U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

September 4, 2013

Leslie Rogers, Regional Administrator
Federal Transit Administration, Region IX
201 Mission Street, Suite 2210
San Francisco, California 94105

Re: FTA Application
Sacramento Regional Transit District
FULL FUNDING GRANT AGREEMENT
South Sacramento Corridor Phase 2
Project (Extension of South Corridor LRT
Service from Meadowview Road to
Cosumnes River College)
CA-03-0806-03 and CA-03-0806-04

Dear Mr. Rogers:

This is in reply to the request from your office that we review the above-captioned application for a grant under section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (1964), now codified as part of the Federal Transit Act, 49 U.S.C. § 5333(b).

This is the Department of Labor's (Department or DOL) final determination of Sacramento Regional Transit District's (SacRTD) ability to preserve and continue, consistent with section 13(c), the pension benefits and collective bargaining rights of its employees represented by the Amalgamated Transit Union (ATU) Local 256 (ATU or Union).

Federal Transit law requires as a condition of 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 law specifically provides:

> Arrangements . . . shall include such provisions as may be necessary for
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> (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
> (2) the continuation of collective bargaining rights;

(3) the protection of individual employees against a worsening of their positions with respect to their employment;
(4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and
(5) paid training or retraining programs.

49 U.S.C. § 5333(b)(2).[1] These arrangements are commonly referred to as section 13(c) agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307. Because the Secretary of Labor's certification is a "condition" for the award of a grant, the Secretary must certify the protective arrangements before the Department of Transportation can award funds to grantees. 73 Fed. Reg. 47,046, 47,047 (Aug. 13, 2008) (preamble to current DOL Guidelines).

In exercising the Department's discretion to ensure fair and equitable protective arrangements in compliance with section 13(c), the Department has reviewed California's Public Employee Pension Reform Act (PEPRA), Assembly Bill 340, (Furutani), Stats. 2012, Chapter 296, West's Ann.Cal.Gov.Code § 7522, et seq., in consultation with the State of California's Office of the Governor, and the State's Labor and Workforce Development Agency with respect to the precise contours of the statute.[2] The Department has also reviewed the relevant collective bargaining agreements, pension plans, and briefs and supporting materials provided by SacRTD and the Union to determine the effects of PEPRA on rights protected by section 13(c). We have concluded that PEPRA makes significant changes to pension benefits that are inconsistent with section 13(c)(1)'s mandate to preserve pension benefits under existing collective bargaining agreements and section 13(c)(2)'s mandate to ensure continuation of collective bargaining rights. Thus, PEPRA precludes the Department from providing the requisite certification to the Federal Transit Authority.[3]

Background – State Law Change to Collective Bargaining Rights

On September 12, 2012, Governor Edmund G. Brown, Jr. signed into California law PEPRA and related pension reform changes. These statutory

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[1] Note the text of the statute was codified from this earlier version in 1994 to separate the fourth assurance into two separate and lettered paragraphs.

[2] Along with the Department's independent review of PEPRA, attorneys from these California state government offices provided the Department with a useful summary of the PEPRA provisions, which the Department relied upon and supplied to the parties.

[3] This denial of certification is issued without prejudice to SacRTD's right to seek or obtain certification under changed circumstances.

provisions became effective on January 1, 2013. PEPRA applies to most California transit systems.[4] PEPRA's practical and legal effect on the employees of transit agencies depends on each union's separately negotiated collective bargaining agreement and the type of pension plan in which the employees participate.[5] In general, PEPRA is immediately effective for employees hired on or after January 1, 2013. These employees are termed "new" employees or, when referring to their participation in any type of a public retirement system or plan, "new" members. PEPRA Article 4, Section 7522.04(e) and (f). For the purpose of this determination, DOL adopts the term "classic," as used by the California Public Employee Retirement System, for all those employees who do not meet the definition of "new." PEPRA introduces a two-tier pension benefit system for these two classes of employees. *Id.*

PEPRA ultimately determines the pension contributions and every significant aspect of the pension benefit calculation for "new" employees. It controls the benefit formula (i.e., percent multiplier of final compensation at various years of service), the definition of compensation used to determine the pension benefit ("pensionable compensation"), and the minimum age for receipt of a pension; it imposes a cap on the amount of final compensation that can be used in the pension benefit determination, and requires "new" employees to pay 50 percent of normal pension costs. Additionally, "new" employees are not eligible to participate in supplemental defined benefit plans. PEPRA Article 4, Sections 7522.10, 7522.20, 7522.32, 7522.34(c), 7522.18(c).

PEPRA also affects the rights of "classic" employees. As of January 1, 2018, PEPRA authorizes employers to set "classic" employees' contribution level at 50 percent of the normal cost of pension benefits after bargaining to impasse, restricted only by a cap set forth in Section 31631.5(a)(1).

