

In the Matter of Arbitration:

Roy H. Peter,
Claimant,

v.

San Francisco Bay Area Rapid Transit
District and Santa Clara Valley
Transportation Authority,
Respondents.

DSP Case No. 04-13c-2

Issued: July 7, 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 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 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 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).

In this case, as described below, the terms and conditions of the Department’s certification of the Santa Clara Valley Transportation Authority’s protective arrangement provide for final and binding arbitration of claims by the Department of Labor (Department).

ORIGIN OF THE CLAIM

This claim arises under the terms and conditions of the Department’s certification of the September 8, 1978 protective arrangement (the Arrangement) executed by the Santa Clara Valley Transportation Authority (VTA)(f/k/a Santa Clara Valley Transit District) and Local 265 of the Amalgamated Transit Union, AFL-CIO (ATU).¹ 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 VTA since its adoption.

The relevant terms and conditions of the Department’s certification state:²

4. Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local union which is a party to, or otherwise referenced in the protective arrangements, shall be afforded substantially the same levels of protection as are afforded to the employees represented by the unions under the above agreements and 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 by the parties to utilize any other final and binding procedure for resolution of the dispute,

¹ Peter originally asserted a claim based on BART’s 13(c) agreement. As more fully discussed below, VTA is the only recipient obligated to provide protections covering the claimant. Therefore, this decision will not address the details of BART’s 13(c) agreement.

² The terms and conditions were first certified by the Department for grant No. 03-0639-01, on July 29, 2004 but the FTA denied the grant. The FTA resubmitted the 2004 grant application to the Department in 2006.

the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination.

Claimant Roy H. Peter asserts that he was laid off from his position as bus maintenance supervisor as a result of a federal project as defined by the protective arrangement. Peter was employed outside the ATU bargaining unit at VTA at the time his claim arose.³ As a non-bargaining unit employee, Peter is entitled to substantially the same levels of protections as bargaining unit employees. Peter attempted to resolve this claim with VTA but was unsuccessful. Peter thus appeals to the Department to make a final and binding determination.

FINDINGS OF FACT

In November 2001, VTA and the San Francisco Bay Area Rapid Transit District (BART) entered into a contract for the extension of BART into Santa Clara County. The parties gave the project the initials “SVRT” for Silicon Valley Rapid Transit. Funding for the SVRT was provided by state, federal, local sources. The contract anticipated \$760,000,000.00 in state funds and \$834,000,000.00 in Federal New Starts funds.⁴ Under the contract, VTA had full financial responsibility for the SVRT. In 2000, Santa Clara County voters had approved a ½ cent sales tax to fund countywide transportation improvements. In addition, the VTA Board of Directors authorized the VTA to issue up to \$550 million in bonds secured by and payable by the sales tax increase. One hundred seventy million could be used for the Preliminary Engineering phase of the project. BART assumed no responsibility for any shortfalls in federal funding or other revenue sources.⁵

As of January 2004, the only federal funding VTA received from the Federal Transit Administration (FTA) for the SVRT extension was \$245,896 for planning work in 2003, which was not certified by the Department.⁶ In 2003, VTA applied for nearly \$2,000,000.00 from the FTA for the Preliminary Engineering Phase of the SVRT. The FTA denied the grant and gave the SVRT a "not recommended" rating. In December 2005, VTA withdrew the SVRT from FTA’s New Starts project qualification and funding program due to FTA concerns about the funding for operations. This included formal withdrawal from the FTA preliminary engineering phase of project development.⁷ In July

³ As stated below, Peter was represented by the County Employees’ Management Association (CEMA) which represented Peter at a grievance hearing in December 23, 2003, related to his layoff and “inplacement” rights. Regardless, either as a CEMA member or individual non-ATU employee, Peter is entitled to “substantially the same levels of protections” under the terms and conditions of the Department’s certification.

⁴ The parties agreed that the VTA would not compete for the federal funding with another BART extension to San Francisco International Airport until the latter had been fully funded in the amount of \$750,000,000.00. VTA, Exh. E.

