



In the matter of arbitration between:

_____)	
AMALGAMATED TRANSIT UNION,)	
LOCAL 1146,)	
Claimant)	OSP Case No. 92-13(c)-1
)	
v.)	
)	
MASSACHUSETTS BAY TRANSPORTATION)	
AUTHORITY,)	Issued: April 30, 2001
Respondent)	
)	
_____)	

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.

Findings of Fact

A. MBTA and the UMTA agreement

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. Ibid. (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); Local Div. 589, ATU v. Massachusetts, 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

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.

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

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).

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,

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

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.

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.

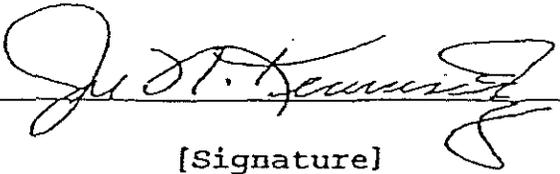
MBTA admits that its capital grants were used to purchase buses and equipment and that some of those buses and equipment

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.

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]