<u>Procedural Background – The Parties' Negotiations</u>

The section 13(c) process begins when the DOL receives a copy of an application for Federal assistance along with a request for certification of employee protective arrangements from the Department of Transportation. Upon receipt of an application involving employees represented by a labor organization, DOL refers a copy of the application to that organization and

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[4] Those operated by charter cities and charter counties not participating in the California Public Employees Retirement System (CalPERS) or the 1937 Act County Requirement System and those operated by the University of California are not affected. In addition, transit systems that use private contractors for the operation of all service and vehicle maintenance, as well as other supporting functions, are not affected. PEPRA Article 4, Section 7522.02(a)(2).

[5] PEPRA's effect on employees of transit agencies also depends on whether the pension plan falls under either CalPERS, the 1937 County Act Systems, or can be defined as an "independent" plan, as is the case with the SacRTD-ATU Local 256 plan.

notifies the applicant of the referral. After referral and notice, DOL recommends the terms and conditions that are to serve as the basis for certification. The DOL's implementing Guidelines (Guidelines) reflect the practice that the previously certified protective arrangement is appropriate for application to the new grant. Therefore, DOL's referral will propose certification based on those terms and conditions. 29 C.F.R. § 215.3(b)(2).

Under DOL's implementing Guidelines, applicants and unions/employees may file "objections" to the terms of a proposed certification within fifteen days. DOL must then determine whether the objections are "sufficient," i.e., "raise[] material issues that may require alternative employee protections" or "concern[] changes in legal or factual circumstances that may materially affect the rights or interests of employees." 29 C.F.R. § 215.3(d). More specifically the Guidelines provide that the parties may "submit objections, if any, to the referred terms," while, at the same time, the parties are "encouraged" to arrive at "a mutually agreeable solution to objections any party has to the terms and conditions of referral." 29 C.F.R. § 215.3(d)(1).

The Amalgamated Transit Union objected to the proposed terms for employee protection certification contained in the Department's referrals for the above-referenced grants on December 20, 2012.[6] The union stated that contrary to the requirements of section 13(c)(1) and (2), the new law will "remove or limit certain mandatory and/or traditional subjects of collective bargaining." The union also stated that among other mandates, PEPRA will impermissibly require participating employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representatives(s) by:

- Raising the minimum retirement ages;
- Reducing pension benefits for new public employees;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing various measures designed to avoid pension "spiking"; and
- Adjusting the compensation cap annually and requiring certain contributions from employees to equal one-half of the normal costs of the plan.

Letter from Jessica M. Chu to John Lund (December 20, 2012), "Objections to Referral Terms".

The Department reviewed the union's objections concerning PEPRA and found the objections sufficient. On January 10, 2013, the Department

[6] On August 30, 2013, the Department consolidated grant amendment CA-03-0806-03 with grant amendment CA-03-0806-04. As such, this determination covers both grant amendments.

communicated to the parties that PEPRA appeared to have removed mandatory and traditional subjects of collective bargaining from the consideration of the parties and to have prevented the continuation of collective bargaining rights of employees. 49 U.S.C. § 5333(B)(2)(b). The Department determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the unions. See 29 C.F.R. § 215.3(d)(3)(ii).

Pursuant to DOL's Guidelines at 29 C.F.R. § 215(d)(3)(ii), the parties were directed on January 10, 2013, to engage in good faith negotiations/discussions to seek a mutually acceptable resolution of issues concerning the continuation of collective bargaining between SacRTD and ATU Local 256 in light of the recently enacted PEPRA.

The parties failed to negotiate a resolution of the issues and were directed to brief certain specified issues under a Briefing Schedule provided by the Department on April 18, 2013. The Department determined and notified the parties at that time that an interim certification of the grants would not be issued because PEPRA might present circumstances inconsistent with section 13(c). The parties submitted initial briefs on May 8, and reply briefs on May 20, 2013.

SacRTD Pension Benefits

The collective bargaining agreement (CBA) and the Retirement Plan covering ATU Local 256 (Retirement Plan or Plan) set forth the pension arrangements between SacRTD and ATU. ATU Brief ("Br."), Exhs. 6 and 7. The Retirement Plan was initially adopted by SacRTD in 1974 and states that "the District has amended and restated the Plan on numerous occasions." Retirement Plan (Retire. Plan.), Art. 1. ATU states that it has negotiated aspects of the Retirement Plan at least 11 times between 1974 and 2004. ATU Br. p. 19; *see also* SacRTD Initial Br. 16.

