



In the matter of arbitration:

James Peterson,)
<i>Claimant</i>)
)
v.)
)
City of El Paso,)
Respondent)

DSP case no. 01-13c-1

Issued: December 12, 2003

ORIGIN OF THE CLAIM

This claim is of an ongoing nature and arises under all Federal Transit Administration grants of transit assistance to the City of El Paso, Texas. Each grant has incorporated protective conditions required under 49 U.S.C. § 5333(b) of the Federal Transit law, commonly referred to as Section 13(c), beginning with the Department of Labor's April 1, 1976 certification of protective conditions, and supplemented by a January 3, 1980, Protective Arrangement that was certified by the Department of Labor on February 13, 1980. These conditions have been certified by the Department of Labor and are incorporated into the contracts for Federal assistance between the Federal Transit Administration and the City of El Paso.

THE CLAIM

The Claimant, as President of the Employee Committee, alleges a failure to preserve rights, privileges, and benefits of the transit employees in violation of the January 3, 1980, Protective Arrangement. This alleged failure resulted from the City's decision in 2000 to terminate the Employee Committee's continued use of the profits from private vending machines located on City Transit Department property.

ISSUE

Did the City's termination of the Employee Committee's continued use of profits from private vending machines on City Transit Department property constitute a failure to preserve and continue rights, privileges, and benefits of employees, in violation of Paragraph 2 of the January 3, 1980 Protective Arrangement?

FACTUAL BACKGROUND

Prior to 1977, three private bus companies operated transit services in El Paso. One of those bus companies was El Paso City Lines. In January of 1977, the City of El Paso acquired the assets of all three bus companies with Federal grants of mass transit assistance. From 1977 to 1980 El Paso operated its transit system through a private contractor, El Paso Transit Services, Inc. In 1980 the City began direct operation of its transit system.

Prior to the 1977 acquisition, one of the private bus companies, El Paso City Lines, had vending machines on its premises. The profits from those machines were controlled by the manager of that bus company. With the City's January 1977 acquisition, that manager left El Paso City Lines and transferred control of the vending machines and their profits to Ms. Rose Monedero, a personnel employee. She asked for volunteers from among the transit employees of the operations and maintenance divisions to help plan and organize an employee function that would use revenues from the vending machines. The volunteers decided to use the funds for an employee picnic.

This was the beginning of the existence of an informal association of the City's transit employees, which later became known as the Employee Committee. Employees trace the beginning of the Employee Committee to 1977 "[b]ased on word of mouth information." While the exact date that the employees formed the Employee Committee is unknown, a bank record demonstrates that the Sun Metro Employees Fund was formally established in February 8, 1980. More recently, the City advised the Committee that its Legal Department did not want the Committee to be associated with Sun Metro's activities because of liability concerns and therefore the City instructed the Committee to omit the words "Sun Metro" from any events that it planned to sponsor.

Since its formation, this Employee Committee has continued to function entirely through volunteers from among the City's transit employees. It has used profits from the vending machines on transit property for the benefit of transit employees and their families. Its activities have occurred outside of the work situation, and have included events and activities such as holiday parties,

picnics, outings, a donation in the event of a death in a transit employee's family, providing gift certificates at local merchants, breakfasts and luncheons on Transit Employee Appreciation Days, etc. The profits from the vending machines benefit employees in general. The Employee Committee volunteers have customarily reserved and used Transit Department (now called Sun Metro) conference rooms for their meetings. All of the meetings of the Employee Committee have been in open session and any transit employee has been welcome to participate in each meeting.

Employee Committee activities have no direct involvement with work assignments, and none of the activities sponsored by the Employee Committee have been identified as job-related. Additionally, the Employee Committee does not deal with wages and working conditions of the transit employees. Those matters are handled by a labor organization which represents the City's transit employees in their conditions of employment. The only aspect of the transit employees' work which the activities of the Employee Committee may touch upon would be improvement in the morale and job appreciation of the transit workers, which might result from the activities of the Employee Committee.

The Employee Committee handled the contact with the vending machine companies, and arranged for the installation and replacement of vending machines. The vending machines were owned, maintained and stocked by the vending companies. The vending companies paid the Employee Committee a "commission" based on the amount and type of product sold. The Employee Committee also has raised money for its social and benevolent activities through other means, such as raffles and selling tickets to entertainment events. Managers of the City's Transit Department were continuously aware of, and encouraged, the existence and activities of the Employee Committee, and occasionally participated in those activities. This situation continued for over twenty years, from the formation of the Committee through 2000.

