

Model Agreement for Operating Assistance, dated July 23, 1975 (Model)³ applicable to operating assistance; a November 6, 1990 TMD side letter concerning paratransit operations; and the November 5, 1990 Resolution of the Durham City Council, applicable to both operating and capital assistance. The certified protective arrangements are incorporated by reference into the grant contract between Durham and the FTA.

BACKGROUND

Prior to 1990 the Durham Transit System (Transit System) had been privately owned and operated by Duke Power Company. In late 1990 and early 1991 Durham acquired the private Transit System from Duke Power Company with one or more Federal grants of financial assistance. In order to accommodate North Carolina law prohibiting the City from bargaining collectively with the union representing the Transit System employees, the City established what is referred to as a Memphis Plan arrangement. Thereby, the management and operation of the Transit System is handled by a private entity under contract to the City, and the contractor bargains directly with the union. In September of 1990, Durham contracted for the operation and management of its Transit System by TMD. The contract authorized TMD to negotiate a Section 13(c) Agreement with the ATU, which had represented the bargaining unit at the Duke Power Company Transit System.

The claims arise from a subsequent change in the operator of the Transit System in 2001. The Claimants, two non-union employees who have been working on the System since it was operated by Duke Power, allege that this change created adverse effects upon their employment rights, privileges, benefits, pensions, and other conditions of employment. They seek remedy for these changes under the protective arrangements included in Durham's grants of Federal assistance.⁴ The Claimants maintain that the Federal assistance was used to effect and support this change in operators and the alleged harms.

THE CLAIMS

On July 1, 2001, Coach USA, through its subsidiary, Progressive Transportation Services, Incorporated, d/b/a Coach USA Transit Services (Coach USA), succeeded TMD as the contract operator and manager of the Transit System.

³ Employee Protections Digest, US DOL, p. D-43.

⁴ This Federal assistance was comprised of the aforementioned operating and capital grants.

With that change in contract operators, certain rights, privileges, benefits, and conditions of employment of the Claimants were changed by Coach USA.

Claim of Barbara P. Faulkner; DSP Case No. 01-13c-2:

Claimant Faulkner began working for the Transit System on November 1, 1974, when it was owned and operated by Duke Power Company. She has continued working for the Transit System, without interruption, since that time. She notes that when TMD took over operation of the Transit System in 1991, all former Duke Power transit employees retained their positions and salary. She states that at the time of Durham's acquisition of the Transit System, "[a]ll employees were told that they were covered by a '13 C' agreement, which protected all transit positions." While employed by TMD, she had been promoted from the position of Maintenance Clerk to the position of Administrative Assistant with no increase in pay. When Coach USA succeeded TMD as operator of the Transit System, she was demoted to Maintenance Clerk and her pay was cut.

She has identified her wages and benefits in her position with TMD as of June 30, 2001, as follows:

- wages - \$14.90 per hour
- vacation - 5 weeks earned per year; unused vacation accumulated and available
- sick leave - 12 days per year
- seniority - 27 years, dating from her employment with Duke Power Company
- length of service awards
- mandatory meetings outside of regular work week - overtime rate
- matching contributions for pension benefit
- holidays and personal days

As a Maintenance Clerk with Coach USA, her wages and benefits were as follows:

- wages - \$13.00 per hour effective in August of 2001
- vacation - 3 weeks earned per year; in 2002, no vacation days could be used before July 1
- sick leave - 4 days accumulation per year; carry forward of unused sick leave days was discontinued
- seniority - all seniority earned prior to July 1, 2001, was forfeited
- length of service awards - discontinued
- mandatory meetings outside of regular work week - straight-time pay

matching contributions for pension benefit - discontinued
holidays and personal days - changed and/or discontinued

She states that "[w]hen the employees discussed these concerns with Coach USA they were informed that Durham was only required to honor the 13(c) Agreement as it related to the bargaining unit employees." She was told that she no longer had any seniority as of January 1, 2002, and that all administrative employees now have the same hire date of July 1, 2001, the date Coach USA took over the operation of the Transit System.

Claimant Faulkner seeks back pay, reinstatement/restoration of former wages, benefits and seniority, including accumulation and rollover of vacation and sick leave from year to year, overtime pay for meetings outside of regular working hours, and her former 401(k) benefits and matching-contribution provisions.

