

In the Matter of Arbitration:

George Myers,
Claimant,

DSP Case No. 21-13c-02

v.

Issued: April 13, 2023

City of El Paso – Sun Metro,
Respondent.

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 that 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 protective arrangements are often referred to as “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) (1976).

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 a representative of a bargaining unit believes one or more employees have been negatively affected as the result of federal assistance or, as in this case, when a dispute arises regarding the “application, interpretation, or enforcement of the provisions” of the protective arrangement. The outcome of the final and binding decision pursuant to the dispute resolution procedures of a protective arrangement is enforceable in state court as a matter of state contract law. *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982).

ORIGIN OF THE CLAIM

This claim arises under the certified protections made applicable to the City of El Paso (City) to protect the interests of employees of the City's Sun Metro mass transit system (Sun Metro) as well as employees of any service area providers. The certified protections include the City of El Paso December 18, 1979 Resolution that authorizes the January 3, 1980 protective arrangements for employees represented by the Amalgamated Transit Union, Local 1256, (ATU Arrangement), and the January 3, 2011 Unified Protective Arrangement (UPA) for employees represented by the American Federation of State, County and Municipal Employees (AFSCME).

The Department's certification also includes terms and conditions that provide protections for employees who are not represented by the ATU or AFSCME. To that end, item five (5) of the terms and conditions of the Department's certification for the City of El Paso state:

Employees of mass transportation providers in the service area of the project who are not represented by a union designated above shall be afforded **substantially the same levels of protections as are afforded to the employees represented by the union(s)** under the above referenced protective arrangements and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

. . . . If the employees are **not represented by a union for purposes of collective bargaining, the Recipient or employee(s) may request the Secretary of Labor to designate a neutral third party or appoint a staff member to arbitrate and render a final and binding determination of the dispute.** (emphasis added).

George Myers is a non-represented supervisor engaged in transit fixed route services of the City of El Paso, Sun Metro, who has made a claim for employee protections under the Act. In accordance with the above final terms of certification for the processing of non-represented employees' claims, Myers invoked existing local claims procedures. The City's attorney denied the claim and the El Paso Civil Service Commission declined to act on the claim. Pursuant to the Department's above terms and conditions of certification, Myers submitted the unresolved claim to the Department for a final and binding determination. The Secretary has delegated his authority to resolve this claim to the Office of Labor-Management Standards.

BACKGROUND

Myers stated that in 2012 he was reassigned from fixed-route operations to supervise the Customer Service Department. While serving in this position, First Transit (managing contractor of the El Paso system) began the practice of assigning work schedules to select supervisors prior to offering supervisory staff the opportunity to select their shifts on the basis of their seniority. At this time, the Director pre-assigned Myers' schedule as the customer service supervisor. In 2019 Myers was reassigned as a supervisor in fixed-route operations.

On June 25, 2020, Myers submitted a written complaint to his immediate supervisor asserting that the Sun Metro practice of pre-assigning schedules to specific fixed-route supervisors violated seniority rights as protected under the Act. Myers filed a grievance with the City's Human Resources Department on September 17, 2020. The City, through the Human Resources Director, denied the grievance on the basis that the Civil Service Rules and Regulations (Rule 2.A.19) permits assigning work to supervisors based on factors other than seniority. On November of 2020, Myers appealed Sun Metro's denial of his claim over the violation of seniority rights with the Civil Service Commission which, on December 14, 2020, declined to act on the claim.

Myers appealed the denial of his claim to the Department of Labor, Office of Labor-Management Standards on January 28, 2021. Myers' initial 13(c) complaint asserts that the City failed to preserve and continue his seniority when the Sun Metro Director pre-assigned some supervisors with less seniority to the work schedule prior to providing the opportunity for him to select his schedules in accordance with his seniority.

POSITION OF CLAIMANT

Myers' initial claim asserts that Sun Metro has always honored seniority for Transit Operators in the selection of work schedules and vacation. Transit Operations Supervisors and Dispatchers have always been incorporated into the same schedule selection sign-ups. While Sun Metro does honor supervisor's vacation selection based on seniority, it now pre-assigns certain supervisors prior to releasing the work schedule to the remaining supervisors, thereby denying Myers' right to sign-up for a work schedule based on seniority.¹

Myers reasons that paragraph 2 of the ATU Arrangement guarantees the supervisors' working conditions as defined in the Sun Metro Rules and Regulation 5.8 ("Sign-up: Transit Supervisor and Communications dispatcher sign-ups are based on seniority"), inferring that these conditions constitute "accrued rights" that cannot be altered. Paragraph 2 of the ATU Arrangement states:

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.

