

In the matter of arbitration between:

_____)	
Nonunion Employees)	
)	
<i>Claimants</i>)	
)	
v.)	OSP Case no. 03-13c-02
)	
New York City Department of Transportation)	Issued: May 24, 2004
)	
<i>Respondent</i>)	
_____)	

DECISION

Origin of the Claim

This claim arises under Federal Transit Administration grants of financial assistance made to Respondent New York City Department of Transportation (NYDOT). Pursuant to Section 5333(b) of the Federal Transit law,¹ the Department of Labor (Department) must certify that fair and equitable labor protective provisions have been included when grants of assistance are made to transit operators. The Department has certified the protective arrangements for each of the applicable grants on the basis of: a) the terms and conditions in the August 8, 1975 Agreement (1975 Agreement) between Transport Workers Union (TWU) Local 100, Amalgamated Transit Union (ATU) Local 1179, and other local unions affiliated with the TWU and the ATU; several private transportation companies; and the Respondent; b) the additional provisions in Exhibit A to the 1975 Agreement; and c) the additional terms and conditions provided by the Department's letters of certification issued pursuant to Section 5333(b). Claimants in this case are 132 employees of four private bus companies² signatory to the 1975 Agreement that have contracted with the Respondent to provide bus service in and around the New York City metropolitan area. These employees are not represented by any union and are not covered by any collective bargaining agreement, and therefore are referred to as the "nonunion employees."

At issue in this case is paragraph 4 of the Department's certification letters, issued in connection with FTA projects numbered NY-03-0345, NY-03-0329, NY-90-X418, NY-90-X465, and others, which states:

¹ 49 U.S.C. §5333(b). This is the recodification of Section 13(c) of the FTA, formerly known as the Urban Mass Transportation Act of 1964.

² The four bus companies involved are Jamaica Buses, Inc., Command Bus Co., Inc., Green Bus Lines, Inc., and Triboro Coach Corporation. These companies will be collectively referred to as the "bus companies."

Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local unions which are party to, or are otherwise referenced in the protective arrangements, shall be afforded *substantially the same levels of protection* as are afforded to the employees represented by the union under the August 8, 1975 agreement and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project. (Emphasis added.)

As the result of this paragraph in the Department's certification letters, employees that are not represented by the unions signatory to the 1975 Agreement are entitled to "substantially the same levels of protection" as those employees that are represented by the signatory unions. The claims at issue here require a determination regarding the meaning of "substantially the same levels of protection."

In their claim, the Claimants seek substantially the same levels of protection afforded represented employees under paragraph 8 of the 1975 Agreement. That provision states:

In the event the Recipient contemplates any change in its organization or operations which will result in the dismissal or displacement of employees, or rearrangement of the working forces represented by the union as a result of the Project, the Recipient shall give reasonable written notice of such intended change to the Union. Such notice shall contain a full and adequate statement of the proposed changes to be effected, including an estimate of the number of employees of each classification affected by the intended changes. Thereafter, within 30 days from the date of said notice, the Recipient and the Union shall meet for the purpose of reaching agreement with respect to the application of the terms and conditions of this agreement to the intended changes. Any such change involving a dismissal, displacement or rearrangement of the working forces represented by the Union shall provide for the selection of forces from the employees represented by the Union on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by the intended changes shall be made on the basis of an agreement between the Recipient and the Union. In the event of a failure to agree, the dispute may be submitted to arbitration by either party pursuant to paragraph (9) of this agreement. In any such arbitration, the terms of this agreement are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to §5(2)(f) of the Interstate Commerce Act.

Respondent's Operational Plans

At the time of the submission of their claim, the nonunion employees alleged that the Respondent was in the midst of making operational changes regarding its use of the bus companies, and those changes would result in the dismissal or displacement of the nonunion employees of the bus companies. Claimants assert that the Respondent "threatens to act in the

immediate future” in implementing such operational changes, thus triggering their right to substantially the same rights as those set out in paragraph 8 of the 1975 Agreement.

