

In the Matter of Arbitration:

James Lindsey et al.)	
<i>Claimants</i>)	DSP Case No. 03-13c-06
)	
v.)	
)	FINAL DECISION
Dallas Area Rapid Transit Authority)	
<i>Respondent</i>)	
)	Issued: April 15, 2008

THE CLAIM

This claim involves some 400 former employees of First Transit, Incorporated (FTI), a former contract operator of certain fixed route services of the Dallas Area Rapid Transit Authority (DART). DART terminated its service agreement with FTI on October 6, 2003, twenty-seven months before it was due to terminate, and took over direct operation of the transit services, employing new hires and somewhat less than twenty-five percent of the former FTI employees. Those who were rehired were employed as probationary employees without seniority and at entry level wages and benefits.

The FTI employees had been represented by Amalgamated Transit Union Local 1635 (Local 1635). The termination of FTI's contract resulted in the loss of most of Local 1635's membership at a time when its President was too ill to keep up with the operation of the Local. Mr. James Lindsey, an Executive Board Member of Local 1635, filed a timely local claim against DART, as authorized by Local 1635's Vice President and four Executive Board Members. The claim was on behalf of all former FTI employees who were dismissed or rehired by DART at lower seniority, wages, and benefits. When DART challenged Mr. Lindsey's authority to file the claim, he attempted to clarify his authority and presented a list of some 400 individuals who allegedly were affected by the termination of the FTI contract. The list was apparently composed of all union and nonunion employees of FTI involved in the DART contract service. Mr. Lindsey also announced, at that time, his intention to file claims on behalf of each affected individual separately, if DART would not consider them as a group.

Following rejection of the claim by DART, Mr. Lindsey filed a timely claim with the Department of Labor. DART immediately questioned Mr. Lindsey's

authority to file with the Department based on the circumstances of Local 1635, Mr. Lindsey's level in the Local 1635's leadership hierarchy and the applicability of certain of the protective arrangements cited in the claim. Given these circumstances, the Department concluded that the issue of Mr. Lindsey's standing to pursue the claim needed to be resolved as a preliminary matter.

On October 11, 2005, the Department issued an Interim Decision finding that Lindsey and the bargaining unit claimants he sought to represent had standing by reason of an authorizing memorandum from Local 1635's Vice President and four Executive Board Members issued during the Local President's incapacitation.¹ Allegations by DART that the Local had closed and that the Local's trustee and the Amalgamated Transit Union International (ATU) opposed the claim were not supported by the record. Additionally, the Department found that Lindsey could represent non-bargaining unit and service area employees, pursuant to the terms of a 1992 Addendum to the ATU-DART protective agreement for capital assistance, if they had satisfied local claims procedures and provided him with signed authorizations by the closing of the record for this arbitration. All individuals who were either members of the former FTI-Local 1635 bargaining unit or who appeared on the list of employees presented to DART with the October 2003 local claim were deemed to have satisfied the local procedures.

THE PROTECTIVE ARRANGEMENTS

In his claim before the Department, Mr. Lindsey cited the certifications of employee protections at DART under Section 5333(b) of Title 49 of the U.S. Code, Chapter 53. For operating assistance, including capitalized preventive maintenance, the protections are memorialized in the Operating Assistance Protective Arrangement dated October 22, 2003. The 2003 Operating Assistance Protective Arrangement covers employees of DART and other mass transit employees in the service area. ATU Locals 1338 and 1635, as representatives of the direct employees of DART and DART's contractor employees, respectively, are deemed parties to the Arrangement. For capital assistance, the employee protections can be found in three documents: 1) the Department's September 30, 1991 certification; 2) Attachments A and B of the September 30, 1991 certification; and 3) a September 1992 Addendum. The September 1992 Addendum applies to employees of private mass transportation companies in the service area of DART, such as FTI.

¹ See *James Lindsey et al. v. Dallas Area Rapid Transit Authority*, DSP Case No. 03-13c-06, INTERIM DECISION, October 11, 2005, Employee Protections Digest. The Interim Decision was limited to the question of the standing of the Claimants to file with the Department of Labor for a final and binding resolution of the dispute. The merits of the claim were not addressed.

In the Interim Decision, the Department ruled that it would not hear claims relating to Federal operating assistance, because the October 22, 2003 Operating Protective Arrangement provides for private arbitration under the auspices of the American Arbitration Association and does not contemplate a role for the Department.² The September 1992 Addendum, on the other hand, clearly provides for the final and binding settlement of disputes involving capital assistance by the Department, if the parties are unable to agree on another procedure. Contrary to the assertion of DART, the Department ruled in the Interim Decision that the term "representative" as used in Paragraph (16)(a) of the Addendum does not refer exclusively to Local 1635. Therefore, the Department concluded that employees, individually or through a chosen representative, may request a final and binding determination by the Department of issues involving capital assistance under the September 1992 Addendum.

