicates that this is a matter to pursue with your state public employee relations board or a comparable entity at the state or local level. As you know, STA argues that it has the right to contract out, by statute and by labor contract. To the extent that its action relies on a labor contract, a grievance thereunder would offer the appropriate means of resolving disputed contracting out actions under that contract, rather than a Section 13(c) claim.

In view of the above, I find that this claim identifies no action of the Spokane Transit Authority that suggests any violation of Section 13(c) at this time. Therefore, I am dismissing your claim effective with the date of this letter.

Sincerely yours,



Bruce M. Leet
Arbitrator

N.B. This case was mistakenly
numbered 94-13c-22 and
has been renumbered 94-13c-23.

In the matter of arbitration between:

JOANOU, ET AL. v. LAS VEGAS RTC
OSP case no. 94-13c-23, et al.

May 10, 1996

Decision

Dear Claimants:

In connection with the above referenced cases, the Regional Transportation Commission (RTC) has advised the Department of Labor (Department) that the claims for Section 13(c) protections have not been filed with the RTC at the local level prior to the Claimants' presentation of them to the Department. The Claimants have implied that they were denied knowledge of, and/or an opportunity to pursue, their Section 13(c) rights and benefits at the local level. These questions have significance for these claims and should be explored by the parties at the local level.

Accordingly, this matter is being returned to the claimants to provide them the opportunity for resolution at the local level. If the parties are unable to resolve the matter at the local level according to the terms and conditions of the certification, they may submit their claim to the Department.

Sincerely,

/s/

for Bruce M. Leet
Arbitrator
Employee Protection Claims

Final 2/16/05

Gerard Ruggiero v. Massachusetts Bay Transportation Authority
OSP Case No. 94-13c-4
October 20, 1996
(Page A-419)

Summary: The Department closed the case administratively when the Claimant failed to respond in a timely manner to its request for additional information.

In the matter of arbitration between:

GERARD RUGGIERO *Claimant*	
v.	OSP Case no. 94-13c-4
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY *Respondent*	Issued: October 20, 1995

Decision

This claim arises under one or more protective arrangements certified by the Secretary of Labor as satisfying the requirements of Section 13(c) of the Federal Transit Act (FTA) (formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended), 49 U.S.C. section 1601, et seq., Pub. L. 102-240, Dec. 18, 1991, as amended. The Claimant initially filed a general description of his claim and the remedy sought. Before contacting the named Respondent employer named in the claim, the Department of Labor, on September 13, 1995, requested additional information from the Claimant. The additional information was due to be received by the Department not later than Friday, October 15. The Claimant forwarded the information postmarked Wednesday, October 13. The information was not received by the Department by the end of the reply period, October 15. On Monday, October 18 the Department closed this case administratively due to the Claimant's failure to provide the requested information in a timely manner. The information reached the Department October 19, 1995. On October 24, 1995, the Department affirmed that the case remained administratively closed as of October 15.

Bruce M. Leet
Arbitrator

In the matter of arbitration between:

MARY CLARK *Claimant*	)	
v.	)	OSP Case no. 94-18-19
CRAWFORD AREA TRANSPORTATION AUTHORITY *Respondent*	)	Issued: October 28, 1996

Summary: Claimant is covered by the Warranty. Although no local claims procedure existed, she filed a timely claim. Her job was funded by state and local money. Although she occasionally worked on Section-18-project duties, her job loss was not a result of a project. Therefore, she is not eligible for protections sought under the Warranty.

ORIGIN OF THE CLAIM

This claim arises under the "Special Section 13(c) Warranty for Application to the Small Urban and Rural Program" (the Warranty), under the Federal Transit Act (FTA).[1] The U.S. Departments of Labor and Transportation developed the Warranty for application of the protective provisions required by Section 13(c) of the Act, to grants for small urban and rural transit activities under Section 18 (recodified at 49 U.S.C. §5311) of the Act. The Secretary of Labor has certified the Warranty as providing the fair and equitable protections required by Section 13(c), for Section 18 grants. The Claimant believes that she was not given the 60-days' notice required by the Warranty when her position was eliminated.

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[1] Formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended), 49 U.S.C. §1601, et seq. Section 13(c) of the Federal Transit Act is recodified at 49 U.S.C. § 5333(b), by Public Law 103-272, § 1(c) (July 5, 1994), 108 Statutes 835.

FINDINGS OF FACT

The Crawford Area Transportation Authority (CATA) in Meadville, Pennsylvania provides two transit programs: 1) a fixed-route system (the city routes), funded with Federal funds under Section 18, and with state funds; 2) a demand-responsive, shared-ride program (the rural routes), funded through the Pennsylvania State Lottery and varying amounts of financial assistance from local governments. The shared-ride program receives no Federal assistance. During 1993 and into 1994, CATA experienced significant losses attributable to its shared-ride program. An October 1993 auditor's report had recommended restructuring of the shared-ride program or, alternatively, obtaining additional funding from Crawford County or the Commonwealth of Pennsylvania, in order for CATA to continue. While such additional funding was under consideration, CATA adopted a resolution on December 20, 1993, to end its shared-ride program effective February 1, 1994. In March of 1994, the County Commissioners approved additional funding for the shared-ride program, on condition that CATA achieve some deficit cutting measures. At about that time, CATA contracted with Liberty Taxi Service to operate the rural routes. In the spring of 1994, CATA also faced legal action by "at least one private carrier that the Authority had previously contracted with for the provision of shared-ride services." State regulations[2] require CATA to use private carriers in its shared-ride program.

The Claimant drove a bus for the city routes from August of 1989 through June 30, 1992. From May of 1990 through June 30, 1992, she also drove a rural route for Hubbard Bus Service, a subcontractor of CATA. The Hubbard Bus contract for the driving of the rural routes was not renewed after June 30, 1992, when CATA took over direct responsibility for coordination and operation of the rural route (shared-ride) program. From July 1, 1992 until March 11, 1994, the Claimant drove a rural route bus for CATA (CATA's resolution to suspend that activity February 1, 1994, apparently was postponed). During those 20 months, she frequently worked in the CATA office on matters pertaining to the fixed-route (Section 18) service. This work included making audio tapes of schedules for blind passengers, revising schedules for detours, helping to pick up money, count it, and deliver it to the bank, and general office duties.

By letter of March 14, 1994, delivered to the Claimant on March 15, CATA notified her that her employment was to be terminated March 28, 1994, "due entirely to downsizing of the driver staff, as certain routes of the Authority under the shared-ride

[2] 67 Pa. Code 425.13(a)(c) reads, in pertinent part: "Private carriers shall be given the fullest opportunity to offer services in a coordinated system..."

program are to be undertaken by a subcontractor." For the last two weeks of her employment with CATA, she worked in the office instead of driving a bus. During these two weeks, CATA's Acting Executive Director told the Claimant that he wanted to keep her employed in the office but that there was no money to do so. On March 24, the Claimant was directed to check specifications in the bids received for CATA's purchase of a new van to be used in the shared-ride program. CATA purchased the van entirely with State funds via a grant dedicated to purchasing capital equipment (that is, the money could not have been used to cover the cost of continued employment of the Claimant or other personnel). The van was delivered in September of 1994. The Claimant was not required to report for work on her last official day of employment, Monday, March 28, 1994. The next month, CATA hired a new, part-time employee to work in the office, funded by the Green Thumb Program, which helps older citizens with little work experience obtain work with public agencies. No CATA funds or Federal Transit Act funds supported that position.

On March 23,1994, the Claimant showed her supervisor the Section 13(c) Warranty and asked why she had not received a 60-day notice of layoff under Section B(2)(b) of the Warranty. The supervisor replied that he was unaware of the Warranty. The Claimant then gave the booklet containing the Warranty and Guidelines to her supervisor, who gave it to CATA's Solicitor to review. On Friday, March 25, 1994, a letter from CATA's solicitor stated that the Claimant was not covered by the Warranty protections. The Claimant then asked for a form to file a claim for protections under the Warranty. Her supervisor replied that he did not know of such a form. Two months later, on May 26, 1994, the Claimant gave CATA a copy of the letter dated May 31, with which she intended to present this claim to the Department of Labor (Department).

CLAIMANT'S POSITION

The Claimant believes that she is covered by the Warranty as a transportation-related employee of an employer providing transportation services assisted by the Project. She also maintains that she is eligible for these protections as an employee "of any other surface public transportation providers in the transportation service area of the project," as specified in Section A, paragraph one, of the Warranty. Stating that she was laid off because CATA subcontracted the routes she was driving, the Claimant interprets Section B(2)(b) of the Warranty to require that CATA should have given her a 60-day notice of layoff. She seeks compensation for that 60-day period, less the two weeks' notice she did receive.

RESPONDENT'S POSITION

CATA initially argues that this claim is untimely filed. Second, CATA believes that the Claimant is not eligible for Warranty protections because she did not work primarily on CATA's Section 18 operation (the fixed-route program), and because the work she performed in that operation was not significant enough to make her eligible for the protections attached to that operation. CATA also defends its failure to provide the Claimant with a 60-day notice by asserting that such failure, and the layoff itself, resulted exclusively from a financial shortfall in operation of the shared-ride program. CATA maintains that any adverse effects encountered by the Claimant did not result from the Section 18 project(s) or Federal funding of those project(s).

DISCUSSION

Timeliness and Jurisdiction

Section B(5) of the Warranty requires a claimant to file a claim with the Recipient within 60 days of the date of termination or layoff.

> *The Recipient or other legally responsible party designated by the Public Body... will make the necessary arrangements so that any employee covered by these arrangements, or the union representative of such employee, may file a claim of violation of these arrangements with the Recipient within 60 days of the date he is terminated or laid off...*(Emphasis added).

In considering this 60-day filing requirement, it is necessary to note that this provision is contingent upon the Recipient's making the necessary arrangements so that an employee can file such claim. Since the Recipient had made no arrangements for filing claims, within 60 days or otherwise, the Claimant cannot be found in violation of the sixty-day filing limitation. As provided in paragraph B(4) of the Warranty:

> *Any dispute or controversy arising regarding the application, interpretation, or enforcement of any of the provisions of this arrangement which cannot be settled by and between the parties at interest within thirty (30) days after the dispute or controversy first arises, may be referred by any such party to any final and binding disputes settlement procedure acceptable to the parties, or in the event they cannot agree upon such procedure, to the Department of Labor...for final and binding determination.* (Emphasis added.)

This dispute first arose when the Claimant requested from her supervisor, on March 23, a 60-day notice of layoff under the Warranty. The parties could not resolve the dispute within 30 days. There is no indication that either party sought the other party's agreement to any other arbitration procedure. In the absence of mutual agreement upon any other final and binding dispute resolution procedure, it was appropriately referred to the Department of Labor for final and binding determination.[3]

Even if the 60-day period were applicable here, this claim still would be timely. When CATA gave the Claimant the notice dated March 14 that she would be laid off two weeks from that date, the last day of her employment became Monday, March 28.[4] CATA's subsequent decision that she need not report for work on that final Monday did not change the official date of her layoff. In reckoning the 60-day period for filing this claim, the correct starting point would be March 29, the first day following the Claimant's last official day of employment. On May 26, CATA received a copy of Claimant's letter dated May 31, whereby she intended to file her claim with the Department of Labor. This gave CATA notice of the claim not later than 59 days after the date of her layoff. The fact that the letter was dated May 31 had no effect on when CATA received notice.

Moreover, the Claimant had shown CATA the Warranty on March 23 and inquired as to CATA's failure to provide her with the 60-day notice. This was after notice of her layoff but prior to the date of her layoff. This put CATA on notice of the claim and of the Claimant's interest in obtaining the Warranty's protections. This action also afforded CATA the opportunity to preserve necessary information and to respond to the alleged violation in a manner consistent with the Warranty and CATA's best interests. Thus, even though the recipient had not established the required claims procedure, the Claimant substantially performed the substance and purpose of such notice requirement, prior to the beginning of the 60-day period, and her claim would be timely on that basis.

