U.S. Department of Labor

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

September 30, 2013

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

Re: FTA Application
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)

Dear Mr. Rogers:

This is in reply to the request from your office that we review the above-captioned application 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).

This is the Department's final determination on the issue of Monterey-Salinas Public Transit System Joint Powers Agency d/b/a Monterey-Salinas Transit's (MST) ability 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, Local 1225 (ATU or the Union).

Federal Transit law requires as a condition of 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)(l). The law specifically provides:

> Arrangements ... shall include such provisions as may be necessary for -
> (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
> (2) the continuation of collective bargaining rights;
> (3) the protection of individual employees against a worsening of their positions with respect to their employment;
> (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and
> (5) paid training or retraining programs.

49 U.S.C. § 5333(b)(2).[1] These arrangements are commonly referred to as section 13(c) agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307. Because the Secretary of Labor's certification is a "condition" for the award of a grant, the Secretary must certify the protective arrangements before the Department of Transportation can award funds to grantees. 73 Fed. Reg. 47,046, 47,047 (Aug. 13, 2008) (preamble to current Department Guidelines).

In exercising the Department's discretion to ensure fair and equitable protective arrangements in compliance with section 13(c), the Department has reviewed California's Public Employee Pension Reform Act, Assembly Bill 340, (Furutani), Stats. 2012, Chapter 296 (PEPRA), in consultation with the State of California's Office of the Governor and the Labor and Workforce Development Agency with respect to the precise contours of the statute.[2] The Department has also reviewed the relevant collective bargaining agreements, pension plans, and the parties' briefs and supplemental materials concerning the provisions of the parties' collective bargaining agreements and PEPRA's effects to determine the effects of PEPRA on rights protected by section 13(c). We have concluded that PEPRA makes significant changes to pension benefits that are inconsistent with section 13(c)(l)'s mandate to preserve pension benefits under existing collective bargaining agreements and section 13(c)(2)'s mandate to ensure continuation of collective bargaining rights. Thus, PEPRA precludes the Department from providing the requisite certification to the Federal Transit Authority.[3]

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[1] Note the text of the statute was codified from this earlier version in 1994 to separate the fourth assurance into two separate and lettered paragraphs.

[2] Along with the Department's independent review of PEPRA, attorneys from these California state government offices provided the Department with a useful summary of the PEPRA provisions, upon which the Department relied.

[3] This denial of certification is issued without prejudice to MST's right to seek or obtain certification under changed circumstances.

Background - State Law Change to Collective Bargaining Rights

On September 12, 2012, Governor Edmund G. Brown, Jr. signed into California law PEPRA and related pension reform changes. These statutory provisions became effective on January 1, 2013. PEPRA applies to most California transit systems.[4] PEPRA's practical and legal effect on the employees of transit agencies depends on each union's separately negotiated collective bargaining agreement and the type of pension plan in which the employees participate. [5] In general, PEPRA is immediately effective for employees hired on or after January 1, 2013. These employees are termed "new" employees or, when referring to their participation in any type of a public retirement system or plan, "new" members. PEPRA Article 4, Section 7522.04(e) and (f). For the purpose of this determination, the Department adopts the term "classic," as used by the California Public Employee Retirement System, for all those employees who do not meet the definition of "new." PEPRA introduces a two-tier pension benefit system for these two classes of employees. *Id.*

PEPRA ultimately determines the pension contributions and every significant aspect of the pension benefit calculation for "new" employees. It controls the benefit formula (i.e., percent multiplier of final compensation at various years of service), the definition of compensation used to determine the pension benefit ("pensionable compensation"), and the minimum age for receipt of a pension; it imposes a cap on the amount of final compensation that can be used in the pension benefit determination, and requires "new" employees to pay 50 percent of normal pension costs. Additionally, "new" employees are not eligible to participate in supplemental defined benefit plans. PEPRA Article 4, Sections 7522.10, 7522.20, 7522.32, 7522.34(c), 7522.18(c).

PEPRA also affects the rights of "classic" employees. As of January 1, 2018, PEPRA authorizes employers to set "classic" employees' contribution level at 50 percent of the normal cost of pension benefits after bargaining to impasse, restricted only by a cap set forth in Section 31631.5(a)(l).

Procedural Background - The Parties' Negotiations

The section 13(c) process begins when the Department receives a copy of an application for Federal assistance along with a request for certification of employee protective arrangements from the Department of Transportation.

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[4] Those operated by charter cities and charter counties not participating in the California Public Employees Retirement System (CalPERS) or the 1937 Act County Requirement System and those operated by the University of California are not affected. In addition, transit systems that use private contractors for the operation of all service and vehicle maintenance, as well as other supporting functions, are not affected. PEPRA Article 4, Section 7522.02(a)(2).

[5] PEPRA's effect on employees of transit agencies also depends on whether the pension plan falls under either the 1937 County Act Systems, can be defined as an "independent" plan, or as is the case with the MST-ATU is a CalPERS plan.

