U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

August 13, 2015

Leslie Rogers, Regional Administrator
Federal Transit Administration, Region IX
201 Mission Street, Suite 2210
San Francisco, California 94105

Re: FTA Applications

Monterey-Salinas Transit
Purchase <30--Ft. Electric Trolley Bus, Rehab/Rebuild <30-Ft. Bus for Electrical Propulsion, Engineering-Design-Construction for Charging Infrastructure
CA-03-0823 (Previously CA-04-0265)

Monterey-Salinas Transit
Additional Funding for JARC MobilityManagement
CA-90-Z005-01

California State DOT (CALTRANS)
On Behalf of : Monterey-Salinas Transit
JARC Mobility Management
CA-90-Z117

Dear Mr. Rogers:

This letter is a further reply to the request from your office that we review the above-captioned applications for a grant under section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (1964), now codified as part of the Federal Transit Act, 49 U.S.C. § 5333(b). On September 30, 2013, in connection with grant CA-03-0823, I sent you the Department of Labor's final determination concerning the ability of the Monterey-Salinas Public Transit System Joint Powers Agency d/b/a Monterey-Salinas Transit (Monterey-Salinas) to preserve and continue, consistent with section 13(c), the pension benefits and collective bargaining rights of its employees represented by the Amalgamated Transit Union (ATU) Local 1225 (ATU or Union).[1] I concluded that the Department of Labor could not certify that Monterey-Salinas would preserve and continue the pension rights and benefits of ATU-represented employees under Monterey-Salinas's existing collective bargaining agreement with ATU, as required by 49 U.S.C. § 5333(b)(2)(A). I also concluded that the Department could not certify that Monterey-Salinas

[1] My September 30, 2013 determinations and this decision are issued in the exercise of delegated authority from the Secretary of Labor. See Secretary's Order 8-2009, § 5.A (4), 74 Fed. Reg. 58835 (Nov. 13, 2009).

would continue collective bargaining rights of ATU-represented employees, as required by 49 U.S.C. § 5333(b)(2)(B). I incorporated those conclusions in my September 30, 2013 determination concerning grant CA-90-Z117 submitted by the California Department of Transportation (Caltrans) on behalf of Monterey-Salinas.

Caltrans sought district court review of my September 30, 2013 determination on CA-90-Z117 and an order that I certify Monterey-Salinas's compliance with 49 U.S.C. § 5333(b). On December 30, 2014, the district court
remanded the matter for further proceedings. *California v. U.S. Dep't of Labor*, __ F. Supp. 3d ___, 2014 WL 7409478 (E.D. Cal. Dec. 30, 2014). On May 8, 2015, the Department asked Monterey-Salinas and ATU for information to assist the Department in the remand proceedings. Caltrans, on behalf of Monterey-Salinas, and ATU responded on May 28, 2015. See *infra*, Proceedings on remand (discussing questions). On June 19, 2015, the Department asked Caltrans and ATU to clarify a response by Caltrans concerning when it hired new employees. Caltrans responded on June 26, 2015.

I have reviewed the district court's decision, the information submitted by Caltrans and ATU, and the district court administrative record of the earlier proceedings on this matter (Administrative Record or AR). I conclude that the Department cannot appropriately certify the existence of fair and equitable arrangements for the continuation of collective bargaining rights, as required by 49 U.S.C. § 5333(b)(2)(B). Additionally, as an independent reason, the Department cannot appropriately certify the existence of such arrangements for the preservation of rights under an existing collective bargaining agreement, as required by 49 U.S.C. § 5333(b)(2)(A). I discuss the relevant factual and procedural background, the district court's decision, and my reasons for not certifying the existence of fair and equitable arrangements to preserve rights under existing agreements and to continue collective bargaining rights.

Background

Collective Bargaining Between Monterey-Salinas and ATU

Since August 1, 1983, ATU Local 1225 and Monterey-Salinas have been parties to collective bargaining agreements. AR 792, 798. At that time, Monterey-Salinas had a pre-existing contract with California's Public Employees Retirement System (CalPERS) to provide a defined benefit pension plan. See AR 829. The 1983 agreement required Monterey-Salinas to make sufficient contributions to maintain the same level of benefits provided by CalPERS. AR 799, art. 51. The 1987 agreement required the same, AR 801, but the 1989 agreement added a provision, effective January 1, 1990, for annual contributions to be divided between the employer and the employee actuarial shares, with the employee share not exceeding 7%. AR 803. Later, the parties reduced the employee share, first to 3.5% of payroll compensation, then to 1.75% of payroll compensation. AR 805, 807. Effective December 1, 1996, Monterey-Salinas was to fund the full employee share. AR 807, 810. The October 1, 2010- September 30, 2013 agreement required Monterey-Salinas to pay the full employee share for employees hired before June 30, 2011. AR 824, 930. For employees hired on or after that date, Monterey-Salinas and the employee would each fund 50%. AR 824, 930.

Since at least October 2001, the parties' agreement generally provided a "2% at 55" formula for benefits, meaning that an employee could retire at age 55 and receive 2% of final compensation multiplied by years of service. AR 814, 818 (04-07), 821 (07-10), 824, 829. Final compensation was calculated based on the highest one year of pay. See AR 794, 910, 1006. Pensionable compensation also included bonuses, overtime, pay for additional services, unused leave, and severance pay. See AR 794, 1067. Compensation in excess of a limit in the Internal Revenue Code ($255,000 for 2013) could not be taken into account. AR 1082.

The October 1, 2010 through September 30, 2013 agreement (AR 917-972) applied to employees in specified classifications. AR 960 (Art. 41.a). "Any new employees within the scope of this Agreement" were required to become members of ATU "within thirty-one (31) days of the date of their employment." *Id*. (Article 41.c). Among other things, the agreement further provided an introductory period for new hires, AR 937 (Article 23), and required Monterey to inform each new employee at the time of his or her employment of the existence of the agreement. AR 961 (Art. 43).

California's Public Employee Pension Reform Act (PEPRA)

In 2012, California enacted the Public Employee Pension Reform Act (PEPRA). PEPRA has been described as a "sweeping pension reform" that "make[s] fundamental changes," including "substantial benefit rollbacks for public employees." Office of Governor Edmund G. Brown Jr. - Newsroom (Aug. 28, 2012), *available at* http://gov.ca.gov/news.php?id=17694. The most significant changes apply to employees hired on or after January 1, 2013. These employees, called "new" employees, must generally contribute at least 50% of the normal cost of their pension benefits. Cal. Gov. Code § 7522.30(a); see AR 1321. If this requirement would impair a contract in effect on January 1, 2013, it does not apply until expiration of the contract. Cal. Gov. Code § 7522.30(f). When employees hired on or after January 1, 2013 are in non-safety positions, their fixed benefit is 2% of final compensation, multiplied by years of service for employees who retire at age 62. The earliest retirement age is 52 (increased from age 50), and the formula tops out at 2.5% at age 67 (increased from age 63). AR 1321; Cal. Gov. Code §§ 7522.15, 7522.20. "Final compensation" is defined as the highest average annual compensation over a three-year period, Cal. Gov. Code § 7522.32, is capped at a Social Security Act limit of between $113,700 and $136,440 for 2013, AR 1082; Cal. Gov. Code §§ 7522.10, 7522.42, and excludes special bonuses, unplanned overtime, and unused vacation or sick leave. Cal. Gov. Code § 7522.34(c); see AR 1321-22. A public employer also cannot offer a plan of replacement benefits to employees subject to the Social Security limit. Cal. Gov. Code § 7522.43(a).