Claim of Montague Barnes; DSP Case No. 01-13c-3:

Claimant Barnes began working for the Transit System on August 27, 1973, when it was owned and operated by Duke Power Company. His employment continued without interruption when the Transit System was acquired by Durham. He was employed by TMD from the time of the acquisition through June 30, 2001. He 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 Dispatch/Supervisor and Trainer and reported to the General Manager of TMD. He supervised the other Dispatchers and was responsible for the operation and adherence-to-schedule of the bus drivers. As part of this job at the Downtown Transfer Terminal, he had extensive contact with the public and handled customer contact and complaints. He identifies his wages and benefits in March of 2001 as follows:

salary - \$38,500 per year
vacation - 5 weeks per year
sick leave - 96 hours per year; sick leave accumulated
accumulated sick leave - 656 hours
holidays - 11 days per year

In May of 2001, in anticipation of a new organizational structure Coach USA planned to implement when it succeeded TMD, he was reassigned to Dispatch/Supervisor with no reduction in his salary or benefits.

As described by Claimant Barnes, when Coach USA took over, all non-union employees were required, prior to the July 1, 2001 change in contractors, to re-apply for employment by Coach USA in the positions they held or in some other position. After interviewing Mr. Barnes, Coach USA informed him that he would not be hired and refused to provide him an explanation for this action.

Claimant Barnes maintains that, under the terms of the certified protective arrangements, he had, and has, a right to continued employment in his job including the right to be hired by the successor contractor without examination or other re-qualification, except as required by State or Federal law. He further maintains that under these protections, no TMD employee's position should be worsened by a change in the operating and/or management entity. He seeks a dismissal allowance, reimbursement for his extra expenses incurred in consequence of this alleged violation of the protective arrangements, and restoration and continuation of all benefits that he previously held while employed with TMD in the Transit System.

REQUIREMENTS OF THE PROTECTIVE ARRANGEMENTS

The November 28, 1990 Agreement was negotiated by the Union and TMD to protect employees represented by the ATU at the time of the acquisition and thereafter. The duty of any successor contractor to accept and implement the terms of the negotiated Agreement appears in the Agreement itself at its Paragraph (21):

(21) This Agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of the arrangements made by or for the Public Body to manage and operate the System.

Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management, provision and/or operation of any System transit services under contractual arrangements of any form with the Public Body, its successors or assigns, shall agree, and as a condition precedent to such contractual arrangements, the public body, its successors or assigns, shall require such person, enterprise, body or agency to agree to be bound by the terms of this Agreement and accept the responsibility for full performance of these conditions;....

Paragraph 23 of the Agreement provides protections for employees and contractor obligations for the preservation of wages and benefits in the context of any change in contractors subsequent to the acquisition. Paragraph 23 of the Agreement reads in part as follows:

(23)(a) In the event of a subsequent transition from private to public management and/or operation of the System, or of *a transfer of service or positions from one private operator or contractor to another*, whether by contract, lease, or other arrangement, any employee providing such services or employed in such positions (except executive and administrative officers) shall be granted a preference in hiring to fill any position on the System with the new operator which is reasonably comparable to the position such employee held. All persons employed under the provisions of this paragraph shall be appointed to such comparable positions without examination, other than that required by applicable state or federal law or collective bargaining agreement, and shall be credited with their years of service for purposes of seniority, vacations, and pensions in accordance with the Contractor's records and applicable collective bargaining agreements. (Emphasis added.)

(23)(b) The obligations of the Contractor with regard to wages, hours, working conditions, health and welfare, and pension or retirement provisions for employees shall be assumed by any person, enterprise, body or agency, whether publicly or privately owned, which is required to grant employees a preference in hiring in accordance with this Paragraph, or the Public Body if it is so required, or the Public Body shall otherwise arrange for the assumption of such obligations. No employee of the Contractor shall suffer any worsening of his or her wages, seniority, pension, vacation, health and welfare insurance, or any other benefits by reason of the employee's transfer to a position with the Public Body or any such person, enterprise, body or agency undertaking management and/or operation of the System....

The terms and conditions of the Agreement are reinforced and made binding on any successors by the November 5, 1990 Resolution of the Durham City Council,⁵ which also serves as one of the primary bases for the Department's certification of Durham's Federal transit grants. The Resolution provides, in part, as follows:

(1) The City of Durham agrees that the Section 13(c) Agreement between the Amalgamated Transit Union Local 1437 (Union) and

⁵ This Resolution was executed on November 28, 1990.

Transit Management of Durham (TMD)...shall be binding on and enforceable against TMD and any successor in the management and/or operation of the Transit System.