Upon receipt of an application involving employees represented by a labor organization, the Department refers a copy of the application to that organization and notifies the applicant of the referral. After referral and notice, the Department recommends the terms and conditions to serve as the basis for certification. The Department's implementing Guidelines (Guidelines) establish a practice that the previously certified protective arrangement is appropriate for application to the new grant. Therefore, the Department's referral will propose certification based on those terms and conditions. 29 C.F.R. § 215.3(b)(2).

Under the Department's implementing Guidelines, applicants and unions/ employees may file "objections" to the terms of a proposed certification within fifteen days. The Department must then determine whether the objections are "sufficient," i.e., "raise[] material issues that may require alternative employee protections" or "concern[] changes in legal or factual circumstances that maymaterially affect the rights or interests of employees." 29 C.F.R. § 215.3(d). More specifically the Guidelines provide that the parties may "submit objections, if any, to the referred terms," while, at the same time, the parties are "encouraged" to arrive at "a mutually agreeable solution to objections any party has to the terms and conditions of referral." 29 C.F.R. § 215.3(d)(l).

Here, the ATU objected to the proposed terms for employee protection certification contained in the Department's referral for the above referenced grant on January 15, 2013. The ATU objected that PEPRA required "participating employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representatives by: "raising the minimum retirement ages; reducing pension benefits for new public employees; imposing new formulas for calculating pensions for new public employees; imposing various measures designed to avoid pension spiking; and adjusting the compensation cap annually and requiring certain contribution from employees equal to one-half of the normal costs of the plan." *ATU Objections.*[6]

ATU states that "negotiations over all these benefit features have been central to public sector collective bargaining in California for decades, allowing parties to trade off various changes in pension benefits for other economic items of importance." *ATU Objections,* p. 4. ATU objected that PEPRA stripped ATU of the right to negotiate over any of these critical aspects of pension benefits, "effectively putting an end to collective bargaining relative to the core subject of retirement benefits." *ATU Objections,* p. 4.

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6 These objections were originally for grant CA-90-Z022. ATU incorporated them by reference and attachment to the grant at issue here. References to ATU Objections refer to those dated November 16, 2012.

The Department reviewed the ATU's objections concerning PEPRA and found the objections sufficient. On February 5, 2013, the Department communicated to the parties that PEPRA appeared to have removed mandatory and traditional subjects of collective bargaining from the consideration of the parties and to have affected the continuation of the collective bargaining rights of employees. 49 U.S.C. § 5333(B)(2)(b). The Department determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the unions. 29 C.F.R. § 215.3(d)(3)(ii).

Pursuant to the Department Guidelines, 29 C.F.R. § 215(d)(3)(ii), the Department directed MST and ATU to engage in good faith negotiations/ discussions to seek a mutually acceptable resolution of issues concerning the continuation of collective bargaining in light of PEPRA. The parties did so on March 7, 2013, but failed to reach a resolution of the issues. On August 15, 2013, the Department directed the parties to respond to certain specified questions in the Briefing Schedule. The parties submitted responses, with accompanying exhibits, on September 6, 2013.

As set forth more fully below, ATU asserts that PEPRA has diminished or eliminated the rights of bargaining unit members. According to ATU, PEPRA makes changes to the substance of bargained-for pension rights for both "new" and "classic" employees and to the right to participate in the bargained for pension plans for "new" employees. ATU asserts that these changes cause an irreconcilable conflict with the requirements of Section 13(c). *ATU Objections and Br., passim.* MST, on the other hand, asserts that PEPRA presents no 13(c) conflict because it preserves the rights of "classic" employees and leaves ample room for bargaining over "new" employee pension benefits. *MST Br.,* p. 8.

MST Pension Benefits - CalPERS

California Public Employee Retirement System (CalPERS) is a defined benefit retirement plan which provides benefits that are calculated using a "defined formula." MST employees participate in one of CalPERS' "miscellaneous" member plans.[7] Retirement benefits are calculated using a member's years of service credit, age at retirement, and final compensation (average salary for a defined period of employment). CalPERS offers a "variety of retirement formulas

[7] "Miscellaneous" plans refer to plans provided to "those employed by the State and universities who are not involved in law enforcement, fire suppression, the protection of public safety, or employed in a position designated by law as industrial, patrol, peace officer/firefighter, or safety." (What You Need to Know About Your CalPERS State and Industrial Miscellaneous Benefits" http:/ /www.calpers.ca.gov/eip-docs/about/pubs/member/your-benefits-your-health-state-misc-inds-benef.pdf, p.3.)

that are determined by the member's employer...; occupation...; and the specific provisions in the contract between CalPERS and the employer."[8]

According to CalPERS, participating "public agencies may include various contract options in their retirement plan or plans."[9] While a "minimum level of benefits" is statutorily required, employers "can amend their contract to enhance the minimum benefits, or provide a range of additional optional benefits to employees." Seen. 8 and 9. All employers when initiating a contract must choose (1) the service retirement formula they will offer; (2) 1 year or 3 year final compensation period; (3) the maximum cost of living adjustment; (4) the amount of lump sum death benefit for retired members; (5) the level of benefits to be provided to survivors of employees not covered by Social Security; and (6) whether to allow industrial disability retirement for miscellaneous members. *Id.* Among the optional benefits CalPERS makes available to miscellaneous members are the following retirement formulas: 1.5% at 65; 2% at 55; 2.5% at 55; 2.7% at 55; 2% at 60; and 3% at 60. *Id.*

