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MEMORANDUM

Via overnight delivery or First Class Mail

TO: Leo McCann, Don Hahs, Freddie Simpson, George Francisco,
Bob Scardelletti, Mike O'Brien, Gary Maslanka, Mike Giansante

FROM: Richard S. Edelman

RE: MBTA Commuter Rail--Pass Claims

DATE: October 20, 2005

We have received an adverse decision from Arbitrator Fishgold on the spouse/dependent pass claims. The arbitrator skipped over the issues of whether use of rail passes by spouses and dependents was a right, privilege and benefit protected by the 13 (c) Agreement and MBTA's argument that continuation of the rail pass benefit is barred by State law. However, he accepted MBTA's arguments that the loss of the pass right was not causally connected to the change in operator because Amtrak made its own decision to withdraw from the bid process, and that the employees were not harmed because they were actually better off under the MBTA agreements.

In so holding, the Arbitrator agreed with MBTA that a 2001 DOL 13(c) decision in a case where a bus company decided not to bid to continue as an MBTA contractor was applicable here. We had argued that that case was distinguishable from our case which was more like the Zack case. However, the Arbitrator disagreed. He said that Amtrak's withdrawal citing financial concerns made this case more like the DOL bus decision and less like the 1987 change from B&M to Amtrak. He also noted that the facts here regarding actual employee harm are different from the Zack case because there the employees suffered 10% pay cut whereas here the changes in wages and other benefits were such that the overall package of wages and benefits following the change in operator were superior to those that had been provided by Amtrak. Mr. Fishgold

cited DOL precedent that for purposes of assessing harm under 13 (c), it is appropriate to look at waged and benefits in the aggregate. After reciting the various ways in which the MBCR agreement provides better compensation than the old Amtrak agreement (and the current status quo on Amtrak) the Arbitrator concluded that there was a loss or adverse effect from the Federal projects.

If anyone has any questions or concerns about this case, please contact me.

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**ARBITRATION PURSUANT TO 13 (C) AGREEMENT
AND CLAIMS PROCESSING AGREEMENT
ARBITRATOR HERBERT FISHGOLD**

American Train Dispatchers Association)
Brotherhood of Locomotive Engineers and Trainmen/IBT)
Brotherhood of Maintenance of Way Employees Division/IBT)
International Brotherhood of Electrical Workers System Council #7)
National Conference of Firemen and Oilers/SEIU)
and Transport Workers Union of America.)

-and-

Massachusetts Bay Transportation Authority)
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OPINION AND AWARD

The instant arbitration arises out of claims by the Rail Unions parties to this case against the Massachusetts Bay Transportation Authority (MBTA) under the parties' Federal Transit Act "13 (C) Agreement". The Unions seek an order requiring MBTA to reinstate an alleged long-standing rule and practice under which spouses and dependents of commuter rail workers were entitled to free commuter rail passage by rail pass. The Unions allege that MBTA deprived the claimants of that right when MBTA charged the operator of its system from the National Passenger Rail Corporation ("Amtrak") to Massachusetts Bay Commuter Railroad ("MBCR").

BACKGROUND

In order to place the instant grievance in its proper context, it is necessary to provide, in some detail, the background leading up to its filing.

MBTA operates an extensive system of bus, subway, light rail, and commuter rail service throughout. Beginning in the early 1970's, MBTA first began subsidizing private railroads, including the Boston & Maine (B&M), that had historically operated their own rail passenger service in the Commonwealth of Massachusetts.

Over time, utilizing Federal funding under the Federal Transit Act (FTA), formerly the Urban Mass Transportation Act (UMTA), MBTA purchased certain assets of the B&M and other bankrupt private rail carriers including rights-of-way, equipment, and terminals, which enabled MBTA to incorporate commuter rail service into its overall public transportation system.

