In the matter of arbitration between:

Kenneth F. Fonck, *Claimant*	)	
v.	)	DSP case no. 01-13c-1
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).

[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.

FOR

Victoria A. Lipnic
Assistant Secretary of Labor
for Employment Standards