Prior to PEPRA, MST "classic" employees received a "2% at 55" pension, *i.e.* an annual pension, beginning at age 55, equal to 2 percent of the employee's "final compensation" multiplied by his or her number of years of service, with actuarial adjustments for earlier or later retirement dates. *ATU Objections,* p. 3; *ATU Br.,* p. 2. Final compensation for purposes of pension benefit was calculated on the basis of one year of pay.[10] *ATU Objections,* pp. 3-4; *ATU Br.,* p. 2. In addition, MST paid all or half of employee contributions for "classic" employees, depending on when the employee was hired. For employees hired on or before June 30, 2011, MST paid the entire employee share of the contributions. For employees hired after that date, MST paid 50 percent of the employee share. *ATU Objections,* p. 4; *ATU Br.,* p. 2. The MST plan provided for purchase of additional retirement service credit ("air time").[11] *ATU Objections,* p. 4; *ATU Br.,* p. 4. In addition, pensionable compensation included bonuses, overtime, pay for additional services, unused leave and severance pay. *ATU Br.,* p. 3.

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8 http://www.calpers.ca.gov/ index.jsp?bc= /about/benefits-overview/retirement/retirement-benefits.xml.

9 http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2011/200-039-11-attach.pdf. (8/30/ 13).

10 ATU alleges the final compensation was based on the *highest* one year of pay. MST refers to the period as "single year compensation." *MST Br.,* p. 4.

11 Air time refers to the purchase of service credit for purposes of service and benefit calculation. Prior to PEPRA some retirement systems offered members the opportunity to purchase up to five years of service credit. PEPRA prohibits a retirement system from accepting applications for the purchase of air time service credit on or after January 1, 2013.

Position of ATU

ATU states that MST, or its predecessor, and ATU have been parties to collective bargaining agreements since September 26, 1973. The parties' current collective bargaining agreement expires on September 30, 2013. *ATU Br.,* Ex. 1. ATU asserts that MST (or its predecessor) has contracted with CalPERS to provide pension benefits to ATU employees since October 5, 1974. ATU states that the parties could, and frequently did, negotiate over the selection of one of five benefit formulas, employer-paid member contributions, as well as over a variety of other benefit options, including whether or not to allow employees to purchase "airtime", and how to determine final compensation. *ATU Br.,* p. 2; *ATU Objections,* p. 4.

ATU claims that PEPRA unilaterally changes the rights of employees to pension benefits obtained though bargaining with MST. In pertinent part, ATU alleges PEPRA's effect on "new" and "classic" employees as follows:

"New" Employees

- Pension Formula: Under PEPRA, the benefit formula is changed from 2% at age 55 to 2% at age 62[12] (Govt. Code§ 7522.20).
- Pensionable Compensation: Under PEPRA, pensionable compensation is based on the highest 3-year average (rather than the highest one-year average for "classic" employees under the current Plan). (§ 7522.32)
- PEPRA excludes certain types of pay from pensionable compensation for the first time, including but not limited to bonuses, overtime, pay for

[12] ATU provides the following chart based on 20 years of service and a final monthly salary of $5,000 to demonstrate the effect of this change:

Retirement Age	Current Benefit "Classic" Employees	Benefit Under PEPRA "New" Employees
SO	$1,426	$0
52	$1,628	$1,000
55	$2,000	$1,300
58	$2,156	$1,600
60	$2,262	$1,800
62	$2,366	$2,000
63	$2,418	$2,100
65	$2,418	$2,300

ATU notes that this analysis understates PEPRA's effect because "CalPERS assumes 3% annual wage growth. Using that rate, the difference between final average compensation under the current Plan and under PEPRA is 2.88% of an employee's compensation in his or her final year. Thus, if the employee's compensation in the final year is $5,000 per month, that is the amount used under the current formula, whereas under PEPRA, only $4,856 would be used."

additional services outside normal working hours, cash payouts for unused leave, and severance pay. (§ 7522.34)

- Employee Contributions: Under PEPRA, employee contributions are fixed at 50% of the annual normal cost(§ 7522.30), and employer 'pick-ups' of any portion of the employee contribution are prohibited. (§ 20516.5; § 20683.2)
- Minimum Retirement Age: Under PEPRA, the minimum retirement age is changed from 50 to 52.

"Classic" *Employees*

- Benefit Enhancements: PEPRA prohibits retroactive benefit enhancements. (§ 7522.44)
- Purchase of Service Credit: PEPRA eliminates purchase of service credit.