⁵ VTA, Exh. E.

⁶ VTA, May 9, 2005 letter.

⁷ FTA *Record of Decision* dated June 24, 2010 re: Santa Clara Valley Transportation Authority Silicon Valley Rapid Transit Corridor Project Santa Clara County, California, p. 1-2.
<http://www.vta.org/sfc/servlet.shepherd/document/download/069A000001EKv9IAG>

2006, FTA submitted a revised application for the 2004 funds for VTA to the Department for certification. The Department certified the protective arrangements on July 11, 2006.⁸

Peter began working for VTA on August 6, 2001 as a Maintenance Supervisor.⁹ As a VTA supervisory employee Peter was represented by the County Employees' Management Association (CEMA).¹⁰ By letters dated November 6, 2003 and December 16, 2003, VTA notified Peter that he was to be laid off effective January 4, 2004.¹¹ Following notification of his lay-off, CEMA filed several grievances on Peter's behalf regarding alleged violations of his seniority and "inplacement" rights in the conduct of the layoff.¹² Those grievances were denied on January 7, 2004.¹³ Two months following his lay-off, Peter began employment with BART as a train operator but at a lower salary and lesser benefits, including benefits of seniority, than he had received with VTA.¹⁴

In July 2004, Peter contacted his new employer, BART, about his 13(c) rights in connection with his VTA layoff.¹⁵ In October and November 2004, Peter contacted ATU Local 1555, which represented him as an employee of BART; CEMA; and AFSCME, which replaced CEMA as a bargaining representative at VTA on March 30, 2004, to inquire about his 13(c) rights and whether any union would represent him.¹⁶ Only ATU responded, in a letter dated November 5, 2004, stating that any 13(c) protections covering his layoff arose out of his employment with VTA and the bargaining representative in place there.¹⁷ ATU also cautioned Peter that typical 13(c) agreements contained statutes of limitations and that his claim could fail on the basis of timeliness if made outside the limitations period. On December 3, 2004, Peter contacted VTA regarding his 13(c) rights.¹⁸ VTA responded on December 15, 2004, denying any violation of his rights. On December 16, 2004, Peter appealed the denial of his claim with the Department.¹⁹

⁸ See July 11, 2006 certification.

⁹ VTA, March 8, 2005 letter.

¹⁰ VTA, Exh M. CEMA and VTA were parties to a Memorandum of Understanding in which VTA recognized CEMA as the "exclusive bargaining representative for all classified and unclassified employee in coded classifications within the Supervisory-Administrative bargaining unit." The MOU was dated June 21, 1999-June 8, 2003. However, Article 17 stated that the agreement "shall remain in full force and effect to and including June 8, 2003, and from year to year thereafter; provided, however, that either party may serve written notice on the other at least 60 days prior to June 8, 2003, or any subsequent June 8th of its desire to terminate this Agreement or amend any provision thereof." VTA, Exh. M. In March 2003, AFSCME filed a petition to decertify CEMA as the exclusive representative. The election was held in March 2004. The employees were offered the choice of CEMA, AFSCME, or no representation. The employees rejected CEMA and elected AFSCME as their exclusive bargaining representative. See *Santa Clara Valley Transportation Authority v. Rea*, Cal. State Court of Appeals, Sixth Circuit, case no. H028841, decision dated June 28, 2006, p. 7.

¹¹ VTA, Exh. N.

¹² VTA, Exh. O.

¹³ *Id.*

¹⁴ Peter, claim form and exhibits.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

POSITION OF CLAIMANT

Peter alleges that he was laid off as a result of SVRT. In his April 22, 2005, letter to the Department, Peter requested that “the scope of [his] 13(c) claim be increased to include all federal funding issued to VTA including but not limited to the purchase of new buses, new LRV’s, facility renovations, new facility construction, as well as highway improvements and commuter rail projects.”