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[3] *Cf.* ATU LOCAL 1363 v. RIDOT, 92-18-6 (1996), U.S. DOL, Employee Protections Digest, p. A-436, U.S. DOL, Division of Statutory Programs (initial filing of claim with Department of Labor was upheld where transit authority had made no provision for filing claims and refused to treat with the Union when it sought to file a claim under the protective arrangement).

[4] The two-week notice beginning March 14 was not delivered to the Claimant until March 15, giving her less than two weeks' notice. For purposes of this claim it is not necessary to consider what significance this may have had on her employment, and whether it would justify allowing her one or more additional days in which to file a claim.

As a separate argument, CATA points out that the Claimant did not file a formal claim with CATA, contrary to the expectation in Section B(5). However, in the absence of the necessary arrangements for filing of a formal claim, it was impossible for the Claimant to file a formal claim. Moreover, thanks to the Claimant's initiative, CATA did, in fact, have an opportunity to resolve her claim at the local level, which is the purpose of the expectation that a formal claim would be filed first with the responsible transit employer. Using this opportunity, CATA responded on March 25 that she was not eligible for protections under the Warranty.

Scope and Purpose of the Warranty

CATA believes that the claimant is not eligible for the Warranty's protections because she was not assigned to CATA's Section 18 program, the fixed-route service in the city, but instead was assigned to the shared-ride program (the rural routes), as her primary duty. However, whether the Claimant worked primarily in the Section 18 program or not does not determine whether she is covered by the Warranty. In Section A, General Application, paragraph one, the Warranty states that it:

> *...shall apply for the protection of the transportation related employees of any employer providing transportation services assisted by the Project ("Recipient"), and the transportation related employees of any other surface public transportation providers in the transportation service area of the project.* (Emphasis added.)

As identified by the Claimant, she unquestionably was an employee who provided services related to transportation, and she worked for an employer who provided transportation services assisted by the project. There is no requirement that she be employed directly in a project activity funded by the Federal grant. Thus, she is covered by the Warranty under the first condition in Section A, paragraph one. Even if, *arguendo*, she were to be considered to have been employed in the rural routes by an employer who did not provide transportation services assisted by the project, she nevertheless would be covered under the Warranty on the basis of the second condition of Section A, paragraph one.

In addressing the scope of protections provided by the Warranty, the Claimant argues that "these guidelines were drawn up to protect employees like myself who try to give their best to their employer and yet are dismissed because corners have to be cut and the employee suddenly finds themselves without a job." The Special Section 13(c) Warranty protections are not that broad. The Warranty serves, in grants and projects under Section 18 of the Federal Transit Act:

...to protect the interests of employees affected by such assistance...[5]

The Warranty does not provide a safety net for an individual employee who simply is "dismissed because corners have to be cut." Rather, under provisions required by Section 13(c)(3), the Warranty protects an employee's conditions of employment which may be affected by the Federal assistance.

Result of a Project

The Claimant seeks a 60-day severance payment because CATA failed to give her a 60-day notice as required by the Warranty in Section B(2)(b):

> *The Recipient or legally responsible party shall provide to all affected employees sixty (60) days' notice of intended actions which may result in displacements or dismissals or rearrangements of the working forces. In the case of employees represented by a union, such notice shall be provided by certified mail through their representatives...*

For a non-union employee, such as this Claimant, this notice provides early communication of the possible change in her employment status which may, or may not, generate protections pursuant to Section 13(c)(3) provisions (protection of the employee against a worsening of his conditions of employment). As a Section 13(c)(3) protection, the alleged harm and/or its effects must be a result of a project in order for the 60-day notice provision to apply to a non-union employee.[6] See, for example, paragraph 7(a) of the National (Model) Agreement, pertaining to dismissal allowances, incorporated into the Warranty by reference in Section B(3) of the Warranty. The result of a project can be direct or indirect, and the protections apply even if other factors also may have affected the employee's interests. This notice provision in the Warranty, however, does not intend to require a 60-day notice of layoff, *per se*, before each and every layoff. In situations affecting a non-union employee's conditions of employment, only such situations that potentially could be a result of Federal assistance for a Section 18 project would require the 60-day notice. I note, however, that this interpretation does not limit any potential remedy (e.g., dismissal allowance or back pay for part or all of the period) for failure to provide the 60-day notice.

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[5]Section 13(c) of the Federal Transit Act (formerly the Urban Mass Transportation Act).

[6]In other situations, such as questions concerning continuation of collective bargaining rights, it is not always necessary to indicate a result of a project. *See, e.g.*, ATU LOCAL 1363, n.3, above.

In this case, the Claimant argues that she was laid off because the rural route activity was contracted out to Lafayette Taxi Service in the Spring of 1994. CATA agrees with this, but adds that the rural routes were funded entirely by State and local money. Although the Claimant did work from time to time on CATA's city routes (funded by grants under Section 18 of the Federal Transit Act), that alone is not enough to activate the Warranty's protections. To apply the Warranty's protections in this claim, there must be some connection between the Federal assistance and the harm or other effects that concern the Claimant. In this case, no such connection appears. CATA has met its burden of proof by showing that the loss of the Claimant's job was due entirely to matters unrelated to the Federal funding: a decline in fare box revenue, insufficient State and local assistance, and a state regulatory requirement that "[p]rivate carriers shall be given the fullest opportunity to offer services in a coordinated system..." See n. 2, above. The fact that, after laying off the Claimant, CATA was able to find alternate, external, non-FTA sources of dedicated funds to hire a part-time employee and to purchase a van, does not suggest a connection to the Federal funding in this case, nor does it suggest that the Claimant has received improper consideration under the Warranty. CATA has demonstrated that no Federal funds were applied to the rural route program for which the Claimant had worked. Further, there is no indication that the Section 18 funding of CATA's fixed-route program (the city routes) had any direct or indirect effect upon the Claimant. Nor do the facts suggest that the Federal funding facilitated CATA's use of other funds elsewhere that otherwise might have been used to continue and/or protect the Claimant's conditions of employment. CATA also has demonstrated that Federal funds have not been, and will not be, applied retroactively to support the events that are the focus of this claim.[7]

DECISION

It is true, unfortunately, that the Claimant has been worsened in her employment. However, since that worsening did not result at least partly from the Section 18 funding under the Act, the Warranty's protections do not apply to that worsening. CATA correctly concludes that the "...Authority acted in the most prudent way imaginable by trying desperately to reduce costs and continue to operate its shared-ride rural transportation program." For the reasons discussed above, I concur in CATA's

[7] *See also,* CERTAIN CAPTAINS v. VALLEJO, OSP case no. 94-13c-20 (1995), Employee Protections Digest, U.S. DOL, OSP, p. A-412. (Even though a grant had been approved, the City of Vallejo demonstrated that no funds under the grant had been drawn or used by the City for any purpose, and there had been no changes or rearrangement of forces in anticipation of the funding. Therefore, no result of the project was found).

decision that the Claimant is not eligible for protections under the Special Section 13(c) Warranty in this situation. CATA was not obligated under the Warranty to provide the Claimant with a 60-day notice of layoff. This decision is final and binding on the parties.

10-28-96
Date

John Kotch
John Kotch
Acting Deputy Assistant Secretary of Labor

In the matter of arbitration between:

JOHN G. WILLIAMS
Claimant
v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
Respondent

OSP Case No. 95-13c-6

Issued: March 26, 1996

Summary

Under a Section 13(c)[1] *Settlement Agreement negotiated between the employer and its unions, Claimant executed a Waiver and Release in exchange for payment, in a Section 13(c)claim. The Department found the waiver appropriate under Section 13(c). The employee's belief that the waiver applied only to wages did not allow him to pursue other Section 13(c) protections arising from the same facts and events.*

Origin of the Claim

This claim arises under one or more protective arrangements certified by the Department of Labor as satisfying the requirements of Section 13(c)of the Federal Transit Act (FTA).[2] Each certification relies principally upon the December 10, 1974 Section 13(c) Agreement negotiated between Massachusetts Bay Transportation Association (MBTA) and the Railway Labor Executives Association, the Congress of Railway Unions, the Brotherhood of Locomotive Engineers, and the Amalgamated Transit Union. The certification included additional conditions as required by the

[1] Section 13(c) is recodified at 49 U.S.C. §5333b, by Public Law 103-272, § 1(c) (July 5, 1994), 108 Statutes 835.

[2] Formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended (49 U.S.C. App. § 1609), the Federal Transit Act is recodified at Title 49 U.S.C. Chapter 53,

Department under Section 13(c). Each pertinent certification is incorporated into a grant contract between the MBTA and the U.S. Department of Transportation. The Claimant was employed in commuter rail service of the Boston & Maine Railroad (B&M), which provided mass transit in the service area of the MBTA projects. Under the certified arrangements, therefore, he is a mass transit employee covered by the protective arrangements.

Jurisdiction

The Department's jurisdiction to arbitrate Section 13(c) claims arises from the terms of the certification of the pertinent grant(s) under Section 13(c) of the Act. Where the certification includes a negotiated Section 13(c) agreement, the arbitration procedure in that agreement governs the arbitration of claims of employees represented by the unions that have signed the agreement. To protect other employees covered by the certification, it is the practice of the Department to require, in the certification, that the grant recipient afford them substantially the same levels of protection as are afforded to those employees represented by the signatory labor organization(s). The Claimant's Union, the International Federation of Professional and Technical Employees (IFPTE) was not signatory to the negotiated 13(c) Agreement in this case. Therefore, the Claimant is covered by the substantially equivalent protections required in the certification.

The certification's requirement for substantially equivalent levels of protections includes both substantive and procedural protections. *See* Congress of Railway Unions v. Hodgson, 326 F.Supp. 68 (1971), n.8 , Opinion of Assistant Attorney General Wm. H. Rehnquist (*4. The statute provides no basis for distinguishing between "substantive" and "procedural" benefits.*).[3] Paragraph 13 of the MBTA's 1974 13(c) Agreement provides for arbitration of employee protections disputes for employees specifically covered by the Agreement. Thus, "substantially the same levels of protections" includes and requires arbitration of disputed claims not covered by the

[3] Although Hodgson and the Rehnquist Opinion addressed Section 405 of the Rail Passenger Service Act, those employee protection requirements are patterned after, and are essentially identical to, the requirements of Section 13(c). Hodgson, n.6 and accompanying text.

Agreement. Where, as here, the parties have not agreed upon any other procedure for arbitration of their Section 13(c) dispute, the Department provides that arbitration.[4]

Background

In 1976, MBTA purchased the facilities, property, equipment and rights of way previously owned and used by B&M in providing the commuter rail service. In this acquisition, MBTA used Federal funds (grant #MA 23-9006, certified September 23, 1976) under Section 13(c) of the Urban Mass Transportation Act. From the 1976 acquisition through December 31, 1986, MBTA continually contracted with B&M to operate and provide the labor for this commuter rail service. In November of 1986, following a public bidding process, MBTA awarded that contract to Amtrak, effective January 1, 1987.[5] On or about December 31, 1986, B&M abolished the Claimant's position and assigned him to the Commuter rail survey and engineering department. MBTA hired him January 12, 1987 as a construction inspector.

The Claimant alleges that, in the loss of his B&M position, he has been worsened with respect to his employment status, seniority rights, pension, job security, and vacation benefits. MBTA requests that, before considering the facts and events of this claim,the Department bifurcate this case and determine first whether the "MBTA 13(c) WAIVER AND RELEASE" executed by the Claimant on April 14, 1993, bars him from pursuing protection of additional benefits in this claim. MBTA asserts that if the waiver stands there will be no need to consider the substantive case. The Department aproved the MBTA's request for bifurcation.