As a result thereof, B&M served as the MBTA's contract operator from 1976 to 1987, when it was replaced by Amtrak. Amtrak then provided commuter rail service under contract with the MBTA until 2003, when it was replaced by the MBCR, effective July 1, 2003, pursuant to a competitive procurement process.

The MBTA included two fundamental requirements in its Request for Proposals (RFP) in the 2002 - 2003 commuter rail procurement process, specifically designed to address the concerns of the Rail Unions. First, the successful proposer was required to establish employment positions for unionized employees equal to the number of positions in existence on March 1, 2002 with the then commuter rail services provider Amtrak, and to fill those positions in seniority order from rosters of eligible union employees. Second, the successful proposer was required to establish initial terms and conditions of employment in accordance with mandatory labor terms and conditions that existed at Amtrak (which were set forth in an Exhibit to the RFP), and was further required to negotiate collective bargaining agreements that included, without limitation, each of the mandatory labor terms and conditions. The mandatory terms and conditions to be imposed were identified by the MBTA, in consultation with the Rail Unions, after extensive review of Amtrak labor contracts, rules, and side letters. These terms and conditions covered the essential elements of the employment relationship, specifically: (1) union recognition and representation; (2) wages; (3) jobs classifications; (4) health and welfare benefits; (5) hours of service; (6) railroad retirement; (7) railroad unemployment insurance; (8) seniority; (9) vacation leave; (10) holidays; (11) bereavement leave; (12) jury duty; (13) discipline; (14) grievances; and (15) uniforms. Notably absent from this list is any reference to a pre-existing "right" to free transportation for spouses and dependents. These RFP requirements were subsequently included in the Commuter Rail Operating Agreement between MBTA and the selected proposer MBCR.

MBTA and the rail unions negotiated a Claims Process Agreement to handle any 13 (C) Agreement claims that might arise in connection with the change from Amtrak to MBCR. That Agreement stated that "The parties further agree that (1) solely by entering agreements with MBCR, the Rail Unions do not thereby waive any claims that any of their members may have against MBTA in connection with the 2003 Contractor Change; and (2) the MBTA maintains its ability to rely on an agreement between a Rail Union and MBCR as a defense to a particular claim" MBTA did not acknowledge that the change gave rise to any liability under the 13 (C) Agreement or that any employee was adversely affected by that change.

The Claims Process Agreement also stated that, by entering the Claims Process Agreement, the Unions did not waive any argument that the 13 (C) Agreement would have required a three-way implementing agreement among the Unions, MBTA and MBCR; and that no member claims in connection with the change from Amtrak to MBCR were waived.

MBTA's agreement with MBCR mandated that MBCR offer jobs to the Amtrak commuter rail workers consistent with their crafts and seniority ranking, and that MBCR adopt certain specified elements of agreements between the Unions and Amtrak, but did not require MBCR to participate in implementing agreement negotiations and arbitration (in advance of commencement of operations) under Section 5 of the 13 (C) Agreement. MBTA did not agree to 13 (C) Agreement implementing agreement negotiations; and the MBTA-MBCR agreement entered in February of 2003 called for discussions between MBCR and the Unions to begin 10 days after a "notice to proceed" was given, with operations to begin on July 1, 2003.

The discussions between MBCR and the Unions resulted in "implementing agreements", which generally stated that the existing Rules Agreement between each Union and Amtrak "will continue to apply to the operations and service which MBCR is to provide the MBTA Commuter Railroad except as specifically provided herein". The agreements stated that they satisfied the requirements of the MBTA-MBCR Operating Agreement; that the agreements did not provide additional pay or benefits that were not applicable under the Amtrak agreement unless expressly specified; and the agreements then identified express modifications, if any, to the Amtrak agreements.

POSITIONS OF THE PARTIES

Briefly stated, the Unions argue that use of rail passes by spouses and dependents is a right, privilege and benefit protected by the 13 (C) Agreement; that it was an established right and benefit of commuter rail workers prior to the change of operator to MBCR; and the loss of the ability of spouses and dependents to use rail passes was "a result of" one or more Federal funded projects, within the meaning of the 13 (C) Agreement; and that the Unions did not waive the rights of their members to spouse and dependent rail passes by their negotiations with MBCR.