Following a recent discovery of inappropriate vending machine activities in another City Department, the City audited vending machines in various City Departments. Among other things, the audits showed that the transit Employee Committee's placement of vending machines on Transit Department property, and use of the profits of the vending machines, had never been formally approved or authorized by the City's governing body. Thereafter, the City directed the Employee Committee to turn over the responsibility for the vending machines, and the profits from the machines, to the City.

By memorandum of December 13, 2000 the Office of the City Attorney set forth the requirement and details for transferring control of these vending machines, their costs, and profits to City control. The memorandum also set forth the distribution of Employee Committee funds, most of which were allowed to be retained by the Committee because they had come from Committee activities other than the vending machines. The City required the

remainder of funds in the Employee Committee account (\$786.06 attributed to vending machine profits) be remitted to the City. The City acknowledged that the vending machines "are a positive aspect for the employees and should be continued." By letter of June 14, 2002, the City communicated, during the consideration of the instant Claim, "that should Mr. Peterson, or his employee group, be interested in operating vending machines on City property, the proper avenue would be to seek City Council approval via lease agreement." This information was not relayed to the Employee Committee in the December 13th memorandum.

The Employee Committee complied fully with the City's December 13, 2000 memoranda, and then filed its initial employee protections claim with the City on January 5, 2001 for restoration of the Employee Committee's use of the profits from the vending machines on Sun Metro property for the benefit of Sun Metro employees. By decision of February 1, 2002 the City's 13(c) Claims Committee denied the claim because the Employee Committee's loss of use of those profits did not worsen the employment position of any El Paso Transit Department employee, and because the transit employees suffered no economic harm in their position as transit employees as a result of City's discontinuance of the Employee Committee's unauthorized use of vending machines on City property. The El Paso Claims Committee further denied the claim on the basis that the change in use and control of the vending machine profits was neither related to, nor caused by, any Federal assistance to which the Section 5333(b) protections apply.

DISCUSSION

Section 5333(b) provides protections for transit employees against adverse effects of the Federal assistance in their employment positions and their conditions of employment. This includes the requirement in Section 5333(b)(2)(A) (formerly Section 13(c)(1)), reflected in Paragraph 2 of the City's 1980 Protective Agreement, that all rights, privileges and benefits of the employees be preserved. On behalf of the Employee Committee, the Claimant maintains that the Committee's use of the profits from the vending machines was a long-established right, privilege, or benefit for the City's transit employees that should be protected under that provision. For the reasons set forth below, the employees' use of the vending machine profits is not protected by the Section 13(c) Protective Arrangement.

The Employee Committee collected profits from the vending machines from about 1977 until the City terminated this practice in 2000. The City knew that the Employee Committee existed but did not discover that the Employee Committee used profits from vending machines until late 1999 or early 2000. Since the City ended the Employee Committee's use of vending

machine funds shortly after they learned of the practice, the City cannot be viewed as acquiescing or approving of the Employee Committee's use of the funds.

The Employee Committee used the profits to fund activities that were social and benevolent in nature and conducted at times other than working hours. Even though the City allowed the Employee Committee to meet in Transit Department conference rooms, the City's Transit Department had no part in arranging, planning, or approving Employee Committee activities. The Committee's activities promoted enjoyment, support, morale and cooperation among the transit employees, their families, and members of the public. The activities were not directly related to, nor are they part of, the transit employees' jobs and working conditions. These activities and their source of funds were not "rights, privileges and benefits of employees" within the meaning of paragraph 2 of the Protective Arrangement, and consequently the City had no obligation under the Agreement to preserve and continue the Employee Committee's receipt of profits from vending machines that were located on City property.

The fact that the Employee Committee never had official authorization to place vending machines on City property, or to use the profits from those vending machines for the benefit of the City's transit employees, provides further support for this conclusion. Without proper authorization, the Employee Committee could not accrue a right, privilege, or benefit to use these profits. As prescribed by the City Charter, only the City Council may approve the use of City property.¹ The Employee Committee argued, "[t]ransit [m]anagement was and has been aware of the Committee's activities and

¹ *City of El Paso, Charter* Article III Section 3.18. LEASE; FRANCHISE; CONVEYANCE AND SPECIAL PRIVILEGE.