PEPRA also changes pension rights for public employees hired before January 1, 2013. It puts limits on the ability of retirees to work and simultaneously collect a pension, and ends the ability of public employees to purchase nonqualified service time (service credit for non-working time) or "airtime." See Cal. Gov. Code §§ 7522.46, 7522.56; AR 1319. It bans retroactive benefit enhancements. Cal. Gov. Code § 7522.44; see AR 1320. It also prohibits any new supplemental defined benefit plans or the inclusion of any new employee in an existing supplemental defined benefit plan. Cal. Gov. Code §§ 7522.18, 7522.43(c), (d).

The Department's September 30, 2013 Determinations

My initial September 30, 2013 determination addressed Grant CA-03-0823. That grant provides funding for replacing a diesel vehicle with a new zero-emissions electric trolley and also includes a "wireless power transfer" system that will charge bus batteries while a bus is parked in a bus stop in the normal course of daily operations. AR 160. The grant also provides funds to rehabilitate or rebuild a bus. AR 160.

I concluded that PEPRA precludes the Department from certifying compliance with section 13(c) because PEPRA makes significant changes to pension benefits that are inconsistent with section 13(c)(1)'s mandate to preserve pension benefits under existing collective bargaining agreements and section 13(c)(2)'s mandate to ensure the continuation of collective bargaining rights. AR 191, 204. For "new" employees, those hired on or after January 1, 2013, I concluded that PEPRA reduces the benefit formula and increases retirement ages, changes the definition of "final compensation" for benefit calculation purposes, imposes equal cost-sharing, prohibits employer-paid member contributions, and redefines "pensionable compensation." AR 205. For employees hired before January 1, 2013, called "classic" employees, I concluded that as of 2018, PEPRA permits increased cost-sharing and prohibits employers from modifying the final compensation formula to anything less than a three-year average. AR 205. For both new and classic employees, I concluded that PEPRA prohibits purchases of "airtime" after June 1, 2013, and caps pensionable compensation at $113,700. AR 205.

To support my conclusion that PEPRA prevents compliance with section 13(c)(2), I stated that under *Jackson Transit Authority v. ATU, Local Division 1285*, 457 U.S. 15 (1982), and *Donovan v. Amalgamated Transit Union*, 767 F.2d 939 (D.C. Cir. 1985), the Department is legally obligated to deny certification where collective bargaining rights have neither been preserved nor continued. AR 201. I further concluded that under *Donovan*, the lessening or diminution of collective bargaining rights, even where they are not entirely eliminated, violates section 13(c). AR 199. In rejecting Monterey-Salinas's argument that state law defines the meaning of collective bargaining rights under section 13(c), I concluded that *Donovan* is the controlling case on this issue. AR 202.

My initial September 30, 2013 determination recognized that Monterey-Salinas agreed not to hire any "new" employees for the term of the collective bargaining agreement that expired on September 30, 2013. AR 202. I concluded that this was of no consequence because Monterey-Salinas made no such commitment for the life of the project funded by Grant CA 03-0823, which spans multiple years beyond September 30, 2013. AR 202-203. I rejected Monterey-Salinas's argument that new employees (hired after January 1, 2013) had no rights before PEPRA was enacted because their rights are established at the time they are hired. AR 203. I explained that under well-established federal labor policy, a collective bargaining agreement applies to all bargaining unit members, regardless of their date of hire. AR 203.

My second September 30, 2013 determination addressed Grant CA-90-Z117, submitted by Caltrans on behalf of Monterey-Salinas. Grant CA-90-Z117 requests funds for mobility management services under a Job Access Reverse Commute program. AR 143. I concluded that

the Department could not certify compliance with section 13(c) for the same reasons given in my determination on Grant CA 03-0823, and I adopted that determination and incorporated it by reference. AR 138-139.

Challenges to the Department's September 30, 2013 Determination

On October 4, 2013, the State of California, on behalf of Caltrans, filed a district court complaint challenging my determination not to certify compliance with section 13(c). The Sacramento Regional Transit District also sued to challenge a September 4, 2013 decision against certification. The same day their complaint was filed, Governor Brown signed legislation making PEPRA inapplicable to public employees whose interests are protected by section 13(c) until a federal district court rules that the Department of Labor erred in determining that PEPRA precludes certification, or until January 1, 2015, whichever is sooner. Assembly Bill No. 1222, § 1, 2013 Cal. Legis. Serv. Ch. 527 (adding Cal. Gov. Code § 7522.02(a)(3)(A)). The legislation also provides that if a federal district court upholds the Department's determination against certification, PEPRA shall not apply to such employees. *Id*. (adding Cal. Gov. Code § 7522.02(a)(3)(B)). Assembly Bill No. 1783, § 1 extended the January 1, 2015 date to January 1, 2016. 2014 Cal. Legis. Serv. Ch. 724.

On December 30, 2014, the district court issued a decision that, in relevant part, concluded that my decisions against certification were arbitrary and capricious. *California v. U.S. Dep't of Labor*, __ F. Supp. 3d ___, 2014 WL 7409478 (E.D. Cal. Dec. 30, 2014). The court remanded the matter to the Department for further proceedings consistent with its order. 2014 WL 7409478, at *22.[2]

In addressing section 13(c)(2), the preservation of collective bargaining, the district court first - concluded that, although the plaintiffs read too much into *Donovan* to argue that it means 13(c) certification should be withheld only when statutory changes completely preclude collective bargaining, the Department read too much into the case by saying it controls the interpretation of section 13(c) in this case. 2014 WL 7409478, at *15. The court stated that the statute at issue in *Donovan* was designed to change the balance of power in one particular labor relationship, while PEPRA makes across-the-board changes in public employee pension law and does not give one party control over collective bargaining. *Id*. at *15-*16. The court therefore concluded that the Department had "relied on *Donovan* reflexively, without properly distinguishing its factual context." *Id*. at *16.

The district court further criticized the Department for failing to consider that even under federal labor policy, rights under state law form a backdrop for collective bargaining negotiations and part of this backdrop may be pension reform. 2014 WL 7409478, at *16 (discussing *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), *Malone v White Motor Corp.*, 435 U.S. 497 (1978), *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and AR 447 (Unified Protective Agreement (Jan. 3, 2011)).

[2] The Department filed a protective notice of appeal of this interlocutory remand decision but then moved for voluntary dismissal. See *State of California v. United States Dep't of Labor*, No. 15-15385 (9th Cir.). On August 12, 2015, the Ninth Circuit granted the motion.

Additionally, the district court concluded that "by finding that PEPRA prevents collective bargaining over pensions, [the Department] essentially determined that a pension is necessarily a defined benefit plan and found that PEPRA's restrictions on such plans means that collective bargaining on these issues could not be continued." 2014 WL 7409478, at *16. Finally, the court concluded that the Department had failed to consider the realities of public sector bargaining, where, among other things, modifications in state pension plans cannot be made binding by negotiators in most states but must be ratified by the legislature. *Id*. at *17.