Myers acknowledges that Rule 5.8.10.1 states "due to the nature of the work conducted by Transit Supervisors and Communications Dispatchers, personnel in these classifications may be assigned work based on other factors than seniority." Myers asserts that Sun Metro relies on this subsection to permit it to identify other "bogus" factors like designating "Special Assignments/Reports" that unfairly allows certain pre-assigned individuals preferred schedules with no weekend shifts.

¹ Myers' Response to the City included an additional issue that was not raised during the local claims resolution proceedings and so is not properly before the Department. On August 13, 2019, the City Council approved a 1% pay raise for all City employees to be effective on March 1, 2020. On April 13, 2020 due to the unprecedented COVID-19 health crisis and the financial impact the 1% pay raise was reduced effective May 24, 2020. The pay reductions were subsequently reversed and the pay raise was reinstated, including lumpsum back payments.

Myers' complaint identifies a list of Federal projects but does not assert that the "worsening" he claims was a result of any of these projects, inferring that simply by virtue of receiving funds under grants TX-2020-032-00; TX-2020-052-00; TX-2020-099-00², the City must comply with the statute's requirements as specified in the above paragraph (2) of the 1980 Arrangement. To be more precise, Myers does not assert that his circumstances were worsened "as a result of" a Federal project; he relies solely on a denial of "accrued rights" as the basis of his claim

In his appeal to the Department, Myers seeks restoration of the opportunity to use seniority for supervisors' work schedule sign-up, presumably requesting the cessation of the practice of pre-assigning certain individuals.

POSITION OF RESPONDENT

The City asserts that Act's requirement to preserve existing, bargained-for rights, privileges, and benefits means that rights/privileges achieved through "collective bargaining or otherwise" cannot be taken away unilaterally. But the City argues that "Myers does not demonstrate any authority evidencing how or where the right to sign up for shifts is a vested or protected right." The City states that the past practice of providing Transit Supervisors the opportunity to sign-up for work schedules on the basis of seniority was not a bargained-for or vested right; the enactment of Sun Metro Rule 5.8 Sign-up was a "managerial decision" to improve efficiency. Moreover, Rule 5.8 does not result in a lessening of rights, privileges, salary, or benefits, including Myers' seniority benefits. Rule 5.8.10.1 permits the Department Head to assign supervisory and dispatch work based on factors other than seniority, which may be necessary for proper operation of the department. In light of this existing rule, Myers is not entitled to a nonvested, unprotected right to bid for his work assignment based on seniority, the City concludes.

In essence, the City asserts, Myers is simply unhappy with his employment conditions, but has failed to identify removal, termination, displacement, or worsening or lessening of benefits, rights or privileges. The City also contends that adverse effects to employees are compensable under the terms of the 13(c) arrangements only if the harm is caused by a federal project undertaken by the grant recipient (i.e., City/Sun Metro). The City cites Department precedent to support their position in this regard.³ Sun Metro states that it has assigned work schedules to Transit Supervisors since 2013, and the reasons for the assigned schedules are unrelated to any project receiving Federal assistance.

Additionally, the City contends that Myers' claim is untimely. Despite Myers' allegation that this change in scheduling procedure for the Transit supervisors began on June 23, 2020, the practice of assigning shifts was actually established in January 2013 – almost eight years prior to Myers' initial complaint. Myers worked under this assigned scheduling procedure for well over

² These three grants funded projects for the (1) Montana RTS Corridor Bus Rapid Transit (BRT) line that connects far east El Paso to Downtown, (2) FY 2020 Formula Funds (planning, ADA paratransit operations, and capitalized preventive maintenance), and (3) the purchase of ten (10) cutaway paratransit vehicles, respectively.

³ *Am. Fed'n of State, County & Municipal Employees, Local 59 v. City of El Paso – Sun Metro*, [DSP Case No. 11-13c-01A and 11-13c-01B \(Apr. 28, 2014\)](#). A claim for "worsening" is based on the 13(c) provision, 49 U.S.C. § 5333(b)(1), providing for "the protection of individual employees against a worsening of their positions related to employment...."). The protection of individual employees against a worsening of their position related to employment must be "as a result of a project."

seven years after the triggering event (the change from bidding on shifts to assigning shifts) occurred before initiating his complaint. The City provided a copy of Myers' January 4, 2013, signed acceptance of these rules. The City asserts, "Transit Supervisors on both the schedule from August of 2013 and from July 2020 were given assignments by management (Superintendent of Operations Robert Dominguez) and "their seniority was more than the complainant's seniority, clearly indicating that the assigning was based on factors other than seniority."