The parties' CBA provides that "there shall be no employee contributions towards said pension plan." CBA Art. 67. Further, the CBA stipulates that SacRTD is to pay the total cost of the pension plan. Retire. Plan Article (Art.) 12.2; *see also* CBA Art. 67, § 2; CBA Art. 97, § 4. The Retirement Plan caps pensionable compensation at the IRS limit ($255,000 for 2013). Retire. Plan Art. 2.6(c); IRS Code Sect. 401(a)(17)(b). Under Article 7.1 of the Retirement Plan, members may retire after 25 years of service or at age 55 with at least 10 years of service. Retire. Plan Art. 7.1. The formula under the Retirement Plan provides for pension payments that start at 2.0 percent of final compensation multiplied by the employee's years of service and increase 0.1 percent per year of service until reaching 2.5 percent at either age 60 or after 30 years of service. Retire. Plan Art. 7.1. Additionally, in calculating pensionable compensation, the SacRTD-ATU Local 256 Plan permits the inclusion of payouts of overtime, shift differentials, bonuses, and cash in lieu of vacation or sick leave. *See* Retire. Plan Art. 2.6(a)(2)-(a)(4). Pensionable compensation under the Retirement Plan is based on the employee's highest consecutive 48-month period of compensation. Retire. Plan Art. 2.16. Article 7.9 of the Plan permits employees who return from disability leave to purchase airtime credit for the term of their disability. ATU claims that it also negotiated benefit enhancements to foster early retirement. ATU Initial Br. 13, Ex. 12.

SacRTD has taken steps to implement PEPRA as it relates to "new" employees. On February 19, 2013, SacRTD distributed a memo to "new" employees announcing that it would begin on March 1, 2013, to deduct from their pay the PEPRA-required 50 percent contribution to pension costs. See ATU Initial Br. 11, 16, Ex. 13.

<u>Position of SacRTD</u>

The Department has carefully reviewed all of SacRTD's submissions, including initial and reply briefs along with attached exhibits. SacRTD characterizes PEPRA as a valid exercise of the State's police powers to regulate public pension plans. SacRTD analogizes PEPRA's limits on pension benefits and its cost-sharing provisions to state-mandated employment benefits which have been held not to conflict with collective bargaining rights. SacRTD Initial Br. 3 (*citing Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985) (upholding Massachusetts law mandating mental health insurance coverage). It suggests that PEPRA, like other state labor standards, merely provides a "backdrop" to negotiations between employers and employees. *Id.* at 2-3 (*citing Fort Haljfax Packing Co. v. Coyne*, 482 U.S. 1 (1987)(Maine law requiring severance payments not pre-empted by labor law).

SacRTD argues that PEPRA does not conflict with section 13(c) because the new law predominantly affects "new" employees who, it asserts, have no pre-existing protected section 13(c) rights. *See Id.* at 7-10. According to SacRTD, although the collective bargaining agreement "would cover new employees hired within the lifetime of the agreement," PEPRA does not impair their rights because "the contractual rights of new employees to pensions are determined and established at the time of hiring," not before. *Id.* Similarly, SacRTD argues that extending negotiated terms and conditions of employment that are contradictory to State law to "new" employees would create new collective bargaining rights beyond the scope of 13(c). *Id.* at 8.

Additionally, SacRTD states that the controlling decision in *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985), holds that state law violates section 13(c) only when it prohibits, eliminates, and "totally prevent[s]" bargaining over mandatory subjects. *See* SacRTD Initial Br. 5-6 (citing *Donovan*, 767 F.2d at 947). Thus, no violation of section 13(c) occurs when a state law leaves intact the parties' ability to engage in good faith negotiations over some elements of a mandatory subject of bargaining. SacRTD Reply Br. 4. Here, SacRTD asserts that PEPRA merely "restrict[s]" the scope of bargaining over pension rights but "preserve[s] the ability to bargain over retirement benefits generally." SacRTD Initial Br. 5-6.

Position of the ATU

The Department has carefully reviewed the Union's initial and reply briefs along with attached exhibits. The Union asserts that PEPRA violates section 13(c)(1) by making substantial unilateral changes to pension benefits under the current collective bargaining agreement and violates section 13(c)(2) by significantly restricting the scope of bargaining over pensions. Any remaining latitude under PEPRA to bargain over pensions cannot compensate for the substantial changes imposed on the benefits of both "new" and "classic" employees. The Union argues that SacRTD cannot cure its PEPRA-imposed inability to bargain over most key aspects of the pension benefit simply by offering its willingness to bargain over wages, deferred compensation, and other economic terms. According to ATU, negotiations must occur over the full range of mandatory subjects of collective bargaining, including pension benefits. Therefore, SacRTD cannot satisfy its duty to bargain by offering to discuss compensation in the aggregate. Moreover, the Union asserts that a defined contribution plan cannot substitute for a defined benefit plan, because it is really a tax-advantaged savings and deferred compensation vehicle, not a pension benefit. ATU Initial Br. 17.

