

In the Matter of Arbitration:

Amalgamated Transit Union, Local 1256  
*Claimant,*

v.

City of El Paso – Sun Metro,  
*Respondent.*

DSP Case No. 12-13c-06

Issued: September 10, 2014

### **FINAL DECISION**

The Federal Transit Act (the Act) requires as a condition of federal financial assistance that the interests of employees affected by the assistance be protected under arrangements the Secretary of Labor certifies are fair and equitable, 49 U.S.C. § 5333(b)(1). The Act specifically provides:

Arrangements . . . shall include provisions that may be necessary for –

- (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
- (B) the continuation of collective bargaining rights;
- (C) the protection of individual employees against a worsening of their positions related to employment;
- (D) assurances of employment to employees of acquired public transportation systems;
- (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and
- (F) paid training or retraining programs.

49 U.S.C. § 5333(b)(2). These protective arrangements are often referred to as “13(c)” arrangements or agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307, as amended, 49 U.S.C. § 1609(c) (1976).

All protective arrangements include a procedure for final and binding resolution of disputes over the interpretation, application, and enforcement of the terms and conditions of the arrangement. This procedure, referred to as a “claim for employee protections,” may be utilized when an individual employee, a group of employees, or

representative of a bargaining unit believes he or they have been negatively affected as the result of federal assistance or, in this case, when a dispute arises regarding the “application, interpretation, or enforcement of the provisions” of the protective arrangement. The outcome of the final and binding determination pursuant to a protective arrangement is enforceable in state court as a matter of contract law. *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982).

In this case, as described below, paragraph 15(b) of the parties’ protective arrangement provides for final and binding arbitration of claims by the Department of Labor (Department).

### **ORIGIN OF THE CLAIM**

This claim arises under the terms and conditions of the January 3, 1980 protective arrangements (the Arrangement) executed by the City of El Paso (City) to protect the interests of employees in the service area of the City’s Sun Metro mass transit system (Sun Metro). The Arrangement has been certified by the Department as fair and equitable to protect the interests of employees and sufficient to meet the requirements of the Act, and has been made applicable to federal assistance provided to the City since its adoption.

The Amalgamated Transit Union, Local 1256 (ATU), represents certain City employees at Sun Metro. ATU attempted to resolve this claim pursuant to the dispute resolution provisions in paragraphs 15(b) of the Arrangement. The City’s attorney denied the claim. Pursuant to paragraph 15(b) of the Arrangement, ATU appeals the denial to the Department for a final and binding determination.

### **BACKGROUND**

On December 6, 2010, ATU Local 1256 President Raul Vargas wrote the City Manager and Director of Sun Metro to request a meeting to discuss a group grievance, comprised of seven issues affecting its members. Seventy-nine employees signed the grievance.

Part II, paragraph 4, of the Arrangement states:

Pursuant to Article 5154(c) of Vernon’s Annotated Civil Statutes, employees shall have the right to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative, including but not limited to any labor organization that does not claim the right to strike. Such presentation of grievances must be done consistent with Company and City established procedures.

Article 5154(c) of Vernon's Annotated Civil Statutes<sup>1</sup> states in part:

Sec. 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees...

....

Sec. 6. The provisions of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike.

The City responded by letter dated January 6, 2011, from Assistant City Attorney, John R. Batoon. The City stated that the ATU's request to discuss a general grievance regarding employees' wage, benefits and conditions of employment was not allowed under Texas law. According to the City, only an individual employee, alone or through a representative, could file a grievance under the Civil Service Rules and Regulations.

By letter dated August 5, 2011, ATU, through its attorney, Hal K. Gillespie, contacted the Assistant City Attorney Batoon, to address the City's interpretation of the law and the Arrangement. ATU also renewed its request for a meeting to present the group grievance. There is no record of any response by the City to this letter.

By letter dated May 18, 2012, to Batoon, ATU initiated a claim under the Arrangement regarding the City's refusal to address the December 6, 2010 general grievance. Citing to paragraph 15(b) of the Arrangement which sets for the process for disputes regarding the "application, interpretation, or enforcement" of the Arrangement, ATU asked Batoon to confirm that he was the proper recipient for the claim, and if not to request that Batoon provide ATU with the contact information for the proper recipient.