In response, the Respondent submits that, as the result of a competitive sourcing requirement to which it must adhere, it has considered for a number of years making changes to the operation of the bus lines. The Respondent concedes that among the changes it has considered over the years has been the transfer of the bus operation from the private bus companies to the Metropolitan Transit Authority (MTA), a public agency. The Respondent indicated that it had engaged in talks with the MTA regarding their assumption of the bus operations, and had set June 30, 2003, as a target date for the execution of an agreement between the MTA and the Respondent on the assumption of bus operations, but that this date had passed without an agreement. As recently as October 2003, however, the Respondent asserted that its talks with the MTA remained in their infancy, that no agreement on the transfer of the bus operations was imminent, and that state legislation, which would be necessary in order to provide the MTA the authority to operate a regional bus line, was not presently contemplated.

During the Department’s consideration of the claim, the Claimants advised the Department that the Respondent announced to the press that it had entered into an agreement with the MTA to transfer, effective July 1, 2004, the operation of the bus service from the private bus companies to the MTA. The Department takes administrative notice of the Respondent’s current operational plans, although the immediate nature of these plans has no substantive impact on the determination in this case.

Positions of the Parties

Claimants argue that pursuant to paragraph 4 of the Department’s certification letters, they are entitled to substantially similar protections to those established in paragraph 8 of the 1975 Agreement. In particular, claimants assert that they are entitled to notice from the Respondent of any contemplated operational changes that will result in dismissal or displacement of employees, and are further entitled to meet with the Respondent to “review and discuss” all contemplated changes.

The Respondent argues that the Claimants are not entitled to paragraph 8 rights for a number of reasons. The Respondent first advances various procedural roadblocks to the effectuation of the Claimants’ argument, including that the Respondent “ha[s] no actual plan” to make operational changes and that therefore paragraph 8 rights, if they exist, are not yet triggered. In addition, the Respondent argues that in order for paragraph 8 rights to apply, any contemplated changes must be made “as the result of the Project,” and that this causal condition has not been met. On the merits of Claimants’ argument that they are entitled to “substantially the same levels of protection” as in paragraph 8, the Respondent argues that such protections are uniquely applicable to employees represented by the union signatories to the 1975 agreement and cannot be applied to the nonunion Claimants in this case.

Discussion and Conclusion

For the reasons set forth below, it is determined that the Claimants are not entitled to notice and the opportunity to negotiate with the Respondent regarding contemplated operational changes under paragraph 8 of the 1975 Agreement. Thus, it is unnecessary to reach a conclusion on the procedural issues raised by the Respondent, including whether the Respondent's operational changes are the result of a federal project.

Section 13(c) agreements contain provisions, as does the 1975 Agreement, requiring the grantee or recipient to provide advance notice to the union of contemplated changes in the organization or operation of the transit system that may result in the dismissal or displacement of employees or in the rearrangement of work forces. Once notice has been provided, the grantee and the signatory union are required to agree on implementing terms to apply the Section 13(c) agreement to the intended changes. Implementing agreements had their origin in rail labor protection, where they typically addressed seniority roster "dovetailing," the assignment of work to affected employees, the consolidation of work rules, and other transitional matters affecting groups of employees.³ This concept was subsequently applied in the transit industry.

Clearly, in their origin, rights to notice of operational changes and the subsequent negotiation over the impact of those changes presumed that the rights would inure to a bargaining representative that could mitigate any adverse affects to the employees on a collective basis. This application is underscored by examining the language of paragraph 8 itself, which requires with particularity that "the Recipient shall give reasonable written notice of such intended changes *to the Union*," and that "the Recipient *and the Union* shall meet for the purpose of reaching agreement with respect to the application of the terms and conditions of [the 13(c) agreement] to the intended changes." (Emphasis added.)

Moreover, the right to notice and negotiation over the effects of proposed changes are intertwined. Unlike the right to bargain a first-time agreement, which is not entirely dependent on advance notice to the other party, the right to negotiate over the impact of contemplated operational changes where an existing agreement is in place is meaningless absent notice of the changes and the nature of those changes.⁴ In the context of anticipated operational changes, the right to bargain *presupposes* that the party contemplating the changes will provide reasonable notice to the affected party. The right to bargain over the impact of contemplated changes is hollow without such prior notice. Similarly, the right to be notified of a proposed change is

³ See "Transit Labor Protection - A Guide to Section 13 (c) Federal Transit Act," National Research Council (1995).