In sum, Myers fails to demonstrate that the City violated any accrued right or that Rule 5.8 gives rise to a worsening that depleted or lowered his seniority, resulting in working fewer or greater hours, or that any worsening (if there was a worsening) was a result of project funds. The City contends that for these reasons (as well as because Myers' claim was untimely), neither Myers, nor any other Sun Metro employee, is entitled to relief under the Protective Arrangement pursuant to the subject claim.

DISCUSSION

Myers May Not Assert a Claim Under 49 U.S.C. § 5333(b)(2)(A).

The first two subsections under the Act, 49 U.S.C. § 5333(b)(2)(A) and (B), also known as 13(c)(1) and (2), are collective rights. They specify that, as a precondition of federal assistance, transit grantees must preserve the rights, privileges, and benefits under existing collective bargaining agreements or otherwise and must continue collective bargaining rights. The intent of paragraph (2) of the ATU agreement that Myers cites is to meet the requirements of 13(c)(1) for employees in the bargaining unit represented by the ATU. Myers is not represented by any union but essentially asserts that he is nonetheless entitled to the precise 13(c)(1) protection against any "denial of accrued rights" established for the ATU represented employees under paragraph (2) of the agreement.

As an individual, non-represented employee, Myers may not bring claims under the ATU's agreement or 13(c)(1) and (2) generally. Because of the very nature of collective rights, not all such rights can be made applicable to individual employees.⁴ As the Department has previously stated, there are no analogous rights protected by 13(c)(1) for non-represented employees, like Myers. There is nothing "substantially similar" to collective bargaining rights or collectively bargained benefits.⁵ Therefore, individual employees like Myers may not assert collectively based rights under the protections that apply to ATU represented employees.⁶

Myers may present his claim to ATU, the union representing transit operators, for its consideration. The ATU, however, retains the sole right to pursue claims for a denial of 13(c)(1) rights under paragraph (2) of its agreement. Within the 60 days from the date of this decision, if the ATU elects to resubmit the claim to the Department, as an appeal of the December 14, 2020 Civil Service Commission's decision, the parties shall treat the time during which the claim has been pending with the Department to have been tolled.

⁴ [*Nonunion Employees v. NYC Dept. of Transp.*, OSP Case No. 03-13c-02 \(May 24, 2004\).](#)

⁵ [*Fred J. Sandoval v Peninsula Corridor Joint Powers Board*, DSP Case No. 12-13c-09 \(June 30, 2015\).](#)


⁶ An individual employee is entitled to assert a claim for "worsening rights" under 49 U.S.C. § 5333(b)(2)(C) (13(c)(3)). But such a claim requires a showing that the "worsening" is "a result of a project." See *Am. Fed'n of State, County, & Municipal Employees, Local 59 v. City of El Paso – Sun Metro*, [DSP Case No. 11-13c-01A and 11-13c-01B](#). Myers has not identified a federal project - nor could he - from which the change he complains of resulted.

This does not mean that individual, non-represented employees, like Myers, have no rights protected under the statute. In accordance with item five (5) of the terms and conditions of the Department’s certification for the City of El Paso, Myers is entitled to “substantially similar” levels of protections as those provided to employees in the bargaining unit subject to the certification.⁷ Like employees represented by the union, nonunion employees are eligible for protection against harms that are “a result of a project” and may submit claims for worsenings⁷ and remedies pursuant to 49 U.S.C. § 5333(b)(2)(C) through (F). These levels of protections are to mitigate impacts from changes in the workplace occurring “as a resulting of a project”, and include dismissal and displacement allowances, reemployment rights, and training for dismissed or displaced employees. In the event that the City had acquired another transit provider or system, employees of the acquired entity could claim assurances of employment.

DECISION

Myers’ claim is dismissed. This decision is final and binding.

Date April 13, 2023



Jeffrey Freund
Director
Office of Labor-Management Standards

⁷ The Department disagrees with the City’s assertion in its response to this claim that “adverse effects to employees are compensable under the terms of the 13(c) arrangements only if the harm is caused by a federal project.” As a pre-condition of federal assistance, the City has a simultaneous and ongoing obligation to the employees represented by the unions to preserve their existing rights, privileges and benefits and continue the employees’ diminutive collective bargaining rights. Any denial of these ongoing 13(c)(1) or 13(c)(2) rights are not solely financially compensable and claims for these protections do not require causal nexus with a particular project.

⁷ As we deny Myers’ claim on the merits, the Department need not address the City’s and the Claimant’s dispute over timeliness.