MBTA contends that the record fails to support the Unions' claims herein. In support of its position MBTA maintains that (1) Amtrak (and other MBTA contract operators) had no authority to set MBTA fare policy regarding free passage, and that the established policy by the MBTA did not allow

spouses and dependents of commuter rail employees to ride free; (2) the "right" to free passage was not a collectively bargained right included in a collective bargaining agreement at the time of the MBCR transition; (3) the alleged "right" to free passage was not carried forward as a collectively bargaining right in the negotiation of new labor agreements between the Rail Unions and MBCR; (4) the alleged "right" to free passage was not lost or otherwise adversely affected as a result of a Federal project; and (5) the commuter rail employee-claimants did not suffer any actual economic harm, in terms of overall wages and benefits, due to the transition to MBCR; in fact, they are better off financially because they took jobs with MBCR.

DISCUSSION

The thrust of the Rail Unions' grievance is that (1) the use of rail passes by spouses and dependents is a right, privilege and benefit protected by the 13 (C) Agreement; (2) it was an established right and benefit of commuter rail workers prior to the change of operator to MBCR; and (3) the loss of the ability of spouses and dependents to use rail passes was "a result of" one or more Federal funded projects, within the meaning of the 13 (C) Agreement.

In their post-hearing submission, the Unions summarized their basic argument as follows:

....This is not a case where the Unions are trying to assert that Section 13 (C) overrides a State law that is a specific bar to the right claimed. Nor is it a case where the Unions seek to enforce a bargaining procedure that is contrary to State law or to preserve a bargaining process in perpetuity. The Unions seek only the preservation of a pre-existing substantive contractual right and benefit where there was no contractual elimination of that benefit..."
(p. 48)

The parties dispute whether the "right" to free passage is a collectively bargained right covered by 13 (C) (1) and (2) since it is arguably based on Amtrak's company policy, and is not included as a "right" or "benefit" in the agreements reached between MBCR and the Rail Unions.

While MBTA maintains it has the sole authority to set fares and to determine what class of riders may be entitled to free transportation, the record indicates that agreements between the Unions and B&M specifically provided for free transportation, and that, when Amtrak was the contractor providing commuter rail service for MBTA, free transportation was provided pursuant to company policy, not pursuant to a collective bargaining agreement. It is also undisputed that MBTA never provided such free transportation

to its workers, nor were the Unions successful in attaining it through collective bargaining; moreover, neither the Unions nor MBCR raised the issue in their negotiations.

While a detailed analysis of these respective positions would eventually determine whether, in fact, there was an existing "right" to free passage, that would not end the arbitral inquiry herein. Even assuming, for purposes of argument, that the "right" to free passage was a "right" or "benefit", as contemplated by 13 (C) in order to prevail on a 13 (C) claim, the claimant must show that the alleged harm, herein, the loss of a "right" to free transportation, was caused by a Federal project. The statutory language of 13 (C) requires that "the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable" (Emphasis added). In adopting this position in UTU v. Brock, the U.S. Circuit Court for the District of Columbia, held that "the only interests protected by Section 13 (C) are those affected by the financial assistance sought". 815 F.2d.1562, 1564 (D.C. Cir. 1987)

Moreover, the terms of the MBTA's 1973 13 (C) Agreement specifically require that a 13 (C) claim for a dismissal or displacement benefit must establish that the employee harm was caused by a Federal project; that an employee was "placed in a worse position with respect to compensation as a result of the Project. (¶ (6) (a)). In addition, paragraph 3 (b) requires the MBTA to protect the rights, privileges, and benefits of service area employees against any worsening that occurs "as a result of the Project". (emphasis added).