In addressing section13(c)(1), the preservation of rights under existing collective bargaining agreements, the district court concluded that the Department had misinterpreted the law and did not consider all relevant factors. 2014 WL 7409478, at *19. In particular, the court distinguished cases under the National Labor Relations Act (NLRA) that the Department relied on to support its conclusion that a bargaining unit includes employees not yet hired. *Id*. at *17-*18. These cases involved new employees or employers pursuing individual agreements or seeking an advantage outside the collective bargaining agreement, the court stated, while the instant case involves employees and employers constrained by PEPRA as a backdrop to their employment relationship. *Id*. at *18. Looking to the terms of the agreements in this case, the court concluded that the portion of Monterey-Salinas's agreement "defining the bargaining unit does not appear to be in the administrative record, yet [the Department] apparently assumed that its understanding of a bargaining unit comported with the definition in that document." *Id*.

Proceedings on remand

On remand, the Department asked Monterey-Salinas and the ATU for additional briefing on the issues raised by the district court's decision and the impact of that decision on the Department's certification under sections 13(c)(1) and/or 13(c)(2). See Department's May 8, 2015 letter to Counsel. The Department also asked whether Monterey-Salinas and the ATU are currently covered by a collective bargaining agreement, the status of negotiations between the parties, whether PEPRA applies to Monterey-Salinas's employees, and whether Monterey-Salinas could have unilaterally imposed the changes that PEPRA requires, without bargaining, if PEPRA had not been enacted.

Caltrans, on behalf of Monterey-Salinas, and the ATU responded to my questions. Both agreed that PEPRA currently applies to employees represented by ATU. Caltrans Response 3, 14; ATU Response 2. Both agreed that there is a current collective bargaining agreement covering the employees in effect from October 1, 2013 through September 30, 2016. This agreement was "bargained within the parameters established by PEPRA." Caltrans Response 3. Among other things, the agreement requires Monterey-Salinas to make sufficient contributions to maintain the benefits provided under the pre-existing PERS (Public Employees Retirement System) contract. Agreement Art. 14.a. Monterey-Salinas pays 100% of the employer's contribution, but employees "shall fund 100% of the employee share of PERS actuarial contributions, provided the employee share of PERS actuarial contributions is capped at 7%." *Id*. The agreement permitted reopening of these provisions before the earlier of the district court's decision or January 2, 2015, *id*., but Caltrans reports that the parties are not currently in negotiations. Caltrans Response 3.

Caltrans and the ATU also agree that this agreement applies to newly hired employees. Caltrans Response 14; ATU Response 17, 19-20. Caltrans reports that Monterey-Salinas hired 64 new employees since January 1, 2013, including 44 who remain with the transit agency, and that all new hires are enrolled in the PERS system on their first day of work at Monterey-Salinas. Caltrans Response 14-15. "All employees hired after January 1, 2013, were adjusted by CalPERS in February 2015 to reflect them as new members under the PEPRA definition." Caltrans Response 14. Caltrans clarified, however, that Monterey-Salinas did not hire any ATU employees between January 1, 2013 and September 30, 2013. June 26, 2015 e-mail from Matthew George to the Department.

Caltrans and the ATU had different views on the effect of the district court's decision and the issues raised in that decision. Caltrans essentially argues that the district court addressed the relevant legal issues, and that the Department is compelled to certify compliance with section 13(c). The ATU argues that the Department should again deny certification. Caltrans viewed the question on whether Monterey-Salinas could have unilaterally imposed the changes that PEPRA requires, without bargaining, if PEPRA had not been enacted as an irrelevant and deeply flawed hypothetical. The ATU stated that *Donovan*, the plain language of section 13(c), and legislative history make clear that a precondition to federal financial assistance is that such changes cannot be unilaterally imposed.

Analysis

I have considered the parties' responses, the record of earlier proceedings in this case, and the district court's decision.

I continue respectfully to disagree with the district court's assessment of my September 30, 2013 determination as arbitrary and capricious, including my reliance on *Donovan*. For purposes of any potential further judicial review, I hereby clarify that the Department adheres to the analysis set forth in my earlier certification decision, and that the Department preserves its rights to rely on that earlier reasoning and analysis as an independent basis for denying certification.

For purposes of remand, however, this Analysis is intended to explain why the factors and issues identified by the district court do not support certification of this grant under Section 13(c). Significantly, the district court's decision permits the Department either to certify the grants at issue or to deny certification. The court did not direct that the Department certify the grants, although the plaintiffs had requested that relief. See Dist. Ct. Doc. 54-1 at 2, 20 (memorandum in support of plaintiffs' motion for partial summary judgment). The court also did not preclude the Department from relying on either section 13(c)(1) or section 13(c)(2) if the Department again decided against certification. Instead, the court identified perceived deficiencies in the Department's stated reasoning for previously denying certification. Under section 13(c)(2), the court concluded that the Department should not have reflexively applied *Donovan* or equated pensions with defined benefit plans and should have considered that rights under state law form a backdrop for collective bargaining negotiations and the realities of public sector collective bargaining. Under section 13(c)(1), the court concluded that the Department should not have decided for itself, based on distinguishable NLRA decisions, that Monterey-Salinas's collective bargaining agreement covered new employees when bargaining here was constrained by PEPRA and the agreement, in the court's view, was not in the record.

Accordingly, and in light of the district court's remand decision, I hereby set out an analysis of sections 13(c)(1) and (2) that does not rely on *Donovan* or equate pensions with defined benefit plans. I then address decisions holding that rights under state law form a backdrop to collective bargaining and the realities of collective bargaining. I conclude that Monterey-Salinas's application of PEPRA prevents the "continuation of collective bargaining" as that phrase is used in section 13(c)(2). I also conclude, as an independent reason for denying certification, that Monterey-Salinas' application of PEPRA prevents "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements," contrary to section 13(c)(1).

Analysis of sections 13(c)(1) and (2)

1. Textual analysis

Sections 13(c)(1) and (2) require the Department to certify the existence of fair and equitable arrangements, which

> 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.

49 U.S.C. § 5333(b)(2)(A), (B).

The key terms in section 13(c)(1) are "preservation" and "existing." The term "preserve" means, "to keep from harm, damage, danger, evil; protect; save." *Webster's New World Dictionary of the American Language* 1153 (college ed. 1962). The term "existing," in the Department's view, refers to the collective bargaining agreement in effect when a transit agency applies for federal funding. Letter concerning UMTA Applications Regional Transportation District from John R. Stepp, Associate Deputy Under Secretary of Labor, to Lou Mraz, Regional Administrator, Urban Mass Transportation Administration at 5 (Mar. 19, 1987). Thus when a transit agency applies for federal funding, the Department has to certify the existence of provisions that protect the rights and benefits under collective bargaining agreements in effect when the transit agency applies for the funding. See AR 1420-22 (reviewing the effect of a Michigan law that, among other things, allowed an emergency financial manager to reject, modify, or terminate one or more terms of an existing collective bargaining agreement, and explaining that section 13(c) requires, among other things, preservation of rights under existing collective bargaining agreements and requiring assurances that the relevant state law provisions would not apply).

The key terms in section 13(c)(2) are "continuation" and "collective bargaining rights." The term "continuation" means "a keeping up or going on without interruption; prolonged and unbroken existence or maintenance." *Webster's New World Dictionary of the American Language* 319 (college ed. 1962). Thus, "when the transit employees had collective bargaining rights that could be affected by the federal assistance * * * these rights must be 'continued' before assistance will be awarded to the public transit authority." *United Transportation Union v. Brock*, 815 F.2d 1562, 1564-65 (D.C. Cir. 1987). The phrase "collective bargaining rights" refers to employees'

right to designate a representative and to bargain collectively through that representative with the employer with respect to wages, hours, and other conditions of employment. *See* 29 U.S.C. § 158(d); *Allied Chemical and Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *cf. State of California v. Taylor*, 353 U.S. 553, 560 (1957) (under Railway Labor Act, "(E)ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions") . "Collective bargaining rights" are therefore not substantive terms of collective bargaining agreements. Instead, the phrase refers to a process that was universally understood in 1964, and now, "to require, at a minimum, *good faith* negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment." *Donovan*, 767 F.2d at 159.