(2) The City of Durham agrees that the Section 13(c) Agreement...executed on July 23, 1975 and commonly referred to as the National, or Model Agreement, which Agreement is attached hereto and incorporated in full herein by reference...shall be binding on and enforceable against TMD and any successor in the management and/or operation of the Transit System.

(3)As a precondition of any future contractual arrangements relating to the management, provision and/or operation of the Durham Transit System, or any part or portion thereof, the City of Durham shall require the management company and/or other contractor to: (a) agree to be bound by the terms of the Agreements referenced in paragraphs (1) and (2) above; and (b) accept the responsibility for full performance of the conditions thereof.

As noted above, Paragraph 21 of the Agreement and the City Council Resolution require that any successor to TMD must be bound by the Agreement. Furthermore, the Agreement requires Durham "as a condition precedent" to any contractual arrangement with a successor contractor to require the contractor to be bound by the terms of the Agreement and accept responsibility for the full performance of the conditions of the Agreement. Durham carried out this obligation with respect to Coach USA through its contract with Coach for the management and operation of the transit system.

In addition to the arrangements described above, the Department of Labor's certification letters include certain enumerated conditions that form part of the certification and are made part of the FTA contract of assistance, along with the protective arrangements. A final enumerated section is included in all certifications, including those cited on the first page of this decision, which specifies that employees other than those party to the specified protective arrangements are afforded substantially the same level of protections and that disputes remaining after exhaustion of any available remedies may be decided by the Secretary of Labor or a designee of the Secretary. The final enumerated section 4 of Durham's certifications for capital assistance reads as follows:

4. Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local union which is a party to, or otherwise referenced in the protective arrangements,

shall be afforded substantially the same levels of protection as are afforded to the employees represented by the union under the agreement dated November 28, 1990, as supplemented, and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

Should a dispute remain, after exhausting any available remedies under the protective arrangements, and absent mutual agreement by the parties to utilize any other final and binding procedure for resolution of the dispute, the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination.

POSITION OF RESPONDENTS

City of Durham

Durham denies any responsibility for Section 5333(b) protections in these claims, because the Claimants were never employees of the City, and the City is not a party to the protective Agreement executed by the Union and TMD. In furthering this position, Durham affirms that it has exercised no control or authority over the management and operation of the Transit System since acquiring it from Duke Power Company in 1990. Beginning with its acquisition of the Transit System, Durham transferred all responsibility for management and operation of its Transit System to its contracted operator under a Memphis Plan arrangement. Durham also supports the position that Coach USA, its operating/management agent, has no obligation to these Claimants for employee protections under the certified terms and conditions, for the reasons set forth by Coach USA.

Coach USA

Coach USA presents its position, through its attorney, in an August 28, 2002 letter to the Department. As a threshold matter, Coach alleges that the complaints before the Secretary are barred because the Claimants failed to utilize and exhaust the remedies in the November 28, 1990 13(c) Agreement.

In its August 28, 2002 letter, Coach recognizes and affirms that it has 13(c) obligations to employees under the Agreement and that these obligations are also set forth in its management contract. Coach USA states in the August 28, 2002 letter:

“The scope of the 13(c) obligation is set forth in 34(D) of the Contract which requires Coach to act in accordance with Paragraph 23 of the Section 13 Agreement and to ‘offer all of the employees of the current Contractor who are engaged in the provision of fixed route services to the City (except executive and administrative officers) comparable positions to the positions currently held by those employees.’”

Additionally, Coach states that members of the Durham Area Transit Authority (DATA)⁶, reiterated to Coach’s local General Manager that it was required to offer positions to all bargaining unit employees, but that employment of non-bargaining unit or executive and administrative employees was at its discretion.

Coach USA concludes that Claimant Faulkner and Claimant Barnes were not entitled to employment in comparable positions when it assumed the operation and management of the Transit System. Coach alleges that the Claimants were executive and administrative employees of the previous contractor and are therefore excluded from coverage under both the terms of the 13(c) Agreement and its management contract. Additionally, Coach concludes that non-bargaining unit employees, such as these two Claimants, are not party to the Agreement, and neither the Agreement’s terms nor the terms of Coach’s management contract with the City require the extension of employee protections to non-bargaining unit employees.

Since Coach recognizes 13(c) obligations in the context of its assumption of the management and operation of the Transit System, its positions stated in the August 28, 2002 letter with respect to non-bargaining unit employees, executive and administrative employees, and the exhaustion of procedural remedies frame the only issues in this matter.