This "causation" requirement of a causal connection between the employee harm alleged and a Federal project has also been recognized in the DOL's rulings on 13 (C) disputes, including decisions rendered by the undersigned Arbitrator. See, e.g., Smith v. Mid Mon Valley Transit Authority, OSP Case No. 91-13 (C)-19 (1992) ("It is not sufficient for a Claimant to merely identify an UMTA project and a worsening of position with respect to his employment"; there must be a causal connection); Amalgamated Transit Union, Local 1388 v. Dallas Transit Systems, OSP Case No. 81-13 (C)-6 (1992) ("[I]n the absence of any facts to support a finding that the worsening of employment conditions resulted from the UMTA funding, and in light of the substantial evidence to support other explanations for the worsening of the Union's employment conditions, [no violations].")

The Unions' principle argument is that the loss of the spouse/dependent pass benefit/privilege was a result of a project under the 13 (C) Agreement. The Unions maintain that the 13 (C) Agreement has a broad scope of coverage, such that it applies to actions that are "a result of the [federally funded] project", including any changes, "whether organizational, operational, technological or otherwise that are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto or facilitated thereby".

They then trace the federal funds granted to the MBTA subject to the 13 (C) Agreement, beginning with the MBTA 1976 acquisition of its commuter rail system, B&M, with Federal assistance, and the intervening grants of assistance the MBTA received for this commuter rail services enabling it to maintain, upgrade and extend the system to-date.

Based on the above, the Unions claim that the change in commuter operator from Amtrak to MBCR was a result of the projects cited, and that the loss of free rail transportation by rail passengers was a direct result of the change in system operator: to wit, if MBTA had not made the change in operator, the pass rights would have continued.

Their primary reliance in support of their conclusion is the 1998 arbitration award by Arbitrator Arnold Zack, growing out of the MBTA's change in commuter rail operator from B&M to Amtrak. He concluded that there was a reduction in pay for commuter rail workers that flowed from MBTA's change from B&M to Amtrak (which had lower pay rates than the B&M), which was "a result of the project":

...[T]he phrase "as a result of the project"...clearly covers events occurring...subsequent to the project...[I]t follows that although that Phase II funding applied to the land acquisition for what was the B&M right of way, it was that funding project which placed the Employer in the position where it could entertain bids for the continuation or replacement of the B&M as operator...[Therefore], the operational change arose out of and was "traceable to the assistance provided" in the 1976 funding.

The MBTA, for its part, primarily relies on the 2001 DOL decision in ATU Local 1146 v. MBTA, OSP Case No. 92-13 (C) - 1 (herein-after the "Rapid Transit" case), wherein the DOL denied 13 (C) claims on facts the MBTA contends are very similar to those presented in the instant case. Notwithstanding the Union therein, as here, having cited a long list of grants received by the MBTA over the years, DOL dismissed the 13 (C) claims, finding that the Union had "not specified facts that would show an arguable causal relation between the grants and job loss, and therefore has not satisfied its burden of proof". Rather,

the DOL found that the "job loss was not the result of these grants but was instead the result of Rapid Transit's decision not to bid on the July 1, 1991 contract for the Winthrop to East Boston service".

DOL noted that while Federal grants were used to purchase buses and equipment used in that service, it concluded that "any such use did not cause Rapid Transit employees to lose their jobs", but rather that the employee harm occurred because "Rapid Transit was unable to bid on the contract because its costs were increasing, not because MBTA had received Federal funding", citing other cases in which it was held that the harm to employees was not causally related to federal projects but rather financial or other problems internal to the companies caused the harm. Finally, the Department addressed the Zack decision in ATU Local 1146 v. MBTA, and, in referring to Zack's board causation analysis, found it not to be binding precedent on the Department, stating it "will not be followed to the extent it is inconsistent with the analysis [in the Department's decision]".

