In the matter of arbitration between:

AMALGAMATED TRANSIT UNION,
LOCAL 1146, Claimant

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, Respondent

OSP Case No. 92-13(c)-1

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). 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

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.

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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

2 The Department thanks the parties for their assistance in reconstructing this record.
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
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.


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

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. The Claimant

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.

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

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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. 00. 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.
l(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. Moreover, respondent has established that the job loss was not the result of these grants but was instead the result of Rapid Transit's

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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.

META 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
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,
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
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. META, 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. META, 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]