Sections 13(c)(1) and (2) thus provide partially overlapping protection for transit employees covered by a collective bargaining agreement. Section 13(c)(1) preserves rights in an existing agreement, which means that an employer cannot change rights set out in the agreement except through collective bargaining, even if the employer was not a party to the agreement, as was the case when public transit agencies acquired operations of private entities. Section 13(c)(2) requires the continuation of collective bargaining rights without regard to whether there is an existing collective bargaining agreement.

In my September 30, 2013 decision, I interpreted the phrase "continuation of collective bargaining rights" in section 13(c)(2) to mean that the lessening or diminution of collective bargaining rights, even when they are not entirely eliminated, violates section 13(c)(2). AR 199. That interpretation is consistent with the Department's treatment of other grant applications. See AR 201 (September 30, 2013 decision, citing the Department's August 16, 2012 *Cover Letter for Referral for Michigan DOT Grant* (MI-04-0052-01) (AR 1412), the Department's May 3, 2011 *Initial Response* and May 20, 2011 *Final Response to Objections for Michigan DOT Grant* (MI-95-x065) (AR 1569, 1571), and the Department's June 23, 2011 *Response to Objections for MBTA DOT Grant* (AA-70-x001-01) (AR 1423)). Because the district court determined that I had incorrectly read *Donovan* to require this result, I reexamined the statutory language, discussed above, legislative history, and understanding of collective bargaining obligations concerning pensions close to the time section 13(c) was enacted. As discussed below, that reexamination leads me again to conclude that the lessening or diminution of collective bargaining rights, even when they are not entirely eliminated, violates section 13(c).

2. Legislative history

The legislative history to section 13(c) shows that Congress intended to provide for a continuation of "collective bargaining rights" as that phrase was understood when section 13(c) was enacted. In 1963, a Senate committee reported a bill that provided only for "the encouragement of the continuation of collective bargaining rights." S. Rep. No. 82, 88th Cong., 1st Sess. 34 (1963). The committee nevertheless "expected that specific conditions normally will be the product of collective bargaining subject to the basic standard of fair and equitable treatment." *Id*. at 28. Going further than the committee, Senator Morse proposed an amendment providing for "the continuation of collective bargaining in any situation where it now exists." 109 Cong. Rec. 5627 (1963). He explained that the amendment would clarify and improve the

protective arrangements of the reported bill by, in relevant part, "mak[ing] it clear that collective bargaining in any situation where it now exists will be continued." *Id*. He explained that the amendment raised a question of public policy:

> Should the Federal Government make available to cities, States, and local governmental units Federal money to be used to strengthen their mass transit system in those communities when the use of that money would result in <u>lessening</u> the collective bargaining rights of existing unions?

Id. (emphasis added). His position was, "we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in <u>worsening</u> the present collective bargaining rights of free labor which operates that transit system." *Id*. (emphasis added).

Opponents of Senator Morse's amendment also understood that the change from "the encouragement of the continuation of collective bargaining rights" to "the continuation of collective bargaining rights in any situation where it now exists" was "an important and significant change." *Id*. at 5683 (statement of Sen. Tower). They proposed an amendment providing for the continuation of collective bargaining rights where it was "not inconsistent with the laws of the State in which the project or a portion of the project is located." *Id*. at 5684. Senator Morse responded that if a state law prohibited a municipality from bargaining with its employees, federal funding could be available if the municipality established a private managerial commission to operate the transit line and bargain with the employees, as done in Memphis, Tennessee. *Id*. He also stated, however, that "[i]n rare cases in which local law prohibits collective bargaining, Federal money would not be available because it would be in conflict with the policy of the bill." *Id*. The Senate rejected the opponents' amendment and passed a bill with Senator Morse's amendment. *Id*. at 5684-85, 5692.

A House of Representatives committee similarly reported a bill that provided only for "the encouragement of the continuation of collective bargaining rights," although the Committee also pointed out that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." H.R. Rep. No. 204, 88th Cong., 1st Sess. 16 (1963). During debate on the bill, Representative Rains proposed an amendment that, among other things, deleted the phrase "encouragement of." *See* 110 Cong. Rec. 14976 (1964). Opponents supported an amendment that would have permitted protective arrangements "only to the extent not inconsistent with State and local law." *Id.* at 14979. Representative Rains' amendment was adopted, and the opponents' amendment rejected. *Id*. at 14984-85. The House thus passed a bill that provided for "the continuation of collective bargaining rights," rather than one that only encouraged that continuation or one that allowed continuation only to the extent not inconsistent with state and local law. *Id*. at 14992.

The Senate accepted the House language ("continuation of collective bargaining rights," rather than the Senate language ("continuation of collective bargaining in any situation where it now exists"). *See* 110 Cong. Rec. 15465 (1964). Senator Morse explained that the House bill had "retained [the Senate's] job protection provisions intact," and that "[t]he substance of the provisions remains untouched." *Id*. at 15453; *see also id.* at 15454 (comparative analysis of the

labor standards provisions of the two bills); *id*. at 15463 (statement of Senator Sparkman) (language of labor standards provisions boils down to one basic issue, whether responsibility should be completely with the Secretary of Labor, as in the House bill, or shared with the HHFA Administrator as in the Senate bill); *id*. (explanation of differences between bills, stating that except for this difference, the Senate and House provisions were "substantially identical").

This legislative history supports the Department's conclusion that Congress intended to protect "collective bargaining rights" as that phrase was understood when section 13(c) was enacted. Additionally, Senator Morse's use of the terms "lessening" and "worsening" to describe the amendment that was substantially enacted as section 13(c)(2) shows that the lessening or diminution of collective bargaining rights, even where they are not entirely eliminated, violates section 13(c). That is the same conclusion I reached in my September 30, 2013 decision, guided by *Donovan*. AR 199. Furthermore, the legislative history shows that state law does not determine the scope of negotiations about pension benefits. Legislators specifically rejected an amendment that required continuation of collective bargaining only to the extent not inconsistent with state law. The Senate and House committees also understood that conditions to protect workers would normally be the product of local bargaining and negotiation. If state law does not protect against a lessening or diminution of employees' collective bargaining rights, the state or municipality can either create and/or contract with a private entity with bargaining authority and thereby qualify for federal funding (*i.e.*, a "Memphis Plan") or forego federal funding. *See also Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, 25 n.8 (1982) (defeat of amendments "reflected a congressional intent that the Federal Government be able to seek changes in state law and ultimately to refuse financial assistance when state law prevented compliance with § 13(c)").