The September 1992 Addendum contains a burden of proof at Paragraph 16(b). This paragraph applies to controversies, such as this, concerning whether or not employees have been affected by a Federal grant and are thereby entitled to protections as specified in Title 49 of the U.S. Code, Chapter 53, Section 5333(b) and the Department's certifications of employee protections for DART. Paragraph 16(b) reads as follows:

(b) In the event of any dispute as to whether or not a particular employee was affected as a result of the Project, it shall be the obligation of the employee to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the burden of the Public Body or the private transit employer, whichever is the party to the dispute, 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 upon the employee, even if other factors may also have affected the employee.

POSITION OF THE CLAIMANTS

The Claimants contend that Federal assistance was used to terminate the FTI contract before the end of its term and facilitate DART's assumption of direct operation of the service. They initially cited Federal Transit Administration

² The Department has consistently ruled that, where a Claimant is a member of a unit represented by a labor union and the protective agreement or arrangement to which the union is a party provides for a final settlement of claims without reference to the Department of Labor, the Department does not have jurisdiction to consider the claim. (See *Calvin (Grimes) Muhammad v. Houston Metro*, OSP Case No. DSP-97-13c-2, March 9, 1998, Employee Protections Digest, p. A-469.)

(FTA) Project Number TX-90-X582 and capital preventive maintenance as the Federal project that had affected the FTI employees. However, the letter to the Department accompanying Mr. Lindsey's claim form also mentioned certain new buses that were funded by the same project. In subsequent communications and briefs the Claimants listed additional Federal grants which they believe may have caused or facilitated the takeover of the FTI service. Some of these grants provided for the purchase of buses, which the Claimants alleged were used as replacements for those operated by First Transit.³ They also suggested that other grants may have funded such activities as the closeout payment to FTI for the early termination of its contract, the hiring and training of replacement workers, the repair and rehabilitation of buses neglected by First Transit, and improvements to maintenance and other facilities previously utilized by First Transit but owned by DART.

On several occasions following the Interim Decision, the Claimants unsuccessfully petitioned the Department to arbitrate this claim based on the alleged effects of both operating and capital assistance. They alleged that the capital preventive maintenance in FTA Project Number TX-90-X582 was not traditional operating assistance. They also claimed that operating and capital funds at DART were "inexplicably intertwined" in effectuating the 2003 operational change which resulted from the takeover of FTI service by DART. Additionally, the Claimants put forth several theories for the consolidation of separate arbitrations on operating and capital assistance based on the commonality of the issues; undue prejudice, delay and cost; and the possibility of conflicting or inconsistent rulings or awards.

The Claimants further argued, unsuccessfully, that no mutually agreed upon forum was available to pursue a claim based on the effects of operating assistance. During the course of this arbitration, they filed for arbitration with the American Arbitration Association (AAA), as provided under the terms of the 2003 Operating Assistance Protective Arrangement. DART, however, refused to join in the request. Despite the Claimants' reference to the protective arrangements and the Department's ruling on their standing to arbitrate similar issues based on capital assistance, the AAA found that no contract or agreement to arbitrate existed between the Claimants and DART on the operating assistance matter. The AAA, consequently, administratively closed the Claimants' arbitration request on July 6, 2006.

The Claimants petitioned for broad discovery on the alleged use of operating and capital assistance in the abrogation of the FTI contract and takeover of the contracted service. They claimed that Federal assistance was used in the termination of the FTI contract; the assumption and direct operation by DART

³ All buses operated by First Transit in DART service were provided and owned by DART.

of FTI service and maintenance; the repair of buses operated by FTI but owned by DART; the replacement of FTI rolling stock with new buses; physical plant improvements necessary for bringing the FTI service in-house; and other unspecified activities necessitated by the abrogation of the FTI service contract. Furthermore, they suggested that operating and capital funds were inseparable or had been intermixed in some of these activities. On March 26, 2007, the Department issued a discovery order which allowed the examination of operating and capital expenditures, but specified that only capital expenditures would be considered in the final arbitration decision.⁴

The Claimants subsequently embarked on a six-week period of discovery as described in the Discovery section of this decision. A forensic accountant was employed by the Claimants to examine FTA grant dispersals, DART expenditures of Federal funds, and related general ledger entries in DART's financial records. The Claimants requested documentation of events and expenditures along five areas of inquiry and deposed DART's Chief Financial Officer (CFO).

The CFO testified that DART had considered several cost saving scenarios, involving the potential termination of the FTI service contract, and that these had been summarized in a short analytical document. The CFO further stated that the final decision to terminate the FTI contract had been based largely on operational, rather than financial, grounds. A chief consideration was FTI's failure to properly maintain DART's buses and other property. In fact, DART anticipated that the termination of the FTI contract would save little or no money over the long-term.