ISSUES

1. Whether the Claimants properly exhausted their remedies under the November 28, 1990 13(c) Agreement.
2. Whether the Claimants, as non-bargaining unit employees, are entitled to employee protections.

⁶ The Durham Area Transit Authority is the entity created by the City to oversee the implementation of transit policy. Its seven board members are appointed by the Durham City Council.

3. Whether the Claimants are properly classified as "executive or administrative officers," and therefore excluded from the protections of the 13(c) Agreement.

DISCUSSION

1. Exhaustion of remedies. Coach asserts that claims before the Secretary by Ms. Faulkner and Mr. Barnes are barred because the Claimants did not utilize the procedural remedies referenced in the 13(c) Agreement. As transit employees in the service area not represented by the union signatory to the Agreement, the Claimants are eligible for substantially the same levels of protection. This does not, however, give them access to the Agreement's specific claims resolution procedure negotiated by the Union for the employees it represents. Non-union employees are obliged to pursue their claims through any existing reasonable and available alternate remedies established for such claims by the grant recipient or other responsible party. As non-bargaining unit employees, the procedural remedies of the 13(c) Agreement specific to the union and its members are not available to Ms. Faulkner or Mr. Barnes.

Claimant Faulkner stated that Coach told her and others that the Agreement could only be honored for bargaining unit employees. Claimant Barnes sought an explanation and assistance from several individuals including Coach's local general manager, the assistant city attorney in charge of DATA matters, a special assistant to the City manager, the City's transit manager, a City council member and the City manager. No local procedures to resolve claims for non-bargaining unit employees were offered or identified in the course of any of these contacts. Nothing in the record indicates that there are alternate procedural remedies available to these Claimants. Therefore, their claims are properly before the Department for final and binding resolution, pursuant to the final enumerated paragraph of the Department's certification letters.

2. Employee protections. Both Durham and Coach USA agree that the 13(c) obligation required Coach to offer comparable employment to all non-administrative and non-executive bargaining unit employees. The August 28, 2002 letter further states that this understanding "was reiterated to the General Manager for Coach ... by members of the Durham Area Transit Authority who discussed with him that Coach was required to offer positions to all bargaining unit employees..." In accordance with this understanding, Coach offered comparable employment to all members of the bargaining unit when it assumed operations from TMD.

The Department accepts the views of Durham, DATA, and Coach, as expressed in the August 2002 letter, as they frame the 13(c) obligations relating to bargaining unit employees who are neither executive nor administrative officers. However, Coach's assumptions regarding the non-bargaining unit employees of the previous contractor are inconsistent with the Department's certifications for the Transit System and precedent relating to the coverage of protective arrangements. For the reasons discussed below, substantially similar protections to those in the 13(c) Agreement should have been extended to non-bargaining unit employees.

The Transit System labor protective obligations under 49 U.S.C. § 5333(b) include, not only the Agreement between TMD and ATU Local 1437, but also those specified in the Department of Labor's certification letters. The Department's certification letters require in their final enumerated paragraph that all transit employees in the service area of the project be protected and those who are not party to or otherwise referenced in the specified protective arrangements are to receive "substantially the same levels of protection." This obligation to provide substantially the same protections extends to non-bargaining unit Transit System employees such as the Claimants in this case. Coach's reliance on the Department of Labor's decision in Certain Captains and The Inlandboatmen's Union v. City of Vallejo, Case No. 94-13c-20, USDOL (1995), Digest, p. A-418, is not applicable here because that case relied on a distinguishable and unique set of facts and circumstances. In Certain Captains, the City of Vallejo voluntarily extended the protections of the 13(c) agreement to unionized deckhands employed in its ferry service in the context of a project carried out entirely with State funds. It was ruled that the non-union captains were not entitled to similar benefits in that instance because no Federal funds were used in the project, and the 13(c) agreement had been voluntarily utilized as a "simple labor contract standing apart from any result of a Federal project." Here, Federal funds are used in the project, see n. 4 supra, and, accordingly, the "substantially the same levels of protection" requirements in the Department's certification letters apply.