3. <u>The prevailing law when section 13(c) was enacted shows that where employees had a right to bargain over pensions and other employee benefits, unilateral employer changes in these areas were precluded.</u>

When section 13(c) was enacted, it was well established that pensions were a mandatory subject of bargaining under the NLRA. The NLRB had reached that conclusion in 1948, its decision had been affirmed by the Seventh Circuit, and other courts of appeals had agreed with the Seventh Circuit or reached the same conclusion on their own. *See, e.g. Inland Steel Co.*, 77 N.L.R.B. 1 (1948), *aff'd*, *NLRB v. Inland Steel Co.*, 170 F.2d 247 (7th Cir. 1948); *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 877-78 (1st Cir. 1949); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683-84 (2d Cir. 1952); *NLRB v. Black-Clawson Co.*, 210 F.2d 523, 524 (6th Cir. 1954); *Pacific Coast Ass'n of Pulp & Paper Mfgrs. v. NLRB*, 304 F.2d 760, 761 (9th Cir. 1962); *Retail Clerks Union, No. 1550 v. NLRB*, 330 F.2d 210, 215 (D.C. Cir. 1964); *accord*, *Allied Chemical*, 404 U.S. at 159 (under the NLRA, "mandatory subjects of collective bargaining include pension and insurance benefits for active employees"). This bargaining obligation meant, among other things, that "an employer's mid-term unilateral modification of such benefits constitute[d] an unfair labor practice." *Allied Chemical*, 404 U.S. at 159; *see* 29 U.S.C. 158(d); *NLRB v. Katz*, 369 U.S. 736, 743-44 (1962). Similarly, a unilateral modification after a collective bargaining agreement expired was an unfair labor practice unless the employer had bargained to impasse on the issue. *See, e.g., Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983); *NLRB v. Hinson v. NLRB*, 428 F.2d 133, 136-37 (8th Cir. 1970); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 449-50

(4th Cir. 1969); *Industrial Union of Marine & Shipbldg. Workers of Am. v. NLRB*, 320 F.2d 615, 620 (3d Cir. 1963).

Cases near the time of section 13(c)'s enactment show that this obligation to bargain over pensions was not restricted to changes that completely eliminated or replaced an existing pension or other employee benefit plan. In *Inland Steel*, for example, an employer unilaterally changed its existing pension policies to require employees to retire at age 65 instead of considering retirement on a case by case basis, and also increased the employer's own pension obligations. 77 N.L.R.B. at **9-**10. The NLRB held that these actions violated the NLRA and ordered the employer to cease and desist from making any unilateral changes without prior consultation with the union representing the employees. *Id*. at **10. In *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 876 (3d Cir. 1968), an employer changed the formula used to allocate company profits in a supplementary compensation plan. The only change "was to reduce the employees' share of company profits in excess of a level which it had attained only twice in its history." *Id*. The NLRB held that the unilateral change violated the employer's duty to bargain collectively, and the court of appeals affirmed, stating that "[t]he effect of the change is not neutralized because the employees might still receive the same dollar amount from the Plan as they received in preceding years." *Id*. at 879. Similarly, the NLRB held that an employer violated its duty to bargain by unilaterally adding a "nonduplicating" provision to a health insurance policy that prevented double recoveries by employees who were covered by the employer's policy and another policy. *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 885-86 (7th Cir. 1968). The court of appeals affirmed, stating that the reductions "were not without substantial impact although they affected only those of the employees who were the beneficiaries of additional employer-participating coverage and who happened to incur medical or hospital expenses covered by both of the insurance programs." *Id*. at 887; *see also Allied Chemical*, 404 U.S. at 159 n.2 (citing *Scam Instrument* as support for its statement that an employer's mid-term unilateral modification of pension and insurance benefits is an unfair labor practice).

These decisions are not anomalies under the NLRA. Instead, they are applications of a general rule that "basic terms which are vital to the employees' economic interest" may not be altered unilaterally by the employer without bargaining. *Leeds & Northrup*, 391 F.2d at 877; *see W.W. Cross*, 174 F.2d at 878 ("we think that Congress intended to impose upon employers a duty to bargain collectively with their employees' representatives with respect to any matter which might in the future emerge as a bone of contention between them, provided, of course, it should be a matter 'in respect to rates of pay, wages, hours of employment, or other conditions of employment'"). That rule continues to apply under the NLRA. *See Mississippi Power Co. v. NLRB*, 284 F.3d 605, 615 (5th Cir. 2002) ("retirement benefits, although prospective, are considered part of an employee's compensation package, and changes in the computation of such benefits do constitute significant changes"); *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357 (D.C. Cir. 2008) (court has "no trouble" rejecting argument that bargaining was not required because a modification of retiree benefits "did not amount to much"); *Georgia Power Co.*, 325 N.L.R.B. 420, 420 n.5 (1998) (rejecting argument that bargaining was not required over changes to retiree benefits that affected a small number of employees because "if a change involves the terms and conditions of employment of unit employees, it is a mandatory bargaining subject even if only a relatively few employees are affected"), *aff'd*, 176 F.3d 494 (11th Cir. 1999) (table).

I recognize that Congress did not incorporate the NLRA into section 13(c). As the D.C. Circuit stated, "Congress neither imposed upon the states the precise definition of 'collective bargaining' established by the NLRA and the case law that has developed under that Act, nor did it employ a term of art devoid of all meaning, leaving the states free to interpret and define it as they saw fit. Instead, Congress used the phrase generically, incorporating within the statute the commonly understood meaning of 'collective bargaining.'" *Donovan*, 767 F.2d at 949. The NLRA cases discussed above show what that commonly understood meaning of collective bargaining means when applied to issues concerning pensions. For these reasons, I conclude that as a general rule, section 13(c) certification is unavailable to a transit agency that unilaterally sets or changes the terms of pensions covering employees in a collective bargaining unit. '

PEPRA is not the kind of background state law that can remove issues from collective bargaining.

As the district court recognized, not all state laws that "form a backdrop to" public employee collective bargaining interfere with section 13(c) rights, even if they affect the scope of the parties' negotiations. However, after examining the Supreme Court cases that the district court relied upon to define the proper interpretation of the "intersection between federal labor policy and a state's system-wide changes in some aspects of public employment" (2014 WL 7409478, at * 16), and other preemption decisions, I conclude that PEPRA is not the kind of state law that can remove issues from the collective bargaining obligation established by section 13(c). I also note, 'that although the Department's Unified Protective Agreement allows modification of "rights which are not foreclosed from further bargaining under applicable law or contract," it does not address the kind of laws that can have this effect.[3]

Two of the cases the district court relied upon hold that minimum labor standards do not impermissibly interfere with collective bargaining and are not preempted by the NLRA under the *Machinists* preemption doctrine. Under *Machinists*, the NLRA preempts state regulation of conduct that Congress intended to be unregulated because it should be left to be controlled by the free play of economic forces. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). Such conduct includes actions that an employer or union may take to put economic pressure on the other side to agree to some proposal during collective bargaining negotiations. *Id*. at 140-147. The two cases holding that minimum labor standards are not preempted under *Machinists* are *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987), and *Metropolitan Life. Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The third case the district court relied on involved a state law that established minimum standards for the funding and vesting of employee pensions, *Malone v. White Motor Corp*., 435 U.S. 497 (1978). The Court in *Malone* held that the NLRA does not preempt the state law because the federal law that governed pensions at the time, the Welfare and Pension Plans Disclosure Act (WPPDA), preserved state authority to regulate the operation and administration of those plans. *Id*. at 505-14 (discussing WPPDA's limited reporting and disclosure requirements and Congressional intent for state law otherwise to govern the plans). Congress repealed the WPPDA in 1974 and replaced it with the Employee Retirement Income Security Act (ERISA), a

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[3] The Department uses the Unified Protective Arrangement when an applicant for federal financial assistance does not have protective terms and conditions set out in other arrangements. 29 C.F.R. § 215.3(b)(2).

federal law that imposes substantive requirements on plans and generally preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a).