The Claimants alleged that DART failed to fulfill its discovery obligations by withholding much of the information and documents requested. They claimed that DART did not produce documents relating to three of the five categories in their requests. While DART provided 2800 pages of reimbursement information from the FTA computer database, it would not furnish general ledger information from its own accounting system. DART did not provide documents from a specific request following and partially derived from the Claimants' deposition of its CFO. These included general ledger information and the cost-benefit analysis concerning the termination of the FTI contract; documentation and reimbursement information for physical plant improvements possibly related to the termination; documentation and reimbursement information for the purchase of certain buses; cure notices concerning FTI's maintenance

⁴ The discovery order ruled that the Department is not an appropriate avenue for appeal or redress of any refusal to arbitrate by a party to the October 22, 2003 Operating Assistance Protective Arrangement or any ruling of lack of jurisdiction by an arbitrator or administrating agency. The Department stated that the Arrangement is in the nature of a contract under which the parties may have a remedy at law. It also affirmed that the Department is not a party to the Arrangement and lacks any authority to enforce the Arrangement.

deficiencies and receipts, disbursements, and other information regarding DART's maintenance of buses formerly operated by FTI; DART's bus replacement schedule; memos from planning meetings referenced by the CFO; and information concerning the final payout DART negotiated with FTI when it abrogated the service contract.

The Claimants maintain that DART's failure to fulfill the Department's scheduling and discovery order deprived them of the opportunity to make a forensic accounting evaluation of the contract's termination and related expenditures. They conclude that, since the termination resulted in no cost savings, despite immediate reductions in routes, salaries, and employment levels, offsetting capital expenditures must have occurred, related to the termination, of the type typically reimbursed by Federal grants. They state that they were deprived of a reasonable opportunity to develop and prove their claim by DART's discovery failures. As a consequence, they call for the Department to reopen and enforce its discovery order or draw an inference that the documents withheld would prove their allegations. As a remedy they request an award to the Claimants of a priority of reemployment and displacement or dismissal allowances.

POSITION OF THE RESPONDENT

DART alleged that the Claimants failed to meet the first step of their burden of proof, concerning capital assistance, because their initial claim cited only the capital preventive maintenance portion of FTA Project Number TX-90-X582.⁵ Capital preventive maintenance funds are treated as operating assistance in the Department's labor protective certifications and are thus not within the purview of this arbitration. The funds had been used by DART to reimburse itself retroactively, as permitted by the FTA, for Fiscal Year (FY) 2002 vehicle and non-vehicle maintenance performed by its three contractors, FTI, ATC Vancom, and Herzog Transit Services. Consequently, DART believed that the Claimants had failed to address any capital assistance project and draw a nexus between any capital funds and the harms that had befallen them. DART thus opposed any further discovery and moved for a dismissal of the complaint.

The Respondent additionally countered that the Claimants were affected solely by the termination of the FTI service contract and that the termination was neither caused by nor carried out with Federal funds. DART cited two reasons for the abrogation of the contract.

⁵ The applicable burden of proof is reproduced in the section of this decision entitled *The Protective Arrangements*. An explanation of the burden of proof is included in the *Discussion* section.

First, a severe budget crisis occurred in FY 2003, because sales tax revenue to DART had declined for three years in a row and was projected to fall by 33 percent over the long-term. This prompted DART to cut its operating budget by \$12.5 million and scale back its capital program by \$1.4 billion. Included in the cutbacks were the elimination of 17.8 percent of the routes formerly operated by FTI and the partial elimination or reduction in frequency of 10.9 percent of the remaining former FTI routes. DART also eliminated 4.7 percent of the routes it operated directly and partially eliminated or reduced frequency on an additional 30.9 percent of its routes. Within this context, DART was able to cancel \$65 million in payouts over the next 27 months by terminating the FTI contract "for convenience" and negotiating a one-time cash settlement of \$1.5 million with FTI.

Second, DART had experienced continued problems with FTI's maintenance of DART-owned buses and equipment. Contract performance issues relating to such deficiencies were communicated to FTI by letter on March 20, 2001, December 5, 2001, and May 9, 2003. In November 2001, DART inspected a total of 30 buses at two FTI operated facilities, and all 30 were found to be inadequately maintained under contract standards. The December 5, 2001 communication warned FTI that the deficiencies in maintenance endangered the performance of its contract and, if not corrected, could result in its termination for default. The May 9, 2003 communication presented a recent statistical process control inspection which, by extrapolation, concluded that 89% of the DART fleet operated by FTI was in service with defects that did not comply with its operating contract. Once again, DART warned FTI that the condition of DART's buses "places your continued performance under the Contract in grave danger." By letter dated June 25, 2003, DART notified FTI that their contract was "terminated in whole for [DART's] convenience, effective October 6, 2003." The notice further directed FTI to submit a settlement proposal within 14 days. Thereafter, the parties negotiated a final payment of \$1.5 million which, DART maintains, avoided the litigation that would have resulted had DART terminated the contract for substandard maintenance.

