

In the Matter of Arbitration:

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

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.

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

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.

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.

A handwritten signature in cursive script that reads "Victoria A. Lipnic". The signature is written in black ink and is positioned above a horizontal line.

Victoria A. Lipnic
Assistant Secretary of Labor