These cases are consistent with my conclusion, shared by the court in *Donovan*, that the demarcation line between state laws that form a permissible "backdrop" to transit employees' collective bargaining and those that interfere with section 13(c) rights is found in federal labor policy, not in state law. *Donovan*, 767 F.2d at 948. As discussed above, and as *Donovan* points out, the legislative history behind section 13(c) reveals that it was "Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy." 767 F.2d at 948. That is understandable because if states could define collective bargaining obligations by reference to their own laws, they could drastically reduce the collective bargaining rights of transit employees simply by passing a law to that effect. Therefore, I reject Caltrans' continued argument that state law defines the scope of collective bargaining and gives employees whatever rights the state decides to give them.

The cases cited by the district court also show that the *Machinists* preemption doctrine provides important guidance in determining what state laws are consistent with federal labor policy. I have therefore examined cases applying this doctrine in addition to the cases cited by the district court. I conclude that PEPRA is not a law setting background minimum labor standards that is permissible under federal labor policy. Instead, it more closely resembles the laws that are inconsistent with federal labor policy because they intrude on collective bargaining.

At the time Congress enacted section 13(c)(2), the Supreme Court had held that the NLRA preempts a state anti-trust law as applied to a collectively-bargained agreement that set minimum rental charges when a motor vehicle is leased to a freight carrier by an owner who drives the vehicle in the carrier's service. *Local 24 of Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959). The purpose of the minimum rental charge was to protect the drivers' wage scale, which could have been undermined by the carrier paying rental charges that were less than the driver's actual cost of operation. *Id*. at 293-94. The Supreme Court concluded that the state law, which was passed under the guise of a price regulation, was not a "remote and indirect approach to the subject of wages," as the state court had held, but rather, was a "frontal attack" on union wages that "threaten[ed] the maintenance of the basic wage structure established by the collective bargaining contract." *Id*. at 294. Accordingly, the Court stated "that there is no room in this [federal] scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id*. at 296 (citing *California v. Taylor*, 353 U.S. 553, 566, 567 (1957)). More broadly, the Court stated, "[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." *Id*. The Court repeated that broad statement from *Oliver* in *Machinists*.

PEPRA resembles the preempted state anti-trust law in *Oliver*. Just as the law in *Oliver* was used to override a collectively-bargained solution that protected employees' wages and working conditions, PEPRA is used here to rollback collectively-bargained pensions. *Oliver* therefore supports the conclusion that PEPRA is inconsistent with federal labor policy. Nothing in *Malone* suggests a broad exception from *Oliver* for laws that involve pensions. Instead, the Supreme Court in *Malone* viewed its decision as consistent with *Oliver* because although *Oliver* affirmed

the "general rule" that the collective-bargaining process is independent from state interference, *Oliver* recognized an exception to the general rule "where it is evident that Congress intends a different result." *Malone*, 435 U.S. at 513. As discussed above, the Court in *Malone* found such Congressional intent in the now repealed WPPDA. *Id.* at 514. Later, the Court cited *Oliver* as bolstering the Court's conclusion that the WPPDA's successor statute, ERISA, preempts a state law prohibiting the offset of workers' compensation benefits by pension payments. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). "Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate pension terms," the Court stated. *Id*.

In *Metropolitan Life*, the Court held that the NLRA does not preempt a state law requiring insurance policies to provide mental health coverage as applied to collectively-bargained benefit plans that purchased insurance policies. 471 U.S. at 727, 751-58. The Court reached this conclusion based on the NLRA's declared purpose to remedy the inequality of bargaining power between employees and employers and resolve the problem of depressed wage rates and purchasing power of wage earners. *Id*. at 753-754. The mandated-benefits law was consistent with this purpose, the Court reasoned, because it was a minimum labor standard designed to ensure adequate mental health treatment to less wealthy residents of Massachusetts, affected union and non-union employees equally, neither encouraged nor discouraged the collective-bargaining processes, and had at most an indirect effect on employees' right of self-organization or collective bargaining. *Id*. at 753, 755-58. In *Fort Halifax*, the Court applied these principles in holding that the NLRA does not preempt a state law requiring employers to provide a one-time severance payment to employees affected by a plant closing. 482 U.S. at 20-22.

Unlike the laws in *Metropolitan Life* and *Fort Halifax*, PEPRA sets no minimum labor standard. Rather, it establishes ceilings on certain negotiated pension benefits and prohibits the parties from negotiating over other aspects of defined benefit pensions. It therefore affects collective bargaining directly and in a way that disadvantages employees. Thus, I conclude that, unlike the laws in *Metropolitan Life* and *Fort Halifax*, PEPRA does not establish a permissible backdrop to public sector bargaining between transit worker unions and transit agencies. Instead it impermissibly interferes with transit employees' collective bargaining rights in violation of federal labor policy and therefore of section 13(c).

The Ninth Circuit's decision in *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (1995), supports this conclusion. In *Bragdon*, the court found *Machinists* preemption applicable to a county ordinance that applied "prevailing wage" requirements to non-governmental construction projects within the county. The Ninth Circuit reasoned that the *Machinists* principle (that the collective bargaining process should be controlled by the free play of economic forces) "can be frustrated by the imposition of substantive requirements," and that some substantive requirements could "virtually dictate the results of the contract." *Id*. at 501. The court concluded that the ordinance was preempted under this reasoning because it did not merely require a "general" minimum wage for such projects, but imposed detailed wage and benefit requirements for a variety of crafts. *Id*. at 502-04. There is, of course, some debate on where to draw the line between preempted and non-preempted state prevailing wage or similar laws. *Compare*

Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 86 n.8 (2d Cir. 2015) (distinguishing *Bragdon*), and *Associated Builders & Contractors v. Nunn*, 356 F.3d 979, 990-91 (9th Cir. 2004) (same), with *520 South Michigan Avenue Associates, Ltd. v. Shannon*, 549 F.3d 1119, 1129-32 (7th Cir. 2008) (agreeing with reasoning in *Bragdon* in finding preemption). Nevertheless, *Bragdon* supports a conclusion that even when a law favors employees, unlike PEPRA, it is preempted if it virtually dictates the results of a collective bargaining contract. *See Nunn*, 356 F.3d at 990-91. PEPRA virtually dictates the results of collective bargaining with respect to defined benefit pension plans by preventing employees from obtaining the favorable terms they had achieved through past bargaining and forcing them to accept rollbacks.

