U.S. Department of Labor

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

August 13, 2015

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 letter is a further 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). On September 4, 2013, I sent you the Department of Labor's final determination concerning Sacramento Regional Transit District's (SacRTD's) 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).[1] I concluded that the Department of Labor could not certify that SacRTD would preserve and continue the pension rights and benefits of ATU-represented employees under SacRTD's existing collective bargaining agreement with ATU, as required by 49 U.S.C. § 5333(b)(2)(A). I also concluded that the Department could not certify that SacRTD would continue collective bargaining rights of ATU-represented employees, as required by 49 U.S.C. § 5333(b)(2)(B).

SacRTD sought district court review of my September 4, 2013 determination and an order that I certify SacRTD's compliance with 49 U.S.C. § 5333(b). On December 30, 2014, the district court remanded the matter for further proceedings. *California v. U.S. Dep't of Labor*, __ F. Supp. 3d ___, 2014 WL 7409478 (E.D. Cal. Dec. 30, 2014). On May 8, 2015, the Department asked SacRTD and ATU for information to assist the Department in the remand proceedings. SacRTD and ATU responded on May 28, 2015, and later supplemented their responses.

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[1] My September 4, 2013 determination and this decision are issued in the exercise of delegated authority from the Secretary of Labor. See Secretary's Order 8-2009, § 5.A(4), 74 Fed. Reg. 58835 (Nov. 13, 2009).

I have reviewed the district court's decision, the information submitted by the parties, and the record of the earlier proceedings on this matter. I conclude that the Department cannot appropriately certify the existence of fair and equitable arrangements for the continuation of collective bargaining rights, as required by 49 U.S.C. § 5333(b)(2)(B). I also deny certification based on a failure to preserve rights under an existing collective bargaining agreement, as required by 49 U.S.C. § 5333(b)(2)(A). I discuss below the relevant factual and procedural background, the district court's decision, and my application of 49 U.S.C. § 5333(b)(2)(A) and (B) in this case.

Background

Collective Bargaining Between SacRTD and ATU

For more than 60 years, ATU has been the collective bargaining representative of transit employees in the Sacramento, California area. See Administrative Record (AR) 288. The employees initially worked for private bus lines and later for a City of Sacramento transit authority that acquired private bus lines. *Id*. SacRTD is the successor to the City's transit authority. *Id*.

Through a series of collective bargaining agreements, SacRTD has provided a defined benefit pension plan to employees represented by ATU. See AR 409 (Pension Plan). A defined benefit plan, as its name suggests, promises to pay employees a fixed benefit under a formula when they retire. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999); *Hurlic v. Southern Cal. Gas Co.*, 539 F.3d 1024, 1029 (9th Cir. 2008) (citation omitted). The plan for ATU-represented employees promises a fixed benefit ranging from 2% of an employee's compensation, multiplied by years of service for employees who retire at age 55 to 2.5% of such compensation multiplied by years of service for employees who retire at age 60. AR 413 (Plan Art. 7.2). Compensation under the plan is capped at an Internal Revenue Service limit ($250,000 for 2012), and is defined to include overtime, shift differentials, bonuses, and cash in lieu of vacation or sick leave. AR 410-11 (Plan Art. 2.6(a), (c) (definition of "compensation"). Employees can retire at any age after 25 years of service. AR 413 (Plan Art. 7.1(a)(2)).). Employees who recover and return from disability leave may also purchase credit for the term of their disability. AR 414 (Plan Art. 7.9). SacRTD pays the full cost of funding the plan and "there shall be no employee contributions toward said pension plan." AR 386 (CBA Art. 67, § 2); see also AR 402 (CBA Art. 97, § 4); AR 416 (Plan Art. 12.2).

The SacRTD pension plan applies to all members of ATU Local 256 who are credited with an hour of service on or after July 1, 2010. AR 409 (Plan Art. 1). A member is credited for each hour of service for which the member is paid or entitled to payment for performance of duties to SacRTD as an "Eligible Employee," including periods of time during which no duties are performed due to vacation, holiday, illness, disability, layoff, jury duty, military duty or authorized leave of absence. AR 411 (Plan Art. 4.2). A person becomes an "Eligible Employee" under the pension plan on the date he or she first becomes an employee and is a member of the bargaining unit represented by ATU. AR 411 (Plan Art. 3.1). This collective bargaining unit is defined to include all employees within the service of SacRTD in specified classifications or

occupations. AR 349 (CBA Section A, Art. 2 § 3, definition of bargaining unit). All employees covered by the agreement are required to become and remain members in good standing in ATU, and new employees who are not members of ATU when hired must present written evidence of having applied for ATU membership before starting work. AR 350 (CBA Section A, Article 3, sections 1 and 2). New employees hired within the lifetime of the agreement are considered probationary and have all the rights, benefits, and privileges under the agreement. AR 372, 719 (CBA Section B, Art. 50). New employees are placed on the seniority list in accordance with the date they are placed on the payroll. AR 372, 719 (CBA Section B, Art. 49, § 2).