ATU Br., pp. 3-4. ATU notes that beginning January 1, 2018, an employer who has bargained to impasse and completed impasse procedures may unilaterally increase the contribution of "classic" members to paying the normal cost of their pension benefit by as much as 8 percent at any single negotiation, and eventually over multiple negotiations to as high as 50 percent of that cost. *ATU Br.,* p. 4 (citing§ 20683.2).

In its March 25, 2013, letter to former OLMS Director John Lund incorporating by reference the objections filed on January 1, 2013, ATU states that PEPRA fundamentally limits MST's bargaining obligation over certain mandatory subjects of bargaining relative to pension benefits.

Position of MST

MST states that its current collective bargaining agreement with ATU is for three years, beginning October 1, 2010 and ending September 30, 2013, and that the parties are "actively engaged in good faith bargaining as to the terms of a successor" agreement.

In most respects, MST echoes ATU's description of its CalPERS plan: "2% @ 55, with single year compensation calculation" benefit formula, with enhancements for (1) "Military Service Credit," (2) the "Section 21571, 1959 Survivor Allowance - First Level," and (3) the "Section 21548, Pre-Retirement Optional Settlement 2 Death Benefit." *MST Br.,* p. 4. MST also describes the same employer paid member contributions for "classic" employees based on date of hire: 100 percent employee share for those hired on or before June 30, 2011 and 50 percent for those hired after that date. *MST Br.,* p. 5. MST also takes the position that following expiration of the existing collective bargaining

agreement, on September 30, 2013, PEPRA changes the benefit calculation for both "new" and "classic" employees by requiring it to be based on the highest average 3 years of compensation.[13] MST acknowledges that PEPRA sets a defined benefit formula of 2 percent at age 62, with an early retirement age of 52, and a maximum benefit factor of 2.5 percent at age 67. *MST Br.,* p. 5.

However, MST argues that while section 13(c) preserves existing rights of employees, it does not preserve and continue rights that an employee never had, i.e., those rights that predated his or her employment. MST states that section13(c) protections for "new" employees are limited to the pension benefits that exist when they are hired and the permissible scope of collective bargaining over terms and conditions of employment, including pension issues, that exists when they are hired. MST asserts that "PEPRA does nothing to impair those rights." Further, MST states that it has not hired any employees since January, 1, 2013, so it has no "new" employees under the existing collective bargaining agreement, which expires September 30, 2013, who have been or will be affected by PEPRA.[14]

MST further states that PEPRA does not limit its ability to negotiate alternative benefits or other forms of compensation to offset limitations imposed by PEPRA. MST claims that it can make both "classic" and "new" ATU employees "whole" through bargaining over the options allowed under PEPRA. *MST Br.,* p. 8.

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[13] MST's statement appears to come from CalPERS' summary of PEPRA's changes to benefits. While section 7522.32 of PEPRA contains some ambiguity, we agree that this provision, which prohibits an employer, on or after January 1, 2013, from "modify[ing] a benefit plan to permit calculation of final compensation on a basis of less than the average annual compensation earned by the member during a consecutive 36 month period" applies to both classic and new members. CalPERS states that the provision affects classic members because it "prohibits employers from offering [abenefit of less than three years to classic members in the future." See *MST Br.,* Ex. D, p. 9.

[14] MST applied earlier for a grant for operating assistance for June 1, 2012 to June 30, 2013, and ATU raised PEPRA-based objections to certification. The parties reached an agreement that MST would not hire employees who would be considered "new" under PEPRA until after September 30, 2013, when the current collective bargaining agreement expires. MST also gave ATU assurances that it would not seek to implement PEPRA 's provisions during the limited term of the grant and would seek a waiver from CalPERS allowing it to maintain the employee-employer pension contributions. The Department ultimately issued a certification based upon the parties' agreement. However, the Department made plain that its certification was not precedential and would not affect determinations related to future MST grants. See Department's December 21, 2012, certification addressing MST Grant (CA-90-2022) and June 10, 2013 for CA-90-Z022-01 for the same operating period identified above. As discussed, *infra,* this fact does not alter PEPRA's effect on new employees hired after September 30, 2013, and does not solve the conflict between PEPRA and section 13(c) in this case.

Analysis of the Parties' Positions

Analyzing the parties' claims requires consideration of relevant legal precedent in this area. In *Jackson Transit Authority v. ATU, Local Division 1285,* 457 U.S. 15, 17-18 (1982), the Supreme Court's recognized that section 13(c) mandates the preservation and continuation of collective bargaining rights as a precondition to receipt of federal transit aid. Specifically, the Court stated:

> To *prevent* federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included 13(c) in the Act ... the statute lists several protective steps that *must be taken* before a local government may receive federal aid; among these is the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights.