DART further maintains that no Federal capital assistance received by it adversely affected the Claimants and that the Claimants failed to prove any such connection. DART provided the Claimants with information on five years of Federal capital grants, which, it stated, failed to show any causal connection between Federal funding and the negative effects on the Claimants. With regard to Federal Grant Number TX-90-X582, cited by the Claimants, capital assistance funds were accepted for light rail and transit center construction unrelated to the FTI service, the purchase of fare collection and dispatch equipment, and the purchase of 16 replacement buses. DART alleged that the number of buses in its active fleet was not changed by the 16 buses and that they were not delivered until one year after the termination of the FTI contract. Capital assistance received from other Federal grants in FY 2003 funded unrelated construction activities and a delayed payment for eleven buses

delivered in 1999. DART concluded that the Claimants were unable to draw any connection to effects on former FTI employees from any Federal grant.

With regard to Federally funded buses, DART insists that the Claimants failed to show any relationship between the termination of the FTI contract and/or the harms that befell them and any retirement, purchase, or repair of buses. While the Claimants raise the composition of DART's fleet before and after the termination of the FTI contract, the Respondent states that such is merely a reflection of the severe economic crisis that it experienced at the time. DART states that reductions in its bus fleet actually began in 2001. In 2003, however, the aforementioned service cutbacks in both FTI and DART routes necessitated a 13.4 percent reduction in DART's overall fleet in one year. However, FTA standards concerning the useful life of transit vehicles and previous commitments to a bus replacement schedule resulted in both bus retirements and purchases during the period.⁶ DART holds that there is no connection between the FTI contract termination and the resulting bus deliveries.⁷ While 90 40-foot buses were delivered in 2002, this followed the retirement of 165 buses that had reached the end of their useful life in late 2001. Similarly, the delivery of 80 40-foot buses in 2004 followed the retirement of 92 similar buses in 2003. DART also renegotiated a contract in order to reduce by 35 the total number of 40-foot buses scheduled for delivery in 2005 and placed 50 three-year-old 30-foot buses in a non-active reserve fleet.

DART states that the fleet it provided to FTI did not differ significantly in age from the vehicles it operated directly. It had a rotation policy which circulated vehicles between the DART and FTI fleets on a regular basis. DART also points to its May 9, 2003 cure notice, which lists maintenance failures by vehicle and shows that all inspected buses were between two and four years old. The cutback in the overall size of DART's fleet, FTA rules concerning the retirement of vehicles past their useful life, and existing commitments to purchase buses may have resulted in the appearance of a reduction in the age of DART's fleet. However, DART states this was not a reason for the abrogation of the FTI contract and had no effect on FTI employees.

DART also states that no Federal capital funds were used to cure the maintenance deficiencies of FTI or to rehabilitate FTI operated vehicles after its contract was terminated. No budget line item was included in the Federal Grants provided to the Claimants that would have permitted DART to use Federal Funds, other than capital preventive maintenance, to maintain or rehabilitate FTI buses. DART points out that in FY 2002 through 2006, it spent

⁶ The FTA standard for the useful life of a 35 to 40-foot transit bus is 12 years or 500,000 miles.

⁷ The Claimants had alleged that DART abrogated the FTI contract so that it could operate the service with newer buses and/or that DART ended the contract so that it could bring the maintenance of its new buses in-house.

\$820 million on capital expenses, only 29 percent of which was from Federal assistance. To the extent that FTI buses needed repairs over \$5000, which would be considered a capital expense by DART, those repairs were made with non-Federal funds. Similarly, DART points out that no Federal funds were used to renovate DART's facilities so that it could operate the FTI service directly.

DART also states that no Federal funds were used to terminate the FTI contract. The \$1.5 million payout to FTI, which terminated the operating contract "for convenience," was not eligible for Federal reimbursement. It was not a concession by DART that FTI had not defaulted on its obligations by failing to maintain DART equipment. Rather, it was a negotiated settlement that avoided litigation. The contract was not "acquired" as suggested by the Claimants. It simply ended, and there is no continuing asset represented by it. Regarding DART's financial crisis, the termination of the FTI contract was one of several options considered. While not the most cost effective option, DART estimated that it saved \$14 million per year, not including the avoidance of costs that would have resulted from the continuance of FTI's maintenance deficiencies.