Waiver

As set forth by the MBTA, and corroborated by the Railway Labor Executives Association (RLEA), the following uncontested facts apply to this waiver. On February 20, 1991, the MBTA and the RLEA (representing many of MBTA's rail unions), and the

[4] *See, e.g.*, LOCAL 103, ATU v. WHEELING, DEP case no. 77-13c-5 (1977), Employee Protections Digest (Digest), U.S. Department of Labor, Office of Statutory Programs, p. A-61 (*As a result [of the requirement for substantially the same level of protections], the Department of Labor is authorized to resolve the issues raised by the non-signatory employees through their collective bargaining agent rather than require them to be submitted for private arbitration).*

[5] For a discussion of this takeover and change of contractors, see CANGIAMILA v MBTA, OSP case no. 91-13c-1 (1995), Employee Protections Digest, U.S. DOL, Office of Statutory Programs, p. A-403

Claimant's union, IFPTE, entered into a procedural agreement for processing Section 13(c) claims arising out of the 1987 change in commuter rail operators. Pursuant to that Agreement, the Claimant submitted an "Application for Section 13(c) Benefits" form to the MBTA. On February 23, 1993, the MBTA, RLEA and IFPTE executed a Settlement Agreement to resolve all outstanding Section 13(c) claims arising out of the 1987 change in MBTA's commuter rail operators. As part of the Settlement, MBTA provided a substantial sum of money to the RLEA, which then had responsibility for determining the appropriate amount to disburse to approximately 900 individual claimants. Paragraph 5 of the Settlement Agreement releases MBTA:

> *from any and all claims, promises,...liabilities, [etc.]...under the 1974 13(c) Agreement, any collective bargaining agreement, [etc.]...arising out of or in any way related to the change in 1987 of the independent contractor operating the MBTA commuter rail service from the B&M to Amtrak or any federally assisted project in connection with such change...The RLEA and the unions, and each of them, understand and agree that this release constitutes and may be asserted [by the MBTA] as a complete defense and bar to any Claim which has been or may be asserted by them or by any person or entity on their behalf...*

Thus, the Agreement provided monetary relief to this group of employees affected by the 1987 change in contractors, in exchange for, among other things, complete discharge of the MBTA from any further obligation towards those employees. The only exception to this release was for a claimant who rejected the settlement, under procedures provided for in Paragraph 3 of the Settlement Agreement.

In conjunction with the Settlement Agreement between the MBTA and the unions, each claimant receiving payment was required to sign an individual Waiver and Release on or before April 14, 1993. That individual Waiver and Release included the following:

> *...In connection with the February 23, 1993 SETTLEMENT AGREEMENT between the MBTA and the Railway Labor Executives' Association and the railroad unions (including the union of which I am or was a member)...and as a condition of my acceptance of the amount to be distributed to me pursuant to that SETTLEMENT AGREEMENT, I hereby waive and relinquish any and all claims that I have or may have against MBTA and its contractors under the 1974 23(c) Agreement...arising out of, or related to, MBTA's 1987 change in the operator of its commuter rail lines, including any claim against MBTA and its contractors. I further hereby release the RLEA, and the union of which I am or*

was a member, of liability for any claim or complaint of any kind which I may have under the 1974 13(c) Agreement...in connection with the decision to settle the dispute with the MBTA, or the February 23, 1993 SETTLEMENT AGREEMENT or any provision of that agreement.

Along with the release form, every claimant received a "Notice Concerning Settlement Under 1974 'Section 13(c)' Agreement" and a "Settlement Rejection Form." The Notice expressly stated the amount to be paid by the MBTA and advised any covered employee wishing to make a claim to submit such claim to their union. The Notice also advised that each employee had the option of rejecting the settlement offer and pursuing his Section 13(c) claim individually against the MBTA. The Claimant did not execute the Settlement Rejection Form.

In this matter now under consideration by the Department of Labor, the Claimant signed and executed the Waiver and Release. He acknowledges this, but maintains that the waiver was only for "monies owed me, and was for only 75% of what due to me." He also supports his position with the fact that "[n]one of these Waiver and Release forms were approved by the Department of Labor as prescribed by Federal Law." The Claimant does not consider the waiver to apply to lost rights and benefits (employment status, seniority rights, pension, job security and vacation), because "all of the other unions and personnel taken over by Amtrak maintained all of their seniority and other benefits."

Discussion

The Department does not routinely accept a purported waiver of employee protections established pursuant to Section 13(c). See, for example, SCHAFFER V. GOLDEN GATE, DEP case no. 77-13c-1 (1979), Employee Protections Digest, U.S. Department of Labor (Digest), p. A-119 (non-union employee's waiver was rejected); PETERSON V. SOUTHERN PACIFIC, DEP case no. 77-C1[6]-23 (1978), Digest, p. B-74 (exempt employee's signing of a settlement agreement indicating salary preservation held not applicable to foreclose his pursuit of other benefits. "...[T]he Department cannot recognize any subsequent arrangement which would abrogate the terms of the employee protective agreement."); STRECKER V. BURLINGTON NORTHERN, DEP case no. 77-C1-14 (1977), Employee Protections Digest, p. B-64 (former exempt

[6]Appendix C-1 is incorporated as part of the minimum benefits required under Section 13(c), by reference to Section 5(2)(f)of the Act of February 4, 1887 (the Interstate Commerce Act). Section 5(2)(f) is recodified at 49 U.S.C. §11347.

employee held not required to agree to proposed waiver described as preventing pyramiding of benefits addressed in Appendix C-1, the certified protections).

The instant waiver situation is distinguishable from the above situations, however. First, this waiver is not limited to one or more specific types or categories of benefits (e.g., salary). Second, the instant waiver resulted from full collective bargaining in good faith between the MBTA and many of its unions, including the union representing this claimant. Second, continuation of collective bargaining is one of the primary protections required by Section 13(c). The Department has continually recognized a union's right to negotiate changes in the benefits and/or protections applicable to the employees it represents. Appropriate changes negotiated through full collective bargaining have a presumption of validity under Section 13(c), and the Department generally would review such negotiated changes only to ensure that the bargaining was fair and in good faith, and that the result is not repugnant to the Act. Third, the Settlement Agreement and the Waiver and Release are straight forward in their terms and not inconsistent with, or unconscionable under, the requirements of the Act and the terms of the pertinent Section 13(c) certifications.

Of special significance in considering this waiver is the fact that the Waiver and Release was executed between the unions and the employees they represent, rather than between the MBTA and the employees. The unions involved in negotiating the Settlement Agreement and the terms of the individual Waiver and Release forms are exceedingly well-experienced in employee protections generally, and in Section 13(c) employee protections specifically. There is no question of whether they might have been at an unfair disadvantage in those negotiations. The MBTA also is very well-versed in the area of Section 13(c) employee protections. Additional significance lies in the fact that this waiver is limited to claims arising from the specific event at issue, the 1987 change in contractors, rather than seeking to waive all claims for employee protections without limitation. Finally, this Claimant has brought his claim here as an individual and is not represented in the claim by his union, which is a party to the Settlement Agreement.

With respect to the Claimant's argument that he does not believe that the Waiver and Release apply to such "nonmonetary" benefits as vacation, pension, or seniority, such personal belief, without more, does not have sufficient weight to offset the clear language of the waiver he executed:

> *...in order to obtain benefits in connection with MBTA's 1987 change in the operator...in connection with the [negotiated] SETTLEMENT AGREEMENT...and*

> *as a condition of my acceptance of the amount to be distributed to me pursuant to that SETTLEMENT AGREEMENT, I hereby waive and relinquish any and all claims that I have or may have against MBTA and its contractors under the 1974 13(c) Agreement...arising out of, or related to, MBTA's 1987 change in the operator of its commuter lines...*

This broad and unambiguous language is not limited to claims involving monetary benefits. Moreover, the Claimant had an option of choosing to execute a Settlement Rejection Form, which clearly explained that by doing so he would retain his right to pursue his separate claim for full 13(c) protections and benefits, but that he would have to do so individually and without payment under the Settlement Agreement. He did not choose that option, instead accepting a substantial payment distributed to him under the Settlement Agreement in exchange for the waiver he executed. Since the instant claim arises squarely out of the 1987 change in contracted operators, the Claimant has waived his right to pursue this claim. Further, Paragraph 2 of the Settlement Agreement provides that the unions "fully indemnify the MBTA for any and all losses, damages...liabilities, costs, expenses...incurred in connection with any such [subsequent claim arising out of these events, or other] Challenge." This demonstrates that, at the time of negotiations, the unions also intended the broad scope of the Settlement Agreement and the Waiver and Release that MBTA describes here, reinforcing MBTA's position.

In the face of the strong factual support of the MBTA's position in this case, and the clear lanaguage of the Settlement Agreement and the Waiver and Release, the Claimant's belief that the Waiver and Release applied only to wages cannot overcome the fact that he waived his opportunity to pursue this claim for any and all rights and benefits under Section 13(c) with respect to the 1987 change in operators. Nor can AMTRAK's treatment of other employees affect this outcome, inasmuch as such treatment was independent of, and unrelated to, this waiver and release to the extent addressed in this record. As to the Claimant's argument that the Settlement Agreement is invalid because it was not certified by the Department of Labor, such argument is misplaced. Section 13(c) requires the Department to certify that fair and equitable arrangements are made to protect the interests of employees affected by Federal assistance included in a pending grant application under the Act. The Settlement Agreement was not part of an application for Federal assistance, nor did it seek to modify the terms of any 13(c) certification. Therefore, the Department's cerfification of the Settlement Agreement was not required.

In view of the above, the Department finds that the Settlement Agreement and the individual Waiver and Release are valid and acceptable under Section 13(c). The MBTA's request that this claim be dismissed as barred by the waiver is upheld. Therefore, it is not appropriate to consider the substance of this case, and this claim is dismissed with prejudice. This arbitration decision is final and binding upon the parties.

March 26, 1996
Date

Charles L. Smith
Charles L. Smith
Deputy Assistant Secretary of Labor

In the matter of arbitration between:

LARY V. DART
OSP case no. 95-13c-7 May 31, 1996

Decision

Dear Claimant:

You have filed a claim for Section 13(c) employee protections with the Department of Labor (DOL). You claim that the Dallas Area Rapid Transit (DART) has violated the applicable Section 13(c) Arrangements in the following ways:

-placing you on administrative leave with pay, pending investigation of an action you took in the performance of your job,
-denying that this enforced, administrative leave with pay has had an adverse effect on you,
-failing to accord you a hearing on your case before the DART Trial Board, following your pursuit of your grievance through the procedure provided for in the Dart Personnel Policy Manual (DPPM).

In filing and describing your claim, however, you have not given any suggestion as to how these matters might relate to a Section 13(c) project, other than your allegation that "DOL required DART to establish" the DPPM in 1988 as a condition to receiving federal transit funds then and in the future. Your complaint appears to lie solely within the DPPM as an individual employee grievance and not within the scope of Section 13(c).

If you mean to argue that DART has failed to preserve and continue rights, privileges and benefits, contrary to paragraph (3)(a) of the Section 13(c) Arrangements, the facts you have provided do not support such an argument. Section 8.7(A) of the DPPM specifically provides authority for DART to place an employee on administrative leave with pay in this situation:

A. Pending Investigations. When an employee is suspected of a violation of an Authority, city, state, or federal law, rule or policy which, if proven, would justify suspension or discharge, but an investigation determining the exact nature and extent of the violation is in progress or incomplete, the employee may be placed

<u>on leave with pay pending the outcome of the investigation and the imposition of disciplinary action.</u> (Emphases added.)

Thus, under the language of Section 8.7(A), DART has acted within its rights under the DPPM. Your July 6, 1995, reading of the provision, to require that an employee cannot be placed on this administrative leave without imposition of disciplinary action, absent additional substantiation for your interpretation, is contrary to the language of the provision.

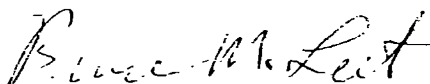
With respect to the adverse effects of DART's action under DPPM Section 8.7(A), I recognize that you have encountered some or all of the adverse effects of being placed on administrative leave. However, inasmuch as the DPPM specifically provides authority for placing an employee on leave with pay, it cannot be said that those adverse effects (such as possible harm to one's reputation) that may attach to being placed on administrative leave constitute a basis for grievance and redress under the DPPM.

