

FINDINGS OF FACT

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

DART uses a "mark-up" system to enable MD employees to select their work location, assignments, hours of work, workweeks³ and days off for a six-month period. Use of the mark-up system also affects the pay (due to opportunities for overtime and shift differentials) for individual MD employees. As outlined in DART's Hourly Employment Manual (HEM), regularly scheduled mark-ups occur twice a year, in January and August. See HEM, MD2, Sec. 6A. The MD Supplement to the HEM provides that "[s]eniority in the Maintenance Department shall govern in the selection of, or assignment to, scheduled working hours and work weeks, sections, . . . vacations and holidays." HEM, MD2, Sec. 5A. The MD Supplement further provides that during mark-ups employees will select hours and assignments "on the basis of seniority provided they are qualified for the work to be performed." HEM, MD2, Sec. 6A. Seniority is based on the employee's date of hire or transfer into a classification (either skilled, or non-skilled) in the MD. For seniority purposes, mechanics and maintainers are skilled classifications; all other positions are unskilled classifications. Applying these principles, a servicer employee is entitled to mark-up (i.e., to select his preferences in the various job selection categories) at any section in the Fleet Maintenance Division on the basis of his seniority among unskilled classification employees.

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

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

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

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

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

THE CLAIM

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

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

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

DISCUSSION

The Relative Burdens of the Parties

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

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

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

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

The Project Identified

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

(a) The term "Project" shall not be limited to the particular facility, service, or operation assisted by Federal funds from the...Act, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided.

(b) The phrase, "as a result of the Project" includes events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto and shall also include events and actions which are as a result of Federal assistance under the Act.

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

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

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

Effect on the Rail Servicer Employees

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

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

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

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

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

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

A. Seniority in the Maintenance Department shall govern in the selection of, or assignment to, scheduled working hours and work weeks, locations (East Dallas Bus Services, Northwest Bus Services, Oak Cliff Bus Services, S&I Rail Services, NRV Services, Body Support Services, Passenger Amenities, Track & ROW, Traction Electrification Systems, Signal Systems, Communications & Control Systems), vacations and holidays. Divisions of the Maintenance Department are Fleet Maintenance; Ways, Structures and Amenities; and Technical Services.

B. The mechanic and maintainer classifications, for seniority purposes, are skilled classifications. All other classifications are unskilled classifications.

An employee may not have seniority in more than one section or classification at any time.

HEM, MD2, Sec.5A and B.

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

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

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

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

Resulting Harm to Employees

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

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

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

Contracting Out

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

Notice and Opportunity for Discussion

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

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

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

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

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

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

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

CONCLUSIONS AND REMEDY

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

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

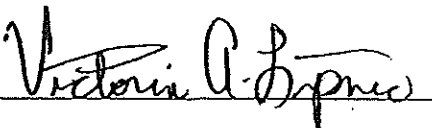
Training and Retraining - One of the primary areas of protection required by Section 5333(b) is that of training and/or retraining affected employees. DART did not fulfill its affirmative obligation under the protective arrangement to provide necessary training for these employees in their new assignments,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

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

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

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

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

A handwritten signature in black ink, reading "Victoria A. Lipnic", written over a horizontal line.

Victoria A. Lipnic

Assistant Secretary for Employment Standards