The term of the collective bargaining agreement was from September 1, 2009 to midnight on February 28, 2013. AR 360 (CBA Art. 27, § 1). The agreement, however, "remain[ed] in full force and effect" while the parties negotiated a new agreement. AR 360 (CBA Art. 27, § 2). SacRTD and ATU have informed the Department that they currently have a collective bargaining agreement effective April 1, 2014 through March 31, 2017.

California's Public Employee Pension Reform Act (PEPRA)

In 2012, California enacted the Public Employee Pension Reform Act (PEPRA). PEPRA has been described as a "sweeping pension reform" that "make[s] fundamental changes," including "substantial benefit rollbacks for public employees." Office of Governor Edmund G. Brown Jr. - Newsroom (Aug. 28, 2012), *available at* http://gov.ca/gov/news.php?id=17694. The most significant changes apply to employees hired on or after January 1, 2013. These employees, called "new" employees, must generally contribute at least 50% of the normal cost of their pension benefits. Cal. Gov. Code § 7522.30(a); see AR 1321. This requirement does not apply if it would impair a contract in effect on January 1, 2013, but only until expiration of the contract. Cal. Gov. Code § 7522.30(f). When employees hired on or after January 1, 2013 are in non-safety positions, their fixed benefit is 2% of final compensation, multiplied by years of service for employees who retire at age 62. The earliest retirement age is 52 (increased from age 50), and the formula tops out at 2.5% at age 67 (increased from age 63). AR 1321; Cal. Gov. Code § 7522.20, 21076, 21076.5. "Final compensation" is defined as the highest average annual compensation over a three-year period, is capped at a Social Security Act limit, Cal. Gov. Code § 7522.42, and excludes special bonuses, unplanned overtime, and unused vacation or sick leave. Cal. Gov. Code § 7522.34(c); see AR 1321-22. A public employer also cannot offer a plan of replacement benefits to employees subject to the Social Security limit. Cal. Gov. Code § 7522.43(a).

PEPRA also changes pension rights for public employees hired before January 1, 2013. It puts limits on the ability of retirees to work and simultaneously collect a pension, and ends the ability of public employees to purchase nonqualified service time (service credit for non-working time) or "airtime." See Cal. Gov. Code §§ 7522.46, 7522.56; AR 1319. It bans retroactive benefit enhancements. Cal. Gov. Code § 7522.44; see AR 1320. It also prohibits any new supplemental defined benefit plans or the inclusion of any new employee in an existing supplemental defined benefit plan. Cal. Gov. Code §§ 7522.18, 7522.43(c), (d).

The Department's September 4, 2013 Determination

My September 4, 2013 determination addressed Grants CA-03-0806-03 and CA-03-0806-04. These grants provide funding for an extension of light rail service, including four new light rail stations with park and ride spaces and a major new transit center at Cosumnes River College. AR 21.

I concluded that PEPRA's changes were inconsistent with sections 13(c)(1) and 13(c)(2). AR 135. In particular, I concluded that PEPRA reduces existing benefit levels for "new" employees (those hired after January 1, 2013) in violation of section 13(c)(1) and diminishes a union's ability to bargain over benefits and contributions for "new" employees in the future, thus violating section 13(c)(2). AR 132. I listed specific, non-exhaustive ways that PEPRA has or will have an impact on SacRTD's new employees by making them pay more of the pension plan's funding costs than required by the SacRTD-ATU collective bargaining agreement and reducing the benefits the collective bargaining agreement would have provided on retirement. AR 132-34. I also determined that PEPRA affects the rights of current employees under the negotiated pension plan by prohibiting the purchase of "airtime" or service credit by employees who return from disability leave, prohibiting benefit enhancements, and preventing SacRTD from creating new supplemental defined benefit plans or certain replacement benefit plans for "new" or current employees. AR 134-35. I noted that SacRTD had taken steps to implement PEPRA as it relates to new employees by informing them in February 2013 that it would begin on March 1, 2013 to deduct from their pay the PEPRA-required contribution to pension costs. AR 125.