With respect to the denial of a Trial Board hearing, the facts that you have provided do not show that a Trial Board hearing was required. As DART noted in responding to your grievance at the several steps, your grievance has not shown the alleged violation of the DPPM, nor the prohibited harm, necessary to a grievance.

Finally, the suggestion that your employment may have been terminated without just cause lies outside of the scope of these Section 13(c) protections, inasmuch as it pertains exclusively to your performance of your individual job and DART's evaluation of that performance. Section 13(c) protections do not preclude discharge for just cause, not do they generally address standards for, and review of, decisions as to the presence of just cause. Such matters normally are addressed in a collective bargaining agreement and/or in personnel policies and procedures. Here, the DPPM, developed through DART's meet and confer process with Local 1338 of the Amalgamated Transit Union, addresses considerations of dismissal for just cause.

Finding nothing in your claim to indicate a violation of DART's Section 13(c) Arrangements, I am closing this case. This claim is dismissed as of the date of this letter.

Sincerely yours,



Bruce M. Leet
Arbitrator

November 7, 1996

Mr. James P. Connor
Directing Business Representative
IAM District Lodge No. 38
299 Newport Avenue, Suite 10
Quincy, MA 02170

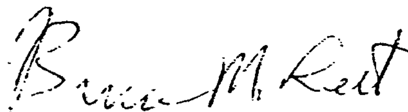
re: IAM LODGE 38 v. MBTA, OSP case no. 96-13c-1

Dear Mr. Connor:

By letters of June 24 and September 3, 1996, I requested the Lodge 38's position on whether, why and how, the Department of Labor has jurisdiction in the above-styled claim for employee protections. Following an extension of time for reply, the Union's position was due postmarked October 17, 1996. I have received no response on this matter of jurisdiction since extending the date for reply to October 17.

Given the concerns mentioned in my letter of September 3, and the silence of the Union in response thereto, it is not clear as to whether the Department of Labor has jurisdiction to arbitrate this claim. In view of the lack of response, therefore, this claim is dismissed without prejudice effective with the date of this letter, provided that if the Union should seek to reinstate, or otherwise pursue, this claim before the Department, the Union first will need to satisfactorily explain the basis for asserting the Department's jurisdiction.

Sincerely yours,



Bruce M. Leet
Appeals Supervisor
for Employee Protections Claims

cc: Frank McDonough, Director of Labor Relations, Massachusetts Bay Transportation Authority, 10 Park Plaza, Boston, MA 02116

In the matter of arbitration between:

AFSCME LOCAL 125 *Claimant* v. DALLAS AREA RAPID TRANSIT *Respondent*	OSP Case No. 96-13c-2 Issued: August 1, 1997

Summary

DART amended it s Draft Personnel Policy Manual as it applied to its salaried employees. AFSCME claimed that the changes were not consistent with the Section 13(c) requirements. DART applied the National Labor Relations Act requirement for showing majority representation to AFSCME's claimed status as bargaining agent, and denied that AFSCME had status to represent salaried employees at DART. The Department closed the case without decision, and without prejudice to further claims by AFSCME or any salaried employee of DART.

The Claim

This claim arises under the terms of a protective Arrangement certified by the Department Labor (Department) on September 30, 1991, as pursuant to the requirements of Section 13(c) of the Urban Mass Transportation Act (UMTA).[1] That certified Arrangement includes the Department's letter of certification and its Attachment A ("Arrangement Pursuant To Section 13(c) of the Urban Mass Transportation Act of 1964,") and Attachment B ("Section 8.10, General Grievances," and "Section 8.11, Modification," of the Dart Personnel Policy Manual). DART has agreed to that certified Arrangement in all pertinent, subsequent grant contracts with the U.S. Department of Transportation for Federal transit assistance. Under numbered paragraph 4 of the Department of Labor's

[1] Formerly the Urban Mass Transportation Act (UMTA) of 1964, as amended (49 U.S.C. App. § 1601), the Federal Transit law is recodified at Title 49 U.S.C. Chapter 53, by Public Law 103-272, § 1(c) (July 5, 1994), 108 Statutes 835. Section 13(c) is recodified at 49 U.S.C. §5333(b).

certification letter, mass transit employees in the service area who are not specifically covered by Attachment A can bring a dispute thereunder to the Department of Labor (Department) for resolution. The American Federation of State, County and Municipal Employees Local 125 (AFSCME) brings this claim for employee protections thereunder on behalf of the salaried employees of Dallas Area Rapid Transit (DART), including Janette Hill and Thomas Hodge, Chapter Co-Chairs of Local 125. AFSCME has exhausted available local remedies and, in compliance with Paragraph 16 of the certified Arrangement and Paragraph 4 of the Department's letter of certification, now submits this dispute to the Department for a final and binding resolution. AFSCME alleges the following violations of, and/or failures to comply with, DART's certified protective Arrangement:

a. DART refuses to acknowledge AFSCME Local 125 as the bargaining representative for Salaried Employees;

b. DART amended the Dart Personnel Policy Manual (DPPM) without following the required procedure for modification set forth in "Section 8.11, Modification," of the DPPM and included in DART's Section 13(c) Arrangement;

c. DART amended the (DPPM) with respect to salaried employees without sufficient participation of all DART employees and/or of AFSCME as the salaried employees' bargaining representative for (meet-and-confer purposes);

d. In amending the DPPM, DART divested salaried employees of protections which they previously had and which DART continues to provide for its non-salaried employees;

e. DART maintains that its salaried employees are outside the scope of Section 13(c), and has announced its intention to evaluate and decrease employee benefits for Salaried Employees.

Findings of Fact

In 1983, DART acquired the assets of the predecessor Dallas Transit System, agreeing to be responsible for all employee protective arrangements required by law.[2] Since then, both salaried and non-salaried DART employees had been covered by the same set of personnel rules and policies, the DPPM. In 1995, DART changed this by developing an Administrative Employment Manual (AEM), which now applies to DART's

[2] Dallas Area Rapid Transit v. Plummer and Amalgamated Transit Union Local 1338, 841 S.W. 2d 870, 873 (Tex.App.-Dallas 1992).

salaried employees in place of the DPPM. In a series of actions beginning on June 21,1995, DART provided its salaried employees, individually, with copies of the proposed AEM and gave each of them an opportunity to review it and respond in writing. Thirty-eight employees submitted comments on the proposed AEM. On July 21, 1995, DART distributed to the salaried employees a summary of those comments and management's responses, together with a copy of four sections of the proposed AEM revised as a result of the employee comments. The revisions were explained to the Board of Directors at its regularly scheduled meeting on July 25, 1995, and AFSCME Local 125 addressed the Board to express its opposition to these changes.

Those revised sections of the AEM took effect August 7, 1995, with a copy of the revised sections provided to each salaried employee on that date. As additional portions of the DPPM were replaced by finalized sections of the new AEM through this process, the salaried employees were given copies of those new AEM sections when they took effect. The changes included, among other things, a change in the general grievance procedure available to the salaried employees. For individual grievances, Section 8.8 of the DPPM had provided salaried employees a four-step procedure, followed by an opportunity in Section 8.9 to appeal to the Trial Board, an independent body whose decision would be final. For general grievances, Section 8.10 of the DPPM had provided salaried employees a two-step process (with an optional third, intermediary step), ending with the report of a neutral, tri-partite fact-finding panel and an option for the panel's report to become the final resolution of the dispute. Section 9.5G of the AEM, effective October 1, 1995, provides salaried employees with a single, mandatory three-step grievance process ending with the final decision made by DART's Manager of Employee and Labor Relations (Level I complaint) or DART's President/Executive Director (Level II complaint).

On October 24, 1995, AFSCME Local 125 filed a General Grievance under DPPM section 8.10 on behalf of all DART salaried employees, asserting that DART's changes in the DPPM with respect to salaried employees were not properly accomplished and that they violate the terms of the DPPM and the Section 13(c) certification. On November 5, 1995, DART denied the grievance because section 8.10 of the DPPM had been changed so as to be no longer available to salaried employees, having been replaced by section 9.5G of the AEM. As an additional reason for denying this general grievance, DART stated that the general grievance was not filed within ten working days and, therefore, was untimely under the provisions of section 9.5 of the AEM.

Discussion

In bringing this claim of violation of the Section 13(c) Arrangement(s) on behalf of the salaried employees at DART, AFSCME claims to be their bargaining representative

for meet and confer purposes under the Texas public employee labor law.[3] DART opposes this claimed status because AFSCME has not demonstrated that it represents a majority of the salaried employees at DART. Acknowledging that Texas law does not contain such a requirement for majority representation, DART points out that it is DART's practice on occasions such as this to look to the National Labor Relations Act for standards and guidance. In this instance, DART has applied the National Labor Relations Act's requirement for a showing of majority representation to deny AFSCME's alleged status as bargaining agent under Texas statutes. As an additional basis for opposing AFSCME's claimed bargaining representative status, DART alleges that two other (unidentified) labor organizations also claim to represent some, or all, of DART's salaried employees.

This question of whether AFSCME has status to represent DART's salaried employees as a bargaining representative presents a situation in which a labor union seeks, for the first time, to establish itself as a bargaining agent. In general, Section 13(c) maintains the status quo of existing bargaining rights and employment conditions, not require bargaining where none existed before. Questions that arise in seeking representation rights under state law ordinarily would be referred to an appropriate state agency with jurisdiction over representation issues in public employee/labor relations. In this case, however, the parties have not informed the Department of such an agency in Texas, nor has one been identified in the review of this case. It may be that in Texas such matters are properly referred to the courts. It is noted that the Court of Appeals in Dallas previously has reviewed DART's Personnel Policy Manual and found that the grievance procedure therein, having been incorporated into the Department's Section 13(c) certification, is enforceable in state court. Dallas Area Rapid Transit v. Plummer and ATU Local 1338, 841 S.W. 2d 870, 873-74 (Tex.App. Dallas 1992).

Given DART's challenge of AFSCME's claimed status under Texas law as bargaining representative of DART's salaried employees, in which capacity AFSCME has brought this claim to the Department of Labor, I do not find it appropriate to proceed to a decision in this claim now. This claim is, therefore, closed without prejudice to Claimant AFSCME, and/or to any salaried employees of DART.

8/1/97
Date

/S/
Bernard E. Anderson
Assistant Secretary

[3] Volume 15, Title 83, Article 5154a and Article 5154c of Vernon's Revised Civil Statutes of the State of Texas, now codified as 617.005 of the Government Code of Texas. This does not include the provisions of Texas statutes applicable to police and firefighters.

In the matter of arbitration between:

CALVIN (GRIMES) MUHAMMAD *Claimant* v. HOUSTON METRO *Respondent*	OSP case no. DSP 97-13c-2 Issued: March 9, 1998

Summary

The Claim is dismissed for lack of jurisdiction for the Department of Labor to arbitrate the claim under the negotiated Section 13(c) Agreement. The Department's receipt of a claim and supporting material neither demonstrates, nor establishes, jurisdiction. The Department has no fiduciary responsibility under Section 13(c) which would provide authority for it to serve as arbitrator in this dispute.

Origin of the Claim

This claim arises under a protective arrangement certified by the Department of Labor as satisfying the requirements of Section 13(c)[1] of the Federal Transit Act (FTA). The protective arrangement includes a negotiated Section 13(c) Agreement executed between Transport Workers of America Local 260, AFL-CIO (TWU), and the Metropolitan Transit Authority of Harris County (Houston Metro). The Claimant seeks to have the Department arbitrate his claim to employee protections under the negotiated agreement. He filed this matter here in May of 1997.

Findings of Fact

[1] Originally passed as part of the Urban Mass Transportation Act (UMTA) of 1964, as amended, 49 U.S.C. section 1601, et seq., Section 13(c) is recodified at 49 U.S.C. § 5333(b).