Peter contests VTA’s position that the layoff was unrelated to the SVRT. Peter alleges that Santa Clara County diverted funds normally used to operate VTA to the SVRT thus leaving VTA without sufficient funds to maintain normal operations causing his layoff.²⁰ Peter claims that VTA’s fiscal emergency was caused by its financial commitment to BART and diversion of revenues to the BART extension. Peter seeks dismissal and displacement allowances under the Arrangement, as well as an order requiring BART to grant him the seniority rights based on his service with VTA.²¹

POSITION OF VTA²²

VTA contends that Peter’s claim is untimely because VTA’s Arrangement has a 60-day time limit for submission of claims, and Peter did not present his claim until ten²³ months after his layoff.²⁴

While VTA acknowledges receipt of \$245,896.00 in federal assistance in 2003 to perform environmental research work related to the SVRT, it denies that the project bore any relation to Peter’s layoff. VTA states Peter’s layoff was part of an across-the-board reduction in force necessitated by a drastic decline in VTA’s principle source of revenue, sales taxes, and declines in ridership due to the financial downturn caused by the 2002 “dot com” recession.²⁵ The 3% service reduction in which Peter was included was the fourth reduction since 2001.²⁶ In addition, the VTA issued bonds against future revenues to avoid a 21% service reduction which would have reduced VTA’s bus service levels

²⁰ Peter, June 10, 2005 letter. Peter states revenues from sales tax increases, Measures A and B, were intended only for expansion of VTA’s bus and light rail service and a CalTrain connection to BART. However, this assertion is not supported by the language of Measure A. See VTA’s Nov. 1, 2010 letter attachments; VTA, Exh. E. Moreover, use of Measure A funds for operating expenses was limited to specific activities, many of which were not to occur until 2008 and 2010. VTA, Nov. 1, 2010 letter attachments.

²¹ *Id.* There is no jurisdictional basis for an order requiring an entity other than the Recipient to perform any remedial acts. Thus, even if an award were appropriate in this case, the Arbitrator has no authority to order that BART provide the requested relief. This is supported by paragraph 18 of the Arrangement which states in part: “During the employee’s protective period, a dismissed employee shall, if he so requests, in writing, be granted priority of employment to fill any vacant position within the jurisdiction and control of the Recipient...”

²² VTA set forth its position in letters dated March 8, 2005; May 9, 2005; June 9, 2005; November 1, 2010; and December 13, 2010.

²³ The Department notes that Peter’s December 3, 2004 inquiry to VTA occurred 11 months after his January 4, 2004 layoff.

²⁴ VTA, November 1, 2010 and December 13, 2010 letters.

²⁵ VTA had declared a “fiscal emergency” to allow it to make service reductions without adhering to certain environmental assessment requirements. This required VTA to hold a public hearing and respond to comments and suggestions made by the public.

²⁶ VTA, March 8, 2005 letter, p. 3.

back to those operated in 1981.²⁷ VTA supplied and points to numerous documents evidencing the decline and measures VTA took over several years to address revenue and cost savings.²⁸ VTA states that it reduced active buses, peak buses, and scheduled bus service miles between 2000 and 2004 and eliminated bus mechanic positions. As a result of fewer mechanics, VTA had less need for bus maintenance supervisors like Peter.²⁹

POSITION OF BART³⁰

BART states that it did not receive any federal funding for the SVRT. Thus, there is no “project” from which his layoff was a result. Moreover, BART asserts that Peter was not a service area employee covered by BART’s own 13(c) agreements. Finally, BART asserts that any claim is untimely because BART’s 13(c) agreement requires an employee to file a claim within 60 days of his layoff.

DISCUSSION

A. Timeliness

Peter failed to present his claim to VTA within the 60 day time period required by the Arrangement. Paragraph 17 of the Arrangement states in part:

The Recipient shall be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee affected as a result of the Project may file a claim through his Union representative with the Recipient within sixty (60) days of the date he is terminated or laid off as a result of the Project.... Unless such claims are filed with the Recipient within said time limitations, the Recipient shall there-after be relieved of all liabilities and obligations related to said claims....