DISCOVERY

The Claimants requested "limited and incremental discovery ... under DOL supervision." They asked for the opportunity to examine books and records required to be kept under the terms of the protective arrangements and to make appropriate document requests related to the use of Federal funds. Additionally, they requested the authority to depose DART and FTI officials, as necessary.

In a March 26, 2007 scheduling and discovery order, the Department granted the Claimants discovery "for the purposes of examining FTA grant dispersals, DART expenditures of Federal funds, and related matters which may have affected them." The Department declined to directly supervise the discovery, but reminded the parties of their obligations for recordkeeping and the exchange of information under the protective arrangements.⁸ The discovery permitted the examination of grant awards and expenditures involving operating or capital funds, but the Department reiterated and emphasized that only capital expenditures would be considered in the final arbitration of the claim.

⁸ Section 11, Paragraph 16(a) of the September 1992 Addendum contains a general recordkeeping requirement, and Section 12, Paragraph 18(b) contains requirements for the exchange of information relative to a claim. The *Discussion* section of this decision reprints and discusses these provisions.

The Department advised that the discovery should be conducted with a minimum of inconvenience, disruption and expense to all parties. DART was requested to appoint one or more knowledgeable officials to assist the Claimants in their discovery, and the Claimants were allowed to select one DART official for the purposes of a written or oral deposition. Counsel for the Claimants and DART were asked to formulate and agree on a plan and schedule for discovery and communicate such to the Department within fourteen calendar days of the scheduling order. The discovery was to be completed within thirty days thereafter.

The parties did not formulate and agree on a plan and schedule for the discovery as required in the Department's scheduling order. Fifteen days into the 30-day discovery period, the Department received a letter from the Claimants' counsel alleging "stonewalling and/or discovery abuse" on the part of the Respondent. The communication requested enforcement of the Department's scheduling order as it pertained to the appointment of a knowledgeable DART official to assist the Claimants in their discovery and the identification and production of documents. The Claimants also requested an extension of the deadline for the completion of discovery, in view of the lack of any dialogue to date with DART's counsel. DART, on the other hand, blamed any delays on the Claimants.

In response to this sparring, the Department reproached the parties for not formulating and agreeing on a plan and schedule for discovery. The extension request was denied, and the Department warned the parties that failure to comply with the instructions in the scheduling order could result in an adverse inference being drawn in the arbitration against the responsible party.

During the course of discovery DART refused to answer general questions, which it characterized as "interrogatories." When the Claimants asked that DART identify certain categories of documents so that the Claimants could judge their relevancy to the discovery, DART judged the request as not specific enough for reply. Approximately five days before the end of the discovery period DART recognized an inquiry from the Claimants as specific and partially within the scope of the Department's discovery order. DART then provided the Claimants with certain records of grant dispersals and expenditures of FTA funds from 1998 through 2005. Subsequently, DART provided the Claimants with copies of its December 2001 and May 2003 maintenance cure orders, FTI's responses to the December 2001 order, maintenance work orders, and descriptions of costs incurred by DART in the repair of buses used by FTI, all of which it characterized as beyond the scope of the discovery. DART then pronounced that it had fully satisfied the document production requirements of the Department's scheduling order.⁹

⁹ Well after the discovery period, and nearly one month after the Claimants' final brief, the Respondent placed in the record a short cost-benefit analysis of several options concerning the

In a letter to DART, following the deposition of its Chief Financial Officer and shortly before the end of the discovery period, the Claimants pointed out that they had been provided with only a small portion of the documents they requested. They listed eight documents or classes of documents still needed for their final brief. Among them were general ledger entries concerning the termination of the FTI contract and repair of FTI buses; cost-benefit and planning information concerning the contract termination; bus replacement schedules and general ledger data on certain bus purchases; documents concerning improvements to DART's physical plant; and documents involved in the contract termination and settlement payment.

In their final brief, the Claimants alleged that "DART systematically failed to adhere to the Department's directives with regard to discovery, and the failure to produce documents robbed Claimants of the opportunity to do a true forensic accounting evaluation." Consequently, they petitioned the Department to sanction DART by assuming that the documents not produced would benefit the Claimants' case. The Claimants subsequently objected to the close of the record in this arbitration until DART produced the documents they had requested and they were given a second opportunity to depose a DART official based on the new documents. DART, on the other hand, stated that its participation in the discovery both exceeded the requirements of the Department's scheduling order and provided more information than the Claimants could reasonably anticipate. Following its final brief, DART filed a counter objection to the Claimants' objection and moved that the record be closed.

Following a 15-day notice to the parties, the Department closed the record in the arbitration. The objections and counter objections were noted, and it was stated that they would be dealt with in the Department's final decision.