In a June 6, 2012 email from Gillespie to Assistant City Attorney Elizabeth Ruhmann, Gillespie confirmed his understanding of a conversation the two had had on June 4, 2012, including his understanding of the next step in the process:

I understand that the next step in the 13(c) process after my discussion with you is for the ATU to file an appeal with the Secretary of Labor who shall make the final and binding determination. ATU Local 1256 will do so promptly and request a hearing in connection with our appeal.

Ruhmann replied on June 20, 2012, stating, in part, "Your statements, for the most part, are correct" and went on to clarify the City's legal position regarding group grievances. On August 6, 2012, ATU filed this claim with the Department.

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<sup>1</sup> This provision is now found in Section 617.005 of the Texas Government Code.

## **POSITION OF ATU**

ATU states that the present claim “is vitally important and remarkably simple and straightforward,” and requests that the Department interpret Part II, paragraph 4, of the Arrangement so that the last sentence thereof is “not used to strip employees of their rights under state law and their rights set forth in the first sentence.”

ATU asserts that the City's argument that permitting group grievances is illegal under Texas law is baseless. ATU asserts that Texas law expressly permits such group grievances, noting that the plain language of Texas Government Code, Section 617.005, expressly provides for public employees (plural), not just a single public employee, to present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike. ATU argues that it would be “absurd and unworkable to read the language of Section 617.5 as the City suggests - so that only an individual without a Union representative or a Union representative on behalf of an individual, but not on behalf of a group of employees could grieve wages, hours or working conditions.” ATU points to the fact that Dallas and the City of El Paso are both in Texas, covered by Texas law, but that Dallas Area Rapid Transit's (DART) protective arrangement provides for the presentation of group grievances.

ATU asserts that the City's position that group grievances are not consistent with Company and City established procedures under the second sentence of Part II, paragraph 4, cannot be used to negate the rights recognized in the first sentence of that paragraph. ATU states that where the City does not have an existing procedure for group grievances, the language of the first sentence requires that the City must then provide reasonable and appropriate procedures, that are not “inconsistent” with existing procedures but in addition to them.

As a remedy, ATU seeks an order affirming employees' right to present group grievances, including through a representative, under the Arrangement.

## **POSITION OF THE CITY**

The City asserts that ATU has not exhausted its administrative remedies because it did not appeal the denial of the grievances to the Civil Service Commission. The City, therefore, asserts that the claim is not ripe for the Department's consideration.

The City states that ATU has failed to meet its burden of describing or demonstrating a direct or indirect causal nexus between the alleged harm and any Federal assistance received by the City, or any exception thereto. ATU asserts that the Act only protects transit employees from specific harms resulting from the federal assistance.

Further, the City asserts that ATU has not identified any benefits, rights or privileges that existed prior to the existence of the Arrangement, which have subsequently been removed, terminated or displaced. Therefore, the City asserts that the claim does not fall within the scope of the Act's protections.

The City states that it recognizes its employees' right to organize into and be represented by unions in the presentation of their grievances, but requires adherence to the law which prohibits collective bargaining in the public sector. The City claims that addressing group grievances not only violates Section 617.005 of the Texas Government Code, formerly article 5154c, but also violates the City's status as a non-meet and confer city. The City claims that nothing in this statutory language explicitly or impliedly confers the right of employees to present group grievances or converts the right to bring an individual grievance into the right to bring a group grievance simply by the grievance being brought through a representative.

The City states that it meets with its employees or their representatives at reasonable times and places to hear their grievances concerning wages, hours of work, and conditions of work pursuant to its established civil service grievance procedure. But, the City does not agree to use this procedure to collectively bargain with its employees in contravention of state law. The City asserts that ATU failed to use procedures in place for individual grievances to present the issues underlying the group grievances.

The City argues that the Arrangement does not dictate the development of local claims procedures or committees, nor does it authorize a determination by the Department of unfair labor practices and safety violations. The City denies that ATU is entitled to any relief under the Arrangement.

