

In the Matter of Arbitration:

Fred J. Sandoval,
Claimant,

v.

Peninsula Corridor Joint Powers Board,
Respondent.

DSP Case No. 12-13c-09

Issued: June 30, 2015

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 commonly 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 section 13(c) 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 Peninsula Corridor Joint Powers Board's (JPB) protective arrangement (the "Arrangement"). 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 JPB since 1994.

Claimant Fred J. Sandoval was a non-represented employee of Amtrak, a contractor charged with operating JPB's rail services. As a non-represented employee, Sandoval is entitled to substantially the same levels of protections as bargaining unit employees under the terms of the Department's certification.

The terms and conditions of the Department's certification state:

4. 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 protection 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.

Should a dispute remain after exhausting any available remedies under the protective arrangements and absent mutual agreement to utilize any other final and binding procedure, any party to the dispute may submit the controversy to final and binding arbitration. ... 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 serve as arbitrator and render a final and binding determination of the dispute.

Sandoval and JPB were unable to resolve this claim. Sandoval thus appeals to the Department to make a final and binding determination.

CLAIMANT'S POSITION

From July 1992 to May 2012, Sandoval was employed by the National Railroad Passenger Corporation (Amtrak) on Amtrak's Caltrain service. Sandoval's final position was Field Supervisor for Amtrak's communications and signal employees. Amtrak operated Caltrain pursuant to a contract with the Peninsula Corridor Joint Powers Board (JPB). On May 26 2012, after the expiration of Amtrak's contract with JPB, TransitAmerica Services, Inc. (TASI) was awarded the contract for the operation of Caltrain for JPB. TASI offered and Sandoval accepted a comparable position as Signal Manager. However, Sandoval asserts that the TASI position offers lesser benefits (pension, matching contributions, pass privileges, short and long term disability, and others) than he enjoyed with Amtrak and he claims that he is thus entitled to a displacement allowance under the terms of the Arrangement to compensate him for the reduction of benefits.

Sandoval resigned his management position with TASI effective November 30, 2012 to return to a bargaining unit position. Sandoval asserts that he did so to reduce the harm caused by the reduction in benefits he was allegedly suffering. Sandoval resigned from TASI effective May 1, 2015.

JPB'S POSITION

JPB states that it assumed responsibility for the operation of the Caltrain service from the Southern Pacific Transportation Company in 1992, and contracted with Amtrak to operate the service. In May, 2010, JPB solicited competitive proposals for a new contractor to operate the Caltrain service and received proposals from five firms. After a lengthy review process and the submission of Best and Final Offers from four firms, JPB awarded the contract to TASI, entering into a five year contract. Amtrak's contract with JPB expired on June 30, 2011, but was continued on a month-to-month basis until JPB authorized transition to the new contractor, ultimately ending June 30, 2012.

JPB argues that Sandoval is not entitled to any displacement or dismissal benefits because he has not shown that he was harmed as a result of a project. JPB further asserts that any entitlement Sandoval arguably had to benefits ended with his resignation pursuant to Sections 2(e) and (f) of the Arrangement which state “[a]n employee shall not be regarded as placed in a worse position with respect to compensation and rules governing his working conditions if such worsening is caused by his resignation...” JPB further asserts that Section 3 of the Arrangement is not applicable to Sandoval’s claim because he was a non-union management employee who TASI offered a comparable non-union management position.

DISCUSSION

A. Sandoval Was Not Worsened As a Result of a Project

The Arrangement provides protections and benefits for displaced or dismissed employees. Sandoval seeks these protections and benefits. However, in order to be eligible for them, he must show that his reduction in benefits was the result of a project receiving federal assistance. Under the Arrangement, paragraph 14, the employee claiming that he 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 Recipient’s burden to prove that factors other than the Project affected the employee. Under the Arrangement, the claiming employee 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.

Paragraph 2 defines the term “Project” stating:

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.

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. Here, Sandoval has not identified a federally funded project as the cause of his alleged worsening. Rather, Sandoval simply points to the expiration of Amtrak's contract and TASI's assumption of Caltrain operations. This is not sufficient to give rise to a claim under the Act or applicable provisions of the Arrangement. See *Clark v. Crawford Area Transportation Authority*, OSP Case No. 94-18-19 (Digest A-455)(to apply protections there must be some connection between the federal assistance and the harm). Accordingly, Sandoval has not established that his alleged worsening was the "result of a project."