To support my conclusion regarding section 13(c)(2), I relied on *Jackson Transit Authority v. ATU, Local Division 1285*, 457 U.S. 15 (1982), and *Donovan v. Amalgamated Transit Union*, 767 F.2d 939 (D.C. Cir. 1985). AR 126-27. In particular, I concluded that *Donovan* supports rejection of SacRTD's argument that only the "elimination" of pensions from the scope of collective bargaining violates section 13(c)(2). AR 128. I also rejected SacRTD's argument that state law can modify the scope of collective bargaining for purposes of section 13(c), stating that *Donovan* was the controlling case on this issue. AR 130. I viewed my decision here as consistent with earlier decisions of the Department, including a certification of a grant involving the Massachusetts Bay Transportation Authority. AR 129-30, 131.

With respect to section 13(c)(1) and new employees, I noted SacRTD's position that, although the September 1, 2009 through February 28, 2013 collective bargaining agreement "would cover new employees hired within the lifetime of the agreement," PEPRA does not impair the rights of new employees because their rights are determined and established at the time of hiring and not before then. AR 125; *see* AR 719 (SacRTD's statement that "the existing collective bargaining agreement does contemplate that new employees would be covered by the terms of the agreement"). I rejected SacRTD's argument as asserting that states remain free to alter unilaterally the terms of a collective bargaining agreement so long as the employees affected by the changes have not begun working yet. AR 131. I explained that section 13(c)(1) requires preservation of benefits under *existing* collective bargaining agreements and thereby protects the rights of all bargaining unit members, and cited precedents under the National Labor Relations

Act (NLRA) to support the conclusion that a collective bargaining agreement applies to all bargaining unit members, regardless of their date of hire. AR 131-32. I noted, however, that the denial of certification under section 13(c)(1) and (2) was without prejudice to SacRTD's right to seek or obtain certification under changed circumstances. AR 121 n.3.

Challenges to the Department's September 4, 2013 Determination

On October 4, 2013, SacRTD filed a district court complaint challenging my determination not to certify compliance with section 13(c). The California Department of Transportation (Caltrans) also sued to challenge a September 30, 2013 determination against certification. The same day this complaint was filed, Governor Brown signed legislation making PEPRA inapplicable to public employees whose interests are protected by section 13(c) until a federal district court rules that the Department of Labor erred in determining that PEPRA precludes certification, or until January 1, 2015, whichever is sooner. Assembly Bill No. 1222, § 1, 2013 Cal. Legis. Serv. Ch. 527 (adding Cal. Gov. Code § 7522.02(a)(3)(A)). The legislation also provides that if a federal district court upholds the Department's determination against certification, PEPRA shall not apply to such employees. *Id*. (adding Cal. Gov. Code § 7522.02(a)(3)(B)). Assembly Bill No. 1783, § 1 extended the January 1, 2015 date to January 1, 2016. 2014 Cal. Legis. Serv. Ch. 724.

On December 30, 2014, the district court issued a decision that, in relevant part, concluded that my decisions against certification were arbitrary and capricious. *California v. U.S. Dep't of Labor*, __ F. Supp. 3d ___, 2014 WL 7409478 (E.D. Cal. Dec. 30, 2014). The court remanded the matter to the Department for further proceedings consistent with its order. 2014 WL 7409478, at *22.[2]

In addressing section 13(c)(2), the continuation of collective bargaining rights, the district court first concluded that, although the plaintiffs read too much into *Donovan* to argue that it means 13(c) certification should be withheld only when statutory changes completely preclude collective bargaining, the Department read too much into the case by saying it controls the interpretation of section 13(c) in this case. 2014 WL 7409478, at *15. The court stated that the statute at issue in *Donovan* was designed to change the balance of power in one particular labor relationship, while PEPRA makes across-the-board changes in public employee pension law and does not give one party control over collective bargaining. *Id*. at *15-*16. The court therefore concluded that the Department had "relied on *Donovan* reflexively, without properly distinguishing its factual context." *Id*. at *16.

The district court further criticized the Department for failing to consider that even under federal labor policy, rights under state law form a backdrop for collective bargaining negotiations and part of this backdrop may be pension reform. 2014 WL 7409478, at *16 (discussing *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), *Malone v White Motor Corp.*, 435 U.S. 497 (1978), *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and AR 447 (Unified Protective Agreement (Jan. 3, 2011)).

[2] The Department filed a protective notice of appeal of this interlocutory remand decision but then moved for voluntary dismissal. See *State of California v. United States Dep't of Labor,* No. 15-15385 (9th Cir.). On August 12, 2015, the Ninth Circuit granted the Motion.