## **DISCUSSION**

### **A. ATU's Claim Is Ripe for Review.**

The City asserts that ATU's claim should not be heard as ATU failed to exhaust remedies prior to appealing its claim to the Department. The City's assertion is in contrast to the position taken in its response to ATU's June 6, 2012 email from Gillespie to Assistant City Attorney Elizabeth Ruhmann, wherein he confirmed that the "the next step in the 13(c) process after my discussion with you is for the ATU to file an appeal with the Secretary of Labor who shall make the final and binding determination." Further, the City's argument that ATU failed to properly use the established grievance procedures misses the point of the ATU's claim which is that a group grievance procedure is required under the Arrangement. ATU is not required to pursue futile efforts to resolve a grievance that the City refuses to recognize as valid from the start. *See Clark v. Crawford Area Transp. Auth.*, OSP Case No. 94-18-19 (Digest A-455, 459).

**B. The State Law Does Not Prohibit the Presentation of Group Grievances.**

Decades ago, Texas state courts defined what is allowable under article 5154c of Vernon's Annotated Civil Statutes, on which the grievance provision of the Arrangement is based. The courts have consistently held that group grievances are allowed and that the presentation of a group grievance does not equate to collective bargaining.<sup>2</sup>

In *Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex.Civ.App.—El Paso 1956, *writ ref'd n.r.e.*), a firefighters union brought an action against the City of Dallas for a judgment declaring that a city ordinance prohibiting the formation of unions violated article 5154c. The court noted that article 5154c, passed in 1947, constituted a “very definite change” in state employees’ labor rights because until that time Texas courts had upheld the validity of ordinances at issue in the case. The court rejected the City’s argument that the article 5154c’s prohibition on collective bargaining contradicted its allowance for the presentation of grievances, individually or through a representative, explaining:

The presentation of a grievance is in effect a unilateral procedure, whereas a contract or agreement resulting from collective bargaining must of necessity be a bilateral procedure culminating in a meeting of the minds involved and binding the parties to the agreement. The presentation of a grievance is simply what the words imply, and no more, and here it must be remembered that the privilege is extended only with the express restriction that strikes by public employees are illegal and unlawful, as is collective bargaining, so it is clear that the statute carefully prohibits striking and collective bargaining, but does permit the presentation of grievances, a unilateral proceeding resulting in no loss of sovereignty by the municipality. We think the statute is clear, unambiguous and not contradictory of itself.

*Id.* at 175-176.

In *Lubbock Prof'l Firefighters v. City of Lubbock*, 742 S.W. 2d 413, 418 (Tex.App.—Amarillo, 1987), the Chief of the Fire Department refused to hear a grievance because (1) the employees did not follow the City's grievance procedure; (2) the grievance was not personally presented by an employee, as required, but by a representative; and (3) it was presented as a group grievance rather than an individual grievance. The firefighters’ union sued for judgment declaring that certain portions of the City's grievance procedure were illegal, and for an injunction requiring the City to recognize and deal with the union. The court began its analysis noting that the legislature’s intent was that the prohibition on collective bargaining “should not be

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<sup>2</sup> Neither party cites to this case law.

interpreted broadly to deny public employees their existing right to present grievances.” *Id.* at 416 (see discussion of attorney general opinions). The court held that “grievances may be presented individually and personally by the employee or by and through a representative of the employee without the personal presence of the employee;” “the representative may be [the union] or other legal entity or any person designated by the employee, so long as the representative does not claim the right to strike against the employer;” and [t]he grievances of each employee may be presented individually or the individual grievances may be combined for a group presentation, by the employees or representatives.” *Id.* at 419. Regarding group grievances, the court concluded that:

[W]hen article 5154c speaks in the plural of ‘the existing right of public employees to present grievances’ it protects grievances presented individually or individual grievances presented collectively. It is arbitrary to say the statute protects one type of grievance and not the other, without any legislative indication that one should be excluded from the statute’s protection.

As to the article’s use of the word “individually” the court stated:

Too much emphasis on the word ‘individually’ obscures its function in the sentence. It is an adverb modifying the verb ‘to present,’ indicating the employees’ options in the *manner* of presentation. The phrase simply means that an employee can present his grievance himself, or appoint a representative to present it for him. If the legislature wanted to restrict the *type* of grievance presented, they would have modified ‘grievance,’ as in ‘individual grievance.’