The right of control, ownership and use of streets, alleys, parks and public places of the City is declared to be inalienable except by ordinance passed by the entire Council. Any ordinance providing for the conveyance, lease or grant of a franchise or special privilege regarding the property of the City shall provide for payment to the City of a reasonable fee as consideration for that conveyance, lease, franchise or special privilege. In addition, any ordinance providing for the lease, franchise, or special privilege shall provide that:

1. At the termination of the lease, franchise or special privilege, the property involved, together with any improvements thereto, made or erected during the term of the lease, franchise or special privilege, shall (either without further compensation or upon payment of a fair valuation therefore as determined by the terms of the ordinance), become the property of the City;
2. No lease, franchise or special privilege shall be granted for a period in excess of thirty years; and,
3. Every lease, franchise or special privilege may be revoked by the City if necessary to secure efficiency of public service at reasonable rates, or to assure that the property is maintained in good order throughout the life of the grant.

approved of the Committee's doing business with the vending companies." However, the manager does not have the required authority to approve the employees' use of vending machine funds.²

Additionally, employees could not have accrued benefits, rights, or privileges that violated Texas law that was applicable to the Employee Committee's use of City property.³ At the time the Committee was created following the City's 1977 acquisition of the private transit companies, the Committee's ability to legally derive profits from vending machines placed on City property was governed by Texas law. The Employee Committee's use of vending machine profits violated at least two provisions of the Texas Constitution.⁴ Those provisions prevent municipalities from making gifts of public funds to groups such as the Employee Committee and from granting extra compensation to municipal employees without proper authorization.⁵

Finally, the City's disallowing continued use of vending machine profits was not related to receiving Federal assistance. The Employee Committee has not demonstrated a connection between the loss of the use of the vending

² See *City of Greenville v. Emerson*, 740 S.W.2d 10,13 (Tex.App.—Dallas 1987, no writ) (Only the city council had authority to enter into municipal contracts. Thus, "neither the fire chief nor the personnel manager had authority to enter into such a contract, and thus the contract would not be binding on the city.").

³ See *Local 1338 Amalgamated Transit Union v. Dallas Transit System*, DEP Case No. 80-13c-2 (USDOL 1981), *Employee Digest* A-248, A-260 ("Claimant's labor relations rights were stipulated as deriving from Texas law which prohibits collective bargaining rights for municipal employees.").

⁴ Tex. Const. art. 3 §52(a) ("Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town, or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever"); Tex. Const. Art. §53 ("The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant, or contractor after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.").

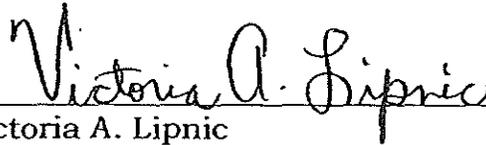
⁵ *Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex.App.—Austin 2002), review denied (Nov. 14, 2002) (The court agreed with the City that it avoided violating Tex. Const. art. III §52 by entering into a lease supported by consideration. If there were no consideration, the lease would have been "a gratuitous donation of public funds or a thing of value."); *City of Greenville*, supra note 2 at 13 (Fire chief or personnel manager contracting to pay "additional sums of money for services already rendered and benefits already paid" violated Tex. Const. art. III §52).

machine funds and Federal assistance.⁶ The City has established that its actions stemmed from a desire to follow Texas law rather than to deprive employee benefits.

DECISION

The Employee Committee's use of vending machines on Transit Department property to fund the Employee Committee did not come within the scope of protections under the City's Section 5333(b) Protective Agreement, because the use was not a right, privilege or benefit of employment; because the use was never approved by the City as required by the City Charter; and because the use violated Texas law. In addition, the City's ban on the use of vending machine profits is unrelated to federal assistance and stems from requirements to properly follow City and State law.

This decision is final and binding on the parties.



Victoria A. Lipnic
Assistant Secretary for Employment Standards

⁶ *Clark v. Crawford Area Transp. Auth.*, OSP Case No. 94-18-19 (USDOL 1996), *Employee Digest* A-455, A-462 ("To apply the Warranty's protections in this claim, there must be some connection between the Federal assistance and the harm or other effects that concern the Claimant.").