3. "Executive or administrative officers" exclusion. The exception in the 13(c) Agreement for "executive and administrative officers" does not apply to the Claimants here. Section 5333(b) requires that fair and equitable protections for all affected mass transit employees must be in place as a precondition of the FTA grants. Although the statute does not define the term *employee*, the only established exception consistent with the statute is for the highest officers of a transit system. Coach's argument to exclude the Claimants in this case is based on its use of the phrase "executive and administrative employees," which substitutes the term *employee* for the term *officer* used in the 13(c) Agreement. The term *officer* has a specific meaning, however, and cannot be used synonymously with *employee*. *Officers* are those persons who occupy the positions

specified in a corporate charter and are typically no more than a handful of its highest-level officials.⁷ In Roland G. Barnes v. Tidewater Transportation District Commission, Case No. 77-13c-31, USDOL(1980), Digest, p. A-95, for example, the Claimant was determined to be outside the definition of covered employee, because, in part, he was an officer of the private company before it was taken over by the public entity. The Claimant was elected to the positions of President and Treasurer by its Board of Directors, he was one of only two officers authorized to sign company checks, and he had executed the contract of sale to the public entity that resulted in his displacement.

Salaried Employees v. Nassau County, Case No. 75-13c-7, USDOL (1975), Digest, p. A-41, offers the most comprehensive discussion of employee coverage under 49 U.S.C. § 5333(b) and the types of positions that may be excluded from 13(c) agreements. The decision concludes that the term (covered) *employee* should be broadly construed and considered to encompass all but the top level individuals performing functions corresponding to the cited positions in the definition of "employee of a railroad in reorganization" in the Regional Rail Reorganization Act. Those excepted positions are: "a president, vice president, treasurer, secretary, comptroller, and any person who performs functions corresponding to those performed by the foregoing officers." The decision further explains that due to variances from carrier to carrier, coverage decisions should be based on a review of the actual functions that an individual performs, and that this review should focus on the extent to which the individuals "impact upon management policy and whether they exercise independent judgment and discretion of the type generally associated with top level management."

Before his reassignment in anticipation of Coach's new organizational structure, Claimant Barnes occupied the position of Lead Dispatch/Supervisor and Trainer. As such, he trained, supervised, evaluated, and disciplined other dispatch/supervisors. He was responsible for the general operation of the Dispatch Office and the Downtown Transfer Terminal. He dealt directly with the public and handled passenger complaints. He also served on two Statewide public transportation committees. He reported directly to the General Manager of TMD, who determined his wages and benefits. There is no indication in the record, however, that Claimant Barnes exercised independent control over any of his duties or participated directly or significantly in top level policy determination. Supervisory or managerial duties, even of a significant nature, do not place an individual outside the scope of 13(c) protections. See Giampaoli v. San Mateo County Transit District (Interim Determination), Case No. 77-13c-30, USDOL (1981), Digest, p. A-172-6. It appears that Claimant Barnes' position was that of

⁷ See 18B Am. Jur.2d Corporations §1343.

an administrative employee or perhaps an executive employee, but not that of an executive or administrative officer.

Claimant Faulkner's position with TMD was that of Administrative Assistant to the General Manager. She apparently performed general administrative tasks for the General Manager and Assistant General Manager. As such she certainly was an administrative employee, but it does not appear that she performed any function that could be construed as an administrative officer.

Because the Claimants do not fall within the 13(c) Agreement's exemption for "executive and administrative officers," they are entitled to the protection of the Agreement. The transition under which their claims arose was between a contractor and subsequent contractor, and the contractor's obligations are set out under Paragraph 23 of the Agreement, which requires that each employee "be granted a preference in hiring to fill any position on the System with the new operator which is reasonably comparable to the position such employee held."⁸ Because the Claimants were not allowed to continue in positions they held with the prior contractor, it is clear that the Paragraph 23(a) preference was not granted.⁹

Any successor contractor to TMD is bound to accept responsibility for implementing the terms and conditions of the protective 13(c) Agreement and other protective arrangements. In addition to the preference requirements discussed above, obligations also exist in Paragraph 23(b) of the Agreement which provides for the continuation of the existing wages, hours, working conditions, health and welfare, and pension or retirement benefits of the Claimants. They are to suffer no worsening of wages, working conditions or any other benefits of employment and are to be credited with all seniority, vacation, accumulated sick leave, pension, and other entitlements in accordance with the records of TMD. Any accrued liabilities at the time of transfer for pension, retirement, sick leave, and vacation leave benefits are the responsibility of the City.

These claims are upheld and the Claimants are eligible for the following remedies.

⁸ The Department takes no issue with the parties' effectuation of the concept of preference within the context of their 13(c) Agreement. We note, however, that the term *preference*, in and of itself, offers less than an absolute job guarantee.

⁹ Coach has made no presentation that the positions formerly held by the petitioners were eliminated, or that the duties, responsibilities, expertise, or qualifications required for the positions under Coach would not be reasonably comparable to those under the prior contractor.

