WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
BOARD OF ARBITRATION
PURSUANT TO INTERSTATE COMPACT § 66(c)

In the Matter of the Arbitration Between:
AMALGAMATED TRANSIT UNION,
LOCALS 689 & 1764

and

Grievance:
MetroAccess Reorganization

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

Before: M. David Vaughn, Esq., Neutral-Arbitrator
Douglas Taylor, Esq., Labor Organization-Arbitrator
Anthony Anderson, Esq., Authority-Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to § 66(c) of the *Interstate Compact* ("Compact") jointly an simultaneously enacted by the Commonwealth of Virginia, the State of Maryland, the District of Columbia ("Parties to the Compact") and enacted by the United States Congress ("Congress"), pursuant to the United States Constitution, Article, § 10, creating the Washington Metropolitan Area Transit Authority ("WMATA" or "Authority") effective February 20, 1967. The Parties to the proceeding are WMATA and the Amalgamated Transit Union, Locals 689 and 1746 ("ATU" or "Unions") (Collectively WMATA and the Unions are the "Parties" to the proceeding).

The employees involved in this dispute are represented for collective bargaining purposes by ATU Locals 689 and 1746 pursuant to certifications issued by the National Labor Relations Board ("NLRB"). The affected employees are employed by several WMATA Contractors including: Diamond Transportation ("Diamond"); First Transit, Inc. ("First Transit"); MV Transportation, Inc. ("MV"); MTM, Inc. ("MTM"); and Veolia North America ("Veolia") together, these employers are referred to collectively as the "Contractors". These Contractors provide a variety of services delivering WMATA's para-transit services, known as MetroAccess.

This dispute comes before a Board of Arbitration ("Board") at the Order of Judge Paul W. Grimm, United States District Court for the District of Maryland ("Grimm Decision").[1] In the underlying litigation before Judge Grimm, the Plaintiffs, ATU Locals 689 and 1764, sought to compel the arbitration of claims against the Defendant, WMATA, concerning asserted notice requirements arising from changes to working conditions, a reorganization, as a result of WMATA entering into new contracts for MetroAccess services. ATU argued the dispute was subject to arbitration under several protective arrangements of the Urban Mass Transit Act of 1964, § 13(c) of UMTA and the Compact § 66(c). WMATA disputed ATU's assertion that the claims were subject to arbitration.

On cross-motions for summary judgment, Judge Grimm denied WMATA's Motion for Summary Judgment and granted ATU's Motion for Summary Judgment to compel arbitration pursuant to Compact § 66(c) before a tripartite WMATA Board of Arbitration ("Board").

Judge Grimm concluded,

> I find that, although Plaintiffs have not shown that any employee protections agreement applies, the dispute nevertheless falls under the arbitration provision of the WMATA Compact and accordingly, I grant summary judgment to Plaintiffs. (Grimm Decision, p. 2)

Pursuant to Compact § 66(c), M. David Vaughn was selected as neutral Chair of the Board. Douglas Taylor is the Union-appointed Arbitrator and Anthony Anderson is the Authority-appointed Member. Consistent with the practice of the Parties, Mr. Taylor, of the law firm of Gromfine, Taylor and Tyler, and Mr. Thompson, of the law firm of Thompson Coburn LLP, served also as the advocates for their respective Parties. Kathleen E. Kraft, Esq., also of Thompson Coburn LLP, served as co-counsel with Mr. Anderson; Brian Connolly, Esq., of Gromfine, Taylor and Tyler, and Jessica Chu, Esq., ATU Associate General Counsel, served as co-counsel with Mr. Taylor.

---

[1] *Local 1764, Amalgamated Transit Union*, et al v. WMATA, PWG-14-334.

On August 3, 2015, on the eve of the first day of hearing, WMATA filed a *Motion to Exclude Evidence, and Argument on or Relating to WMATA's Criminal Background Screening Policy* ("*Motion*"). (Tr 8-9) On August 24, 2015, ATU filed an Opposition to *WMATA's Motion* ("*Opposition*"). The Board denies the Motion and considers the evidence.

A hearing was convened at 1325 G Street, NW, Washington, D.C., on August 4, 2015; it continued on September 1 and 23, 2015; and November 3 and 4, 2015. The Parties were each afforded full opportunity to present witnesses and documentary evidence and to cross-examine witnesses and challenge documents offered by the other.

