

U.S. Department of Labor

Office of Labor-Management Standards
Division of Interpretations and Regulations
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Washington, D.C. 20210



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RE: CORRECTED WAIVER REQUESTED FOR CERTIFICATION
FOR PENDING FTA GRANT APPLICATIONS
Broward County Board of County Commissioners
FL-2023-027; FL-2023-029; FL-2023-047

Dear Ms. Andrews, Ms. Lonergan, and Mr. Katzman:

I am writing to follow up to my July 14, 2023 letter to further explain the Department's position that the time limited waivers of the provisions of CS/CS/SB 256: Employee Organizations Representing Public Employees (hereinafter referred to as "CS 256"), issued by the Florida PERC on July 5, 2023 do not resolve the dispute over Broward County's (Grantee) capacity to comply with 49 U.S.C. § 5333(b).

Background

Statutory Background

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) (commonly referred to as Section "13(c)"). 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) (emphasis added).

CS 256 contains the following relevant requirements and prohibitions regarding certain employee organizations that implicate Section 13(c): (1) prohibiting employee organizations from having dues and uniform assessments deducted and collected by the employer; (2) requiring employee organizations to petition the Florida Public Employees Relations Commission (PERC) for recertification as bargaining agents; and (3) requiring the PERC to revoke the registration and certification of employee organizations in a variety of circumstances.

CS 256 allows the PERC to waive the applicability of these provisions to transit grantees. A grantee may petition the PERC for a waiver “after it has been notified by the Department of Labor that the [grantee’s] protective arrangement covering mass transit employees does not meet the requirements of 49 U.S.C. s. 5333(b) and would jeopardize the employer’s continued eligibility to receive Federal Transit Administration funding.” CS 256, Section 2 (codified at Fla. Stat. § 447.207(12)). The PERC may waive the provisions listed above “to the extent necessary for the public employer to comply with the requirements of 49 U.S.C. s. 5333(b).” *Id.*

Procedural History

The Department is currently processing many grant applications for federal transit funding from Florida transit agencies pursuant to Department Guidelines (29 CFR Part 215) that have been affected by the legislative changes required by CS 256. The proceedings concerning the above-captioned grant applications began on May 24, 2023, when the Department referred the applications, along with the Proposed Terms for Employee Protection Certification, to Grantee and ATU. In letters dated June 6 and June 8, 2023, ATU objected to certification of the grants on the grounds that CS 256 precluded Grantee from preserving collectively bargained for rights and continuing collective bargaining rights as required by 49 U.S.C. § 5333(b)(2)(a) and (b).

By letter dated June 23, 2023, the Department found that ATU had raised a sufficient objection and directed the parties to engage in good faith negotiations and discussions to seek a mutually acceptable resolution to address the issues raised by CS 256. The negotiations order directed the parties to discuss whether Grantee would request a waiver of CS 256’s provisions from the PERC. On June 26, 2023, the parties submitted a joint stipulation and request that the Department expedite its process with the expectation that Grantee would seek a waiver of CS 256’s requirements from the PERC if the Department issued a determination finding that, in light of CS 256, Grantee’s protective arrangements

do not meet the requirements of 49 U.S.C. § 5333(b) and the application of CS 256 to unions representing Grantee's transit employees jeopardizes Grantee's ability to receive federal assistance.

By letter dated June 28, 2023, the Department determined that the legislative changes contained in CS 256 jeopardized the ability of Grantee to comply with its previously certified protections and continue its eligibility for federal assistance, subject to compliance with 49 U.S.C. § 5333(b). The Department notified the parties that the Grantee must obtain a waiver from CS 256's requirements from the PERC in order to provide protections required by § 49 U.S.C. § 5333(b) and to thereby continue to be eligible to receive federal assistance.

On June 29, 2023, Grantee submitted an emergency petition for a waiver to the PERC. On July 5, 2023, the PERC issued five orders granting waivers to the unions representing employees of Grantee, but limiting the waivers to the time periods covered by the collective bargaining agreements for each union. The waiver for ATU Local 1267 expires on September 30, 2023. The waiver for ATU Local 1591 expires on September 30, 2025.

On July 14, 2023, the Department issued a letter to the parties that explained how "[a] time-limited waiver cannot fully resolve the conflict between CS 256 and the protective arrangements required by 49 U.S.C. § 5333(b), which apply for the duration of the federally funded project." The Department noted that the dispute could be resolved if the Grantee secures a waiver from the PERC that extends for at least the duration of the federally funded project. The Department requested the parties' views about resolution of the dispute, including whether Grantee would seek a modified waiver from the PERC.

On July 19, 2023, Grantee submitted a second emergency petition for a waiver to the PERC, requesting that the waivers be permanent. On July 21, 2023, the PERC issued an "Order Directing Response" to Grantee. The PERC explained that "it is unclear to the Commission how the current waiver does not satisfy the requirements of 49 U.S.C. § 5333(b) with respect to the protective arrangements and agreements in place." The PERC requested that Grantee provide a response by August 3, 2023 that addresses four enumerated topics.