The Union does not claim that section 13(c) overrides PEPRA, but that PEPRA precludes SacRTD from meeting the requirements for Federal funding of public transit agencies under section 13(c). ATU states that the Secretary cannot certify protective conditions for SacRTD because PEPRA has caused employees to lose benefits to which they are entitled under the collective bargaining agreement and because it restricts the scope of bargaining over pensions.

Analysis of the Parties' Positions

Analyzing the parties' claims requires consideration of the Supreme Court's holding in *Jackson Transit Authority v. ATU*, *Local Division 1285*, 457 U.S. 15, 17-18 (1982). The Court recognized in *Jackson Transit* that section 13(c) mandates the preservation and continuation of collective bargaining rights as a precondition to receipt of federal transit aid. Specifically, the Court stated:

> To *prevent* federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included 13(c) in the Act . . . the statute lists several protective steps that *must be taken* before a local government may receive federal aid; among these is the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights.

Id. at 17 (emphasis added). Shortly after *Jackson Transit*, the U.S. Court of Appeals for the District of Columbia Circuit underscored section 13(c)'s mandate to continue collective bargaining rights. *Donovan*, 767 F.2d at 939. In *Donovan,* the union objected to the Department's section 13(c) certification in the aftermath of a Georgia state law, Act 1506, which removed various subjects from the scope of bargaining between the transit agency and the union. The court, relying on *Jackson Transit*, reiterated that section 13(c) sets forth mandatory requirements, "not simply general objectives or suggestions." *Id.* at 944. Thus:

> [t]he Secretary is not free to certify a labor agreement that does not provide for the continuation of collective bargaining rights simply because he believes that, on balance, the agreement is fair. Rather, he must first determine that the requirements of the statute [i.e., the five enumerated sections of section 13(c)] are fully satisfied *before* he can find an agreement "fair and reasonable."

Id. at 946. Turning to the specific provisions of the Georgia law, the court characterized the effect of the law as removing mandatory subjects from collective bargaining. The court specifically noted that the provision in the state law that barred the municipal transit agency from negotiating over benefits for part-time employees prevented "the continuation of collective bargaining over wages that section 13(c) mandates." *Id.* at 952. The court concluded that while section 13(c) does not dictate or perpetuate the substantive terms of a collective bargaining agreement, it requires that any changes "be brought about through collective bargaining, not by state fiat." *Id.* at 953.

While both parties cite to *Donovan* as setting forth the proper test for determining whether a transit agency has satisfied section13(c), the parties interpret the holding in vastly different ways. The Union argues that under *Donovan* the lessening or diminution of collective bargaining rights violates section 13(c), and that PEPRA has such an effect. *See* ATU Initial Br. 5-6. SacRTD seeks to narrow the applicability of the *Donovan* holding by arguing that only the complete removal or elimination of a mandatory subject of bargaining violates section 13(c), and that PEPRA does not completely remove or eliminate pensions from collective bargaining. *See* SacRTD Initial Br. 5-6; SacRTD Reply Br. 4.

Donovan provides no support for SacRTD's argument that only the elimination of pensions from the scope of collective bargaining would offend section 13(c). Indeed, the Court in *Donovan* noted that the Georgia law "*altered in several material respects* the existing statutory authorization of [the employer] to engage in collective bargaining" by reserving to management the inherent right to control various aspects of wages and working conditions. 767 F.2d at 951 (emphasis added). However, the law did not restrict the parties from negotiating over *entire* subjects of mandatory bargaining. For example, the law reserved to management the "right to subcontract service, other than for the operation of rail or bus vehicles, provided no employees are laid off." *Id.* This reservation left to the parties the ability to negotiate over subcontracting where layoffs would occur or subcontracting that did involve the operation of bus or rail. Similarly, under the law management reserved to itself "the right to hire part-time employees, for no more than 25 hours per week, without payment of fringe benefits." *Id.* This restriction still permitted bargaining over the hiring of part-time employees for more than 25 hours a week and where fringe benefits would be paid. In addition, the law reserved to management "the right to establish the number of regular hours that may be worked in a week, not to exceed 40 hours, and to fix the number of overtime hours, not to exceed 10 hours per week." *Id.* Once again, this removed only partially the subject of regular and overtime hours from the ambit of bargaining. Yet the court still concluded that the law violated Section 13(c)'s requirement to continue collective bargaining over mandatory subjects. Thus, we conclude that *Donovan* supports the union's position that restricting the right to bargain over mandatory subjects violates Section 13(c)(2).