For ATU testified Karen Reed, a First Transit Driver; Linda Penny, a First Transit Dispatcher; Paul Harrington, ATU National Coordinator, Joint Industrial Council; Gary Rouse, a Veolia Operator and ATU Local 1764 Shop Steward; Faye Lawson, WMATA Material Handler and ATU, Local 689 Organizer; Gerrard Webb, ATU, Local 689 Representative; Esker Bilger, ATU, Local 689 Financial Secretary Treasurer; Jackie Jeter, ATU, Local 689 President; Christian T. Kent, WMATA Assistant General Manager, Access Services.[2] For WMATA testified Thomas Webster, WMATA Managing Director, Office of Management and Budget Services; Omari June, WMATA Director, Office of MetroAccess Service and Phillip Staub, WMATA Chief Counsel, Governance, Human Resources and Civil Rights. All witnesses were sworn and sequestered. Union Exhibits ("Ux __") 1-43 and Employer Exhibits ("Ex __") 1-24 were offered and received into the record. A court reporter was present at the hearing; by agreement of the Parties, the verbatim transcript ("Tr __") constitutes the official record.

At the conclusion of the hearing, the evidentiary record was complete. On or about February 8, 2016, the Parties submitted

[2] Christian T. Kent also testified as a WMATA witness.

written post-hearing briefs. On or about March 18, 2016, following a grant of leave to do so, the Parties submitted reply briefs. The record of proceeding closed upon receipt of both reply briefs. A draft Award was circulated to the Board on April 29, 2016. The draft has been the subject of Board deliberations, which are reflected in revisions to the Award made herein.

This Opinion and Award is issued following review of the record and consideration of the arguments of the Parties. It interprets and applies the Compact and Urban Mass Transit Act of 1964, §13(c) ("UMTA" or "13(c)").[3]

ISSUES FOR DETERMINATION

Two issues are presented for resolution by the Board as follows:

> 1. Whether WMATA must collectively bargain with ATU Locals 689 and 1746, representing MetroAccess contractor employees, pursuant to the Compact, Article XIV - Labor Policy?
>
> 2. Whether WMATA must compensate MetroAccess contractor employees pursuant to protective arrangements under the Urban Mass Transit Act of 1964, §13(c)?

As to compensation which might be required pursuant to UMTA protective arrangements, the proceeding will initially determine liability, if any, and defer a determination of damages, if any, to another proceeding.

RELEVANT COMPACT PROVISIONS

66. Operations

(a) The rights, benefits and other employee protective conditions and remedies of section 13(c) of the Urban Mass Transportation Act of 1964, as amended

---

[3] Codified as 49 USC §5333(b).

(49 U.S.C. 1609(c)), as determined by the Secretary of Labor, shall apply to the operation by the Washington Metropolitan Area Transit Authority of any mass transit facilities owned or controlled by it and to any contract or other arrangement for the operation of transit facilities. Whenever the Authority shall operate any transit facility or enter into any contractual or other arrangements for the operation of such transit facility the Authority shall extend to employees of affected mass transportation systems first opportunity for transfer and appointment as employees of the Authority in accordance with seniority, in any nonsupervisory job in respect to such operations for which they can qualify after a reasonable training period. Such employment shall not result in any worsening of the employee's position in his former employment nor any loss of wages, hours, working conditions, seniority, fringe benefits and rights and privileges pertaining thereto.

(b) The Authority shall deal with and enter into written contracts with employees as defined in section 152 of Title 29, United States Code, through accredited representatives of such employees or representatives of any labor organization authorized to act for such employees concerning wages, salaries, hours, working conditions and pension or retirement provisions.

(c) In case of any labor dispute involving the Authority and such employees where collective bargaining does not result in agreement, the Authority shall submit such dispute to arbitration by a board composed of three persons, one appointed by the Authority, one appointed by the labor organization representing the employees, and a third member to be agreed upon by the labor organization and the Authority. The member agreed upon by the labor organization and the Authority shall act as chairman of the board. The determination of the majority of the board of arbitration, thus established shall be final and binding on all matters in dispute. If after a period of ten days from the date of the appointment of the two arbitrators representing the Authority and the labor organization, the third arbitrator has not been selected, then either arbitrator may

request the Federal Mediation and Conciliation Service to furnish a list of five persons from which the third arbitrator shall be selected. The arbitrators appointed by the Authority and the labor organization, promptly after the receipt of such list shall determine by lot the order of elimination, and thereafter each shall in that order alternatively eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits including health and welfare, sick leave, insurance or pension or retirement provisions but not limited thereto, and including any controversy concerning any differences or questions that may arise between the parties including but not limited to the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, and the interpretation or application of such collective bargaining agreements and any grievance that may arise and questions concerning representation. Each party shall pay one-half of the expenses of such arbitration.

* * *

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

FACTUAL BACKGROUND

The Authority operates the Washington, D.C., metropolitan area mass transportation system, including the bus and subway systems. Among the transportation services WMATA provides is MetroAccess, a transportation service for people unable to use fixed-route transit services due to disabilities. MetroAccess projects, like many WMATA transportation services and projects, are supported in part by Federal Mass Transit Grants ("Federal funding") for which WMATA applies to and received from the Department of Transportation. Based on obligations arising out of Federal funding of transportation projects, and pursuant to Urban Mass Transit Act

("UMTA") § 13c, WMATA and ATU have entered into employee protective arrangements ("EPA") which provide for notice of changes in working conditions which might affect transit workers, as well as employee compensation and job protections, which pursuant to UMTA Section 13c are subject to arbitration of labor disputes arising from covered projects ("§ 13c Arbitrations").