Id. at 17 (emphasis added). Shortly after *Jackson Transit,* the U.S. Court of Appeals for the District of Columbia Circuit underscored section 13(c)'s mandate to continue collective bargaining rights. *Donovan v. Amalgamated Transit Union,* 767 F.2d 939 (D.C. Cir. 1985), In *Donovan,* the union objected to the Department's section 13(c) certification in the aftermath of a Georgia state law, Act 1506, which removed various subjects from the scope of bargaining between the transit agency and the union. The court, relying on *Jackson Transit,* reiterated that section 13(c) sets forth mandatory requirements, "not simply general objectives or suggestions." *Id.* at 944. Thus:

> [t]he Secretary is not free to certify a labor agreement that does not provide for the continuation of collective bargaining rights simply because he believes that, on balance, the agreement is fair. Rather, he must first determine that the requirements of the statute [i.e., the five enumerated sections of section 13(c)] are fully satisfied *before* he can find an agreement "fair and reasonable."

Id. at 946. Turning to the specific provisions of the Georgia law, the court characterized the effect of the law as removing mandatory subjects from collective bargaining. The court specifically noted that the provision in the state law that barred the municipal transit agency from negotiating over benefits for part-time employees prevented "the continuation of collective bargaining over wages that section 13(c) mandates." *Id.* at 952. The court concluded that while section 13(c) does not dictate or perpetuate the substantive terms of a collective bargaining agreement, it requires that any changes "be brought about through collective bargaining, not by state fiat." *Id.* at 953.

Under *Donovan* the lessening or diminution of collective bargaining rights, even where they are not entirely eliminated, violates section 13(c). Indeed, the Court

in *Donovan* noted that the Georgia law *"altered in several material respects* the existing statutory authorization of [the employer] to engage in collective bargaining" by reserving to management the inherent right to control various aspects of wages and working conditions. 767 F.2d at 951 (emphasis added). However, the law did not restrict the parties from negotiating over *entire* subjects of mandatory bargaining. For example, the law reserved to management the "right to subcontract service, other than for the operation of rail or bus vehicles, provided no employees are laid off." *Id.* This reservation left to the parties the ability to negotiate over subcontracting where layoffs would occur or subcontracting that did involve the operation of bus or rail. Similarly, under the law management reserved to itself "the right to hire part-time employees, for no more than 25 hours per week, without payment of fringe benefits." *Id.* This restriction still permitted bargaining over the hiring of part-time employees for more than 25 hours a week and where fringe benefits would be paid. In addition, the law reserved to management "the right to establish the number of regular hours that may be worked in a week, not to exceed 40 hours, and to fix the number of overtime hours, not to exceed 10 hours per week." *Id.* Once again, this removed only partially the subject of regular and overtime hours from the ambit of bargaining. Yet the court still concluded that the law violated Section 13(c)'s requirement to continue collective bargaining over mandatory subjects. Thus, we conclude that *Donovan* supports the union's position that restricting the right to bargain over mandatory subjects violates Section 13(c)(2).

Senator Morse, the sponsor of section 13(c), stated his intent that transit agencies that "lessen" collective bargaining rights not receive federal funding. As stated in the *Manager's Handbook: Guidance For Addressing Section 13(c) Issues,*[15] "supporters of the bill strongly asserted that the labor protection provisions were not intended to infringe upon or vitiate State or local laws, but rather to assure that the Federal assistance did not diminish any *existing* collective bargaining rights." (Emphasis in original).

There is nothing in *Donovan* or the language of section 13(c) that permits the Department to certify a transit grant if a change in state law substantially reduces existing benefits and significantly limits the scope of bargaining over them. In this instance, because MST and its represented transit employees

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is G. Kent Woodman, Attorney at Law, Eckert, Seamans, Cherin & Mellott, *Manager's Handbook: Guidance for Addressing Section 13(c) Issues,* (Publication written for the Public Private Transportation Network (PPTN), an Urban Mass Transportation Administration (UMTA) technical assistance program, p. 3. (February 24, 1987).(The opinions findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PPTN, COMIS Corporation (administrator of the PPTN program), the United States Department of Transportation, UMTA, or the Office of the Secretary.) The author has provided services of a technical and advisory nature under contract to the PPTN and is considered an expert in his field.

had the ability to bargain over the full panoply of pension rights, the process of collective bargaining with respect to those terms must continue in order for the Department to certify.

MST asserts that section "13(c) does not deny the State of California the authority or prerogative to make prospective changes to address the economic condition of public pension systems." *MST Br.,* p. 3. MST is correct, as section 13(c) does not supersede the operation of state law and impose federal policy on the state. Indeed, the State of California is free to pass any number of laws affecting public employees. However, if that law is inconsistent with the requirements of section13(c), the state must forego federal funding. As stated in *Donovan,* "Section 13(c) does not prescribe mandatory labor standards for the state but rather dictates the terms of federal mass transit assistance." 767 F.2d at 947. *See Jackson Transit,* 457 U.S. at 27 ("Congress intended that §13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities") (footnote omitted); *Local Division 589 v. Massachusetts,* 666 F.2d 618, 627 (1st Cir. 1981) *("Local* 589")(section 13(c) does not invalidate state law, but states that have laws that prevent the making of fair and equitable arrangements cannot obtain federal assistance).