*Id.* at 418, n7; *see also Firefighters' & Police Officers' Civil Service Com'n of City of Houston v. Herrera*, 981 S.W.2d 728 (Tex.App. 1998) (court rejected city’s argument that a group grievance could not be lodged because the city ordinance does not explicitly grant the right to a group grievance; silence on the issue did not mean that the employees were prohibited from bringing a group grievance).

As shown above, the City’s arguments regarding state law were examined and rejected decades ago by Texas courts.

### **C. The Arrangement Requires the Presentation of Group Grievances.**

Whether brought as a claim regarding a dispute over the “application, interpretation, or enforcement of the provisions” under paragraph 15(b) of the Arrangement or as a claim, or objection, based on a denial of an accrued right under paragraph 2,<sup>3</sup> the result is the same. The Arrangement requires the City to allow for the presentation of group grievances.

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<sup>3</sup> Paragraph 2 of the Arrangement states: “All rights, privileges, and benefits (including pension rights and benefits) of employees (including employees already retired) shall be preserved and continued, provided

Contrary to the City's assertions, claims regarding the preservation of rights, privileges, and benefits do not need to establish a causal nexus with a project. *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985); *Amalgamated Transit Union, Local 691 v. City Utilities of Springfield*, OSP Case No. 91-12c-18 (Digest A-473) ("*Donovan* reaffirms that protections pursuant to Sections 13(c)(1) and (2) do not require a result of a project (beyond receipt of, or application for, Federal assistance), and that these sections do not require any harm to specific employees, in order to activate and/or apply their protective requirements.").

To satisfy the requirements of the Act, the City is obligated as a precondition of federal financial assistance to continue the "diminutive" collective bargaining rights of public employees such as they exist under state law. *Local 1338, Amalgamated Transit Union v. Dallas Transit System*, DEP Case No. 80-13c-2 (Digest A-248, 260); 49 U.S.C. § 5333(b)(2)(A) (the preservation of rights, privileges, and benefits ... under existing collective bargaining agreements **or otherwise**"). As shown above, public employees in Texas have enjoyed the right to present group grievances since 1947 and the Arrangement, which cites to the statutory basis for that right, protects it as an "accrued right." The Arrangement provides that such group grievances must be presented in accordance with the Company and City "established procedures." To meet the burden of continuing this right that is "otherwise" derived under state law, such "established procedures" must be construed to allow for the presentation of group grievances that were permitted when the Arrangement was executed and subsequently certified by the Department and remain so today. To interpret the Arrangement otherwise would jeopardize its sufficiency under the Act. Therefore, any efforts by the City to delete group grievances from the procedures, or other means to invalidate the statutory right of employees to present a group grievance, constitutes a failure to continue the collective bargaining rights or rights "otherwise" derived. Moreover, it is not permitted under state law. *See Lubbock Prof'l Firefighters*, 742 S.W. 2d 413.

## DETERMINATION

The City's restrictive interpretation of Part II, paragraph 4 of the Arrangement is contradicted by the intent and purpose of the Act, the Arrangement, and state law. The City shall develop a grievance process for the presentation of group grievances in accordance with this decision within 90 days of this decision. In the interim, the City shall process the group grievances underlying this claim in accordance with Steps 4 and 5 of the existing process.

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that any such rights, benefits and privileges may be improved, changed, or added to so long as there is no denial of accrued rights."

Finally, section 5333(b)(1)(A) requires that all of the remedies directed in: this decision be performed by the City in full and in a timely manner. If this is not done, then in future applications by the City for federal transit assistance, an objection to certification based on the City's failure to timely perform these remedies will be deemed to present material effect(s) on employees as required under 29 C.F.R. § 215.3(b)(1), and will be deemed by the Department to constitute sufficient objection(s) under 29 C.F.R. § 215.3(d)(2). Pursuant to 29 C.F.R. § 215.3(d)(6), such objections will require the Department, as appropriate, to direct the parties to commence or continue negotiations. Pursuant to 29 C.F.R. § 215.3(h), "the Department retains the right to withhold certification where circumstances inconsistent with the statute so warrant until such circumstances have been resolved."

This decision is final and binding.

Date: September 10, 2014



Michael J. Hayes

Director, Office of Labor-Management Standards