The Claimant is represented by Local 260 of the (TWU) for purposes of collective bargaining, and/or meet and confer rights as provided for by Texas statutes.[2] Local 260 has executed a collective bargaining agreement with the Respondent, Houston Metro, setting forth terms and conditions of the Claimant's employment. Local 260 also has negotiated and executed the applicable Section 13(c) Agreement under which the Claimant brings this case. Local 260 is not participating in this claim, however, because, according to the Claimant, Local 260 does not believe that Section 13(c) protections apply to this claim.

Jurisdiction

In bringing this case to the Department of Labor, the Claimant relies initially on the Section 13(c) Agreement for jurisdiction. The negotiated Section 13(c) Agreement contains a dispute resolution procedure at Paragraph 4. That procedure provides, in pertinent part, the following:

> *(4) In the case of any labor dispute or controversy regarding the application or enforcement of any of the provisions of this Agreement which cannot be settled by collective bargaining within 30 days, such dispute or controversy may be submitted at the written request of either party to a Board of Arbitration composed of three (3) persons, as hereinafter provided... If the two arbitrators selected by the Union and the Company are unable to agree upon the selection of a third arbitrator within five (5) days...then either arbitrator may request the American Arbitration Association to furnish a list of five (5) persons who are members of the National Academy of Arbitrators from which the third arbitrator shall be selected....*

This procedure in Paragraph 4 does not provide the Department with jurisdiction to hear and decide this claim.

In seeking to demonstrate the Department's jurisdiction over this claim, the Claimant also relies on the Department's correspondence in this case. He notes that the Department has acknowledged that the Claimant's petition states that he and his co-workers[3] "request/invoke the jurisdiction of the Secretary of Labor." The Claimant argues

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[2] *See*, ATU Local 1338 v. Dallas Transit System, DEP case no. 80-13c-2 (1981), *in* Employee Protections Digest, USDOL, p. A-248 (meet and confer rights are protected as a form of collective bargaining rights for purposes of Section 13(c)). The instant decision relies on the certified Section 13(c) Protective Agreement as it exists at Houston Metro, and makes no comment on Texas statutes.

[3] The Claimant submitted similar petitions from several hundred co-workers and seeks to include their claims within his own. Because this claim is dismissed for lack of jurisdiction, further examination of that aspect is not required.

that, by this acknowledgment, the Department agreed that it has jurisdiction. He concludes that such acknowledgment also suffices to establish the Department's jurisdiction. That acknowledgment, however, and other Department correspondence, were executed for the purpose of receiving and processing the Claimant's filings in order to determine, among other things, whether the Department would have jurisdiction in this claim. The Department's acknowledgment of the content of materials submitted by a claimant, however, is not to be confused with a determination that the petition (or even several hundred such petitions) would be sufficient to establish the Department's jurisdiction. The Department's action in acknowledging an attempt to file a claim, in assigning it a case number, or in receiving and reviewing petitions, letters or other materials does not establish jurisdiction. If the Department's jurisdiction does not exist independent of such actions, attempts by a claimant to invoke/request the Department's jurisdiction must fail because there is no jurisdiction to invoke. The Department's jurisdiction to arbitrate a Section 13(c) claim arises from a statute, a contract, a Section 13(c) protective arrangement, a Section 13(c) certification, the mutual agreement by the parties to the dispute to have the Department arbitrate the claim, or from some other source independent of the claim itself. No such source of jurisdiction for the Department is present in this claim.[4] A claiming employee cannot generate jurisdiction by the Department of Labor out of his own beliefs and requests, nor out of the Department's receipt of his claim and related materials.

The Claimant also believes that the letters and petition(s) he submitted in this claim should, and would, activate:

> *the fiduciary responsibility of the Department to the employees of the work place by invoking jurisdiction and discerning the will of the people...[the Department is] suppose to protect...."*

This argument has no weight because there is no such fiduciary responsibility or authority. The Department's role as arbitrator (which is different from that of a fiduciary) in employment situations depends on the existence of statutory, contractual or other authority as indicated above.

The Claimant also suggests that there is dissatisfaction with the leadership of the Local Union among some members of the bargaining unit, and that this necessitates the

[4]This case raises no question of jurisdiction under the Department's standard requirement in Section 13(c) certifications, that "other" transit employees receive substantially similar levels of protections as those covered by the negotiated protective Agreement. The Claimant is covered by the negotiated Agreement and, therefore, does not qualify as one of the "other" transit employees.

Department's jurisdiction because those members may not be assured of adequate representation by the Union. This allegation does not offer a basis for the Department of Labor to assert jurisdiction or to otherwise intervene. Such alleged dissatisfaction would need to be addressed through the Union's internal procedures, or through whatever state or local government agency procedures might be available for selection of a bargaining representative. The Department generally will recognize the established leadership of a labor union unless and until the membership, through appropriate procedures, elects new leadership.

Decision

The arbitration procedure in Paragraph 4 of the Section 13(c) Agreement governs this claim and does not provide jurisdiction for the Department of Labor to arbitrate a dispute thereunder. The Claimant, as an employee in the bargaining unit represented by Local 260, whether or not a member of the Union, would have to pursue his Section 13(c) claim through Local 260 and/or through the dispute resolution procedure in Paragraph 4. Disagreements between the Claimant and his Union do not allow the Claimant to substitute arbitration by the Department of Labor for the arbitration procedure negotiated by his Union.

In the face of the clear language of Paragraph 4 of the Section 13(c) Agreement and the Claimant's position as a member of the bargaining unit represented by Local 260, and in the absence of any known or identified basis for the Department to assert jurisdiction over this claim, this case is dismissed for lack of jurisdiction.

3/9/98
Date

/S/
Bernard E. Anderson
Assistant Secretary

In the matter of arbitration between:

IRBY FOSTER & JAMES BRACE *Claimants* v. DALLAS AREA RAPID TRANSIT *Respondent*	DSP case nos. 98-13c-1 & 2 Issued: December 16, 1999

Summary

Claimants were accepted for positions under a posting that included training and pay upgrade upon completion of the training. Training was delayed for a year, and then offered without the pay upgrade. The employer sought to retroactively close the "window" of pay upgrade. The employer claimed that it had resolved these claims in a settlement agreement with the union. The claimants were found not to have been included in the settlement agreement and, therefore, are entitled to retroactive training, pay, seniority and related benefits.

Origin of the Claim

These two claims arise under a grant of financial assistance to Dallas Area Rapid Transit (DART) pursuant to the Federal Transit law. As a condition of receiving that assistance, DART has agreed to apply the employee protective arrangement certified by the Department of Labor (Department) as satisfying the requirements of Section 13(c) of the transit law.[1] These terms and conditions were first certified for DART grants TX-03-0142, TX-90-X103, and TX-90-X193, on September 30, 1991, and have been repeated for subsequent grants, including those applicable to these claims. The 1993 DART certification includes an additional Section 13(c) Arrangement entitled "Light Rail Transfer Implementation Agreement," negotiated by DART and Local 1338 of the Amalgamated Transit Union. These claims pertain to that Light Rail Agreement and were filed with the Department on November 4, 1997.

[1] Originally part of the Urban Mass Transportation Act (UMTA) of 1964, as amended, 49 U.S.C. § 1601, *et seq.*, Section 13(c) is recodified at 49 U.S.C. § 5333(b).

Jurisdiction

DART's principal defense to the claims of Irby Foster and James Brace alleges that the Department has no jurisdiction over "the parties" (which DART defines as ATU Local 1338 and DART), nor over these claims, because "the parties have settled these Section 13(c) claims as provided for in Paragraph 16(a) of DART's certified 13(c) Arrangement. Paragraph 16(a) provides two alternative means for resolving Section 13(c) disputes. Under the first alternative, the dispute:

> *may be submitted at the written request of the Public Body or the employee, individually or through such employee's representative, to any final and binding disputes procedure acceptable to the parties...*

The second option provides the following:

> *in the event they cannot agree on such procedure, to the Department of Labor, or its designee, for purposes of final and binding determination of all matters in dispute....*

In objecting to the Department's jurisdiction over "the parties," DART relies on the first option in Paragraph 16(a), maintaining that:

> ***ATU Local 1338 and DART, agreed to submit this dispute to DART's General Grievance Procedure and the dispute was resolved between the parties on September 26, 1997. The resolution reached between the parties encompassed the 13(c) claims presented by Foster and Brace.***

DART did execute a Memorandum of Agreement with ATU Local 1338 on September 26, 1997, covering several other Section 13(c) disputes which also pertained to M-6 upgrades under the Light Rail Transfer Implementation Agreement. The Agreement purportedly was reached under DART's General Grievance Procedure (Dart Personnel Policies Manual (DPPM), Section 8.10). Those other 13(c) disputes are specifically identified, by employee name, in Attachment 1 to the Memorandum of Agreement. Each of those employees was awarded the M-6 upgrade retroactively by the Memorandum of Agreement. Neither attachment 1 nor the Memorandum of Agreement itself makes any mention of the claims of Foster and Brace.

Numbered paragraph 1 of the Memorandum of Agreement states that use of the General Grievance Procedure for Light Rail Transfer Implementation Agreement disputes

is limited to the issues covered in the Memorandum of Agreement, and that "[f]uture disputes will be resolved in accordance with DART's 13(c) arrangement." In addition, immediately preceding the date and signatures on the Memorandum of Agreement, numbered paragraph 9 sets forth the following conditions:

> 9. *It is further understood and agreed to by the parties that this agreement contains the entire agreement between the parties and supercedes any prior or contemporaneous written or verbal agreement between the parties, and may be amended only by mutual written agreement.* (Emphasis in original.)

Paragraph 9 is a standard "zipper clause" used in labor relations documents to limit the scope and significance of the document to that which is clearly specified by its terms, and to exclude considerations of possible intent or additional understandings/interpretations not specifically provided in the agreement. Based on these provisions and Attachment 1, the parties to this Memorandum of Agreement have established that it does not cover these Section 13(c) claims of Foster and Brace.

Further, DART's efforts to demonstrate that the instant claims were settled by the September 26, 1997 Memorandum of Agreement are undermined by DART's own actions. DART has maintained that "the parties to the 13(c) Arrangement" have resolved these Section 13(c) claims pursuant to the first option in Paragraph 16(a), by use of DART's General Grievance Procedure. Yet In letters dated October 10, 1997, DART advised Claimants Foster and Brace as follows:

> *...please be advised that the issues that were raised by the ATU's "alleged grievance"* [and allegedly settled by the September 26, 1997 Memorandum of Agreement] *were not matters that were grievable through any of DART's grievance procedures.*
>
> *The issues raised were all in reference to the interpretation of the Light Rail Transfer Implementation Agreement which is part of DART's "Arrangement Pursuant to Section 13(c)...*
>
> *Since the parties to the 13(c) Arrangement resolved the dispute in accordance with paragraph 16(a) of the 13(c) Arrangement, any further claims by you or other parties on your behalf must follow the procedures outlined in paragraph 16(a) of the 13(c) Arrangement.*
>
> *Thus, any dissatisfaction you may have to the resolution reached by the 13(c) Arrangement parties may be submitted to:*
>
> *1. The United States Department of Labor, or*

2. If you are a member of ATU Local No. 1338, you many present your dispute to the Executive Board in accordance with the by-laws of the local union.

Accordingly, in light of the clear language of the Memorandum of Agreement, and in the absence of any evidence in the record from Local 1338 corroborating the alleged settlement of the instant 13(c) claims, I find that these claims have not been settled and that they have been referred correctly to the Department of Labor for final and binding resolution.

It is noted that it is not clear that the Union had authority to settle the instant Section 13(c) claims. This issue need not be resolved, however, in light of this conclusion that the Memorandum of Agreement does not apply to these claims. The Union has not participated in these claims before the Department of Labor.

