

In the Matter of Arbitration:

Russell M. Barber et al.,  
*Claimants,*

v.

County of Tioga, New York,  
*Respondent.*

DSP Case No. 15-13c-01

Issued: October 4, 2016

### **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 employee protective arrangements are commonly 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).

All employee 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. 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).

## **ORIGIN OF THE CLAIM**

This claim arises under the terms and conditions of the Special Warranty Arrangement for non-urban grants of assistance (the "Warranty"). The Warranty 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 rural assistance for Tioga County ("Tioga") through Section 5311 grants submitted on its behalf by the State of New York, Department of Transportation (Grantee). The Warranty provides a procedure for resolving disputes over the interpretation and application of its terms.

The employees in the service area of a project are intended third-party beneficiaries to the Warranty made applicable to the Grantee in its grant contract with the U.S. Department of Transportation. As a precondition of release of assistance, the Grantee assured the Department that each Recipient under the grant (including Tioga) accepts the terms and conditions of the Warranty. In addition, the Warranty provides that employees are also beneficiaries to the protective arrangements referenced in any subsequent contracts between the Grantee and each Recipient. Employees not represented by any labor organization, or if so represented through their representative on their behalf, may assert claims with the Recipient regarding the protective arrangements under this provision. It is under these provisions that the Claimants first sought relief with Tioga.

Paragraph 1 of the Warranty sets out a recipient's obligations and defines the term "Project" stating:

The Project shall be carried out in such a manner and upon such terms and conditions as will not adversely affect employees of the Recipient and of any other surface public transportation provider in the transportation service area of the Project. It shall be an obligation of the Recipient to assure that any and all transportation services assisted by the Project are contracted for and operated in such a manner that they do not impair the rights and interests of affected employees. The term "Project," as used in this Arrangement shall not be limited to the particular facility, service or operation assisted by federal funds, but shall include any changes, whether organizational, operational, technological or otherwise, which are directly or indirectly a result of federal assistance. The phrase "as a result of the Project," shall, when used in the Arrangement, include events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project), are not within the purview of this Agreement.

Claimants made unsuccessful attempts to resolve their claim with Tioga County (Tioga), the Recipient of the federal assistance. Claimants therefore filed their claim with the U. S. Department to Labor (Department) for a final and binding determination.

### **CLAIMANTS' POSITION**

Claimants are non-represented employees of First Transit, Tioga's former contracted provider of transportation services. The contract between Tioga and First Transit covered January 1, 2014 through December 31, 2018. However, on September 18, 2014, Tioga's legislature voted to terminate the contract with First Transit, effective November 30, 2014, and issued notice to First Transit.

Tioga subsequently executed an agreement with neighboring Chemung County (Chemung) for Chemung to provide transportation services in and between their respective boundaries and beyond and for use of transportation equipment. Pursuant to that contract, Chemung is administratively responsible for seeking and distributing funds under the Section 5311 program for service in Tioga County. The contract with Chemung does not provide for re-employment for Claimants with Chemung or its contractor, who is also First Transit.

Claimants allege that Tioga used project funds to execute a new contract with Chemung County resulted in their loss of their jobs. Claimants propose that while Tioga terminated the contract, it did not terminate "the project" funding. Claimants essentially assert that Tioga used projects funds contrary to its obligation in paragraph 1 of the Warranty to "assure that any and all transportation services assisted by the Project are contracted for and operated in such a manner that they do not impair the rights and interests of affected employees." They also appear to allege that by terminating the contract prior to its full term, Tioga violated its obligation to use project funds "in such a manner and upon such terms and conditions as will not adversely affect employees of the Recipient and of any other surface public transportation provider in the transportation service area of the Project." However, Claimants also state that Tioga's termination of its contract with First Transit "was less of a fault of [Tioga's] lack of funds, but rather brought about as a result of the implementation of a catastrophic plan to consolidate Medicaid transportation service."

Claimants seek a separation allowance or dismissal allowances for a period of up to 45 months. In addition, Claimants seek money damages for Tioga's failure to post notice of receipt of the federal assistance and the terms and conditions of the Warranty made applicable to the project. Claimants cite Tioga's failure to post the notice as the contributing factor of their delay in filing their claim with Tioga and, subsequently, with the Department.

### **TIOGA'S POSITION**

Tioga argues that the Department should procedurally dismiss the claim as untimely because Claimants failed to submit it within 60-days of the date of their termination as required by paragraph 16 of the Warranty.

Tioga also argues that it provided First Transit with the 60-day notice of termination required by the contract with Tioga, and that the notice provisions under the Warranty do not impose any additional requirements. Tioga asserts that the termination of the contract is not an “intended action which may result in displacements or dismissals . . . as a result of the Project”, which would otherwise trigger notice under the Warranty. Accordingly, Tioga states that it has satisfied its procedural obligations under the terms of the Warranty.