The Authority works to operate MetroAccess in a manner consistent with standards it sets, as well as to convey an image that MetroAccess is a WMATA operation, notwithstanding that the service is contractor-operated. The vans used to provide the service are painted and lettered for WMATA. Employees wear WMATA uniforms.

Prior to June 2013, WMATA provided MetroAccess service solely through contractor MV. At that time, and in an effort to improve operational efficiencies, WMATA decided to reorganize MetroAccess services and to divide MetroAccess contracts among multiple contract-transit service providers, including Diamond; First Transit; MV; MTM; and Veolia. Those contracts constrained the Contractors to provide services on conditions (e.g. scheduling) which clearly constituted conditions of employment which are within the Compact's scope of bargaining, but from which the Contractors are precluded from varying. The Unions have been successful in organizing some of the contractors and have been recognized for purposes of bargaining. In more detail than is practical or necessary to describe, the Unions sought to bargain with the Contractors about those and other subjects but were met with responses that were in essence, refusals to move in areas covered by the WMATA contracts with the contractors. The evidence is sufficient to persuade the Board that bargaining has been constrained in areas regulated by the contracts between the Contractors and WMATA. The efforts of the Unions to have WMATA participate in their bargaining with the Contractors have been unavailing.

As a result of WMATA's determination to reorganize MetroAccess services through multiple Contractors, ATU also asserted the Union was entitled to notice of the reorganization pursuant to Section 13c of UMTA and to negotiate the terms of transition that might impact employees the Union represented pursuant to the EPAs.

WMATA responded that it had no obligation to provide notice or to negotiate with ATU pursuant to the EPAs because the MetroAccess reorganization was not "as the result of a Federally funded project" and maintained that WMATA uses no Federal funds for MetroAccess operations. Further, WMATA contended that MetroAccess employees are not WMATA employees but are directly and exclusively employed by the Contractors. Therefore, asserted WMATA, it has no obligation to arbitrate disputes with ATU Locals representing MetroAccess employees.

Thereafter, ATU sought to resolve the dispute through arbitration, taking substantive steps to select a neutral to hear and to decide the dispute. However, WMATA maintained that it had no obligation to arbitrate the matter and rejected the Unions' initiatives. On February 3, 2014, ATU filed a *Complaint and Motion to Compel Arbitration* in the United States District Court for the District of Maryland. The *Complaint* was resolved through cross-motions for summary judgment in the Grimm Decision, described above, compelling arbitration pursuant to § 66© of the Compact. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearings and in thorough, able post-hearing briefs and reply briefs. The positions are briefly summarized as follows:

ATU asserts that, for labor relations and collective bargaining purposes, WMATA is a co-employer or joint-employer of MetroAccess contract employees under National Labor Relations Board ("NLRB") doctrine. ATU acknowledges that as a governmental entity,

WMATA is not itself subject to the National Labor Relations Act ("NLRA") or within the jurisdiction of state or Federal collective bargaining statutes. However, ATU maintains that the NLRB joint-employer doctrine and standards are applicable to WMATA's relationship with, and obligations to, MetroAccess employees.

ATU argues that, since § 66(c) of the Compact states that WMATA "shall deal with and enter into written contracts with employees as defined in [the NLRA]," NLRB precedent regarding joint-employers should be applied by the Board with regard to WMATA's relationship with MetroAccess contractors and employees. ATU asserts, based on recent NLRB doctrine set forth in *BFI Newby Island Recycle*, 204 LRRM 1154 (2015), that WMATA is clearly a joint-employer. ATU argues that WMATA sets or controls MetroAccess contractors' policies and procedures in areas including hiring and firing, background checks, drug and alcohol testing, supervision, work rules, Drive Cam incidents, hours of work, fatigue management, personal cell phones, cash handling and other terms and conditions of employment. It maintains that the contractual conditions imposed by WMATA on its Contractors effectively restrict the right of Unions representing those employees to bargain the full range of compensation, as well as terms and conditions of their employment, in violation of the letter and spirit of the Compact.

For these reasons, ATU contends that MetroAccess employees are entitled to engage in collective bargaining directly with WMATA under § 66(c) of the Compact. ATU concludes that because WMATA is a second employer of Contractor employees, the Authority is obligated by law to collectively bargain with the authorized representatives of MetroAccess employees which are ATU, Locals 689 and 1764. The Unions maintain that the Authority's failure and refusal to participate in such negotiations constitutes a violation of the Compact.