Under the standard set forth in *Jackson Transit* and *Donovan,* the Department is legally obligated to deny certification where collective bargaining rights have neither been preserved nor continued.[16] As the court in *Donovan* stated, section 13(c)'s requirement that labor protective arrangements provide for continuation of collective bargaining rights means, at a minimum, "that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." 767 F.2d at 951. The Department has consistently articulated this position in Departmental correspondence to grantees and unions. *See* the Department's August 16, 2012, *Cover Letter for Referral for Michigan DOT Grant* (MI-04-0052-01); the Department's May 3, 2011, *Initial Response* and May 20, 2011 *Final Response to Objections for Michigan DOT Grant* (MI-95-x065); the Department's June 23, 2011 *Response to Objections for META DOT Grant* (A-70-x00l-0l).

Quoting *Local 589,* 666 F.2d 618, MST states that 13(c) does not mandate that the substantive terms of collective bargaining agreements remain frozen. *MST Br.,* p. 3, In *Local 589,* the First Circuit upheld a Massachusetts law prohibiting

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[16] The Department has similarly held that collective bargaining representatives are not obligated to bargain over benefits that have been unilaterally eliminated, or capped, nor must they bargain to a predetermined result. *ATU v. City Utilities of Springfield,* Dept. Case No. 9113c18 (June 1, 1999).

the labor union from bargaining collectively over management's actions to hire, promote, assign, direct and discharge employees, to assign overtime, or to hire part-time employees. The state lawalso forbade the transit authority to agree to pay pensions based upon overtime pay or to provide for automatic cost-of-living adjustments. MST's reliance on *Local 589* is misplaced. That case dealt with the issue whether section 13(c) preempts a state law, not whether a state must provide protective arrangements consistent with section 13(c) in order to obtain federal grants. As the court in *Donovan* remarked, 767 F.2d at 947 n.9 (emphasis added), *"We decide today the question the* First *Circuit did not reach,* and hold that where a state, through its laws or otherwise, fails to satisfy the requirements of Sec. 13(c), the Secretary must cut off funds by denying certification."; *See also* FTA Legal Research Digest ("the Massachusetts case *left open the question of what would result if the* state *lawprecluded the* state *or* its *agencies from complying with 13(c),* which was essentially addressed in a subsequent decision involving an ATU challenge to a Department certification" ((referencing *Donovan)* (emphasis added)).[17]

The DC Circuit's exhaustive decision in *Donovan* -- as opposed to the earlier First Circuit decision -- is the controlling case on this issue. As discussed earlier, *Donovan* holds that the Secretary cannot certify a labor protective arrangement or agreement that fails to satisfy all five enumerated subsections of the Act. Federal labor policy, rather than state law, defines the substantive meaning of the collective bargaining rights that must be continued for purposes of section 13(c). Where a state statute forecloses negotiation between management and labor over mandatory subjects of collective bargaining, the Secretary cannot certify. Here, there can be no dispute that pensions are a mandatory subject of bargaining. *Donovan,* 767 F.2d at 952, (citing *NLRB v. Black-Clawson* Co., 210 F.2d 523 (6th Cir. 1954) (profit sharing plans are "wages")); *Detroit Police Officers Ass'n v. City of Detroit,* 391 Mich. 44, 214N.W.2d 803 (1974) (pensions are a mandatory subject). Therefore, MST erroneously claims that state lawchanges that foreclose collective bargaining over many aspects of pensions are legally consistent with section13(c).[18]

MST argues that PEPRA does not affect the rights of "new" employees in this case because it has not hired any "new" employees. While MST agreed not to hire any "new" employees for the term of the current collective bargaining agreement, which expires on September 30, 2013 (seen. 14), it has made no such commitment for the life of the grant in the instant case, which spans

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[17] G. Kent Woodman, Jane Sutter Starke, Leslie D. Schwartz, *Transit Labor Protection-A Guide to 13(c) Federal Transit Act,* Transportation Research Board Legal Research Digest, 10 (June 1995, No. 4), http:/ /onlinepubs.trb.org/online pubs/tcrp/terp_lrd_04.pdf_.

[1]s MST asserts that PEPRA does not affect bargaining with respect to alternative benefits, such as life insurance or deferred compensation, that PEPRA neither affects nor eliminates. The availability of collective bargaining over other aspects of pension benefits does not cure the fundamental conflict between PEPRA and section 13(c), namely, that PEPRA removes from the scope of collective bargaining many key aspects of pensions.

multiple years beyond that date. Thus, the rights of "new" employees hired after September 30, 2013, are clearly affected by PEPRA in the ways described above, and the fact that MST has not yet hired "new" employees is of no consequence.

