

In the Matter of Arbitration:

American Federation of State, County  
and Municipal Employees, Local 59  
*Claimant,*

v.

City of El Paso – Sun Metro,  
*Respondent.*

DSP Case No. 11-13c-01A (Morales)  
11-13c-01B (Velasquez)

Issued: April 28, 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 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 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 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.

The American Federation of State County and Municipal Employees, Local 59 (AFSCME), represents certain City employees at Sun Metro. AFSCME and the City made attempts to resolve these claims pursuant to the dispute resolution provisions in paragraphs 15(a) and (b) of the Arrangement. The City's Civil Service Commission ultimately denied these claims. Pursuant to paragraph 15(b) of the Arrangement, AFSCME appeals the denial to the Department for a final and binding determination.

### **POSITION OF AFSCME**

AFSCME filed two separate claim actions with regard to this matter—one on January 13, 2010, for Raymundo Morales, and another on November 29, 2011, for Eduardo Velasquez.

#### **A. Raymundo Morales, Fleet Maintenance Technician**

Raymundo Morales had been a Coach Mechanic II with Sun Metro since June 2, 1994 when in 2006 the City reclassified his position as "Fleet Maintenance Technician." AFSCME alleges that, as a result of the reclassification, Raymundo Morales suffered a loss of rights, privileges, and benefits pursuant to section 5333(b)(2)(A) and a worsening of his position related to employment pursuant to section 5333(b)(2)(C). Specifically, AFSCME contends that the reclassification caused Morales to lose supervisory and training duties and the ability to bid on vacations and automotive technician positions by seniority.

As a remedy, AFSCME seeks displacement allowance as compensation for the on-going harm, reinstatement of Morales to his former seniority status above the junior employees (classified as “Coach Mechanic I” under the prior system), and reinstatement of the practice of bidding on schedules and vacations according to seniority.

### **B. Eduardo Velasquez, Fleet Maintenance Supervisor**

Eduardo Velasquez had been a Coach Mechanic Supervisor with Sun Metro since June 13, 1994 when in 2006 the City reclassified his position as “Fleet Maintenance Supervisor.” AFSCME alleges that Velasquez suffered loss of rights, privileges and benefits pursuant to section 5333(b)(2)(A) and a worsening of his position related to employment pursuant to section 5333(b)(2)(C). Specifically, AFSCME contends that in October 2010 the Assistant Director of Maintenance began assigning maintenance employees to a work schedule. AFSCME alleges that this is in contravention of past practice, by which Sun Metro Maintenance Department employees, including supervisors, bid for schedules by seniority. As a result of being denied the ability to bid for his schedule by seniority, Velasquez was unable to retain his previous schedule. AFSCME also contends that Velasquez lost his ability to bid for vacation time by seniority. AFSCME therefore contends that Velasquez suffered a worsening of his position, and that the City failed to preserve the rights, privileges and seniority benefits pursuant to the Arrangement.

As a remedy, AFSCME seeks the restoration of the former system of bidding for vacation and work schedules by seniority. The appeal also requests a remedy that the City be found in non-compliance with the protective arrangements and prohibited from further federal assistance.

### **POSITION OF THE CITY**

The City admits that Morales and Velasquez’ positions were reclassified in 2006. The City states that the reclassification was done pursuant to the City Charter, following public notice and hearings at which any employee or interested party were allowed to appear and voice objections or comments. The City denies that Morales’ lost supervisory responsibilities as a result of the reclassification and points out that his performance evaluation for his prior classification contained no rating in supervisory categories. Further, the City also asserts that Morales failed to apply for the position of automotive technician he alleges he was denied when it was posted. The City also denies that Morales lost the ability to bid for vacation or work schedules, but admits that the time for bidding changed from every six months to once a year. The City denies that Morales suffered any loss of wages, benefits or seniority.

With regard to Velasquez, the City states that in February 2008, not October 2010 as Velasquez alleges, Sun Metro management replaced bidding by seniority for fleet maintenance supervisor schedules with management assigned schedules. The City asserts that Velasquez’ claim is untimely given the actual implementation date of the new scheduling

procedures. The City also asserts that the change was based on management's "determination that the method of supervisors bidding on their work shifts by seniority could not provide the needed efficiencies to improve consistency, quality and quantities of equipment" needed by "the maintenance department to make it successful." The City asserts that bidding by seniority for vacation has not been affected. The City further denies that Velazquez lost any supervisory duties or was "worked out of a class," noting that his job description contains numerous supervisory duties. The City also denies that Velasquez suffered any loss of wages, benefits or seniority.

The City argues that that bidding by seniority was not an accrued right and maintains that neither the scheduling procedure nor its implementation bear any relationship to the existence of any protected right or to a federally funded project.