B. There is No Substantially Equivalent Section 3 Right for Nonunion Employees.

Section 3 of the Arrangement provides specifically negotiated provisions for the continuation of collective bargaining rights and carry-over rights for represented employees when JPB changes contractors. Specifically, Section 3(c) states:

(c) In the event of the termination by the JPB of its contract with Amtrak, and the continuation of substantially similar commute service through award by the JPB to another contractor, employees of Amtrak represented by the Union shall be granted a preference in hiring to fill any position in the operation of the service which is reasonably comparable to the position such employee previously held. All employees who are affected by the change in contractors will be entitled to the protections of this Arrangement, whether they remain in their employment with Amtrak or become employees of the new contractor.

The new contractor may not staff any position in the operation with any individual other than one represented by the Union and previously employed in a reasonably comparable position immediately prior to the engagement of the new operator. Such employees shall be credited with their years of service for purposes of seniority, vacations, and pensions in accordance with their Amtrak and SPTCO service.

The obligations of Amtrak with regard to wages, hours, working conditions, health and welfare and pension or retirement for employees shall be assumed by any contractor which is required to grant employees a preference in hiring in accordance with this Section 3. No employee of Amtrak shall suffer any worsening of his or her wages, seniority, pension, vacation, health and welfare insurance, or any other benefits by reason of the employee's transfer, provided that all such rights, privileges and benefits may be modified by collective bargaining.

The Department has previously addressed nonunion employees' right to "substantially the same" protections in the context of protective arrangement provisions providing for collective rights. In *Swanson v. Denver Regional Transp. Dist.*, DEP Case No. 77-13c-24 (A-186), Denver Regional Transit (DRT) acquired Denver Metro Transit (DMT) with federal funds triggering DMT's employees' assurances of reemployment under 49 U.S.C. § 5333(b)(2)(D).¹ The protective arrangement also provided that DMT's union employees would be given first opportunity for new jobs in the bargaining unit created as a result of the project in accordance with seniority and fair and equitable arrangements determined by management and union. Swanson, a non-bargaining unit employee, was provided comparable employment but asserted that he was entitled to first right to non-bargaining unit jobs. The Department disagreed, explaining that the provision at issue provided "a mechanism, based on seniority and concurrence between the union and [DRT], for the filling of positions, which [Swanson] does not assert applies to him" and that Swanson was not "seeking a literal application of the terms" of the provision but one that gave him the right of a first opportunity for jobs *outside* the bargaining unit. The Department stated the "substantially the same level of protection" did not require the broad interpretation proposed by Swanson, noting that the provision was intended to provide "an orderly mechanism, based on seniority, to achieve the goal of continued employment." DRT's offer of comparable employment to Swanson satisfied its obligation to prevent Swanson from suffering a worsening of his employment as a result of a project and provide assurances of employment due to the acquisition.

In *Nonunion Employees v NYC Dept. of Transp.*, OSP Case No. 03-13c-02,² nonunion claimants sought precisely the same level of protection provided to union employees under a provision providing for written notice of changes that will result in dismissal or displacement and subsequent negotiation with the union over changes. The Department disagreed, explaining:

Because of their nature, not all collective rights and obligations contained in the 1975 Agreement can be interposed to the same affect [sic] 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.

In this case, Section 3 of the Arrangement explicitly applies to "employees represented by the Union." Moreover, it provides a valuable mechanism for an orderly change in employers and benefits by providing for modification by *collective bargaining* of rights, privileges and benefits affected by the change in contractors. There is no substantially equivalent mechanism to apply to nonunion employees like Sandoval.

¹ The termination of a contract at its expiration or by its terms does not trigger such reemployment rights.

² Available at <http://www.dol.gov/olms/regs/compliance/foia/transit/clm.htm>

Applying Section 3 to nonunion employees would effectively provide greater rights to them than it does to those union employees to whom the provision explicitly applies and for whom it was negotiated by allowing for no mechanism to modify or renegotiate the nonunion employees' prior rights, privileges, and benefits, thus essentially freezing them. Therefore, Section 3 has no substantially equivalent application to nonunion employees like Sandoval.

DETERMINATION

The evidence does not support a finding that Sandoval suffered a worsening of position related to employment as a result of a project. 49 U.S.C. § 5333(b)(2)(C). Further, there is no substantially equivalent protection to Section 3 of the Arrangement for nonunion employees.

Therefore, the claim is denied.

This decision is final and binding.

Date June 30, 2015



Michael J. Hayes

Director, Office of Labor-Management Standards