Tioga also asserts that the termination of the contract between Tioga and First Transit was a result of changes implemented by the State of New York in the administration of Medicaid Transportation that made Tioga’s contract with First Transit financially unsustainable. The termination of Tioga’s contract with First Transit was a direct result of this loss of Medicaid funding. Tioga asserts that Claimants are not eligible for dismissal or displacement allowances because under paragraph 1 of the Warranty employees “worsened solely because of the total or partial termination of the Project or exhaustion of Project funding shall not be deemed eligible for a dismissal or displacement allowance.”

Tioga’s response to the claim also addresses other matters to negate all responsibility to the First Transit employees engaged in the former Tioga transit service. Tioga asserts that First Transit is the “Recipient” under the terms of the Warranty, and as such, the Claim should join First Transit as a party respondent.

## **DISCUSSION**

### **A. Notice**

As an initial matter, the parties do not dispute that the Claimants were provided with adequate 60-day notice of the termination of the contract. The County derives their obligation to do so under the terms of its contract with First Transit, as opposed to any perceived obligations under paragraph (5)(a) of the Warranty. This distinction has no bearing on this case when the parties appear to be at odds as to whether Tioga County, as a Recipient of funds through the State of New York (Grantee), fulfilled its other notice and posting requirements under the terms and conditions of the Warranty. The County fails to respond to the Claimants’ accusations with regard to its non-compliance with this provision.

Paragraph 16 of the Warranty sets out a recipient’s posting obligations:

The Recipient will post, in a prominent and accessible place, a notice stating that the Recipient has received federal assistance under the Federal Transit statute and has agreed to comply with the provisions of 49 U.S.C., Section 5333(b). *This notice shall also specify the terms and conditions set forth herein for the protection of employees.* The Recipient shall maintain and keep on file all relevant books and records in sufficient detail as to provide the basic information necessary to the proper application, administration, and enforcement of this arrangement and to the proper determination of any claims arising thereunder.

A Grantee or Recipient which fails to fulfill an obligation under the Warranty can lose its eligibility for an expedited Department certification of rural funds under Section 5311 of the Federal Transit Act, and thereby forfeit federal assistance until it comes in compliance. Moreover, the Respondent's alleged failure to post the Warranty implicates significant impacts on an employee's awareness of his or her rights under the Warranty and the availability of claims handling procedures to be made available by the Recipient. The Respondent does not rebut the accusation, and therefore has made itself subject to any ongoing or unfiled claims.<sup>1</sup>

## **B. Worsened As A Result of a Project**

The Warranty provides protections and benefits for employees who were worsened as a result of a project. The Claimants seek these protections and benefits. However, in order to be eligible for them, they must show that their subsequent lay-off was the result of a project receiving federal assistance. Under the Warranty, paragraph 15(d), an employee claiming that he or she was affected by the Project has the obligation to "identify the Project and specify the pertinent facts of the Project relied upon." It is then the Respondent's burden to prove that factors other than the Project affected the employee. The claimant shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee. *Id.* "As a result of a Project" is limited in that volume rises and falls of business, brought about *solely* by other causes, are not within the purview of the Warranty. See above, Warranty ¶1.

Here, Claimants assert that project funds under NY-18-X033 were used by Tioga to execute a contract with an entity other than their employer, First Transit.

The Recipient's obligations pursuant to the above are limited to the extent that the employees' existing rights and interests are determined by a collective bargaining agreement. This expectation does not prohibit Tioga from terminating a contract under its terms in order to address financial losses. As nonunion employees of a contracted provider, there is no guarantee of continued employment beyond the expiration of the contract, for any reason. The protections of nonunion employees in such instances, therefore, does not provide a right to a job, salary, or benefits for the Claimants after the contract was cancelled. Such employees are protected solely from impacts as a result of a project.

As set forth above, a claim based on an adverse effect as a "result of a project" must be linked to the federal assistance provided. In this case, the Department finds that the loss of State Medicaid funds is the sole causal reason for the termination of Tioga's contract with Claimants' employer. The provision of state assistance, or lack thereof, is not "a project" as defined in the Warranty. Furthermore, employees who are worsened solely because of a termination of the project or exhaustion of project funding are not eligible for displacement or dismissal allowances. Therefore, the evidence does not support a finding that Claimants were worsened as a result of project NY-18-X033.

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<sup>1</sup> Amalgamated Transit Union Locals 22 et. al. v. Massachusetts Executive Office of Transportation and Construction, DSP Case 99-18-01, p. 3

## DETERMINATION

First Transit's contract with Tioga was terminated under its terms due to a lack of state funding, not as a result of a project. Tioga County is directed to comply with the posting requirements of the Warranty.

Therefore, the claim is denied.

This decision is final and binding.

Date 10/04/2016 Michael J. Hayes  
Michael J. Hayes  
Director, Office of Labor-Management Standards