ATU argues that the reorganization and resulting adverse impact constituted a "project" and were the result of a project under the UPA and § 13(c) agreement. ATU asserts that the

MetroAccess reorganization adversely affected ATU Local 689 and 1764 employees and thereby obligated the Authority to bargain with the Unions pursuant to § 13(c). It maintains that the reorganization was the result of a "project" within the meaning of the § 13(c) protective arrangements because Federal Transit Administration ("FTA") funds were used to facilitate the reorganization and are also used in virtually all aspects of MetroAccess operations. ATU argues that the term "project" must be broadly defined and is not limited by the Unified Protective Arrangements ("UPA") in the record and includes events occurring in anticipation of, during, and subsequent to the reorganization project. ATU maintains that the reorganization could not have occurred, but for federal funding. Despite WMATA's claim that the reorganization was implemented for reasons of productivity and efficiency, ATU argues these reasons do not diminish the adverse impact on MetroAccess employees or eliminate its bargaining obligation.

ATU asserts that the harm to MetroAccess employees is clear and justifies retroactive protections consistent with § 13(c). ATU argues WMATA was obligated to give notice to the Unions and then participate in bargaining with them in order to reach meaningful agreements, with expedited arbitration to resolve disputes, if necessary.

ATU contends, in summary, that the evidence and law establish that WMATA is a joint or co-employer with each of the MetroAccess contractors and asserts that the Board should order WMATA to engage in direct bargaining with ATU Locals 689 and 1746. ATU urges, as well, that the labor protective arrangement requirements provide an independent grounds for the Board to order WMATA to the bargaining table to negotiate over the implementation of the reorganization. It urges that the grievance be sustained.

WMATA argues that the June 3, 2011 UPA is the applicable § 13(c) arrangement for analyzing the status of MetroAccess Contractor employees. It asserts that this is important because

the Department of Labor ("DOL") has applied this UPA only to individuals directly employed by WMATA and the new jobs clause language does not extend, and has never extended, to WMATA Contractor employees.

WMATA asserts that June 3, 2011 UPA notice requirements do not apply to the MetroAccess reorganization because WMATA did not anticipate displacements, dismissals or rearrangements of working forces as the result of an FTA funded project. WMATA argues that dismissals, or rearrangements of working forces resulting from the MetroAccess reorganization were from efficiencies and economies unrelated to the receipt and use of FTA funds.

WMATA asserts that the § 13(c) protections against adverse effects on employees as a result of a project require a causal connection between the Federal assistance and the alleged adverse effects. WMATA argues, based on case precedent, that the MetroAccess reorganization did not provide the required causal connection. Further, WMATA argues that, while ATU exhibits document 17 FTA grants to WMATA, those grants have nothing to do with MetroAccess or, in particular, no causal connection to the reorganization at issue. WMATA argues, in expectation of an ATU argument that WMATA is a federalized entity, that Arbitrator Bornstein previously rejected ATU's expansive argument that everything that WMATA does is, essentially, Federalized.[4]

WMATA asserts that it had no obligation to provide notice under § 13(c) to ATU, and had no obligation to bargain with the Unions representing employees of the Contractors because the reorganization was not the result of FTA assistance. WMATA argues the reorganization was for operational reasons, including

[4] This WMATA argument involves the disputed Award in *Amalgamated Transit Union, Local 689 v. Washington Metropolitan Area Transit Authority* (Borenstein, Neu.) (May 17, 1999). WMATA cites to the Award in support of its argument that it is not a Federalized entity. ATU argues the Award is invalid because the Union withdrew the underlying complaint before the Award was executed. ATU's assertions are the more persuasive. However, although the Award is not precedential, Arbitrator Bornstein's Award still provides insight as to this dimension of the Parties' overall § 13(c) coverage dispute.

increasing demand for paratransit services, ADA class actions and demands of multiple stakeholders.

As to ATU's demand to bargain pursuant to § 66 (c) of the Compact, WMATA asserts that the Contractor employees are not WMATA employees. The Authority argues that the NLRA definition incorporated in the Compact establishes who is an employee and so delimits the scope of the bargaining unit with respect to which WMATA must bargain. It argues that the evidence clearly establishes that MetroAccess employees are employees of the Contractors alone and, as such, cannot invoke Compact rights and remedies because the Compact applies, by its terms, only to WMATA employees. Moreover, asserts WMATA, the Compact does not and cannot incorporate the NLRA definition of employer or the NLRA obligation to bargain on that basis as a co-employer because WMATA is a political subdivsion of Virginia, Maryland and the District of Columbia. The Authority argues for this reason WMATA has constitutional sovereign immunity from labor laws passed pursuant to the Commerce Clause and 11th Amendment immunity for hiring and similar decisions.

WMATA asserts that the Compact does not provide for or allow joint employer status. Further, the Authority contends that NLRA jurisprudence on joint employer status cannot apply to an employer, like WMATA, which is exempt from the NLRA.

For all these reasons, WMATA concludes that the Board does not have the jurisdiction, power or authority to order WMATA to the bargaining table with ATU Locals which do not represent WMATA employees.