DISCUSSION

Paragraph 16(b) of the September 1992 Addendum contains a burden of proof typical of protective arrangements under 49 U.S.C. Sec. 5333(b) of the Federal Transit law. The burden of proof is essentially a three step process that requires the Claimants, at the first step, only to identify the Federal project or use of Federal funds that affected them and state the circumstances of the project alleged to have brought about their harms. The second step of the burden of proof requires DART to prove that factors other than a Federal

potential termination of FTI's service contract. The existence of this document had been disclosed during the Claimants' deposition of DART's Chief Financial Officer and was requested by the Claimants thereafter, during the period of discovery.

project affected the Claimants. If this is accomplished, the Claimants must prove that Federal funds affected them, at least in part, in order to prevail.

The Claimants, in this case, have satisfied their initial burden by identifying FTA Project TX-90-X582 and other Federal grants and describing how those Federal funds allegedly caused or supported DART's termination of the FTI contract and assumption of the FTI operations, which caused them to lose their jobs completely or to be terminated from FTI and rehired by DART at significantly reduced wages and benefits. As set forth more fully above in the section regarding the Claimants' position, they alleged that they were harmed because DART used Federal funds from FTA grant TX-90-X582 and others to purchase buses that replaced those formerly operated by FTI, repair and rehabilitate buses formerly operated by FTI, improve maintenance and other facilities previously used by FTI, hire and train replacement employees, and fund the closeout payment to FTI for early termination of the contract.

DART's responsibility at the second step of the burden of proof is "to establish affirmatively that such effect was not a result of the Project, by proving that factors other than the Project affected the [Claimants]." (Paragraph 16(b), September 1992 Addendum.) In this instance, DART has asserted that its termination of the FTI contract and assumption of the service was motivated by a significant reduction in sales tax revenue and deficiencies in FTI's maintenance of DART equipment. However, DART cannot meet its burden simply by articulating reasons unrelated to Federal funding; rather, DART must demonstrate that the sales tax shortfall and deficient maintenance caused it to cancel the contract with FTI and bring that operation in-house. Although the record in this arbitration is replete with documents which, on their face, show that DART faced serious financial challenges and performance problems related to FTI's maintenance of DART's equipment, it is not possible to determine whether DART has successfully supported its assertion without reviewing evidence that may counter DART's position.

The Claimants sought discovery in order to obtain evidence that would disprove DART's alleged reasons for terminating the contract, as well as prove their claim at the third step of the burden of proof that Federal funding played a role in DART's termination of the FTI contract and takeover of its service. The discovery process operates within the framework provided in the protective arrangements, which in this case is broadly stated. Section 11, Paragraph 16(a) of the September 1992 Addendum contains a general recordkeeping requirement which reads in pertinent part as follows:

The Public Body and private transit employer (as appropriate) shall maintain and keep on file all relevant books and records in sufficient detail as to provide the basic information necessary to the determination of claims arising under these conditions.

Additionally, Section 12, Paragraph 18(b) of the September 1992 Addendum contains a general requirement for the exchange of information relative to a claim. The relevant portion of Section 12, Paragraph 18(b) reads as follows:

[T]he parties shall exchange such relevant factual information in their possession as may be requested of them, and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual information as may be relevant.

While the determination regarding Mr. Lindsey's standing to file this claim was pending, DART displayed an extreme reluctance to provide information requested by the Claimants concerning the cancellation of the FTI contract and assumption of its service. Even after the Department affirmed the Claimants' standing in its October 11, 2005 Interim Decision, however, DART was still less than forthcoming in responding to the Claimants' initial questions and did not provide its minimal response to the Claimants until December 2005, nearly two months later. The Claimants' subsequent efforts to obtain information from DART also met with resistance.

On March 26, 2007, the Department issued a discovery and scheduling order as described in the *Discovery* section of this decision. The Department's order reflected the broad scope and cooperative spirit manifested in the requirements of the protective arrangements at Section 11, Paragraph 16(a) and Section 12, Paragraph 18(b). Unfortunately, the discovery did not proceed in an orderly fashion, despite the protective arrangements and the instructions in the Department's order.

The Department's scheduling order provided that counsel for the Claimants and DART agree on a plan and schedule for discovery within fourteen calendar days of the order. The scheduling order further required that the parties communicate their plan and schedule to the Department. This was not done, apparently because no real plan or schedule was ever concluded.