²⁷ VTA, Exh. G4; see also August 6, 2003 memorandum from Peter M. Cipolla to Technical Advisory Committee Santa Clara Valley Transportation Authority Board of Directors re: January 2004 Transit Service Reduction Plan, p. 8.

²⁸ VTA, Exhs. I, F1, F2, F3, F8, F9, G1, G3, J, J1, K2, K3. For example, from 2001 to 2002, sales tax revenues experienced the most extreme decline in the history of the VTA, declining over 20% in the first two quarters of fiscal year 2002;²⁸ from 2001 to 2004, average weekly ridership declined from 183,100 to 123,200;²⁸ and from 2002 through 2003, the VTA Board of Directors discussed multiple options for increasing revenue, including increasing fares, new sales tax initiatives, and a 21% service reduction for bus and light rail.²⁸ In addition, the August 6, 2003 VTA memorandum, p.3-4, fn. 26 supra, states: “Last year VTA proposed a budget that included a 5% service reduction and fare increase in July 2002, another 9% reduction in VTA bus and light rail service hours was implemented in April 2003, and a number of one-time revenue enhancement strategies were incorporated into the budget. The capital budget has continued to be reviewed over the last one and one-half years identifying over \$120 million in capital projects that have been deferred, reduced or eliminated.... Even with the fare increase and service reductions, VTA still has an on-going structural deficit projected to be approximately \$100 million annually.”

²⁹ VTA, May 9, 2005 letter, p. 4.

³⁰ BART set forth its position on this claim in letters dated March 9, 2005; May 6, 2005; and December 10, 2010.

Peter was laid off on January 4, 2004. Under the terms of the Arrangement, Peter was required to file his claim by March 5, 2004. However, Peter did not contact VTA regarding his 13(c) rights until December 3, 2004. The only reason Peter offers for this failure is his lack of knowledge regarding 13(c) protections. Throughout his employment with VTA Peter enjoyed representation by CEMA. CEMA filed numerous grievances on Peter's behalf related to his layoff and inplacement rights. CEMA's failure to assert Peter's 13(c) rights at the time of his layoff or make Peter aware of those rights is not a reason to waive the 60 day requirement set forth in the Arrangement. Therefore, the claims are dismissed as untimely. However, due to the delay in issuing this decision, the Department will also address the merits of Peter's claim.

B. Result of the Project.

In a claim based on a "worsening" as a result of a project, 49 U.S.C. § 5333(b)(2)(3), the claimant has the obligation to (1) identify the project and (2) specify pertinent facts of the project on which he or she relies. Paragraph 15(d) of the Arrangement states:

(d) In the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be his obligation to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the Recipient's burden to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may have also affected the employee.

Peter identified the SVRT as the project that caused an adverse effect on his employment. However, Peter's allegations of "pertinent facts" relating to the SVRT — that VTA diverted funds from operations to the SVRT— do not support a finding that the federal assistance provided resulted in the adverse effect. As shown, there was no federal funding for the SVRT to which 13(c) protections were applied until two and one half years after Peter's layoff. Even if the 13(c) protections applied to the environmental work done for the SVRT in 2003, Peter has failed to show that that specific federally funded portion of the SVRT caused VTA to direct any revenue away from operations and toward that SVRT related work or how that specific project caused his layoff.

The Arrangement, paragraph 1, states:

(1) The term project, as used in the 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 the Project" shall, when used in this agreement, 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. (emphasis added).