WMATA asserts, in the alternative, that even if the Compact permitted a joint employer inquiry, WMATA is not proven to be a joint employer of MetroAccess contract employee. WMATA argues that a recent NLRB decision, *Browning-Ferris Industries of California, Inc.*, 361 NLRB No. 186 (August 27, 2015) ("*BFI*"), establishes the tests for application of the joint employer doctrine. WMATA argues

that it is not a joint employer with the MetroAccess contractors under any of the *BFI* tests which include: hiring, firing, discipline, supervision, direction, wages and hours, workforce size, scheduling, seniority, overtime, work assignment, and manner and method of work performance. WMATA's point-by-point argument addresses and refutes each *BFI* test, concluding that none of the elements are sufficient to create a joint employer relationship with the MetroAccess contractors.

Next, WMATA asserts that § 66(b) of the Compact obligated the Authority only to arbitrate "labor disputes" between WMATA and its "employees." WMATA points out that the MetroAccess employees represented by ATU Locals 689 and 1746 are not WMATA employees. Therefore, it maintains, the § 66(c) arbitration process is unavailable to labor organizations representing these employees.

As to § 66(a) of the Compact, which provides for labor protection similar to § 13(c), WMATA asserts that the MetroAccess employees are not employees of affected mass transportation systems acquired by WMATA. It argues that Compact § 66(a)'s legislative history confirms that Congress was concerned about employee displacements from WMATA's acquisition of area private transit properties. For this reason, WMATA argues, § 66(a) tracks the § 13(c) employment protections, but only to protect private transit employees whose employers or operations are taken over by WMATA using Federal assistance. Therefore, maintains WMATA, the § 66(a) labor protection language applies only to the four privately-owned Washington DC region bus companies acquired in 1972 with Federal funds and not to companies which provide service pursuant to contracts with the Authority. WMATA concludes that, since MetroAccess employees represented by Unions are not employees of mass transportation systems acquired by WMATA, the § 66(a) protections do not apply.

For all these reasons, WMATA urges that the Board deny the Union's claims as without merit.

DISCUSSION AND ANALYSIS

It was the burden of ATU to show that WMATA is obligated to extend § 13(c) labor protections and/or § 66(c) rights to MetroAccess Contractor employees. For the reasons which follow, the Board holds that the Unions failed to meet their burdens and that ATU's claims must be denied.

The Board's § 13(c) Jurisdiction

ATU seeks to have this Board grant § 13(c) labor protections to employees of WMATA Contractors pursuant to Compact § 66(c). The ATU locals representing these WMATA Contractor employees are not recognized as bargaining agents for WMATA employees under the Compact because the contractor employees are not employees of WMATA.

Compact § 66 (b) and (c) provide definitions of the employees and labor organizations which fall within the jurisdiction of the Compact and this Board. These definitions are statutory and substantially inelastic. The Board's jurisdiction is constrained thereby to hear and to decide disputes brought by WMATA employees and the certified labor organizations representing Authority employees. The NLRA definitions of the term employee is imported from that Statute, as the term existed at the time it was adopted. There is no support for the proposition that the drafters of the Compact envisioned that the definition would change as NLRB doctrine, let alone that the drafters intended to authorize development of a common law to interpret the Compact or to borrow external doctrines.

Application of the Compact's imported NLRA definition of "employee" simply brings WMATA employees within that definition within the coverage of the Compact. It may bring Contractors and their employees within that coverage. However, the language does not stretch to make employees of WMATA Contractors to be employees of WMATA. The Compact cannot provide an elastic forum for this

Board to redress perceived injustices inflicted on MetroAccess Contractor employees. In particular, there is no room to declare WMATA a joint employer with those Contractors for purposes of bringing WMATA to the Contractors' bargaining tables.

For these reasons, the Board finds that MetroAccess Contractor employees are not WMATA employees or joint employees of the Authority and its Contractors and that the ATU Locals representing the MetroAccess Contractor employees are not labor organizations representing WMATA employees within the meaning of § 66. Therefore, the Board is without jurisdiction under the Compact to make WMATA a party as a joint employer to the bargaining between those Contractors and the labor organizations representing their employees. Moreover, the Board concludes that it lacks jurisdiction under the Compact to hear and to decide the merits of ATU's § 13(c) claims for non-employees of WMATA presented by labor organizations which are not recognized pursuant to the Compact.

UMTA § 13(c)

Even if it were to be assumed that the Board has jurisdiction over ATU's § 13(c) claims, ATU's claim for § 13(c) notice and labor protections arise out of WMATA's decision to reorganize MetroAccess in June 2013. At that time, the evidence establishes, WMATA ended MV's role as the sole provider of all MetroAccess services, dividing the work among other Contractors, including Diamond, First Transit, MV, MTM and Veolia. ATU, the representative of some bargaining units of the Contractor employees, demanded that WMATA provide advance notice, pre-implementation bargaining, and various applicable rights and protective arrangements pursuant to § 13(c). WMATA refused.