⁴ Similarly, under the National Labor Relations Act, the obligation to negotiate an initial collective bargaining agreement consists of "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...." 29 U.S.C. §158(d). By contrast, in the case of an existing collective bargaining agreement that one party seeks to terminate or modify, the same duty to bargain includes the obligation to "serve written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or...sixty days prior to the time it is proposed to make such termination or modification." 29 U.S.C. §158(d)(1). By analogy, it is apparent that when operational changes have an impact on an existing arrangement, the duty to bargain over those changes, and the attendant bargaining right of the other party, cannot be satisfied without prior notification to the other party of the proposed changes. The two components are entirely interdependent.

relatively empty without the concomitant right to bargain over the impact of the proposed change.

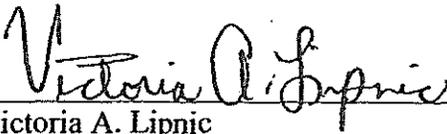
Because of their nature, not all collective rights and obligations contained in the 1975 Agreement can be interposed to the same affect on individual employees such as the Claimants. For this reason, the Department's certification letters require that the recipient provide not identical or indistinguishable protections for employees unrepresented by signatories to the Section 13(c) agreement, but rather provide "substantially the same" levels of protection for those employees. There are some rights set out in Section 13(c) agreements, such as the right to submit claims to a collectively bargained grievance-arbitration process, that presume the existence of a collective bargaining representative. Such rights do not have "substantially the same" meaning or application in the absence of such an employee representative. *See, e.g., Swanson v. Denver Regional Transportation District*, DEP Case No. 77-13c-24, Employee Protections Digest A-186 (1981) (an individual employee who was not represented by the union was not entitled to have applied to him terms intended to apply only to bargaining unit members). As stated in *Swanson*, "[w]here a provision in a protective arrangement is by its terms directly applicable to members of a bargaining unit, employees who are not members of the bargaining unit are entitled to substantially the same level of protection as provided to bargaining unit members. *Provision of substantially the same level of protection does not, however, require the broad interpretation of [the Section 13(c) agreement] proposed by the Claimant.*" *Id.* at A-194 (emphasis added).⁵

This point is underscored by examining the Department's nonunion employee certification letter. In cases in which neither the grantee's employees, nor the employees of any other transit provider in the service area are represented by a union, the Department nevertheless must certify that the recipient has agreed to the application of a basic set of statutorily sufficient labor protective provisions. The Department does so by issuing a nonunion certification letter that compels the grant recipient to adhere to certain protective provisions, such as the maintenance and preservation of previously existing employee rights and privileges and the financial responsibility to protect and compensate employees who are placed in a worse position as a result of the federal project. Notably, nowhere in the Department's nonunion certification letter is any mention of the rights contained in the instant Section 13(c) agreement to notice of contemplated changes and the ability to bargain over the impact of those changes. Such rights, as stated in the 1975 Agreement, are collectively oriented and have no "substantially similar" application to individual employees.

⁵ On this point, it is not suggested that notice, particularly notice involving work reduction or layoff, to individual employees not represented by the signatory unions would not be of benefit to those employees. This decision holds only that the 1975 Agreement in this case provided for notice in the context of an attendant bargaining right, which indicates, for the reasons stated above, that it flows to the employee representatives rather than to individual employees. Similarly, it is not suggested as a broad principle that many rights and obligations enumerated in the 1975 Agreement can arguably be characterized as exclusively collective in nature and therefore inapplicable to individual employees. If this were so, the meaning of the Department's certification letter requiring that employees not represented by the signatory unions be provided "substantially the same levels of protection" would be lost. Rather, this decision should be viewed as one that is narrow in context, with applicability only to the limited issue of the meaning of "substantially the same" notice and negotiation rights contained in paragraph 8 of the 1975 Agreement.

There is no precedent in this area, nor do the Claimants cite any, for the expansive proposition that essentially collective rights contained in the Section 13(c) agreement can be broadly construed to apply to individual employees unrepresented by the signatory unions. Nothing in the terms of the Department's certification letter, the 1975 Agreement, or the statute itself compels such a result. For the foregoing reasons, the Claimants' claim for notice and negotiation in this matter is denied.⁶

Dated: *May 24, 2004*


Victoria A. Lipnic
Assistant Secretary of Labor for
Employment Standards

⁶ The Claimants requested that the Department bifurcate their claim in this matter into two parts. In this first part, which is fully addressed by this Decision, the Claimants assert rights to notice and negotiation under paragraph 8 of the 1975 Agreement. In the second part of their claim, which remains to be presented and decided, the Claimants will assert rights to substantive protections under the 1975 Agreement.