REMEDIES

The Department of Labor certifications for the aforementioned grants provide that "the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination." Pursuant to that authority, the following remedies are provided consistent with paragraph 16(b), including the award of full back pay and allowances and other benefits to make employee-claimants whole. The remedies shall be implemented no later than thirty days following the date of this decision.

The City of Durham has limited responsibility for the claims presented, because, under its Memphis Plan arrangement, responsibility for the management and operation of the Transit System rests with its contractor. However, its management contract with Coach reserves the responsibility for accrued pension, retirement, sick leave, and vacation leave liabilities, as of the effective date of the contract, with the City. To the extent that the remedies later specified involve such liabilities, they are the responsibility of the City. Coach USA, on the other hand, has primary responsibility for 13(c) liabilities in its status as the independent successor contractor that succeeded TMD.¹⁰ This responsibility covers the entire period between its assumption of the operation of the Transit System and the Claimants' acceptance or declination of employment/re-employment with the current operator of the System under this award. The employment/re-employment obligations of the following award rest with the current successor contract operator of the Transit System.¹¹

The current operator of the Transit System shall grant Claimant Faulkner and Claimant Barnes their preference in hiring by offering both individuals positions with the Transit System comparable to those they occupied prior to the anticipation or effectuation of the July 1, 2001 transfer of operations to Coach. Appointment to such positions shall be without examination, other than that which may be required under applicable State or Federal law or collective bargaining agreement and shall commence immediately upon acceptance by the Claimant. Such appointment shall be under the same wages, hours, benefits, and

¹⁰ Effective June 30, 2003, Coach sold its transit division to First Transit, Inc. by means of an asset sale. Coach's contract with Durham (entered into by Coach's subsidiary, Progressive Transit Services, Inc.) was transferred and assigned to First Transit, Inc. as part of that sale. However, Coach retained any liabilities pre-dating the sale.

¹¹ MV Transportation, Incorporated entered into a five-year contract to operate the Transit System, effective July 1, 2004. This successor contractor is bound to implement the hiring preference requirements with the restoration of all compensation, rights, privileges, and benefits associated with the claimants' previous position with TMD. See 13(c) Agreement, paragraph 21.

conditions of employment, including all rights and privileges, applicable to such positions prior to the transfer of operations to Coach plus any and all increases, supplements, and betterments which have 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. Additionally, both Claimants are entitled to receive the full value of all wages and benefits lost due to the failure of Coach to grant their preferences.

With respect to Claimant Barnes, Coach may offset the above payments by any earned income or realized cash benefits he may have earned in any employment in the period between his last employment at TMD and his acceptance or declination of employment with the current operator of the Transit System. Should Claimant Barnes decline the offer of employment, he shall be deemed to have elected retirement and receive the same benefits and privileges that would accrue to an employee with equal seniority and service who retired or otherwise terminated employment under honorable circumstances on the date of his declination.

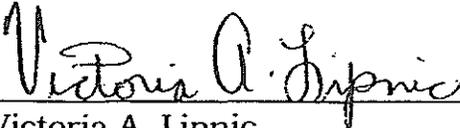
The Claimants shall exercise their hiring preference within 15 days of its offer by accepting or declining the offer of employment. However, any declination of a comparable position shall not result in the forfeiture of any current employment with the Transit System or the other remedies to which the Claimants are entitled under this award. Both Claimants, irrespective of their election to accept or decline a comparable position, shall be credited with all years of service, dating from their initial employment with Duke Power and continuing without interruption to the date of the acceptance or declination, notwithstanding any forfeiture of seniority imposed by any operator of the Transit System or any break in service caused by the failure of any operator to grant a hiring preference. Such recomputed years of service, plus all additional subsequent service, shall be utilized thereafter 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 the Claimants prior to the July 1, 2001 take over of operations by Coach or its anticipation, but not mentioned herein, shall also qualify for continuation and preservation at their prior levels. This includes any subsequent general wage increases or improvement in benefits for which the Claimants otherwise would have qualified after the takeover.

Prompt determination of the specific amounts and specific terms and conditions of the rights, privileges and benefits to be paid and/or restored is referred to the parties. In the event the parties cannot agree on individual amounts, terms

and/or conditions, the Department retains limited jurisdiction to resolve such disagreements for purposes of the remedies herein.

This decision is final and binding on the parties.


Victoria A. Lipnic
Assistant Secretary of Labor