From the beginning, WMATA's obligations under § 13(c) and the applicable UPAs and EPAs turned on whether the MetroAccess reorganization's alleged adverse impact on MV (and other Contractor) employees was the result of a Federally fund "project". The answer is critical to a further determination of MV employees'

right to notice, to bargain through their exclusive representatives and to receive dismissal or displacement allowances under § 13(c), as well as, other labor protections. These protections and benefits are only required if the employees are laid off or demoted as a result of a covered project.

It was ATU's burden to identify a particular project and to show a casual link between the project and the adverse consequences impacting the employees who enjoy the § 13(c) and UPA labor protections. The Board finds that ATU failed to meet its burden.

ATU's record evidence does not identify a specific, Federally funded project leading to the MetroAccess reorganization. The Union broadly implies that WMATA's MetroAccess service would not exist "but for" the Federal funds supporting WMATA's MetroAccess. For this reason, the ATU argument continues, the reorganization at issue is a Federally funded project which resulted in adverse consequences to MV employees, thereby triggering § 13(c) and UPA organizational rights and labor protections. The Board is not persuaded.

There is no record evidence of specific Federal funding of the MetroAccess reorganization and no record evidence of a causal link between the reorganization and the other Federal grants supporting MetroAccess. There is significant material evidence that WMATA implemented the reorganization to achieve efficiency and economy in service operation arising for steady increasing demands for paratransit services in the Washington Metropolitan area and recent ADA class action law suits. The fact that MetroAccess vans, physical plant and other components of its operations are Federally funded is not sufficient to establish a connection between such funds and the reorganization. On this record, the Board cannot find that the MetroAccess reorganization was the result of a Federally funded project.

Casual Connection

The scope of coverage of Section 13 (c) has been the subject of prior litigation. WMATA argues, convincingly, that ATU failed to show a causal connection between the Federal assistance and the alleged adverse effects of WMATA's restructuring of its contracts for MetroAccess services. The Authority bases its arguments on two Department of Labor ("Department") decisions: *Stephens v. Monterey Salinas Transit* ("Monterey Salinas Transit") and *Fuller v. Greenfield and Montague Transportation Area and Franklin Regional Transit Authority* ("Fuller").[5]

Monterey Salinas Transit concerned § 13(c) claims arising from a merger of two transit properties. The Department found that, the Claimants failed to identify a casual connection between any projects under the Act and the alleged effects which are subject to their petition. It is not sufficient, in the Court's view, to merely indicate that the Respondent, at some time, received a Federal grant or funds under the Act.[6] In this dispute, ATU has not shown WMATA's restructuring of MetroAccess was connected to FTA funding so as to be a project as defined by § 13(c).

Fuller concerned § 13(c) claims involving restructuring demand-response services and a change to a contracting relationship, similar to WMATA's restructuring of MetroAccess contracts, which resulted in 16 employee-lay offs. The Department concluded that a transit agency's contemporaneous purchase of new buses with UMTA assistance was not sufficient to trigger § 13(c) liability. The Department found that "[t]here must be a nexus between the project and the direct cause of termination of

---

[5] *Stephens v. Monterey Salinas Transit*, DEP Case Nos. 82-13c-6 & 82-13c-4 (Nov. 10, 1982) and Fuller v. Greenfield and Montague Transportation Area and Franklin Regional Transit Authority, DEP Case 81-18-16, et seq. (Apr. 13, 1987).

[6] *Monterey Salinas Transit, p. A-345*

employment."[7] Thus, despite the purchase of new buses by the transit agency, the Department concluded, the required nexus did not exist. The Department found that the purchase of new vehicles was a constant and not a variable factor. Similarly, the Board concludes that WMATA's MetroAccess vehicles, purchased with Federal assistance, are a constant and not a variable factor which has no effect on the employees impacted by the restructuring of the MetroAccess contracts.

As in *Fuller*, the Board cannot find that a nexus exists between WMATA's restructuring of the MetroAccess contractors and the alleged adverse effects to employees, based on ATU's broad assertion that the entire MetroAccess system is a Federally funded project, which when restructured by WMATA triggered § 13(c) liability.

Both *Monterey Salinas Transit* and *Fuller* establish as well that the burden of proof is on the claimant to establish the causal connection and nexus between a Federally funded project and § 13(c) claims. The Board finds that ATU has not met this burden of proof. MetroAccess Contractors which allegedly triggered an obligation to bargain with those labor organizations pursuant to § 66(c).

