

In the Matter of Arbitration:

Jaime A. Arellano, Jr., President Our
Struggle for Survival and Justice
Committee,

Claimant,

v.

City of El Paso – Sun Metro,

Respondent.

DSP Case No. 11-13c-02

Issued: April 29, 2014

FINAL DECISION

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

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

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

All protective arrangements include a procedure for final and binding resolution of disputes over the interpretation, application, and enforcement of the terms and conditions of the arrangement. This procedure, referred to as a “claim for employee protections,” may be utilized when an individual employee, a group of employees, or representative of a bargaining unit believes he or they have been negatively affected as the result of federal assistance. Only a representative of a bargaining unit may file a claim for a violation of continuation of collective bargaining rights under subpart B of the Act.

49 U.S.C. § 5333(b)(2)(B). The outcome of the final and binding determination pursuant to a protective arrangement is enforceable in state court as a matter of contract law. *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982).

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

ORIGIN OF THE CLAIM

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

Jaime A. Arellano, Jr., President of Our Struggle for Survival and Justice Committee (collectively referred to as "OSSJC"), brought this claim on behalf of himself and other retirees of Sun Metro. OSSJC and the City made attempts to resolve these claims pursuant to the local procedures provided in paragraphs 15(a) and (b) of the Arrangement for resolving disputes over the interpretation, application and enforcement of the Arrangement. The City's Civil Service Commission denied the claim on January 13, 2011. Pursuant to paragraph 15(b) of the Arrangement, OSSJC appeals the denial to the Department to make a final and binding determination.

FACTS AND POSITIONS OF THE PARTIES

In February 2011, the City stopped providing retired transit workers and their spouses free bus passes, discontinuing a policy that had been in place since 1947.¹ *OSSJC Response to City's First Supplemental Response*. The City claimed that the practice violated a state law prohibition on gifts of public funds. The City also claimed the policy was inappropriate because other City retirees were not provided the same benefit. *Initial City Response*, p. 2. The City asserted that the change in policy was not related to any project covered by the Arrangement. *Id.* OSSJC contested the policy change through the procedures set forth in the Arrangement. OSSJC asserted that the policy change constituted a denial of an accrued right under paragraph 2 of the Arrangement. The City's Civil Service Commission denied the claim on January 13, 2011.

¹ The City's bus pass benefit for retirees also arose in *Davis v. City of El Paso*, DSP Case No. 80-13c-7.

Following the denial, OSSJC appealed to the Department on February 21, 2011, seeking a restoration of the benefit and damages. While the appeal was pending before the Department, on August 20, 2013, the City Council approved a reinstatement of the benefit for fiscal year 2014 (Sept. 1, 2013-Aug. 31, 2014). Based on that action, the City urged the Department to dismiss or deny OSSJC's claim as moot.

DISCUSSION

A. Mootness

The City's reinstatement of the bus pass policy for fiscal year 2014 does not resolve the question whether the City's discontinuation of the policy violated the Arrangement or address the harm that the discontinuation may have caused. It also does not address the likelihood of the same action reoccurring in another fiscal year as the City notes in its First Supplemental Response, p. 1, "The continued existence of this program is and will be dependent upon the annual approval of the program by the Mass Transit Board during the City's annual budget process." Therefore, the issue is not moot.

B. Section 5333(b)(2)(A) – the preservation of rights, privileges, and benefits (including continuation of collective bargaining rights and benefits) under existing collective bargaining agreements or otherwise.

The Arrangement states:

2. All rights, privileges, and benefits (including pension rights and benefits) of employees (including employees already retired) shall be preserved and continued, provided that any such rights, benefits and privileges may be improved, changed, or added to so long as there is no denial of accrued rights.

Contrary to the City's assertions, claims regarding the preservation of rights, privileges, and benefits do not need to establish a causal nexus with a project. See *Amalgamated Transit Union, Local 691 v. City Utilities of Springfield, Missouri*, OSP Case No. 91-13c-18 (June 1, 1999) ("Protections pursuant to sections 13(c)(1) and (2) do not require a result of a project."); *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). The City's determination to do away with a 64 year old policy benefitting transit retirees amounted to a "denial of an accrued right" under the Arrangement. The City has failed to offer any argument— other than the misplaced argument that the discontinuance was not related to a project— to contradict this conclusion. The City's reliance on an interpretation of state law does not lessen its obligations under the Arrangement. Further, the fact that the law was otherwise addressable by a vote of the City Council highlights the weakness of the City's position.

DETERMINATION

In signing the FTA contract of assistance, the City undertook the obligations of the Act as prerequisites to its receipt of Federal assistance. The City has obtained the benefit of its bargain, the Federal assistance; but has failed to meet its obligations when it denied retirees an accrued right. OSSJC's claim of the City's violations of the 1980 Section 13(c) Arrangement is upheld.

REMEDY

The City is to provide a copy of this decision to all transit retirees. Any transit retiree affected by the City's discontinuance of the bus pass benefit is to be reimbursed for the bus fares the retiree, and spouse, incurred during the time of discontinuance based on a presentation of actual expenses or a reasonable estimate thereof, and not less than the cost of the monthly bus passes to which the retiree, and spouse, were eligible to purchase during the discontinuance. OSSJC is awarded reasonable costs (copying, facsimile, and postage) related to its filing of this claim. Any disputes under this remedy paragraph are to be resolved by application of the grievance procedure in paragraph 15(b) of the Arrangement.

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

This decision is final and binding.

Date 0 - (jq-01 V

1LkhJ4t/ctfE

Michael J. Hayes

Director, Office of Labor-Management Standards