Moreover, MST asserts that prospective employees have no vested right to any benefits. According to MST, new employees have not suffered any diminution of rights, because they did not possess rights before PEPRA became effective. Rather, the rights of new employees are established at the time they are hired. *See MST Br.,* p. 6. In essence, MST maintains that the State remains free to alter unilaterally the terms of a collective bargaining agreement without running afoul of section 13(c) so long as the employees affected by those changes have not begun working. However, there is no applicable distinction between "new" and "classic" employees for purposes of sections 13(c)(l) and (2). Section 13(c)(l) specifically requires preservation of benefits under *existing* collective bargaining agreements, and section 13(c)(2) requires the continuation of collective bargaining rights. Thus, unlike sections 13(c)(3), (4) and (5), these first two subsections protect the collective rights of all bargaining unit members, not individual rights. Under well-established federal labor policy, "[u]nlike a standard commercial contract, a collective bargaining agreement binds both those members within a bargaining unit at the time the agreement is reached as well as those who later enter the unit." *Gvozdenovic v. United Air Lines,* 933 F.2d 1100, 1106-07 (2d Cir. 1991).[19] In other words, a collective bargaining agreement is applicable to all bargaining unit members, regardless of their date of hire.[20] As a result, the Secretary cannot certify a grant sought by a transit agency if the transit agency unilaterally reduces the negotiated benefits of any bargaining unit employees, regardless of their date of hire, or precludes the union from negotiating over benefits and contributions for employees hired during the term of the collective bargaining agreement.

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[19] *See Wood u. Nat'l Basketball Ass'n,* 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (citing *J.J. Case* Co. *u. NLRB,* 321 U.S. 332, 335 (1944)), *afjd,* 809 F.2d 954,961 (2d Cir. 1987). Protections against unfair labor practices are also applicable to job applicants as "employees" under the **NLRA.** *See Reliance Ins. Companies u. NLRB,* 415 F.2d 1, 6 (8th Cir. 1969). To hold that collective bargaining agreements do not bind these future employees "would tum federal labor policy on its head." *Nat'l Basketball Ass'n,* 602 F. Supp. at 529.

[20] *NLRB u. Laney & Duke Storage Warehouse* Co., 369 F.2d 859, 866 (5th Cir. 1966) (citing *Leroy Mach* Co., 147 NLRB 1431, 1431 (1964)). Unions are "entitled" to bargain with employers over terms affecting new hires. *See id.* In *Leroy Machine Company,* the National Labor Relations Board (NLRB) held that the employer violated the NRLA by refusing to bargain with the union over "rates of pay for new jobs, a mandatory subject of collective bargaining." 147 NLRB at 1431. Furthermore, the employer has a duty to bargain "with the collective bargaining agent of the present employees" over conditions of employment "as [they apply] to future employees." *City of New Haven u. Conn. State Bd. of Labor Relations,* 410 A.2d 140, 145 (Conn. Super. Ct. 1979).

DETERMINATION

An analysis of PEPRA's effect on the collective bargaining rights of transit workers covered by the parties' collective bargaining agreement reveals an impermissible conflict with sections 13(c)(l) and 13(c)(2). PEPRA both reduces existing benefit levels for such "new" employees (thus violating section 13(c)(l)'s "preservation of benefits" requirement), and diminishes a union's ability to bargain over benefits *and* contributions for "new" and "classic" employees in the future (thus violating section 13(c)(2)'s "continuation of collective bargaining rights" requirement).

CalPERS has published several documents that discuss how PEPRA affects the plan. Below is a summary of a chart which CalPERS published, that MST attached to its brief as Exhibit D, showing some of the changes PEPRA makes to the plan:

Summary of Change	**PEPRA§**	**Affects *Classic* Members**	**Affects *New* Members**
Defines "new" member as one who is brought into CalPERS membership for first time on or after 1/1/13	7522.04(f)	X	X
Reduces benefit formula and increases retirement ages for "new" members. 2% at age 62 for all "new" members with an early retirement age of 52 and a maximum benefit factor of 2.5% at age 67.	7522.15 7522.20 7522.25		X
Caps pensionable compensation at $113,700	7522.10		X
Imposes equal cost sharing (i.e. 50% of the total normal cost of their pension benefits) on "new" members and prohibits employer paid member contributions. As of 1/1/18, employers, following bargaining to impasse, may unilaterally require classic members to pay up to 50% of the total normal cost of their pension benefits subject only to a percentage cap on the increase	7522.30 20516.5 20683.2	X	X
Prohibits purchase of additional retirement service credit (ARSC or "Airtime") on or after 1/1/13.	7522.46	X	X
Redefines "pensionable compensation" for "new" members as "the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules."	7522.34		X
Requires 3 year final compensation for "new" members. (i.e. Final compensation means the highest average annual pensionable compensation earned by a member during a period of at least 36 consecutive months). And prohibits emplo er from adopting less than 3 r. final compensation period for "classic" members who are current! subj ct to a 3 ear period.	7522.32	underlined provision affects "classic" employees	X

http://www.calpers.ca.gov/eip-docs/employer/program-services/summary-pension-act.pdf.

PEPRA also affects the specific MST-ATU plan at issue in similar fashion. Prior to PEPRA, the MST-ATU plan provided for employer-paid member contributions at the rate of 100 percent for those hired before June 30, 2011, and 50 percent for those hired after that date. "Classic" employees received a "2% at 55" pension benefit. Final compensation was calculated based on one year. Employees could purchase airtime, and pensionable compensation included bonuses, overtime, pay for additional services, unused leave and severance pay.