The Claim

The Claimants believe that they have been wrongly denied the opportunity to acquire vendor training and to be promoted to the M-6 pay category. They argue that this denial unfairly violates the conditions set forth in the job postings for which these individuals were accepted. They also maintain that this denial violates DART's Light Rail Transfer Implementation Agreement, part of DART's Section 13(c) obligations. They argue that DART improperly sought to modify the posted conditions, while they were in effect, under which vendor training and upgrade to the M-6 pay grade was offered and/or available.

Findings of Fact

In 1992, DART and the Amalgamated Transit Union negotiated the Light Rail Transfer Implementation Agreement, setting forth certain provisions pertaining to its new Light Rail system. As established in the Light Rail Transfer Implementation Agreement, DART posted openings for positions in its new Light Rail operation over the next several years. The Claimants applied, and were accepted, for positions under such postings made in approximately October (Foster) and November (Brace). The Light Rail Transfer Implementation Agreement, as well as these postings, specified that persons accepted during the undefined, "initial hiring" period would need to test out at the M-4 level (as a mechanic) and then would be given vendor training, an approximately eight-week course. The Light Rail Transfer Implementation Agreement and the job postings further specified that upon successful completion of vendor training such employees would be awarded the pay grade of M-6. The record indicates that all individuals hired before the Claimants under this job posting had been given vendor training promptly and had been awarded

M-6 pay-grade status upon successful completion of the vendor training. The record also indicates that individuals hired after the Claimants for this same position received vendor training and promotion to M-6 pay grade upon completion of the vendor training.

Both Claimants had signed up to work for DART's new Light Rail activity in the fall of 1996. Claimant Foster was working for DART's bus operations and requested a transfer to DART's new Light Rail operation in the position of Light Rail Vehicle technician. He was interviewed October 19, 1996 and was offered the position five weeks later, on November 26, 1996. He was not given an opportunity to sign a letter of acceptance for the position until a month after that. Claimant Brace had not previously worked for DART and was offered employment with DART in the Light Rail position in November of 1996.

Foster and Brace successfully tested out at the M-4 level in approximately October and November of 1996, respectively, and qualified for vendor training. Without explanation in this record, DART continuously postponed vendor training for these two successful candidates for about a year. In November of 1997, DART offered them vendor training but without the opportunity for the posted promotion to M-6 pay grade upon satisfactory completion of the training. Thereafter, DART categorized the Claimants as having fallen outside the undefined "initial hiring period" and subject to the conditions of "subsequent hiring" status, which would not include an award of M-6 status upon completion of vendor training. However, nothing in this record, including the Light Rail Transfer Implementation Agreement, indicates an ending date for the initial hiring period, nor when any subsequent hiring period was to begin.

In November of 1997 DART proposed a Modified Light Rail Transfer Implementation Agreement to the Department, for determination of whether the proposed Modified Light Rail Transfer Implementation Agreement would satisfy Section 13(c) and could be substituted for the Light Rail Transfer Implementation Agreement. The Modified Light Rail Transfer Implementation Agreement proposed to delete the provisions referring to initial hiring period and the awarding of upgrades to M-6 pay grade upon completion of vendor training.

Discussion

The Claimants' proffered facts and arguments pertaining to their applications and qualifications for the posted positions (including vendor training and upgrade to M-6 pay category upon its completion) are uncontradicted by the record. The Light Rail Transfer Implementation Agreement is part of DART's pertinent Section 13(c) arrangements certified by the Department and is incorporated into DART contracts with the Federal government for Federal transit law assistance for DART transit service. DART sought to establish, after the fact of the actions disputed herein, that December 31, 1996 was the cutoff date for the initial-hiring period and the upgrading to M-6 upon completion of vendor training. However, as set forth in the Light Rail Transfer Implementation Agreement, the

initial hiring period doesn't indicate any date for the termination of the initial hiring period, nor does it provide for establishing such a termination date. As part of the Department's certification, the terms and conditions of the Light Rail Transfer Implementation Agreement could not be changed by local action in the absence of a new certification by the Department, which had not occurred during the time in question. No evidence has been submitted for the record to demonstrate that appropriate action was taken, during the period of time covered by these claims, to end the initial hiring period on December 31, 1996.

Moreover, even if December 31, 1996 had been shown to have been appropriately established as the end of the initial hiring period, the terms regarding vendor training and upgrade to M-6 were specified in the Fall 1996 job postings under which the Claimants were accepted and hired for the positions in DART's Light Rail system. Additionally, the Claimants have submitted unopposed statements describing instances in which other DART employees were accepted into comparable Light Rail positions and given vendor training and M-6 upgrades after 1996. Accordingly, the record does not support DART's argument concerning its denial of vendor training and upgrade to M-6 pay grade to the Claimants.

Award

The Claimants met all the qualifications for the Light Rail Transfer Implementation Agreement job postings under which they were accepted and hired by DART under the initial hiring conditions. Under the terms of the job postings, they should have received timely vendor training and should have received M-6 pay status upon satisfactory completion of the training. Their employment histories have differed following the filing of their claims, however, and separate remedies are required.

Claimant Foster, who remains employed by DART, is to be given the eight weeks of vendor training, if he has not yet completed it. Upon successful completion of the training (to be evaluated on the same basis as applied to those who completed vendor training in 1996), he is to be awarded M-6 status retroactive to March 15, 1997, the date by which he estimated he would have completed vendor training had it been promptly provided by DART. If the training is completed successfully, he will be entitled to full back pay at the M-6 rate retroactive to that date, including subsequent general wage increases he otherwise would have received in M-6 status, and any benefits that might have been available and/or improved if he had been timely upgraded to M-6 status as of that date. Such back pay is to be reduced by the amount of his regular wage earnings with DART but excluding overtime, shift differential and other premium pay he has received in the interim.

Provided he successfully completes vendor training as above, Claimant Foster also is to have his seniority fully adjusted retroactively to reflect his M-6 status as of March 15,

1997, in the same manner as other DART employees upgraded to M-6 pay-grade as a result of completion of vendor training were accorded increased or otherwise improved seniority. If the handling of seniority for employees promoted to M-6 between October 1996 and March 1998 was not consistent, Claimant Foster's seniority is to be computed in a manner comparable to the most favorable seniority established for any employee in such M-6 status. His awarded seniority shall be applied to all employment conditions/considerations, and he is to have the same status that he would have attained had he received this M-6 status March 15, 1997 and been able to participate in all "mark-ups" and other seniority picks beginning March 15, 1997. All other rights and benefits which Claimant Foster lost or failed to receive (including use of vacation and leave, inclusion in M-6 mark-ups, etc.), related to DART's failure to provide him with timely vendor training and upgrade to M-6, are to be restored retroactively and continued.

During the processing of this case, Claimant Brace resigned from DART employment in consequence of what he considered DART's mistreatment relating to the rights disputed herein. DART is to offer Mr. Brace the opportunity to return to DART employment in the Light Rail position that he had last occupied. If he accepts that offer, he is to be promptly given vendor training if he has not already completed it. Upon successful completion (as above) of the training, he is to be awarded the M-6 pay grade retroactive to March 15, 1997, the date which is approximately the time that he could have completed vendor training had it been promptly provided by DART under the pertinent job posting. He then will retain at least M-6 status with full, retroactive rights, and with seniority credit beginning with his first day of employment by DART and adjusted to M-6 seniority status retroactive to March 15, 1997. This offer to Claimant Brace, by DART, will include full back pay with retroactive rights and benefits, including retroactive seniority and "mark up" opportunities and other rights and benefits, with mitigation of amounts of back pay due in a manner similar to that described above with respect to Claimant Foster.

If Claimant Brace chooses not to accept DART's offer of return to this M-6 position, DART is directed to pay Claimant Brace for all wages he would have received if he had been timely provided vendor training and had been promoted to M-6 status, for the period beginning March 15, 1997 and ending with the date of his receipt of DART's offer of re-employment under this decision, reduced by any regular wages (excluding overtime, shift differential and other premium pay) he earned from his principal employment with other employers during that period. This computation is to include compensation for any wage and/or benefit increases to which he might otherwise have been entitled with DART during that period if he had remained in DART's employ and had been promoted to M-6 status March 15, 1997.

DART is to take all necessary actions regarding, and is to make all payments due hereunder to, Claimant Foster within 30 days following the date of this award. In the case of Claimant Brace, DART is to offer him employment as set forth above within 10 days following the date of this award. Claimant Brace is to notify DART within 30 days after

receipt of DART's offer of employment as to whether he chooses to accept it or not. DART is then to complete all necessary actions and to make all payments due hereunder regarding Claimant Brace, within either: a) 20 days after receipt of Claimant Brace's notification to DART that he declines re-employment in DART's Light Rail System; or, b) within 30 days after Claimant Brace's notification to Dart that he accepts re-employment in DART's Light Rail System, with payments and other adjustments that are dependent upon M-6 status to be accomplished immediately upon his successful completion of promptly offered vendor training.

Any disputes about the amounts due under this award, or about any other aspects of this award, are to be resolved through the Trial Board procedures set forth in the Dart Personnel Policies Manual Section 8.9, without the requirements of previously completing other grievance procedures or steps. In such Trial Board proceeding, Claimant may be represented by any representative of his choosing provided such representation is specifically and clearly authorized by the Claimant in writing. This award is final and binding.

12/16/99
Date

/S/
Bernard E. Anderson
Assistant Secretary of Labor

ATU Locals 22, 174, 448, 589, 690, 1037, 1363, 1512, 1548 and 1578 v.
Massachusetts Executive Office of Transportation and Construction
DSP Case No. 99-18-1
March 16, 2001
(Digest page no. A-500)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimants alleged that the Massachusetts Executive Office of Transportation and Construction (MEOTC) failed to provide and maintain a complete and up-to-date list of all existing transportation providers in the service area of the project and any labor organizations representing the employees of such providers, and failed to timely affirm the requests of Claimants to become parties to its Special Warranty under the Small Urban and Rural Program. The Department determined that, while Claimants allegations were factual, the delays identified were the result of initially inadequate information provided by MEOTC's sub-recipients rather than an absence of good faith. No damages had resulted to any Claimant as a result of the omissions. The Department extended the time period for filing claims for an additional 20 days, and required MEOTC to an appropriate monitoring process.

In the matter of arbitration between:

Amalgamated Transit Union Locals 22, 174, 448, 589, 690, 1037, 1363, 1512, 1548 and 1578
Claimants

v.

Massachusetts Executive Office of Transportation & Construction
Respondent

DSP case no. 99-18-1

Issued: March 16, 2001

Origin of the Claim

These claims for employee protections arise under the Small Urban and Rural Warranty protective arrangement for Federal grants of money under Section 18 of the Urban Mass Transportation Act, as amended. Section 18 is recodified at 49 U.S.C. § 5311 of the Federal transit law. These grants for the period in question would include MA-18-X020 and MA-18-X021, and any other applicable grants for MEOTC from 1996 through 1999. The Department of Labor (Department) has certified this Warranty as satisfying the requirements of Section 13(c) of the Urban Mass Transportation Act (49 U.S.C. §1609(c), as amended (recodified at 49 U.S.C. § 5333(b)), necessary for Section 18 grant approvals. Amalgamated Transit Union Locals 22, 174, 448, 589, 690, 1037, 1363, 1512, 1548 and 1578, through their representative, the Amalgamated Transportation Union International, have filed these claims with the Department pursuant to Sections B (4) and (9) of the Section 18 Warranty. Under those sections and Section A, paragraph 1, of the Warranty, any party to the Warranty, and any transportation-related employees of any public transportation providers in the service area of the Federal project, may file disputed claims for employee protections with the Department of Labor. These claims are properly filed with the Department of Labor.

The Dispute

ATU asserts four violations of the applicable Warranty protections:

(a). That the Massachusetts Executive Office of Transportation and Construction (MEOTC), Respondent, has failed to provide to the Department, and to maintain for the

duration of the project(s), a complete and up-to-date list of all existing transportation providers in the service area of the project and any labor organizations representing the employees of such providers;

(b). That the Department incorrectly neglected to insist on correction of such defects in MEOTC's obligations under the Warranty.