Further, there is no support for SacRTD's removal or elimination approach in the language or history of section 13(c). Senator Morse, the sponsor of section 13(c), stated his intent that transit agencies that "lessen" collective bargaining rights not receive federal funding. As stated in the *Manager's Handbook: Guidance For Addressing Section 13(c) Issues,*[7] "supporters of the bill strongly asserted that the labor protection provisions were not intended to infringe upon or vitiate State or local laws, but rather to assure that the Federal assistance did not diminish any *existing* collective bargaining rights." (Emphasis in original).

[7] G. Kent Woodman, Attorney at Law, Eckert, Seamans, Cherin & Mellott, *Manager's Handbook: Guidance for Addressing Section 13(c) Issues*, (Publication written for the Public Private Transportation Network (PPTN), an Urban Mass Transportation Administration (UMTA) technical assistance program, p. 3. (February 24, 1987).(The opinions findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PPTN, COMIS Corporation (administrator of the PPTN program), the United States Department of Transportation, UMTA, or the Office of the Secretary.) The author has provided services of a technical and advisory nature under contract to the PPTN and is considered an expert in his field.

There is nothing in *Donovan* or the language of section 13(c) that permits the Department to certify a transit grant if a change in state law substantially reduces existing benefits and significantly limits the scope of bargaining over them. Further, there is no support for SacRTD's removal or elimination approach in the language of sections 13(c)(1) and (2). In this instance, because SacRTD and its represented transit employees had the ability to bargain over the full panoply of pension rights, the process of collective bargaining with respect to those terms must continue in order for the Department to certify.

SacRTD argues that section 13(c) does not prevent a state from exercising its police powers by enacting a law regulating the pensions of state employees. *See* SacRTD Initial Br. 2-3; SacRTD Reply Br. 2-3, 7. SacRTD is correct, as section 13(c) does not supersede the operation of state law and impose federal policy on the state. Indeed, the State of California is free to pass any number of laws affecting public employees. However, if that law is inconsistent with the requirements of section13(c), the state must forego federal funding. As stated in *Donovan,* "Section 13(c) does not prescribe mandatory labor standards for the state but rather dictates the terms of federal mass transit assistance." 767 F.2d at 947. *See Jackson Transit*, 457 U.S. at 27 ("Congress intended that §13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities") (footnote omitted); *Local Division 589 v. Commonwealth of Massachusetts,* 666 F.2d 618, 627 (1st Cir. 1981) (although section 13(c) does not invalidate state law, states that have laws that prevent the making of fair and equitable arrangements cannot obtain federal assistance).

Under the standard set forth in *Jackson Transit* and *Donovan*, the Department is legally obligated to deny certification where collective bargaining rights have neither been preserved nor continued.[8] As the court in *Donovan* stated, section 13(c)'s requirement that labor protective arrangements provide for continuation of collective bargaining rights means, at a minimum, "that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." 767 F.2d at 951. The Department has consistently articulated this position in Departmental correspondence to grantees and unions. DOL's August 16, 2012, *Cover Letter for Referral for Michigan DOT Grant* (MI-04-0052-01); DOL's May 3, 2011, *Initial Response* and May 20, 2011

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[8] The Department has similarly held that collective bargaining representatives are not obligated to bargain over benefits that have been unilaterally eliminated, or capped, nor must they bargain to a predetermined result. *ATU v. City Utilities of Springfield*, Dept. Case No. 9113c18 (June 1, 1999).

Final Response to Objections for Michigan DOT Grant (MI-95-x065); DOL's June 23, 2011 *Response to Objections for MBTA DOT Grant* (A-70-x001-01).

Relying on *Local 589*, 666 F.2d 618, SacRTD argues that PEPRA's modification to state law affecting public employee pensions, and by extension the scope of potential bargaining, comports with the letter and spirit of section 13(c). In *Local 589*, the First Circuit upheld a Massachusetts law prohibiting the labor union from bargaining collectively over management's actions to hire, promote, assign, direct and discharge employees, to assign overtime, or to hire part-time employees. The state law also forbade the transit authority from agreeing to pay pensions based upon overtime pay or to provide for automatic cost-of-living adjustments. *See* SacRTD Reply Br. 1-2, n.1. SacRTD's reliance on *Local 589* is misplaced. That case dealt with the issue whether section 13(c) preempts a state law, not whether a state must provide protective arrangements consistent with section 13(c) in order to obtain federal grants. *See Donovan,* 767 F.2d at 947 n.9 ("We decide today the question the First Circuit did not reach, and hold that where a state, through its laws or otherwise, fails to satisfy the requirements of Sec. 13(c), the Secretary must cut off funds by denying certification."); *see also* FTA Legal Research Digest ("the Massachusetts case *left open the question of what would result if the state law precluded the state or its agencies from complying with 13(c)*, which was essentially addressed in a subsequent decision involving an ATU challenge to a DOL certification" ((referencing *Donovan*) (emphasis added)).[9]