The Claimants bear some responsibility for the lack of a discovery plan, since they apparently did not contact the Respondent's counsel until at least 7 days into the 14-day planning period.¹⁰ However, once contacted, the Respondent did not designate a knowledgeable official at DART to assist the Claimants in

¹⁰ There appears to be some disagreement in the record as to when the Respondent was contacted. The Claimants reference telephone contact with the counsel for DART on April 2, 2007. A letter dated April 9, 2007, from Claimants' counsel to DART's counsel is on the record, as is a letter to the Department from DART's counsel referencing contact with a paralegal from the counsel for the Claimants' office on the same date. However, in an April 13, 2007 letter, DART's counsel states that the Claimants have yet to contact him to discuss a plan or schedule for discovery.

their discovery until April 24, 2007, long after the April 9 end of the planning period and the 15th day of the 30-day period the Department allotted for the actual discovery. Additionally, when requested, DART's counsel would not advise the Claimants on the appropriate DART deponent, stating, incorrectly, that the Department had mandated that the selection be made solely on the basis of the Claimants' judgment.¹¹ Furthermore, the Claimants' April 9 request for DART's identification of categories of documents evidencing the procurement or use Federal funds was apparently ignored in DART's reply of April 13. DART appeared to be unresponsive to all requests from the Claimants to identify classes of documents and recordkeeping procedures so that the Claimants could refine their document requests. These are all matters that the parties should have decided in the 14-day planning period mandated by the Department.

With regard to the production of documents, the Department's scheduling order gave the Claimants authority to examine "FTA grant dispersals, DART expenditures of Federal funds, and related matters which may have affected them." DART took a very narrow view of this authority and responded only to document requests it deemed adequately specific. Demanding specificity is not a substitute for the planning mandated by the Department's scheduling order. This placed too heavy a burden on the Claimants, who could not be expected to know the details of FTA's reimbursement procedures and DART's accounting system.

DART provided the Claimants with DART grant proposals and awards, Department certifications of FTA grants, records of FTA dispersals under the grants, and documents concerning FTI's failure to properly maintain DART's buses. It did not, however, provide the Claimants with many other requested records, which may have been "DART expenditures of Federal funds and related matters" included in the Department's scheduling order. Such documents included general ledger entries, cost-benefit and planning documents, bus replacement schedules, records concerning improvements to DART's physical plant, documents reflecting FTI's response to the May 2003 deficiency notice, and documents involved in the contract termination and settlement payment. Importantly, DART simply ignored these requests and presumptuously declared the Department's scheduling order satisfied. It did not take the opportunity during the planning period to reach an understanding with the Claimants on these other requests or to challenge them. DART did, in its final brief, cite the admonition in the Department's scheduling order that, "The discovery should be conducted with a minimum of inconvenience,

¹¹ The Department's scheduling letter read, "Claimants may select one DART official, who in the Claimants' judgment is thoroughly aware of matters involved in the discovery, for purposes of a written or oral deposition." The Department, by permitting the Claimants to select a deponent, did not relieve DART of its obligation under the 1992 Addendum to provide "such relevant factual information in their possession as may be requested of them," including the identity of individuals with knowledge of pertinent facts.

disruption and expense to all parties.” Relying on this admonition, DART then stated that a complete response to the Claimants’ requests would have resulted in “extreme inconvenience, disruption and expense.” This may or may not have been true, but the time to surface such an allegation is in the discovery phase of the claim, not in the final brief.

DART’s unilateral action of simply ignoring the Claimants’ requests and running out the clock on the discovery burdened the adjudication of this claim and violated Section 12, Paragraph 18(b) of the protective arrangements. Because DART failed to provide any of the internal financial records that the Claimants requested, and thus deprived the Claimants of the ability to challenge DART’s financial justifications, DART cannot defend its actions on any financial or economic basis. Therefore, the only justification that will be considered in this arbitration will be DART’s argument that it terminated the FTI contract and brought the service in-house because of FTI’s poor maintenance of the DART-owned equipment. All other arguments by DART are disallowed.

In support of its position, DART has shown that in November 2001 it conducted a statistical process control [SPC] inspection of 30 buses at two FTI-run facilities, revealing that every bus was in a substandard state of repair. DART notified FTI in December 2001 that the maintenance level on the buses maintained at those facilities was unsatisfactory and, if the deficiencies were not corrected, FTI was at risk of losing its contract with DART. Although FTI alleged that many of the problems identified appeared to result from unilateral changes by DART to the performance requirements of its contract and/or contract ambiguities, FTI set up a detailed work plan to address all of the defects within 60 days.

DART conducted another SPC inspection of FTI’s buses in March 2003. In May 2003, DART reported that its inspection of 28 buses disclosed, by extrapolation, that 89% of the buses operated by FTI were noncompliant with the contractual standard. Further, DART stated that many of the issues identified in its December 2001 notice to FTI remained uncorrected. DART demanded that within 10 days FTI, under risk of losing its contract, complete all outstanding work orders, submit a plan to bring all buses up to the contractual standard, and submit a plan to preclude recurrences of substandard maintenance.