(c). That the Department was remiss in failing to identify Respondent as in non-compliance with the Act for the failure in (a), above;

(d). That the Department has failed to timely affirm the requests of some, or all, of the Claimant labor organizations to become party to the Warranty protective arrangement as applied to the projects in question. The Claimants seek to become parties to the Warranty as follows: ATU Local 22 on behalf of the workers it represents that are employed by RTA Transit Services, Inc.; ATU Local 448 in its status as the collective bargaining agent of certain employees of Springfield Transit Management, Hampden County Transit, Inc. and Longueil Transportation, Inc., (U.S. Express); ATU Locals 174 and 1037 as the joint collective bargaining representative for Union Street Bus Company, Inc., employees; ATU Local 589 as the union representative of certain Massachusetts Bay Transportation Authority workers; ATU Local 690 as the collective bargaining agent of certain employees of Management of Transportation Services, Inc., and of Montachusett Opportunity Council, Inc.; ATU Local 1512 as the bargaining representative for Peter Pan Bus employees; ATU Local 1548 as the representative of certain Plymouth & Brockton Street Railway Co. employees; and ATU Local 1578 on behalf of the LoLaw Transit Management, Inc., workers (staffing Lowell RTA services) which it represents. Additionally, information in the record of this case (Claimants' Exhibit 2 in the ATU letter of August 12, 1999) indicates that ATU Local 1363 seeks to become a party to the Warranty for the applicable grants as the representative of certain employees of Bonanza Bus Lines.

Discussion

The facts of this case are not in dispute. MEOTC acknowledges the failure to provide to the Department, and to maintain, a complete and up-to-date list of all transportation providers who are eligible recipients of transportation assistance funded by the project, and of the labor organizations representing employees in the service area of the project representing employees of such providers. Such delay may occur from time to time when the sub-recipients fail to furnish the necessary information to the grant recipient, which nevertheless has the responsibility for obtaining this information and submitting it to the Department. MEOTC states in its brief that it stands ready to amend the 1996-1999 grant applications so that the Claimant labor organizations are included. MEOTC further indicates a willingness to readily resolve the current matter and to provide a mechanism for monitoring the process in the future.

The Department also recognizes a substantial delay in its affirming the Claimant labor organizations' requests to sign-on as parties to the Warranty for the pertinent projects. This delay may have accompanied Department efforts to provide technical assistance to Respondent in its efforts to comply with the Section A requirements to provide and maintain the list of eligible recipients and the list of labor organizations representing their employees. I take administrative notice of the Department's letter of September 28, 1999 (copy attached), which affirmed that all the Claimant labor organizations are considered party(ies) to the Warranty arrangements agreed to by Respondent for the pertinent grants and/or projects. Such affirmation does not make such recognition effective with the date of that letter. Rather, it recognizes that the labor organizations are parties to the Warranty as of the date of the respective grants. This is in keeping with Respondent's observation in its brief, that "no damages have resulted to any local or union member as a result of omissions."

In this Small Urban and Rural Program, recipients and sub-recipients sometimes lack the familiarity with grant requirements that is customary in grants for larger transit projects in urban areas. Requirements such as the need to provide the Department with a complete and up-to-date list of eligible recipients and of the labor organizations that represent their employees, may appear to lack a self-interest component, from a recipient's or sub-recipient's point of view. This requirement is not entirely lacking in self-interest to a recipient or sub-recipient, however. As the Department previously has noted,[1] a recipient which fails to fulfill an obligation (whether it's own obligation or one dependent upon information from a sub-recipient) under the Warranty can lose its eligibility to avail itself of the expedited Warranty approval for its grant applications. Further, a grant applicant or sub-recipient who has failed to comply fully and in good faith with the requirements of the Warranty may subject itself to ongoing, potential liability for any unfiled claims, until the body achieves full compliance with all aspects of the warranty. "The time period for filing [any/all] claims under grants approved prior to the date of DOL's compliance certification to FTA for RIDOT shall begin with the date of the DOL compliance certification."[2] These are but two of the possible self-interests that might motivate a sub-recipient or recipient to ensure that they have complied with the Section 13(c) requirements of the Section 18 Warranty arrangements.

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[1]ATU Local 1363 v. Rhode Island Department of Transportation, OSP case no. 92-18-6, Employee Protections Digest, p. A-436, A-447 (1996).

[2] Letter of November 12, 1996 (copy attached), page 2, from Ronald W. Glass, Director, Division of Statutory Programs, ESA, U. S. Department of Labor, to Leonard F. Clingham, Jr., Esq., Rhode Island Department of Transportation.

Award of Remedy

In this situation I find no indication on the part of Respondent of an absence of good faith nor an unwillingness to deal with any labor organization. Furthermore, Respondent has indicated both the willingness and the ability to comply with the requirements of the Section 18 Warranty and to assure appropriate resolution of this matter. To the extent that any uncertainty remains as to the status of the Claimant labor organizations represented herein in by the ATU International, I repeat that each of them is a party to the Section 18 Warranty for the applicable Section 18 grants, and has been party thereto, as described above in reference to the Department's letter of September 28, 1999.

There has been no indication of a lack of good faith in these matters and I have confidence that the parties will be able to develop adequate written assurances, sought by Claimants, of Respondent's future compliance with the applicable mandates of the Warranty. To ensure that the protected employees were not prevented from pursuing claims as a result of the issues raised herein, the time period for filing claims under the applicable grants will begin to run 20 days after the issuance of this decision. Additionally, Respondent is directed to implement its offer to resolve any remaining details in the current situation and to develop a mechanism for monitoring the process in the future to ensure that such omissions will not recur, by initiating discussion and negotiation with the ATU International to secure those ends.

In order to facilitate compliance with this Award and with the Warranty , a copy of each Section 18 grant application of Respondent is to be provided to the ATU Counsel herein when such application is made to the Federal Transit Administration, through December 2002.

This decision is final and binding upon the parties.

March 15, 2001
Date

Joe N. Kennedy
Acting Assistant Secretary

ATU Locals 22, 174, 448, 589, 690, 1037, 1363, 1512, 1548 and 1578 v.
Massachusetts Executive Office of Transportation and Construction
DSP Case No. 99-18-1
March 16, 2001
(Digest page no. A-500)

The following summary was prepared by the author specifically for this project, and does not constitute the official summary of the Department of Labor.

Summary: Claimants alleged that the Massachusetts Executive Office of Transportation and Construction (MEOTC) failed to provide and maintain a complete and up-to-date list of all existing transportation providers in the service area of the project and any labor organizations representing the employees of such providers, and failed to timely affirm the requests of Claimants to become parties to its Special Warranty under the Small Urban and Rural Program. The Department determined that, while Claimants allegations were factual, the delays identified were the result of initially inadequate information provided by MEOTC's sub-recipients rather than an absence of good faith. No damages had resulted to any Claimant as a result of the omissions. The Department extended the time period for filing claims for an additional 20 days, and required MEOTC to an appropriate monitoring process.

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

In the matter of arbitration between:

Amalgamated Transit Union Locals 22, 174, 448, 589, 690, 1037, 1363, 1512, 1548 and 1578 *Claimants*	DSP case no. 99-18-1
v.	
Massachusetts Executive Office of Transportation & Construction *Respondent*	Issued: March 16, 2001

Origin of the Claim

These claims for employee protections arise under the Small Urban and Rural Warranty protective arrangement for Federal grants of money under Section 18 of the Urban Mass Transportation Act, as amended. Section 18 is recodified at 49 U.S.C. § 5311 of the Federal transit law. These grants for the period in question would include MA-18-X020 and MA-18-X021, and any other applicable grants for MEOTC from 1996 through 1999. The Department of Labor (Department) has certified this Warranty as satisfying the requirements of Section 13(c) of the Urban Mass Transportation Act (49 U.S.C. §1609(c), as amended (recodified at 49 U.S.C. § 5333(b)), necessary for Section 18 grant approvals. Amalgamated Transit Union Locals 22, 174, 448, 589, 690, 1037, 1363, 1512, 1548 and 1578, through their representative, the Amalgamated Transportation Union International, have filed these claims with the Department pursuant to Sections B (4) and (9) of the Section 18 Warranty. Under those sections and Section A, paragraph 1, of the Warranty, any party to the Warranty, and any transportation-related employees of any public transportation providers in the service area of the Federal project, may file disputed claims for employee protections with the Department of Labor. These claims are properly filed with the Department of Labor.

The Dispute

ATU asserts four violations of the applicable Warranty protections:

(a). That the Massachusetts Executive Office of Transportation and Construction (MEOTC), Respondent, has failed to provide to the Department, and to maintain for the

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duration of the project(s), a complete and up-to-date list of all existing transportation providers in the service area of the project and any labor organizations representing the employees of such providers;

(b). That the Department incorrectly neglected to insist on correction of such defects in MEOTC's obligations under the Warranty.

(c). That the Department was remiss in failing to identify Respondent as in non-compliance with the Act for the failure in (a), above;

(d). That the Department has failed to timely affirm the requests of some, or all, of the Claimant labor organizations to become party to the Warranty protective arrangement as applied to the projects in question. The Claimants seek to become parties to the Warranty as follows: ATU Local 22 on behalf of the workers it represents that are employed by RTA Transit Services, Inc.; ATU Local 448 in its status as the collective bargaining agent of certain employees of Springfield Transit Management, Hampden County Transit, Inc. and Longueil Transportation, Inc., (U.S. Express); ATU Locals 174 and 1037 as the joint collective bargaining representative for Union Street Bus Company, Inc., employees; ATU Local 589 as the union representative of certain Massachusetts Bay Transportation Authority workers; ATU Local 690 as the collective bargaining agent of certain employees of Management of Transportation Services, Inc., and of Montachusett Opportunity Council, Inc.; ATU Local 1512 as the bargaining representative for Peter Pan Bus employees; ATU Local 1548 as the representative of certain Plymouth & Brockton Street Railway Co. employees; and ATU Local 1578 on behalf of the LoLaw Transit Management, Inc., workers (staffing Lowell RTA services) which it represents. Additionally, information in the record of this case (Claimants' Exhibit 2 in the ATU letter of August 12, 1999) indicates that ATU Local 1363 seeks to become a party to the Warranty for the applicable grants as the representative of certain employees of Bonanza Bus Lines.

Discussion

The facts of this case are not in dispute. MEOTC acknowledges the failure to provide to the Department, and to maintain, a complete and up-to-date list of all transportation providers who are eligible recipients of transportation assistance funded by the project, and of the labor organizations representing employees in the service area of the project representing employees of such providers. Such delay may occur from time to time when the sub-recipients fail to furnish the necessary information to the grant recipient, which nevertheless has the responsibility for obtaining this information and submitting it to the Department. MEOTC states in its brief that it stands ready to amend the 1996-1999 grant applications so that the Claimant labor organizations are included. MEOTC further indicates a willingness to readily resolve the current matter and to provide a mechanism for monitoring the process in the future.

The Department also recognizes a substantial delay in its affirming the Claimant labor organizations' requests to sign-on as parties to the Warranty for the pertinent projects. This delay may have accompanied Department efforts to provide technical assistance to Respondent in its efforts to comply with the Section A requirements to provide and maintain the list of eligible recipients and the list of labor organizations representing their employees. I take administrative notice of the Department's letter of September 28, 1999 (copy attached), which affirmed that all the Claimant labor organizations are considered party(ies) to the Warranty arrangements agreed to by Respondent for the pertinent grants and/or projects. Such affirmation does not make such recognition effective with the date of that letter. Rather, it recognizes that the labor organizations are parties to the Warranty as of the date of the respective grants. This is in keeping with Respondent's observation in its brief, that "no damages have resulted to any local or union member as a result of omissions."