### **FINDINGS OF FACT**

The Department finds the following:

1. Morales and Velasquez's positions were reclassified by the City in 2006, as part of a city-wide reclassification.
2. The reclassification was done pursuant to the City Charter, following public notice and hearings at which any employee or interested party were allowed to appear and voice objections or comments.
3. The reclassification was not done as a result of a project funded by federal assistance.
4. Neither Morales nor Velasquez suffered a reduction in supervisory duties as a result of the reclassification.
5. Neither Morales nor Velasquez suffered a reduction in privileges based on seniority with regard to vacation bidding as a result of the reclassification.
6. Morales did not suffer a reduction of privileges based on seniority with regard to the placement of employees in automotive technician positions following the reclassification.
7. The employees assigned to the automotive technician positions held those positions prior to the 2006 reclassification.
8. Neither Morales nor Velasquez suffered a reduction of wages, benefits, or seniority as a result of the reclassification.
9. Morales did not suffer a reduction of privileges based on seniority with regard to bidding on schedules.

10. The City had a past practice of unspecified duration and origin of allowing fleet maintenance supervisors to bid by seniority on work schedules.
11. The City discontinued the past practice of allowing fleet maintenance supervisors to bid by seniority on work schedules in February 2008 for reasons unrelated to a project.
12. Neither AFSCME nor Morales and Velasquez pursued grievances with the City over their allegations outside of the present claims.

## **DISCUSSION**

### **A. The Capital Assistance Protective Arrangement Does Not Apply to these Claims.**

In both cases, AFSCME asserts that the City violated the “Capital Assistance Protective Arrangement” by failing to provide 60-day notice that it was contemplating the elimination of bidding and seniority rights and removal of duties as a result of the reclassification. In support of this contention, AFSCME quotes the standard language of the Capital Assistance Protective Arrangement which provides: “The Recipient shall provide to all affected employees sixty (60) days’ notice of intended actions which may result in displacements or dismissals or rearrangements of the working forces as a result of the Project.”

The Capital Assistance Protective Arrangement is not the same as the Arrangement. Further, the Department has no record of any certification on the basis of the Capital Assistance Protective Arrangement for the City of El Paso. The Arrangement sets forth the terms and conditions by which the City is to comply with the Act. The Arrangement, ¶14, states that “in the event the City shall contemplate other major changes in the nature of its operation which would adversely affect a significant number of its employees necessitating a rearrangement as a result of the Project, the City shall give reasonable written notice of such intended change to the employee affected. ...” AFSCME has not presented any argument that the alleged facts meet that standard and require notice under the Arrangement. In addition, as discussed below AFSCME has failed to show how any of the alleged “worsening” acts were the result of a project. Therefore, the Department denies this aspect of the claims.

### **B. Claimants Were Not Worsened As A Result of a Project.**

The protection of individual employees against a worsening of their positions related to employment—must be “as a result of a project.” The Arrangement states:

7. Any employee covered by this agreement who is ...placed in a worse position with respect to compensation, hours, working conditions, fringe

benefits, or rights and privileges pertaining thereto ... at any time during his employment as a result of the Project, including any program of efficiencies or economies directly or indirectly related thereto, shall be entitled to receive any applicable rights, privileges and benefits as specified in the below listed employee protective arrangements; provided, however, that nothing in these provisions shall be deemed to supersede or displace any other provisions of this agreement, and in the event of any conflict or inconsistency between them, the other provisions of this agreement shall control. (emphasis added).

17. The term “Project,” as used in this agreement, 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 a result of the assistance provided. The phrase “as a result of a Project,” within the meaning of this agreement, shall include any changes or events occurring in anticipation of, during, and subsequent to the Project.

Here, AFSCME has failed to link its allegations to any project receiving Federal assistance. Moreover, AFSMCE did not establish that the “organizational” or “operational” changes in the maintenance department were a result of a project. The City, on the other hand, has demonstrated that the alleged acts were the result of factors other than a project. In the case of Raymundo Morales, the reclassification of his position was done pursuant to a 2006 citywide reclassification. As for Eduardo Velasquez, the change in supervisory bidding was done to improve efficiency and provide necessary training to other employees. Therefore, the Department denies this aspect of the claims.

**C. Claimants Have Not Shown They Were Denied An Accrued Right.**

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.

Unlike “worsening” claims discussed above, and 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. However, there does need to be a factual basis for finding that a past practice amounts to an “accrued right,” particularly where, as in Texas, the employer is prohibited under state law from executing a collective bargaining agreement, and the alleged affected rights, privileges and benefits are “otherwise” derived. Here, the parties agree that there was a past practice of fleet maintenance

supervisors bidding by seniority on schedules. However, the City asserts that such bidding is not an accrued or vested right. AFSCME claims it is but has failed to provide sufficient information on the origin and duration of the past practice to allow the Department to make this conclusion. With regard to the other alleged changes to past practices, the Department finds there was either no change or no denial of an accrued right. Therefore, this claim is denied.

### **DETERMINATION**

The rights of employees have been preserved and continued in accordance with the Act. 49 U.S.C. § 5333(b)(2)(A). Moreover, the evidence does not support a finding that the employees suffered a “worsening” of positions related to employment as a result of a project. 49 U.S.C. § 5333(b)(2)(C).

Therefore, the claims are denied.

This decision is final and binding.

Date \_\_\_\_\_

\_\_\_\_\_  
Michael J. Hayes  
Director, Office of Labor-Management Standards