The DC Circuit's exhaustive decision in *Donovan* -- as opposed to the earlier First Circuit decision -- is the controlling case on this issue. As discussed earlier, *Donovan* holds that the Secretary cannot certify a labor protective arrangement or agreement that fails to satisfy all five enumerated subsections of the Act. Federal labor policy, rather than state law, defines the substantive meaning of the collective bargaining rights that must be continued for purposes of section 13(c). Where a state statute forecloses negotiation between management and labor over mandatory subjects of collective bargaining, the Secretary cannot certify. Here, there can be no dispute that pensions are a mandatory subject of bargaining. *Donovan,* 767 F.2d at 952, (citing *NLRB v. Black-Clawson Co.*, 210 F.2d 523 (6th Cir. 1954) (profit sharing plans are "wages")); *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 214N.W.2d 803 (1974) (pensions are a mandatory subject). Therefore, SacRTD erroneously claims that state law changes that foreclose collective bargaining over many aspects of pensions are legally consistent with section13(c).[10]

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[9] G. Kent Woodman, Jane Sutter Starke, Leslie D. Schwartz, *Transit Labor Protection-A Guide to 13(c) Federal Transit Act*, Transportation Research Board Legal Research Digest, 10 (June 1995, No. 4), http://onlinepubs.trb.org/online pubs/tcrp/terp_lrd_04.pdf (last visited August 27, 2013).

[10] SacRTD adds that PEPRA does not affect bargaining with respect to alternative benefits, such as life insurance or deferred compensation, that PEPRA neither affects nor eliminates.

Contrary to SacRTD's argument, denying certification in the instant matter is not inconsistent with the Department's recent certification in Massachusetts. Reply Br. SacRTD, pp. 1-3. The 2009 modifications to the enabling statute of the Massachusetts Bay Transportation Authority (MBTA), An Act Modernizing the Transportation System of the Commonwealth, St.2009, c. 25, §§ 140, 146, transferred the health care plans of active and retired MBTA employees to the Massachusetts General Insurance Commission (GIC), removing from collective bargaining that coverage and attending benefits. The Massachusetts Act did not place hard caps on health care benefits or impose restrictions on negotiating supplemental plans. The language of the Act specifically provided an exemption for all current collective bargaining agreements, preserving employees' existing rights and benefits. As a result, after extensive negotiations, MBTA and the union (ATU) were able to agree to a health and welfare trust plan that provided benefits and coverage supplementary to those provided by the mandated GIC coverage. In sum, contrary to the situation here, the Massachusetts Act fully preserved rights and benefits under existing collective bargaining agreements, and the parties were able to negotiate a supplemental health plan, thus continuing collective bargaining rights.

SacRTD argues that prospective employees have no vested right to any benefits. According to SacRTD, "new" employees have not suffered any diminution of rights, because they did not possess rights before PEPRA became effective. Rather, the rights of "new" employees are established at the time they are hired. *See* SacRTD Initial Br. 7-10. In essence, SacRTD asserts that the State remains free to alter unilaterally the terms of a collective bargaining agreement without running afoul of section 13(c) so long as the employees affected by those changes have not begun working yet. However, there is no applicable distinction between "new" and "classic" employees for purposes of sections 13(c)(1) and (2). Section 13(c)(1) specifically requires preservation of benefits under *existing* collective bargaining agreements, and section 13(c)(2) requires the continuation of collective bargaining rights. Thus, unlike sections 13(c)(3), (4) and (5), these first two subsections protect the collective rights of all bargaining unit members, not individual rights. Under well-established federal labor policy, "[u]nlike a standard commercial contract, a collective bargaining agreement binds both those members within a bargaining unit at the time the agreement is reached as well as those who later enter the unit." *Gvozdenovic v. United Air Lines*, 933 F.2d 1100, 1106-07 (2d Cir. 1991).[11] In

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SacRTD Initial Br. 14. The availability of collective bargaining over other aspects of pension benefits does not cure the fundamental conflict between PEPRA and section 13(c), namely, that PEPRA removes from the scope of collective bargaining many key aspects of pensions.

[11] *See Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (citing *J.I. Case Co. v. NLRB,* 321 U.S. 332, 335 (1944)), *aff'd*, 809 F.2d 954, 961 (2d Cir. 1987). Protections against unfair labor practices are also applicable to job applicants as "employees" under the NLRA. *See Reliance Ins. Companies v. NLRB*, 415 F.2d 1, 6 (8th Cir. 1969). To hold that

other words, a collective bargaining agreement is applicable to all bargaining unit members, regardless of their date of hire.[12] As a result, the Secretary cannot certify a grant sought by a transit agency if the transit agency unilaterally reduces the negotiated benefits of any bargaining unit employees, regardless of their date of hire, or precludes the union from negotiating over benefits and contributions for employees hired during the term of the collective bargaining agreement.

