

In the Matter of Arbitration:

Barbara Carr and Kevin Carr,
Claimants,

v.

Dallas Area Rapid Transit (DART),
Respondent.

DSP Case No. 12-13c-08

Issued: August 5, 2014

FINAL DECISION

The Federal Transit Act (the Act) requires as a condition of federal financial assistance that the interests of employees affected by the assistance be protected under arrangements the Secretary of Labor certifies are fair and equitable, 49 U.S.C. § 5333(b)(1). The Act specifically provides:

Arrangements . . . shall include provisions that may be necessary for –

- (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
- (B) the continuation of collective bargaining rights;
- (C) the protection of individual employees against a worsening of their positions related to employment;
- (D) assurances of employment to employees of acquired public transportation systems;
- (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and
- (F) paid training or retraining programs.

49 U.S.C. § 5333(b)(2). These protective arrangements are often referred to as section “13(c)” arrangements or agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307, as amended, 49 U.S.C. § 1609(c).

All protective arrangements include a procedure for final and binding resolution of disputes over the interpretation, application, and enforcement of the terms and conditions of the arrangement. This procedure, referred to as a “claim for employee protections,” may be utilized when an individual employee, a group of employees, or representative of a bargaining unit believes he has or they have been negatively affected

as the result of federal assistance. Only a representative of a bargaining unit may file a claim for a violation of continuation of collective bargaining rights under 49 U.S.C. § 5333(b)(2)(B). The outcome of the final and binding determination pursuant to a protective arrangement is enforceable in state court as a matter of contract law. *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982).

In this case, as described below, Dallas Area Rapid Transit's (DART) protective arrangement provides for final and binding resolution by the Department of Labor (Department).

ORIGIN OF THE CLAIM

These claims arise under the terms and conditions of the September 30, 1991 protective arrangement (the Arrangement) accepted by DART. The Arrangement has been certified by the Department as fair and equitable to protect the interests of employees and sufficient to meet the requirements of the Act, and has been made applicable to federal assistance provided to DART. Paragraph 16(a) of the Arrangement states:

Any dispute or controversy arising between any employees covered by this Arrangement and the Public Body, regarding the application, interpretation, or enforcement of the provisions of this Arrangement (not otherwise governed by paragraph 13(d) of this Arrangement) which cannot be settled within thirty (30) days after the dispute or controversy first arises, may be submitted at the written request of the Public Body or the employee, individually or through such employee's representative, to any final and binding disputes procedure - acceptable to the parties, or in the event they cannot agree on such procedure, to the Department of Labor, or its designee, for purposes of final and binding determination of all matters in dispute.

Claimants are bus operators for DART. They attempted to resolve this matter through the grievance process but were unsuccessful. They now seek a final and binding determination by the Department. DART has agreed that resolution of this matter by the Department is proper.

POSITION OF CLAIMANTS

Claimants Barbara and Kevin Carr have been bus operators for DART since 1990 and 1992, respectively. Claimants allege that DART's implementation and operation of its Smart Bus program, for which they allege federal funds were used, worsened their positions of employment. Specifically, Claimants allege that DART's Smart Bus program negatively affected Claimants' seniority rights because, as standard bus operators, they were not permitted to bid for Smart Bus operator positions in October 2012. Claimants

also allege that DART denied non-union bus operators “meet and confer” rights in connection with the implementation of the Smart Bus program.

POSITION OF DART

The terms and conditions of employment for DART’s bus operators are generally set out in the Hourly Employment Manual (“HEM”). The grievance and modification procedures set forth in the HEM are incorporated in the Arrangement. The modification provision states that DART, with the exception of the modification section itself and the grievance process, may modify the personnel rules following advance notice to employees and/or their representatives and providing the same an opportunity to present their views. Further, the HEM establishes seniority by classification, stating:

All employees shall be governed by job classification seniority in their respective organization. It is further understood that if an employee moves from one job classification to another, he shall not carry his seniority to that job classification, but shall take his place at the bottom of the seniority list in the new job classification.

In 2011, DART initiated its Smart Bus program to address economically underperforming standard bus routes and reduce operating and maintenance costs. Under this program, 40 foot standard buses were replaced with 26 foot Smart Buses on some routes. DART states that, due to difficult economic circumstances, it was faced with eliminating a significant portion of its bus service, and corresponding jobs, or adopting more cost-effective service. DART states that the Smart Bus program enabled it to “save jobs, maintain service to DART’s customers and member cities and [to] help address DART’s budget shortfall (which in turn will allow DART to provide pay increases to its employees and maintain premiums for the consumer-directed health care options).” Moreover, DART states that it complied with the notice of the changes proposed for the implementation of the Smart Bus program and, beginning in September 2010, engaged in “no fewer than six multiday Meet and Confer sessions” with the Amalgamated Transit Union (ATU), the union representing the largest number of DART operators, about the implementation . As a result, DART states that:

(1) it followed the modification process set out in [the HEM and the Arrangement] to create a new Smart Bus Operator classification; (2) established a wage rate for the new classification that was lower than the wage rate for standard bus operators; (3) adopted a seniority structure for Smart Bus operators that recognized that the new classification would be filled by a mix of operators coming from different positions; (4) permitted standard bus operators who would have otherwise been displaced from service due to the elimination of standard bus routes to fill Smart Bus operator positions, at no loss of pay, until standard bus operator positions became available; and (5) afforded those standard bus operators who filled Smart Bus operator positions temporarily, the choice of returning to standard bus operator classification once standard bus positions became

available or remaining in Smart Bus operator positions at reduced wage rates and with seniority based on the new classification.

DART states that, following the above modifications to the HEM, no standard bus operator, including Claimants, was required to relinquish either pay or seniority unless he or she voluntarily chose to do so by remaining in a Smart Bus operator classification position after a standard bus operator position became available.

DART states that, on October 9, 2012, it conducted a “markup” for the selection of routes for the standard bus operator classification and for the Smart Bus operator classifications to become effective in December 2012. Given the modifications to the HEM discussed above and Claimants’ seniority, DART required the Claimants to bid within the standard bus operator classification. On October 15, 2012, Claimants filed a general grievance objecting to the inability of standard bus operators to bid for routes within the Smart Bus operator classification. After meeting with Claimants’ counsel, DART denied the grievance on January 24, 2013.

DART asserts that it followed the process set forth in the Arrangement for revising the terms and conditions of employment set out in the HEM and conducted the October 2012 markup in accordance with those revisions. DART states that Claimants, through this claim, are attempting to retain standard bus operator pay and seniority while declining to accept standard bus operator positions. Further, DART claims that, if Claimants were to suffer any adverse effect on their seniority or wages, it would be a result of their own voluntary decision to decline standard bus operator positions and request permanent assignments to the lower paid Smart Bus operator classification.

DISCUSSION

A. Claimants Do Not Have Standing to Present a § 5333(b)(2)(B) Claim.

Claimants state that DART denied their “meet and confer” rights because DART has never invited any non-union bus operator to attend a “meet and confer” meeting. Section 5333(b) protects the existing rights, privileges and benefits of DART employees as constituted in the HEM and the Arrangement. As set forth above, only a representative of a bargaining unit may file a claim for a violation of continuation of collective bargaining rights under this section. Moreover, DART engaged in several multiday “meet and confer” sessions with the union representing the largest number of employees. Section 5333(b)(2)(B) does not obligate DART to also meet with individual employees, including Claimants. Therefore, this claim is denied.

B. Claimants Have Not Shown They Were Worsened.

The Arrangement protects employees against a worsening of their positions related to employment as a result of the federal financial assistance provided. Paragraph 7(c) states:

Any employee placed in a worse position with respect to hours, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during the employee's employment as a result of the Project shall be considered a "worsened employee," and shall be made whole. Reasonable efforts should be made to restore the precise benefit lost or affected. If such attempts are unsuccessful; or unsuitable, an alternative remedy awarding offsetting benefits or compensatory damages may be acceptable if the harm has a readily ascertainable economic value and such an award would result in a fair and equitable substitute.

In this case, Claimants essentially argue that their retention of the same standard bus operator positions, same wages, and same seniority after DART's implementation of the Smart Bus program constitutes a "worsening." Claimants base their argument on DART's failure to provide them the same offsetting benefit (i.e. a Smart Bus operator position with no wage reduction) that DART provided to standard bus operators who actually lost their positions as a result of the Smart Bus program.

DART's implementation of the Smart Bus program was clearly designed to avoid dismissing or displacing standard bus operators by allowing those affected as a result of the Smart Bus program to retain employment and their standard bus operator pay through such time as they were able to return to standard bus operator positions. DART's response to its obligations under the Arrangement – notice to the union, "meet and confer" sessions regarding implementing changes, and the provision of offsetting benefits – is what is contemplated by the Arrangement. It does not constitute a "worsening" for standard bus operators who, like Claimants, were unaffected by the Smart Bus program due to their seniority to maintain their standard bus operator positions. Further, Claimants do not assert that they had the ability to bid for positions outside their classification prior to the implementation of the Smart Bus program and, thus, fail to show that their continued inability to do so in relation to the new Smart Bus classification constituted any change at all in their positions. Rather, it appears that it was a preservation of the status quo, in full compliance with the Act. Therefore, this claim is denied.

DETERMINATION

Claimants do not have standing to assert a claim for a violation of continuation of collective bargaining rights. In addition, the evidence does not support a finding that Claimants suffered a "worsening" of positions related to employment as a result of a project.

Therefore, the claims are denied.

This decision is final and binding.

Date _____

Michael J. Hayes
Director, Office of Labor-Management Standards