The Eleventh Circuit's decision in *Hull v. Dutton*, 935 F.2d 1194 (1991), also supports my conclusion that PEPRA is not the kind of background law that can remove issues from collective bargaining. Hull was an employee of a state agency responsible for operating port facilities at a switching railroad. Because the agency was a carrier under the Railway Labor Act, it was required to bargain collectively with its employees, unlike other state departments. Hull sought longevity pay benefits provided by state law but not provided by the governing collective bargaining agreement and argued that the state law was a background minimum labor standard under the rationale of *Metropolitan Life* and *Fort Halifax*. The Eleventh Circuit rejected that argument because the laws in *Metropolitan Life* and *Fort Halifax* applied not only to union and nonunion members "but also to those workers not employed by the state," while the state longevity statute applied "only to [the state's] own employees and not to its citizens generally." *Id*. at 1198. The court explained:

> [Th]e state, *when acting as an employer*, has a much narrower latitude to enact laws that trench upon the terms of a collective bargaining agreement negotiated under the regime of federal labor laws. The 'state civil service relationship,' as the Supreme Court has noted, 'is the antithesis of that established by collectively bargained contracts throughout the railroad industry [citing *California v. Taylor*, 353 U.S. at 560]. Indeed, the logic of Hull's argument would give the State tremendous liberty to abrogate collective bargaining contracts with its own employees under the guise of enacting a 'minimum labor standard.' The State, for example, could just as easily unilaterally *lower* the wages of employees set by contract, as well as *raise* them if the longevity pay statute were applied to employees of the Docks Department. Such latitude would have a pernicious effect on the collective bargaining process and would directly implicate the concern recognized in both *Metropolitan* and *Fort Halifax* that this mechanism should be shielded from intrusive state laws.

Id. That rationale applies here. Monterey-Salinas is established by California state law to carry out transportation functions within a certain area. Cal. Pub. Util. Code § 10600 *et seq*. Its employees are admittedly subject to PEPRA, a law that applies to public sector employees, not to citizens or employees generally. By unilaterally reducing pension benefits, PEPRA exemplifies the "pernicious effect on the collective bargaining process" that concerned the Eleventh Circuit in *Hull*.

The Realities of Public Sector Collective Bargaining

The district court also concluded that the Department erred by not "considering the realities of public sector bargaining," including the fact that any modifications to state pension plans "must be ratified by the state legislature." *California*, 2014 WL 7409478, at *16-*17. Caltrans adds that in the public sector, terms and conditions of employment are public decisions shaped by political processes and realities outside the direct control of a particular public sector employer and must operate within legislatively-imposed budget constraints and be consistent with the legislature's policy direction. Caltrans Response 9-10. In Caltrans' view, PEPRA is a legislative policy that California's public employers take to the bargaining table. *Id*. at 10. The ATU says that the reality of public sector collective bargaining adverted to by the district court is legally irrelevant because Monterey-Salinas is an independent agency authorized by state law to negotiate and enter into collective bargaining agreements through the Meyers-Milias-Brown Act, and nothing in California law requires submission of those agreements for ratification by the California legislature or any other higher authority in California with the power of the purse. ATU Response 15 & n.8.

The Meyers-Milias-Brown Act requires covered transit districts to bargain collectively with representatives of their employees and provides procedures for resolving disputes that does not include ratification by the state legislature or higher state authority. Cal. Gov. Code §§ 3505 *et seq*. Thus, I agree with the ATU that ratification by the state legislature is not an issue to the extent Monterey-Salinas remains covered by the Meyers-Milias-Brown Act.

The concerns raised by the district court and Caltrans are also not new; they existed when section 13(c) was enacted. Then, as now, state legislatures could exercise control over the terms and conditions of employment outside the direct control of a particular public sector employer. Congress recognized that reality in considering state agencies that were prevented by state law from collective bargaining. As discussed above, Congress decided not to make collective bargaining contingent on state law but instead gave states a choice: provide for a continuation of existing collective bargaining rights directly, allow transit agencies to contract with a private entity to manage a transit system and continue collective bargaining through the private entity (the "Memphis" arrangement), or forego federal funding. Congress accommodated states by not continuing a right to strike. *See* 109 Cong. Rec. at 5672-73 (Statement of Sen. Morse); *Donovan*, 767 F.2d at 953-54. Congress also did not require any particular form of binding arbitration, but did require some process that avoids unilateral control by an employer over mandatory subjects of collective bargaining. *Donovan*, 767 F.2d at 955.

Similarly, budget constraints are and have been an issue for many employers, public and private. The solution is for parties with collective bargaining obligations to bargain within budget constraints, not for an employer to use budget constraints as a reason for unilaterally removing a subject from bargaining. As the Court in *Donovan* recognized, "the substantive provisions of collective bargaining may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat." 767 F.2d at 953; *see also id*. at 957 (Ginsburg, J., concurring) ("a collective bargaining scheme that would have been characterized '"unfair"' or '"inequitable"' in 1972 might appear just and adequate in 1990. But Congress did not provide for

sunsetting 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.").

For these reasons, the realities of public sector collective bargaining are not a sufficient reason to permit section 13(c) certification of a transit agency that has implemented PEPRA.

Application of section 13(c) in this case

1. Monterey-Salinas does not continue collective bargaining rights under section 13(c)(2)

As discussed above, the phrase "continuation of collective bargaining rights" in section 13(c)(2) means that collective bargaining rights cannot be lessened or worsened unilaterally, even if they are not completely eliminated. By implementing PEPRA, Monterey Salinas has substantially lessened the rights of employees to bargain collectively over pensions. I therefore conclude that Monterey's implementation of PEPRA fails to provide for the "continuation of collective bargaining rights" required by section 13(c)(2).

My initial September 30, 2013 decision listed a number of ways that PEPRA lessens the ATU's ability to bargain over pension benefits for employees, primarily new employees hired after January 1, 2013. AR 204-06. For example, it reduces the benefit formula and increases retirement ages for new employees. Cal. Gov. Code §§ 7522.15, 7520.20. It requires new employees to pay at least 50% of the normal cost of funding their pension. Cal. Gov. Code § 7522.30. It defines "final compensation," used to compute a benefit for new employees, over a three-year period instead of a shorter one. Cal. Gov. Code § 7522.32. It also caps the amount of compensation to be included for new employees and excludes bonuses, unplanned overtime, and unused vacation or sick leave. Cal. Gov. Code §§ 7522.34, 7522.42.

PEPRA also changes pension rights for public employees hired before January 1, 2013. It puts limits on the ability of retirees to work and simultaneously collect a pension, and ends the ability of public employees to purchase nonqualified service time (service credit for non-working time) or "airtime." See Cal. Gov. Code §§ 7522.46, 7522.56; AR 1319. It bans retroactive benefit enhancements. Cal. Gov. Code § 7522.44; see AR 1320. It also prohibits any new supplemental defined benefit plans or the inclusion of any new employee in an existing supplemental defined benefit plan. Cal. Gov. Code §§ 7522.18, 7522.43(c), (d).

These effects of PEPRA are essentially undisputed. It is also undisputed that Monterey Salinas is applying PEPRA to its bargaining unit employees. It reports that it has hired new employees since January 1, 2013, and that all new hires are enrolled in the PERS system on their first day of work. Caltrans Response 14-15. CalPERS in turn has "adjusted" all employees hired after January 1, 2013 "to reflect them as new members under the PEPRA definition." Caltrans Response 14. It is immaterial that Monterey Salinas and ATU negotiated a new collective bargaining agreement effective October 1, 2013 because the agreement was "bargained within the parameters established by PEPRA," Caltrans Response 3.

My conclusion that PEPRA prevents the continuation of collective bargaining rights under section 13(c)(2) does not mean that section 13(c) incorporates all of the NLRA law on collective bargaining. *See Donovan*, 757 F.2d at 749. As discussed above, section 13(c) does not preserve a right to strike and leaves open a number of options for public employers on how to resolve bargaining disagreements. My decision here is also not saying that every unilateral change to a collective bargaining agreement will preclude certification under section 13(c). As I explained in my earlier decision, however, the Department cannot certify a grant when a change in state law substantially reduces existing benefits and significantly limits the scope of bargaining over them, as is the case with PEPRA. AR 200; *cf. Carrier Corp.*, 319 N.L.R.B. 184, 1995 WL 597269, at **19 (NLRB Sept. 29, 1995) (for a unilateral mid-term alteration of a collective bargaining agreement to violate the NLRA, "it must involve a change that is material, substantial, and significant, affecting the terms and conditions of employment of bargaining unit employees"). Thus, I do not view my decision here as adopting a rigid rule that prevents certification under section 13(c)(2) any time a state law addresses an issue that is also a subject of collective bargaining. *See also supra* (discussing background state laws that can remove issues from collective bargaining).