DETERMINATION

An analysis of PEPRA's effect on the collective bargaining rights of transit workers covered by the SacRTD-ATU Local 256 agreement reveals an impermissible conflict with sections 13(c)(1) and 13(c)(2). PEPRA's imposition of a two-tier structure on the collective bargaining agreement primarily affects bargaining unit employees hired after January 1, 2013. PEPRA both reduces existing benefit levels for such "new" employees (thus violating section 13(c)(1)'s "preservation of benefits" requirement), and diminishes a union's ability to bargain over benefits *and* contributions for "new" employees in the future (thus violating section 13(c)(2)'s "continuation of collective bargaining rights" requirement).

PEPRA has or will soon have an impact on many specific aspects of negotiated pension plan benefits for SacRTD employees. The impacts discussed below are intended to be illustrative, not exhaustive.

PEPRA has had an immediate effect on SacRTD's "new" employees. Under the collective bargaining agreement in place, SacRTD pays the total cost of the pension plan. CBA Art. 67, § 2; CBA Art. 97, § 4; *see also* Plan Art. 12.2. In addition, it prohibits employees from contributing to the plan. CBA Art. 67. However, PEPRA, Article 4, Section 7522.30 requires that "new" employees pay at least 50 percent of the normal pension plan costs, and employers are

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collective bargaining agreements do not bind these future employees "would turn federal labor policy on its head." *Nat'l Basketball Ass'n*, 602 F. Supp. at 529.

[12] *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966) (citing *Leroy Mach. Co.*, 147 NLRB 1431, 1431 (1964)). Unions are "entitled" to bargain with employers over terms affecting new hires. *See id.* In *Leroy Machine Company,* the National Labor Relations Board (NLRB) held that the employer violated the NRLA by refusing to bargain with the union over "rates of pay for new jobs, a mandatory subject of collective bargaining." 147 NLRB at 1431. Furthermore, the employer has a duty to bargain "with the collective bargaining agent of the present employees" over conditions of employment "as [they apply] to future employees." *City of New Haven v. Conn. State Bd. of Labor Relations*, 410 A.2d 140, 145 (Conn. Super. Ct. 1979).

prohibited from paying any of the required employee contributions.[13] SacRTD has already advised "new" employees that it would begin deducting these PEPRA-mandated costs from pay beginning March 1, 2013, *See* ATU Initial Br. 11, 16, Ex. 13, and has implemented that change. Thus, as a direct result of PEPRA, "new" SacRTD employees are paying 50 percent of the pension plan costs, an amount the collective bargaining agreement does not require them to pay.

PEPRA greatly affects the pension benefits for "new" employees. ATU poses these two scenarios to explain PEPRA's effects, which SacRTD has not disputed:

- 45 year old employee with 25 years of service could retire under the CBA with a benefit of 50% of his or her final salary. Under PEPRA, the employee could not retire until age 52 with a 32% benefit.

- 55 year old employee with 30 years of service could retire under the CBA with 75% of his or her final average salary. Under PEPRA, the employee would receive 39% of his or her final average salary.

PEPRA also affects the calculation of final, pensionable compensation in several ways, all of which have the effect of lowering the pension benefits of "new" employees. The Retirement Plan provides that pensionable compensation includes payouts of overtime, shift differentials, bonuses, and cash in lieu of vacation or sick leave, all of which appear to be barred by PEPRA. *See* Retire. Plan Art. 2.6(a)(2)-(a)(4); PEPRA Sections 7522.34(a) and 7522.34(c). Section 7522.34(c)'s prohibition against the inclusion of specific forms of compensation in the calculation of pensionable compensation thus eliminates certain amounts previously negotiated by the parties. Further, PEPRA requires a cap on pensionable compensation of $113,100, indexed to annual changes in the cost of living. PEPRA, Art. 4, Section 7522.10. In the ATU negotiated pension plan, pensionable compensation is capped at the IRS limit ($255,000 for 2013). *See* Retire. Plan Art. 2.6(c); IRS Code Sect. 401(a)(17)(b).