PEPRA unilaterally changes those benefits. For "new" employees, PEPRA reduces the benefit formula and increases retirement ages (2 percent at age 62 for all "new" members and a maximum benefit factor of 2.5 percent at age 67); changes the definition of "final compensation" for benefit calculation purposes to the highest average annual compensation during a consecutive 3-year period; imposes equal cost sharing; prohibits employer paid member contributions; and redefines "pensionable compensation." For "classic" employees PEPRA allows employers, as of 2018, following bargaining to impasse, to require classic members to pay up to 50 percent of the total normal cost of their pension benefits subject only to a percentage cap on the increase and prohibits employers from modifying the final compensation formula to anything less than a three-year average. For both "new" and "classic" employees, PEPRA prohibits purchase of airtime on or after June 1, 2013, and caps pensionable compensation at $113,700.

By unilaterally imposing these terms, PEPRA forecloses bargaining on these issues for both "new" and "classic" employees. The PEPRA-mandated changes in benefits demonstrate that the benefits under the parties' *existing* collective bargaining agreements are not preserved in accordance with section 13(c)(l). In essence, "new" employees will have to pay more to fund their pensions and work longer to achieve the same benefit they would have been entitled to before PEPRA. "Classic" employees will be restricted in the range of benefits and will not be able to bargain for benefits they previously enjoyed. and will not be able to purchase airtime and, as of 2018, will likely pay more for their benefits.

MST argues that although PEPRA affects "new" employees, any "new" employees would have no vested right to any benefits because the rights of employees are established at the time they are hired. According to MST, "new" employees have not suffered any diminution of rights, because they did not possess rights before PEPRA became effective. Sections 13(c)(l) and (2) protect the collective rights of all transit employees covered by collective bargaining agreements, not individual rights. No applicable distinction between "new" and "classic" employees exists for purposes of these sections. As stated above, a

collective bargaining agreement is applicable to all bargaining unit members, regardless of their date of hire.

PEPRA, by operation of law, has altered those terms and conditions affecting the existing rights of bargaining unit members, contrary to section 13{c)(l). Further, these changes impact rights under section 13{c){2) as they foreclose bargaining on these terms and, accordingly, do not allow for the continuation of collective bargaining rights.

Prior to PEPRA, the parties were able to bargain over a variety of CalPERS benefit formulas and other terms affecting contributions and benefits. Future bargaining over many of those issues has been restricted by state fiat and fails section {c){2)'s obligation for continuation of bargaining rights. Therefore, the Department cannot certify the grant sought by MST because PEPRA has resulted in a unilaterally imposed reduction of the existing benefits of bargaining unit employees as well as an impermissible effect on the continuation of collective bargaining.

CONCLUSION

There is little dispute over the impact of PEPRA on the existing rights of employees covered by the parties' collective bargaining agreement and on the scope of collective bargaining. Indeed, the Department has conferred extensively with the State to determine the contours of the law. MST has set forth bases to support certification. We have carefully considered the arguments of both parties. We do not find persuasive MST's arguments that these changes are consistent with certification under section 13{c).

Congress incorporated in section 13{c) the commonly-understood meaning of collective bargaining that requires, at a minimum, good faith negotiation to the point of impasse, if necessary, over wages, hours, and other terms and conditions of employment. *Donovan,* 767 F.2d at 949. Meaningful collective bargaining does not exist when a state mandates changes in what the parties have previously negotiated, dictates results, or removes relevant issues from consideration.

MST is correct that PEPRA allows for negotiation over some aspects of pension benefits. However, the Department has concluded that PEPRA significantly reduces pension entitlements under the existing collective bargaining agreements for employees hired after January 1, 2013 and precludes the Union from negotiating many aspects of their and "classic" employees' pension plans, including the employee contribution rate, in subsequent agreements. Sections 13{c)(l) and {2) require the preservation of pension rights and benefits and the continuation of collective bargaining rights. These rights are prerequisites for federal assistance under section 5333{b) of the Transit Act. Under PEPRA, MST cannot comply with the requirements of the Act. Therefore, the effects of

PEPRA render it legally impermissible, under the current circumstances, for the Department to certify fair and equitable employee protective conditions for grants to MST.

Sincerely

Michael Hayes,Director
Office of Labor Management Standards

Attachment

cc: Scheryl Portee/FTA
David C. Laredo/De Lay & Laredo
Michelle Overmeyer/ Monterey-Salinas Transit
Robert Molofsky / ATU
Jessica M. Chu/ ATU
Sonia Bannister/MSEA
Wesley Toy/SCCEM
Ray Cobb/IBEW
Mary Kay Henry/ SEIU
David L. Neigus/IAM
James P. Hoffa/IBT
Bonnie Morr, c/o Cara McGint/UTU
Elizabeth A. Roma/ Guerrieri, Clayman, Bartos & Parcelli
Carolyng Gomes/Guerrieri, Clayman, Bartos & Parcelli
Richard Edelman/ O'Donnell, Schwartz & Anderson