WMATA Joint Employer Status and Compact § 66(c)

Even if it is assumed that the Board has jurisdiction over ATU's claim that WMATA is a joint employer with MetroAccess Contractors, as the Union contends, it is clear that the joint employer status in collective bargaining relationships is an NLRB-created doctrine based on the Board's interpretation of the NLRA. As indicated, the collective bargaining relationships between WMATA and the labor organizations representing eligible WMATA employees arises out of the Compact, which creates a statutory or treaty framework for a labor relations structure among the three affected

---

[7] *Fuller, p. A-388*

jurisdictions. There is no Compact language supporting the existence of a joint employer doctrine or recognizing a joint employer relationship between WMATA, a governmental entity which the Parties agree is not within the coverage of the NLRA, and other, private sector employers who serve as Contractors. As stated above, the Compact cannot be interpreted to create rights, in this case NLRB-style joint employer status, for employees who are not WMATA employees and/or for labor organization which do not represent WMATA employees. The Compact does not permit the Board's reach beyond the margins of the treaty's plain and express language.

For these reasons, the Board concludes that WMATA cannot be found to be a joint employer with MetroAccess Contractors. WMATA has no obligation under § 66(c) to participate in collective bargaining between MetroAccess Contractors and the labor organization which represent Contractor employees.

WMATA's Motion to Exclude Evidence

Having concluded that the Board lacks jurisdiction over ATU's claim, a decision on WMATA's *Motion to Exclude Evidence* is moot. To the extent not moot, the *Motion* is denied.

Conclusion

The Board notes that the limitations on the Contractors to bargain with the labor organizations representing their employees is, as a practical matter, constrained by the conditions imposed by WMATA on them. Those contracts limit or preclude effective bargaining on the part of the Contractors, even if they were so inclined or were so compelled under the NLRA.

The equities of the situation point toward a resolution which recognizes the rights of employees of WMATA's Contractors, the rights of the labor organizations to bargain on their belief and the obligation of WMATA to deal with the bargaining and

representational consequences of the situation it has created. There are political and equitable factors which point in favor of allowing Contractor employees a full scope of bargaining rights and, to the extent that those right are restricted by the terms of WMATA's agreements with the Contractors, to have WMATA at the table in the Contractors' negotiations with the Unions representing Contractor employees. Failures to do have created situations where Contractor employees doing substantially the same work as WMATA, under a WMATA umbrella, receive less favorable terms and conditions of employment. That, in turn, will certainly result in morale and other issues between those employees, their exclusive representatives, and WMATA and its Contractors. However, these are essentially political and equitable arguments that cannot be addressed through arbitration ordered pursuant to the Compact or pursuant to UMTA Section 13 (c).

The Board lacks jurisdiction to hear and to decide the disputes presented by non-WMATA employees and labor organization which do not represent WMATA employees.

A W A R D

ATU's claims are denied.

Issued at Clarksville, Maryland this 12th day of July 2016.

M. David Vaughn,
Neutral Member

Douglas Taylor, Esq.
Labor Organization-Arbitrator

Anthony Anderson, Esq.
Authority-Arbitrator

representational consequences of the situation it has created. There are political and equitable factors which point in favor of allowing Contractor employees a full scope of bargaining rights and, to the extent that those right are restricted by the terms of WMATA's agreements with the Contractors, to have WMATA at the table in the Contractors' negotiations with the Unions representing Contractor employees. Failures to do have created situations where Contractor employees doing substantially the same work as WMATA, under a WMATA umbrella, receive less favorable terms and conditions of employment. That, in turn, will certainly result in morale and other issues between those employees, their exclusive representatives, and WMATA and its Contractors. However, these are essentially political and equitable arguments that cannot be addressed through arbitration ordered pursuant to the Compact or pursuant to UMTA Section 13 (c).

The Board lacks jurisdiction to hear and to decide the disputes presented by non-WMATA employees and labor organization which do not represent WMATA employees.

A W A R D

ATU's claims are denied.

Issued at Clarksville, Maryland this 12th day of July 2016.

M. David Vaughn,
Neutral Member

Douglas Taylor, Esq.
Labor Organization-Arbitrator

Anthony Anderson, Esq.
Authority-Arbitrator

Dissent
(see attached Opinion)

BEFORE A BOARD OF ARBITRATION
M. DAVID VAUGHN, CHAIRMAN

In the Matter of:

LOCALS 1764 and 689, AMALGAMATED TRANSIT UNION,	}	
and	}	Re: MetroAccess Dispute
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY.	}	

DISSENTING OPINION
UNION-APPOINTED ARBITRATOR DOUGLAS TAYLOR

No one should infer from this dissent that the arbitration process must have been infirm, meaning that the Board of Arbitration was somehow negligent or dense. My colleagues on the Board are experienced, able and perceptive professionals. We deliberated at great length in an atmosphere of candor and respect. I know that the content of the award benefitted from the skill of our Chairman as principal draftsman and direct input from Mr. Anderson and from me. However, even talented, experienced and dedicated arbitrators err and this opinion is a prime example of such a (fortunately) rare misstep. I write to explain my dissent and, more purposefully, delineate the consequences which will follow the award.