Under Article 7.1 of the current Retirement Plan, members may retire after 25 years of service, or at age 55 with at least 10 years of service, to receive a pension that starts at 2.0 percent of final compensation multiplied by years of service. That pension increases 0.1 percent per year of age or service, capping at 2.5 percent at either age 60 or after 30 years of service. For "new"

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[13] The only exception is if an existing agreement contains a contrary provision and would thereby be "impaired." However, the exception is effective only until the agreement is amended, extended, renewed, or expired. *See* PEPRA, Article 4, Section 7522.30(f).

employees, PEPRA establishes a minimum age requirement of fifty two years for retirement, and employees receive a multiplier of 1 percent that increases to 2.5 percent at age 67. PEPRA, Art. 4, Section 7522.20. In order to achieve a 2.0 percent multiplier, "new" employees will have to work until age 62, at least an additional seven years over the current plan requirement to a 2.0 percent multiplier. Under PEPRA, retirees will also have to wait until age 67 to receive the maximum 2.5 percent multiplier rather than becoming eligible at age 60 or at 30 years of service.

In addition to the reduced benefits, PEPRA effectively eliminates the CBA-negotiated "25 and out" provision which provides for a pension benefit to an individual with twenty five years of continuous service at any age. The Department acknowledges that PEPRA does not explicitly forbid "25 and out" provisions. However, the law's changes in retirement age and benefits upon retirement significantly alter benefits associated with such plans for "new" employees. The effect on the negotiated "25 and out" option seriously affects employees who began service with SacRTD prior to age twenty five. Such individuals will have to work longer to qualify for a pension but they will receive lower monthly benefits.

SacRTD argues that PEPRA advantages participants in the instant matter because the law provides for retirement at 52 years of age rather than retirement at 55 years of age under the ATU plan. SacRTD Reply, p. 12. SacRTD's claim, however, fails to recognize that the ATU Retirement Plan provides for retirement at age 55 *or* after 25 years of service. SacRTD's claim reads the 25 and out provision out of the Retirement Plan and, as established above, PEPRA's effective elimination of this benefit affects the continuation of collective bargaining rights.

PEPRA also affects the rights of current employees under the negotiated pension plan. As of January 1, 2013, PEPRA prohibits employees from purchasing service credit for years not worked for purposes of pension entitlement ("airtime" or nonqualified pension service credit). PEPRA, Art. 4, Section 7522.46. Article 7.9 of the Plan permits employees who recover and return from disability leave to purchase airtime credit for the term of their disability. Retire Pen. Plan Art., 7.9. *See also* SacRTD Initial Br. 11.[14] PEPRA

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[14] SacRTD asserts that PEPRA prevents payments for service credits for periods when an individual is out of work due to disability. SacRTD Initial Br. 11. This assertion supports the conclusion that PEPRA detrimentally affects current employees. The interplay between PEPRA and the Internal Revenue Code, 26 U.S.C. 415(n), is complex, however, and the Department makes no conclusion that PEPRA's prohibition on the purchase of nonqualified service credit (airtime) prevents all service credit for disability and medical leave.

thus invalidates the negotiated airtime provision for any employee returning from disability after January 1, 2013. Additionally, except for annual cost-of-living adjustments, PEPRA Section 7522.44 prohibits benefit enhancements for service performed prior to the operative date of the enhancement. *See* ATU Initial Br. 13, Ex. 12. Finally, PEPRA prevents SacRTD from creating new supplemental defined benefit plans or certain replacement benefit plans for "new" *or* current employees. PEPRA, Section 7522.18; Section 7522.43; *See also* SacRTD Reply Br. 11.

CONCLUSION

There is little dispute over the impact of PEPRA on the existing rights of employees covered by the SacRTD-ATU Local 256 collective bargaining agreement and on the scope of collective bargaining. Indeed, the Department has conferred extensively with the State to determine the contours of the law. SacRTD has thoroughly argued its legal and factual bases to support certification. We have carefully considered the arguments of both parties. We do not find persuasive SacRTD's arguments that these changes are consistent with certification under section 13(c).

Congress incorporated in section 13(c) the commonly-understood meaning of collective bargaining that requires, at a minimum, good faith negotiation to the point of impasse, if necessary, over wages, hours, and other terms and conditions of employment. *Donovan,* 767 F.2d at 949. Meaningful collective bargaining does not exist when a state mandates changes in what the parties have previously negotiated, dictates results, or removes relevant issues from consideration.

SacRTD is correct that PEPRA allows for negotiation over some aspects of pension benefits. However, the Department has concluded that PEPRA significantly reduces pension entitlements under the existing collective bargaining agreements for employees hired after January 1, 2013 and precludes the Union from negotiating many aspects of their pension plans, including the employee contribution rate, in subsequent agreements. Sections 13(c)(1) and (2) require the preservation of pension rights and benefits and the continuation of collective bargaining rights. These rights are prerequisites for federal assistance under section 5333(b) of the Transit Act. Under PEPRA, SacRTD cannot comply with the requirements of the Act.

Therefore, the effects of PEPRA render it legally impermissible, under the current circumstances, for the Department to certify fair and equitable employee protective conditions for grants to SacRTD.

Sincerely,

Michael J. Hayes

Michael J. Hayes, Director
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