As acknowledged above, the Claimants sought unsuccessfully through the discovery process to obtain documents concerning FTI’s response to the May 2003 maintenance deficiencies notice in order to challenge DART’s position that it cancelled the FTI contract and brought the service of those routes in-house for reasons unrelated to Federal funding. However, an adverse inference will not be drawn from DART’s failure to provide these documents (or to certify that no such documents exist). Whatever documents may exist regarding FTI’s

response to the May 2003 cure notice would not alter the fact that DART twice (in December 2001 and May 2003) issued cure notices to FTI because of what DART judged to be substantial maintenance deficiencies. DART provided the Claimants with cure notices sent to FTI and lists of defects found in individual buses during DART inspections of its vehicles operated by FTI. Before the close of the discovery period, DART provided the Claimants additional information concerning the cure notices, responses to the 2001 notices from FTI, and a list of work order numbers and repair costs that DART associated with FTI buses. Considering both the requirements of the protective arrangements and its scheduling order, the Department finds that these materials were provided to the claimants in a timely and appropriate manner.¹² DART successfully demonstrated that FTI was unable to sustain a level of maintenance that satisfied DART, which potentially affected DART's ability to comply with FTA standards concerning the useful life of FTA funded vehicles. Thus, DART has established that the FTI contract was abrogated for performance reasons which were unrelated to any Federal funding.

Accordingly, DART having shown that it cancelled the FTI contract and brought the routes in-house for a reason unrelated to Federal funding, i.e. poor maintenance of DART's equipment, the burden has shifted to the Claimants, under the third step of the burden of proof framework, to prove that Federal funding did play a role in the harms to their employment.

In turn, the Claimants maintain that DART's failure to provide the information they requested concerning DART's expenditures of Federal funds should result in an adverse inference that the documents, had they been produced, would have supported the Claimants' position. An adverse inference will not be drawn in this instance because it does not appear that the financial records the Claimants sought could have demonstrated that Federal funds were used to facilitate cancellation of the FTI contract and assumption of the service. While general ledger data could potentially show every source of DART's revenue and every expenditure, it is unclear what this would contribute to the Claimants' case. The Claimants have made vague allegations that operating and capital funds at DART were "inexplicably intertwined," but such is improbable, with respect to Federal funds, due to FTA's grant award and reimbursement procedures.¹³ Additionally, even though documents involved in the FTI contract

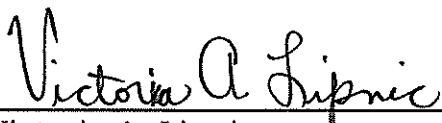
¹² Ironically, DART characterized this additional information as "as beyond the scope of discovery production requirements."

¹³ FTA Circular 5010.1C, which concerns procedures for grants and reimbursements to transit agencies, states that "[a] grant obligates the grantee to undertake and complete activities defined by the scope and budget as incorporated in the grant agreement." Generally, any major reprogramming of funds permitted under these requirements results in a grant amendment or new grant and requires a new Department of Labor certification of labor protective conditions. DART has provided the Claimants with all FTA grant awards and all Department certifications for the years requested, and no such reprogramming has been alleged.

termination and settlement payment would highlight the moneys involved, such would be considered operating expenses by the Department in the context of a contract for operating service. Records concerning improvements to DART's physical plant might be instructive, but the Claimants have not described these improvements as necessary or involved in any significant way with the assumption of FTI's service by DART. Likewise, any general ledger or other information regarding the repair of DART buses previously operated by FTI would not seem to be relevant. Minor repairs to the buses would certainly be classified as an operating expense and, therefore, outside the purview of this arbitration. Major bus rehabilitations, though potentially capital in nature, would be necessary for DART's continued use of the vehicles in accordance with FTA useful life standards and do not appear to have any special significance for DART's decision to take over FTI-operated service, even if such expenditures reduced the overall savings from the abrogation of FTI's contract. Finally, bus replacement schedules would seem superfluous, because bus purchases and deliveries that actually occurred are already on the record, and the significance of the new buses is unclear. All the buses, whether operated by FTI or DART, were owned by DART, the new buses are used in the same service, and they have not changed materially in kind or character. In these circumstances, the buses seem to be a constant, whether or not they were purchased with Federal funds.¹⁴

DECISION

The Respondent has shown that the FTI contract was terminated for performance reasons. The Claimants, on the other hand, have been unsuccessful in proving that Federal funds were used to abrogate the contract or facilitate the resulting takeover of FTI service by DART, thereby affecting their employment. This claim is therefore denied and dismissed with prejudice.


Victoria A. Lipnic
Assistant Secretary of Labor

¹⁴ See *Debra Fuller et al. v. Greenfield and Montague Transportation Area and Franklin Regional Transit Authority*, DEP Case No. 81-18-16, April 13, 1987, Employee Protections Digest, p. A-384, where it was ruled that buses which were purchased with Federal funds to replace worn out buses and which would be used to provide the same service previously operated by the employer of the affected employees were a constant and therefore not the cause of the employees' harms.