As stated above, the 2004 grant application submitted by VTA as Exhibit C2 was denied by the FTA in 2004, and not approved for funding until July 2006. The VTA's general expectation of federal funds for the entirety of the SVRT dating back to its inception, or even two and one half years prior to actual receipt of the federal funds, cannot be considered "anticipation" of the project under the Arrangement. Moreover, even if the 2006 protections applied at the time of Peter's layoff, Peter has failed to specify how the 2006 federally funded portion of the SVRT resulted in his layoff or that VTA directed any revenue away from operations and toward the SVRT. Therefore, Peter has not fulfilled his obligation to specify pertinent facts supporting his claim that he was adversely affected by the SVRT. *See Local 1086, Amalgamated Transit Union v. Port Authority of Allegheny County et al*, DEP Case No. 79-13c-12, Digest A-88 (allegation that several federal projects for competing transit provider economically disadvantage transit company and resulted in the worsening of transit employees positions was not sufficient to "describe a plausible theory of cause and effect with respect to the project(s)" where bus company was in general decline during period and union did not specify facts to show why such decline might have occurred as a result of the projects); *Haddad v. Worcester Regional Transit Authority et al*, DEP Case No. 78-13c-43, Digest A-196 (While spillover effect of federal assistance was conceivable, such effect was not inevitable nor even most probable. Claimant has responsibility to show the alleged connection between the project and the direct cause of termination of employment.).

Moreover, VTA has shown that the 2004 layoff was an economy or efficiency unrelated to the SVRT. According to the Arrangement "as a result of the Project" does not include "volume rises and falls of business ... brought about by causes other than the Project." The evidence supports VTA's position that the 2004 layoff was caused by a lack of funding from its revenue sources rather than any expected or "anticipated" influx of federal funding, *See Santa Clara County Transit District v. Amalgamated Transit Union, Div. 265*, Opinion and Award (Bogue 5/28/1996)(submitted by VTA as Exh. H). Peter's speculative, alternative budget options for the VTA are not sufficient to show that the 2003 or 2006 federally funded SVRT projects had an effect on his employment. *See Stephens v. Monterey Salinas Transit*, DEP Case Nos. 82-13c-6 & 82-13-4, Digest A-343 (Claimants failed to show that project that alleged resulted in adverse effects was funded through the Act); *Fuller v. Greenfield and Montague Transp. Area et al*, DEP Case No. 81-18-16, Digest A-384 ("Adverse affect [sic] on an employee after a UMTA grant has been awarded does not establish that the adverse affect [sic] was caused by the grant. There must be a nexus between the project and the direct cause of termination of employment."). Moreover, Paragraph 3 of the Arrangement specifically states:

Unless otherwise provided, nothing in this agreement shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the applicable collective bargaining agreement.

Further, because the Arrangement clearly states that it is a claimant's burden "to identify the Project and specify the pertinent facts of the Project relied upon." Peter's April 22, 2005 request to expand his claim "to include all federal funding issued to VTA including but not limited to the purchase of new buses, new LRV's, facility renovations, new facility construction, as well as highway improvements and commuter rail projects" fails to meet that standard. See *Local 1086, Amalgamated Transit Union v. Port Authority of Allegheny County*, DEP Case No. 79-13c-12, Digest A-88. Thus, Peter's request is denied and the claim is limited to the effects of the SVRT project originally identified in Peter's claim.

Therefore, the claims against VTA are dismissed.

C. BART

As set forth above and in its responses to this claim, BART did not request or receive federal financial assistance for the SVRT.³¹ Therefore, there was no "project" to which 13(c) protections applied for which BART was responsible. The claims against BART are dismissed.

DETERMINATION

Peter failed to present his claim to VTA within the 60 day time period required by the Arrangement. Further, the evidence does not support a finding that Peter suffered a "worsening" of position related to employment with VTA or BART as a result of a project. Therefore, the claims are denied.

This decision is final and binding.

Date July 7, 2014

Michael J. Hayes

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

³¹ Peter attempts to link a BART extension project in Alameda County to the SVRT by citing to an FTA statement in the 2004 grant application that the projects were "connected" and a notation that BART was contributing some of its state funds to cover VTA's required match for the federal grant. The "connected" description relates to the projects' environmental impact statements and bears no relation to the issues addressed in this decision. Further, Peter has failed to identify any federal funding that BART received to reimburse it for the match contribution.