In this Small Urban and Rural Program, recipients and sub-recipients sometimes lack the familiarity with grant requirements that is customary in grants for larger transit projects in urban areas. Requirements such as the need to provide the Department with a complete and up-to-date list of eligible recipients and of the labor organizations that represent their employees, may appear to lack a self-interest component, from a recipient's or sub-recipient's point of view. This requirement is not entirely lacking in self-interest to a recipient or sub-recipient, however. As the Department previously has noted,[1] a recipient which fails to fulfill an obligation (whether it's own obligation or one dependent upon information from a sub-recipient) under the Warranty can lose its eligibility to avail itself of the expedited Warranty approval for its grant applications. Further, a grant applicant or sub-recipient who has failed to comply fully and in good faith with the requirements of the Warranty may subject itself to ongoing, potential liability for any unfiled claims, until the body achieves full compliance with all aspects of the warranty. "The time period for filing [any/all] claims under grants approved prior to the date of DOL's compliance certification to FTA for RIDOT shall begin with the date of the DOL compliance certification."[2] These are but two of the possible self-interests that might motivate a sub-recipient or recipient to ensure that they have complied with the Section 13(c) requirements of the Section 18 Warranty arrangements.

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[1]ATU Local 1363 v. Rhode Island Department of Transportation, OSP case no. 92-18-6, Employee Protections Digest, p. A-436, A-447 (1996).

[2] Letter of November 12, 1996 (copy attached), page 2, from Ronald W. Glass, Director, Division of Statutory Programs, ESA, U. S. Department of Labor, to Leonard F. Clingham, Jr., Esq., Rhode Island Department of Transportation.

Award of Remedy

In this situation I find no indication on the part of Respondent of an absence of good faith nor an unwillingness to deal with any labor organization. Furthermore, Respondent has indicated both the willingness and the ability to comply with the requirements of the Section 18 Warranty and to assure appropriate resolution of this matter. To the extent that any uncertainty remains as to the status of the Claimant labor organizations represented herein in by the ATU International, I repeat that each of them is a party to the Section 18 Warranty for the applicable Section 18 grants, and has been party thereto, as described above in reference to the Department's letter of September 28, 1999.

There has been no indication of a lack of good faith in these matters and I have confidence that the parties will be able to develop adequate written assurances, sought by Claimants, of Respondent's future compliance with the applicable mandates of the Warranty. To ensure that the protected employees were not prevented from pursuing claims as a result of the issues raised herein, the time period for filing claims under the applicable grants will begin to run 20 days after the issuance of this decision. Additionally, Respondent is directed to implement its offer to resolve any remaining details in the current situation and to develop a mechanism for monitoring the process in the future to ensure that such omissions will not recur, by initiating discussion and negotiation with the ATU International to secure those ends.

In order to facilitate compliance with this Award and with the Warranty , a copy of each Section 18 grant application of Respondent is to be provided to the ATU Counsel herein when such application is made to the Federal Transit Administration, through December 2002.

This decision is final and binding upon the parties.

March 15, 2001
Date

Joe N. Kennedy
Acting Assistant Secretary

In the matter of arbitration between:

Amalgamated Transit Union Locals 587, 757, 1015, 1384, 1576 and 1700 *Claimants* v. Washington State Department of Transportation *Respondent*	DSP case no. 99-18-2 Issued: October 25, 2001

Summary

WSDOT receives Federal assistance under Section 5311, a formula-based rural transit assistance program. Claimants maintained that between 1996 and 1999 WSDOT violated multiple requirements of the Section 13(c) Warranty, which are preconditions for such assistance. The Department determined that WSDOT did fail to perform various requirements of the Warranty, including failure to provide timely notice of the identities of the grant Recipients. Because of WSDOT's failure to provide this notice, certain assertions which would generally be brought against a Recipient are considered in this decision naming WSDOT as the responsible party. The Department upheld the Unions' claims and awarded informational and procedural remedies.

Origin of the Claim

These claims arise under the Special Section 13(c) Warranty for Application to the Small Urban and Rural Program[1] (Warranty). The Department of Labor (Department) has certified the Warranty as satisfying the protective requirements under 49 U.S.C. § 5333(b) of the Federal Transit law (formerly Section 13(c) of the Urban Mass Transportation Act of 1964, as amended). The Warranty is incorporated into the contracts of assistance between the Washington State Department of Transportation (WSDOT) and the U.S. Department of Transportation's Federal Transit Administration (FTA), which approves the

[1] The Small Urban and Rural Program initially was established by Section 18 of the Urban Mass Transportation Act of 1964, as amended. Section 18 has been recodified at 49 U.S.C. § 5311 of the Federal Transit law.

grants and provides the funds for Section 5311 rural grants to state transit authorities. These claims pertain to grants numbered WA-18-X014, WA-18-X015, WA-18-X016, and WA-18-X017, received by WSDOT from 1996[2] through 1999. Amalgamated Transit Union Locals 587, 757, 1015, 1384, 1576 and 1700, represented by the Amalgamated Transit Union International (ATU), have filed these claims with the Department pursuant to Section B(4) of the Warranty. Under Section B(4), any party to a disputed claim for employee protections which is not resolved within 30 days after the dispute arises, may refer the claim to any final and binding disputes settlement procedure acceptable to the parties. In the event the parties cannot agree on such procedure, any party may refer the claim to the Department of Labor for final and binding determination. These claims are properly filed with the Department for final and binding determination.

The Claimants maintain that Respondent WSDOT has violated multiple requirements of the Warranty, beginning in 1996 and continuing through the September 1999 filing of this claim. The Claimants first allege that WSDOT failed to fulfill the requirements of Section A, Paragraph (2) of the Warranty. This requires the Public Body to:

> *...provide to the Department and maintain at all times during the Project an accurate up to date listing of all existing transportation providers which are eligible Recipients of transportation assistance funded by the Project, in the transportation service area of the Project, and any labor organizations representing the employees of such providers.*

The Claimants also allege that WSDOT failed to certify to the Department that the "designated Recipients have indicated in writing acceptance of the terms and conditions of the warranty,"[3] as required by Section A, Paragraph (3) of the Warranty.

The Claimants further allege that WSDOT failed to make the necessary arrangements so that any covered employee or union representative may file a claim of violation, as required under Section B(5) of the Warranty.

Finally the Claimants allege that WSDOT failed to post the required Section B(8) notice(s) indicating that the Recipient has received federal assistance and agreed to comply with the terms of the Warranty.

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[2]These claims initially included violations of the Warranty for 1995. However, during the pendency of these claims, the Amalgamated Transit Union International (ATU) was provided information previously not made available to the Union from WSDOT and/or the Department of Labor. This information showed WSDOT compliance with the Warranty in 1995. ATU consequently has withdrawn the portion of these claims pertaining to 1995.

[3] "Recipient," as used in the Warranty, refers to those entities designated by the Public Body (grant applicant) as eligible for receipt of grant funds.

Discussion and Conclusions

The Department has determined that WSDOT failed to perform certain requirements of the Warranty; most notably for purposes of this claims determination, to provide to the Department timely notice of the identity of the Recipients who had agreed in writing to accept the terms of the Warranty for grants from 1996 to 1999. Because of WSDOT's failure, ATU was not given timely notice of the identity of the Recipients as required under Part A. Therefore, the Claimants' assertions against WSDOT regarding Part B violations, which would typically be required to be brought against a Recipient, are considered in this decision.

I. Filing of up-to-date lists of Recipients and labor organizations.

WSDOT acknowledges that it failed to timely file with the Department the required and updated lists of Recipients and of the related labor organizations, for its 1996 through 1999 grants. However, WSDOT argues that it understood the obligation to maintain the listings up-to-date at all times during the project to require only the updating of such lists when WSDOT sought additional Federal transit funds. Further, WSDOT indicated that it receives this information from Recipients only at the time of application, and asserted that it had no obligation to provide information it had not received from the Recipients. These interpretations are incorrect. Under the terms of the Warranty, WSDOT has an affirmative obligation to obtain the information necessary to maintain these lists in an up-to-date manner during the project and any subsequent effects, and to submit any changes to the Department.

As of August 24, 1999, the Department had received the required updated lists of Recipients and related labor organizations for WSDOT's 1996 through 1999 grants.[4] While this fulfills WSDOT's obligation under Part A, Paragraph (2) of the Warranty, its failure to file these documents in a timely manner delayed the Department from providing this information to ATU. While WSDOT's failure delayed ATU from learning the identities of the Recipients of WSDOT's Section 5311 grants, it also prevented ATU from becoming a party to those Recipients' Warranty arrangements where applicable.

II. Filing of certification.

WSDOT acknowledges its failure to timely provide to the Department the certification, required under Part A, Paragraph (3), that the Recipients have indicated in writing acceptance of the terms and conditions of the Warranty. WSDOT alleged, albeit erroneously, that it had submitted the certification of the Recipients' written acceptances

[4] WSDOT provided amendments to these updated lists through letter dated October 21, 1999.

of the terms and conditions to FTA. Even if accurate, such submittal would not satisfy the requirement of the Warranty to submit such certification to the Department.

III. Arranging for procedures to file claims.

Pursuant to Part B(5) of the Warranty, a Recipient must "make the necessary arrangements so that any employee covered by these arrangements, or the union representative of such employee, may file a claim. . . ." As noted above, ATU might have filed claims under Part B of the Warranty against the Recipients for failure to make such arrangements; however, since WSDOT had failed to identify the designated Recipients, ATU was unable to do so. Moreover, the record evidence does not establish that the Recipients herein have made the required arrangements for filing a claim. Accordingly, inasmuch as the Recipients, those best able to provide such information, could not be named respondents in this claim, the Department is unable, based on the information in the case file, to make a finding as to whether the Recipients made the necessary arrangements under Part B(5).

IV. Posting notices.

The Warranty states in Part B(8): "The Recipient will post, in a prominent and accessible place, a notice stating that the Recipient has received federal assistance under the Urban Mass Transportation Act and has agreed to comply with the provisions of Section 13(c) of the Act." As discussed in III above, WSDOT's failure to timely file the required Part A information identifying Recipients prevented ATU from filing this claim against the Recipients. Further, the record evidence did not indicate that each Recipient had made the requisite posting.

Failure to provide the fundamental information of the existence and content of the protective provisions deprives the employees and their unions of knowledge of such protections and of the opportunity to use that information. This adverse effect is compounded by the failure identified in III, above, to provide and publish a procedure for filing and pursuing claims of the interpretation, application and/or enforcement of the protective arrangements.

Award of Remedy

WSDOT provided the Department with updated lists of eligible Recipients and the related labor organizations, as specified in Section A, Paragraph (2) of the Warranty for all relevant WSDOT grants and/or projects from 1996 and through 1999. The Department has provided copies of WSDOT's letters of certification to ATU, according to established procedures, and ATU has elected to become a party to the Warranty for the grants in

question. However, as it has been determined that WSDOT failed to timely provide the requisite filings with the Department and that there is insufficient evidence to establish that requisite Recipient obligations have been met, WSDOT is required to provide the following:

1. WSDOT must provide the Department with copies of the written acceptances of the Warranty by each designated Recipient under WSDOT grant applications from 1996 through 1999. Failure to provide these written acceptances to the Department within 60 days of the date of this determination could lead to a finding of non-compliance which would render WSDOT ineligible for Section 5311 transit funds.

2. WSDOT must provide the Department with evidence, with a copy the ATU, that the claims procedure as required in Section B(5) of the Warranty is in place.

3. WSDOT must provide the Department with evidence, with a copy to ATU, that the posting requirement under Section B(8) of the Warranty has been fulfilled for all Recipients under all grants from 1996 to 1999.

4. At the time of its next grant application to FTA, WSDOT is to provide notice to the Department, and to ATU, that the grant application has been submitted.

5. Within 30 days following submission of the next grant application, WSDOT must provide Notice to the Department that the claims procedure required under Part B(5) and the Notice procedure required under Part B(8) have been fulfilled.

This decision is final and binding upon the parties.

October 25, 2001

/s/
Joe N. Kennedy
Acting Assistant Secretary