The parties requested the Department provide clarification regarding the second enumerated topic in the PERC's order: "Describe with specificity how chapter 2023-35, sections 3 and 4, Laws of Florida, conflict with any protective arrangements or agreements required by 49 U.S.C. 5333(b), with respect to current or pending grants." We provide this letter in response.

CS 256's Conflict with Section 13(c)

CRS 256's Requirements are Inconsistent with Collective Bargaining Rights

CS 256 makes changes that interfere with transit employees' collective bargaining rights absent a waiver from the PERC. CS 256, Section 3 prohibits a public employer from deducting union dues and uniform assessments from the salaries of transit employees. In doing so, CS 256 removes a critical mandatory subject of collective bargaining: dues check-off.

CS 256, Section 4 augments the requirements in Florida law for employee organizations to register with the PERC and renew their registration annually. As part of the annual application for renewal of

registration, the union must provide details regarding the number of represented employees with valid signed membership authorization forms and who are paying dues. If fewer than 60 percent of the employees eligible for representation in the bargaining unit pay dues during the union's last registration period, then the union must petition for recertification as the exclusive representative of all employees in the bargaining unit. Additionally, the legislation provides that an employer may challenge the accuracy of the union's application for renewal of registration. If the PERC finds the application is inaccurate or does not comply with the law, then it shall revoke the union's registration and certification.

CS 256, Section 4 impermissibly undermines the presumption of the continuing majority status of a certified or recognized union. It expands the means and methods of by which a union loses its right to act as the exclusive bargaining agent for a transit authority's employees without regard to the existence of any evidence that the union has lost its majority status. As such, the changes required by CS 256 impermissibly interfere with the collective bargaining rights of transit workers protected by Section 13(c) and a waiver of these requirements is required in order to ensure Grantee can comply with its Section 13(c) obligations.

A Waiver that Extends for the Life of the Federally Funded Project is Needed to Resolve the Conflict with Section 13(c)

Section 5333(b)(1)(B) (commonly referred to as "13(c)(2)") prohibits infringement of collective bargaining processes during the entirety of a federally funded project, including after the expiration of individual collective bargaining agreements. The Act protects and preserves the existing representation and collective bargaining process in the transit industry in place before the influx of federal assistance. For as long as the grantee is using federal funds conditioned on abiding by Section 13(c)'s protections, the grantee must continue its collective bargaining process, even following the expiration of a collective bargaining agreement. *See City of Macon v. Marshall*, 439 F. Supp. 1209 (1977) (upholding Department's refusal to certify where city failed to continue collective bargaining rights after acquisition and expiration of the collective bargaining agreement); *see also Amalgamated Transit Union, AFL-CIO v. Donovan*, 767 F.2d 939, 957 (D.C. Cir. 1985) (Ginsburg, J., concurring) ("Congress did not provide for sunseting section 13(c) and said nothing in the text of the provision to suggest that the essential process entailed in 'the continuation of collective bargaining rights' should come to mean less as time goes by.").

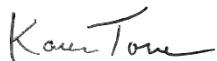
The protections of the Act, as consistently applied by the Department of Labor, ensure that the process of representation and collective bargaining continues and are not at the mercy of changing state laws while federal funds (and the benefits flowing from those funds) are in place. In other words, "[t]he substantive provisions of collective bargaining agreements may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat." *Donovan*, 767 F.2d at 953. In enacting CS 256, the state made unilateral changes that interfere with transit employees' collective bargaining rights. Without a waiver of CS 256's provisions, grantees will not be able to comply with their previously certified protections and continue their eligibility for federal assistance, which is subject to compliance with Section 13(c). *See id.* at 947 n.9 ("hold[ing] that where a state, through its laws or otherwise, fails to satisfy the requirements of § 13(c), the Secretary must cut off funds by denying certification"); *Loc. Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass.*, 666 F.2d 618, 634 (1st Cir. 1981) (explaining that if a state currently receiving transit funds

“chang[es] its laws contrary to the policy of s 13(c),” then the Secretary may enforce the statutory scheme by “halt[ing] the flow of funds”).

As the Department explained to the parties in its July 14, 2023 letter, a waiver that extends only for the duration of an existing collective bargaining agreement does not fully resolve the dispute over Grantee’s compliance with Section 13(c). The Grantee must continue to abide by the commitments made in the certified protective agreements for the life of the project to which the Department’s certification applies, whether that is the period over which operating assistance is used to pay salaries or the useful life of a funded vehicle or facility. *See* Boise, City of, Certification, ID-90-X013-A, November 24, 1987, p. 4, item 6 (explaining that the grantee “must continue to abide by the commitments made in the [13(c)] agreement for the life of the grant contract or contracts to which the agreement was applied”). Even if a collective bargaining agreement expires mid-project, the Grantee’s assurance to continue collective bargaining pursuant to 49 U.S.C. § 5333(b)(2)(b) does not. As it stands now, the waivers will expire and the conflict with state law will immediately return while the federally funded project is ongoing. Thus, the temporary waiver fails to resolve the conflict between CS 256 and the requirement under section 13(c)(2) that arrangements be in place necessary to ensure the continuation of collective bargaining rights.

I hope this clarifies this important issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen Torre".

Karen Torre, Chief
Division of Interpretations and Regulations

cc: see referral