Based on the above analysis, MBTA argues that the Department's decision in ATU Local 1146 v. MBTA should be controlling in rendering the Arbitrator's decision herein, maintaining that the facts therein are consistent with those presented herein. In that regard, MBTA contends that (1) both cases involved a transition in contractors for MBTA transit services; (2) in both, the incumbent contractor did not bid in the procurement and did not seek to remain the provider of services; (3) the incumbent contractors cited financial reasons, including the fixed price contract structure, as the reason for not bidding; (4) the 13 (C) protective agreement being applied was the MBTA's 1974 13 (C) Agreement; and (5) the unions involved cited a long list of Federal grants spanning many years and argued that the use of Federal grants to purchase assets used in the service was sufficient to create 13 (C) liability.

Applying the rationale of the Department as expressed in ATU Local 1146 v. MBTA, the Arbitrator finds that a similar analysis avails itself here. In the instant proceeding, the record demonstrates that Amtrak did not bid in the procurement because of its concerns that would, in Amtrak's view expressed in its letter of July 30, 2002, make it "impossible to develop a reasonable pricing strategy to control risk"; that it "does not have the flexibility or fiscal resources to gamble on a five-or-ten-year fixed price contract". In an attachment to that letter, Amtrak listed the "significant burdens and costs" that precluded it from bidding, e.g., indemnification and liability provisions, penalties for failure to perform contractual obligations, environmental responsibilities, and long term fixed price contract situations. Accordingly, the

Arbitrator herein concludes that Amtrak chose not to bid due to financial concerns similar to those of Rapid Transit, specifically the perceived increasing costs associated with a level funding contract, and that Amtrak's withdrawal was not an event that gives rise to any 13 (C) relief.

In reaching that conclusion, the Arbitrator also notes that the facts at issue herein with regard to actual employee harm is clearly distinguishable from those at issue in the Zack arbitration. There was actual employee harm in the Zack decision: the transition from the B&M to Amtrak resulted in the wages of the affected employees being reduced by 10%. Herein, the employees transitioning from Amtrak to MRCR received significant wage increases amounting to 20% over five years. In that regard, after the transition, the overall wages and benefits enjoyed by the Claimant employees are superior to the economic package they were provided by Amtrak, their former employer.

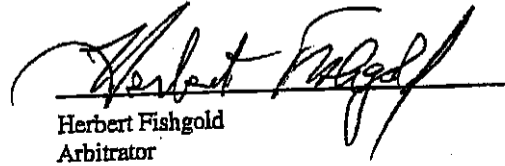
Indeed, DOL has determined that the appropriate test is to look at wages and benefits in the aggregate, not just a single benefit that has been lost or reduced, in assessing whether an employee has been "harmed" for purposes of 13 (C). See, e.g., Employees v. Metropolitan Suburban Bus Authority, DEP Case No. 75-13c-1 (1975) (loss of 5 days of annual leave in a transition of services/takeover "equitably offset" by the substitution of personal leave days, salary increases, and additional holidays); Povlitz v. Maryland Mass Transit Administration, DEP Case 78-13c-54 (1980).

Finally, MBCR not only replicated Amtrak wages and benefits, it enhanced the employees' wages by providing a 5% wage increase on July 1, 2003, by providing additional 5% increases through 2007 (for a total of 20% over five years), and by providing a \$1000 incentive bonus to employees who took a MBCR job. The record further shows that the MBCR wages are an improvement over what the employees would have received, through 2007, if they had remained at Amtrak. See Tr. Vol I at 42.

Based on all of the above, the Arbitrator finds that, even if the free passage for spouses and dependents of commute, rail employees constituted a "right" or "benefit" subject to protection by Section 13 (C), the record fails to support any finding that this "right/benefit" was lost or otherwise adversely affected as a result of a Federal project.

AWARD

The 13 (C) claims brought by the Rail Unions in this arbitration seeking free transportation on MBTA commuter rail service for the spouses and dependents of certain unionized commuter rail contractor employees are denied.


Herbert Fishgold
Arbitrator

October 17, 2005