Section 13(c) of the Urban Mass Transportation Act of 1964 (now appearing as 49 U.S.C. Section 5222(b)) requires that the U. S. Secretary of Labor certify that a transportation grant recipient has made an "arrangement" which "shall include provisions that may be necessary for" the "continuation of collective bargaining rights." WMATA has made many such arrangements over the years. In most cases, continuation is assured by the provision of the WMATA Compact which establishes collective bargaining for WM ATA's own employees. In conjunction with the MetroAccess paratransit service, however, the workers are employed by subcontractors. WMATA accepted massive Federal grants and arranged to protect MetroAccess workers directly by accepting the so-called "Uniform Protective Arrangement" or "UPA." That arrangement includes, as the statute commands, WMATA's express promise that "the collective bargaining rights" of MetroAccess

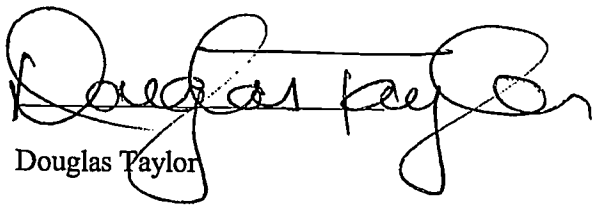
workers "shall be preserved and continued." Paragraph 2 of the UPA pointedly states: "Where [WMATA] has no collective bargaining relationship with the Unions representing employees in the service area, [WMATA] will not take any action which impairs or interferes with the . . . preservation or continuation of collective bargaining rights of such employees." WMATA's promises have scarcely lapsed or expired, as it continues to accept hundreds of MetroAccess vehicles annually to replenish its fleet, all 80% funded by Federal grant money covered specifically by the UPA.

In 2013 WMATA re-organized the operation of its MetroAccess Service by hiring three private service providers to cover service formerly provided by one, hiring another separate service provider to generate employee work schedules and, finally, taking much more direct control over day-to-day management of the workers, imposing a plethora of mandatory work rules which included mandatory discipline for particular violations, and routinely disqualifying (in effect, discharging) workers who, in WMATA's view, were not performing adequately. WMATA imposed new hiring requirements as well, which meant that some 30-40 existing MetroAccess drivers lost their jobs in 2013 at WMATA's insistence, even though they were hired by successor contractors. WMATA retained a firm to install and monitor (from San Diego, California) event cameras in every single MetroAccess Van, and report their observations to WMATA. WMATA hired a team of supervisors and a firm designated as "quality assurance" personnel to monitor drivers as they went about their daily tasks, all with the effective authority to discipline the drivers. WMATA receives, investigates and resolves directly all customer complaints about MetroAccess drivers. Because most of the meaningful work rules, most of the actual supervision and all work hours of all drivers are controlled directly and finally (i.e. without recourse) by WMATA, the contracts leave the companies it hired to employ the drivers without authority to negotiate over hours of service or discipline and discharge of employees for alleged work rule violations. All of these facts are undisputed on the record. Both of my fellow arbitrators agree that "the limitations on contractors to bargain with the labor organizations representing their employees is, as a practical matter, constrained by the conditions imposed by WMATA on them." (Majority Opinion, p. 19) Yet the majority also concludes through reasoning which I frankly cannot fathom, that collective bargaining rights have not been "impaired" or "interfered" with by WMATA. If, as the majority states, we lack jurisdiction to compel WMATA to revise the conditions it has imposed, then the protective arrangement is unenforceable.

This award will have two obvious and immediate consequences. Unless the Unions and their members are induced to forego bargaining over hours of work and over discipline and discharge due to work rule violations, there will be no stable collective bargaining. In the transportation industry in particular, the determination of work hours is a recurrent and central feature of collective bargaining, and determination of discipline a daily, vital collective bargaining activity, so

agreements without addressing those topics are unlikely. The Unions have the right to bargain over these matters, under the NLRA, but the employers are unable to bargain over them because the determining entity is WMATA, not the employers. However, since WMATA is beyond NLRB jurisdiction, and this Board of Arbitration is unwilling to act, no remedial order can force WMATA to the bargaining table. An unfair labor practice strike by MetroAccess workers is thus virtually inevitable, and repeated strikes are likely. Secondly, if the arrangement cannot, as this Board has essentially held, ensure that WMATA will preserve collective bargaining rights, then the UPA cannot serve in the future as an "adequate arrangement" to preserve those rights within the meaning of Section 13(c). An administrative or legal challenge to WMATA grants will become imperative.

In summary, I do not dissent to scorn the opinion or to berate my colleagues or to urge again the virtue of the Union position, but to indicate the practical enormity of this award. I am saddened that we have missed a perfectly sound, lawful opportunity to ameliorate labor strife. The political determination to preserve the full scope of collective bargaining for MetroAccess workers, as an express condition of mass transit assistance grants, has been made already, by the U.S. Congress, and the job of this Board was merely to effectuate that decision. I am sorry to observe that we have failed.



Douglas Taylor