Contrary to Caltrans' argument, Caltrans Response 5, the fact that some form of bargaining can continue post-PEPRA, as shown by the experience of the San Francisco Bay Area Rapid Transit District (BART) and its unions, does not mean that such bargaining provides the "continuation of collective bargaining rights" required by section 13(c)(2). The BART unions reportedly bargained over pensions within the constraints of PEPRA while PEPRA was in effect. Dist. Ct. Doc. 26-2 ¶¶ 3-5 (Decl. of Victoria R. Nuetzel). Such bargaining does not provide for the continuation of collective bargaining rights required by section 13(c)(2) because the continuation of collective bargaining rights means, as discussed above, that a transit agency generally cannot change pension terms during the term of or after the expiration of a collective bargaining agreement without bargaining to impasse. In some instances, a union may waive its right to bargain. *Cf. Local Joint Executive Board v. NLRB*, 540 F.3d 1072, 1079 (9th Cir. 2008); *Pacific Coast*, 304 F.2d at 765. Whether or not the unions in BART waived their right to bargain over PEPRA, the unilateral changes required by PEPRA prevent the continuation of unions' right to bargain over the changes. Moreover, the BART unions eventually reached an agreement that did <u>not</u> comply with PEPRA after California passed legislation suspending PEPRA's applicability to employees protected by section 13(c). *See* Dist. Ct. Doc. 26-2, ¶ 6 (Decl. of Victoria R. Nuetzel). BART's experience thus shows that the results of bargaining are different when PEPRA is in effect than when it is not in effect and thus confirms the impact that PEPRA has on collective bargaining.

PEPRA's restrictions on defined benefit plans also harm employees despite the possibility of bargaining over defined contribution plans. A defined benefit plan, as its name implies, provides an employee a fixed periodic payment on retirement. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999); *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024, 1029 (9th Cir. 2008). "[T]he employer typically bears the entire investment risk" in a defined benefit plan. *Id*. In contrast, a defined contribution plan is one where employees typically contribute a fixed amount to an individual account, sometimes with employer contributions, and the employee on retirement receives whatever level of benefits these contributions and investment returns, after

fees and expenses and other adjustments, will provide. *Id.*, U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan*, Ch. 1, *available at* http://www.dol.gov/ebsa/publications/wyskapr.html. In a defined contribution plan, the employee therefore bears the investment risk, and often must decide how much to contribute, how to invest, what kind of investment return to expect, and how to transform whatever account balance the employee has on retirement into retirement income. *See, e.g.*, U.S. Government Accountability Office, *Retirement Income, Ensuring Income Throughout Retirement Requires Difficult Choices*, GAO-11-400 (June 7, 2011), *available at* http://www.gao.gov/products/GAO-11-400.

Employees faced with these investment risks and decisions in a defined contribution plan quite reasonably may prefer to keep an existing defined benefit plan, particularly if their union has been able to negotiate generous terms. When a law like PEPRA makes fundamental changes and substantial benefit rollbacks to defined benefit plans, Office of Governor Edmund G. Brown Jr. - Newsroom (Aug. 28, 2012), *available at* http://gov.ca/gov/news.php?id=17694, employees can also reasonably view the possibility of a defined contribution plan as insufficient to make up for those losses. *See* ATU Response 13 n.5 (viewing a defined contribution plan as "not a pension plan at all; it is nothing more than a tax advantaged forced savings plan" that may not be sufficient to sustain employees throughout their retirement). As I explained in my September 4, 2013 decision involving a grant by the Sacramento Regional Transit District, PEPRA therefore differs from a Massachusetts law that transferred group health insurance coverage from a transit agency to an insurance commission because the Massachusetts law placed no hard caps on health care benefits and no restrictions on negotiating supplemental plans. AR 131. PEPRA puts hard caps on defined benefit plans and restricts parties' ability to negotiate supplemental defined benefit plans, even if such plans do no more than supplement (such as by establishing a guarantee of minimum benefit) a defined contribution retirement plan such as those envisioned by PEPRA.

2. Monterey Salinas has not preserved rights under an existing collective bargaining agreement as required by section 13(c)(1)

When Monterey-Salinas and Caltrans applied for the section 13(c) grants at issue here, Monterey-Salinas had a collective bargaining agreement in effect from October 1, 2010 through September 30, 2013. AR 917-972. The district court concluded that "[t]he portion of [this agreement] defining the bargaining unit does not appear to be in the administrative record, yet DOL apparently assumed that its understanding of a bargaining unit comported with the definition in that document." 2014 WL 7409478, at *18. The definition of the bargaining unit is in the record, however, and says the agreement covers employees in certain job classifications for the entire term of the contract without excluding employees hired after a certain date. AR 960 (Art. 41.a). The definition supports the agreement's coverage of new employees because "[i]t is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit." *Airway Cleaners, LLC*, Case 29-RC-099871, 2015 WL 1735355, at *3 (NLRB April 15, 2015).

Leaving aside the definition of bargaining unit, I conclude that the agreement applies to new employees, i.e., those hired on or after January 1, 2013. In earlier proceedings, Monterey Salinas and ATU discussed PEPRA's effect on new employees under the agreement, which indicates an understanding that the agreement applied to new employees. AR 794-96, 910-14. The terms of

the agreement support this understanding. The agreement requires, among other things, that "any new employees within the scope of this Agreement" become members of ATU "within thirty-one (31) days of the date of their employment," AR 960 (Article 41.c), provides an introductory period for new hires, AR 937 (Article 23), and requires Monterey to inform each new employee at the time of his or her employment of the existence of the agreement. AR 961 (Art. 43). The agreement also specifically distinguishes between employees hired before June 30, 2011 and those hired after that date in addressing funding for the pension plan. AR 824, 930. These provisions would be superfluous if the agreement, in effect since October 1, 2010, did not cover new employees. Additionally, the parties' current collective bargaining agreement, in effect from October 1, 2013 through September 30, 2016, has the same material language and the parties expressly agree that it covers new employees. Caltrans Response 14; ATU Response 17, 19-20; see CBA articles 23, 41.a, 41.c, 43.a.

Because of PEPRA, Monterey Salinas is unable to preserve employee pension rights and benefits under the agreement in effect from October 1, 2010 through September 30, 2013. As explained in my September 30, 2013 decision, for new employees, PEPRA reduced the benefit formula and increased retirement ages, changed the definition of "final compensation" for benefit calculation purposes, imposed equal cost-sharing, prohibited employer-paid member contributions and redefined "pensionable compensation." AR 205. As of 2018, PEPRA permits increased cost-sharing and prohibits employers from modifying the final compensation formula to anything less than a three-year average for employees hired before January 1, 2013. AR 205. For both groups of employees, PEPRA prohibits purchase of "airtime" and caps pensionable compensation. AR 205. This failure to preserve pension rights and benefits precludes certification under section 13(c)(1).

Sincerely,

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