Additionally, the district court concluded that by finding that PEPRA prevents collective bargaining over pensions, [the Department] essentially determined that a pension is necessarily a defined benefit plan and found that PEPRA's restrictions on such plans means that collective bargaining on these issues could not be continued. 2014 WL 7409478, at *16. Finally, the court concluded that the Department had failed to consider the realities of public sector bargaining, where, among other things, modifications in state pension plans cannot be made binding by negotiators in most states but must be ratified by the legislature. *Id.* at *17.

In addressing section13(c)(1), the preservation of rights under existing collective bargaining agreements, the district court concluded that the Department had misinterpreted the law and did not consider all relevant factors. 2014 WL 7409478, at *19. In particular, the court distinguished cases under the NLRA that the Department relied on to support its conclusion that a bargaining unit includes employees not yet hired. *Id*. at *17-*18. The court stated that these cases involved new employees or employers pursuing individual agreements or seeking an advantage outside the collective bargaining agreement while the instant case involves employees and employers constrained by PEPRA as a backdrop to their employment relationship. *Id*. at *18.

The court also concluded that the Department had arrogated to itself the authority to define a bargaining unit in determining that the September 1, 2009 through February 28, 2013 collective bargaining agreement covered new employees. 2014 WL 7409478, at *18. The court reasoned that the agreement defines bargaining unit as employees in SacRTD's service, and "[a]n employee cannot be 'in service' before he or she has started work." *Id*. (citing Oxford American Dictionary Online).

Proceedings on remand

Following the district court's decision, the Department asked SacRTD and the ATU for their views on the decision the Department should reach under sections 13(a)(1) and 13(a)(2) in light of the district court's decision. See Department's May 8, 2015 letter to Counsel. The Department also asked whether SacRTD and ATU are currently covered by a collective bargaining agreement, the status of negotiations between the parties, whether PEPRA applies to SacRTD's employees, and whether SacRTD could have unilaterally imposed the changes that PEPRA requires, without bargaining, if PEPRA had not been enacted.

SacRTD and the ATU responded to the questions. The ATU asserts that, as of May 28, 2015, SacRTD has not taken a public position on whether the statutory exemption from PEPRA enacted on October 4, 2013 remains in effect but has not applied PEPRA to its ATU-represented employees or, insofar as ATU is aware, to any of its other employees. ATU Response 1. SacRTD states that it "will not fully apply PEPRA" until its current contract with the ATU is amended or expires. SacRTD Response 4. SacRTD also says that it hired 24 new employees since January 1, 2013, applied PEPRA to them, but stopped doing so when California enacted the October 4, 2013 exemption and returned to affected employees any funds collected from them during the period of PEPRA's applicability. SacRTD Response 17.

SacRTD reports that its current collective bargaining agreement with ATU, effective April 1, 2014 through March 31, 2017, *available at* www.sacrt.com/contracts.stm, includes "PEPRA-like" modifications to the collectively-bargained pension plan that will apply to all new employees hired on or after the agreement's effective date. SacRTD Response 4. The ATU views this new agreement as legally irrelevant but reported that the modification requires employees hired on or after January 1, 2015 to contribute 3% of compensation (wages) to the plan until the plan becomes fully funded. June 10, 2015 e-mail from Jessica Chu. SacRTD and the ATU agree that the current agreement, like the September 1, 2009 through February 28, 2013 agreement, applies to newly hired employees. SacRTD Response 14-16; ATU Response 18-19.

SacRTD and the ATU had different views on how the Department should rule in light of the district court's decision. SacRTD essentially argues that the district court addressed the relevant legal issues, questions whether the Department is following the court's remand instructions, and argues that the Department should certify compliance with section 13(c). The ATU argues that the Department should again deny certification. SacRTD viewed the question on whether SacRTD could have unilaterally imposed the changes that PEPRA requires, without bargaining, if PEPRA had not been enacted as a hypothetical issue raising new and distinct legal issues under California labor law. The ATU stated that *Donovan*, the plain language of section 13(c), and legislative history make clear that a precondition to federal financial assistance is that such changes cannot be unilaterally imposed.

Analysis

I have considered the parties' responses, the record of earlier proceedings in this case, and the district court's decision.

I continue respectfully to disagree with the district court's assessment of my September 4, 2013 determination as arbitrary and capricious, including my reliance on *Donovan*. For purposes of any potential further judicial review, I hereby clarify that the Department adheres to the analysis set forth in my earlier certification decision, and that the Department preserves its rights to rely on that earlier reasoning and analysis as an independent basis for denying certification.

For purposes of remand, however, this Analysis is intended to explain why the factors and issues identified by the district court do not support certification of this grant under Section 13(c). Significantly, the district court's decision permits the Department either to certify the grants at issue or to deny certification. The court did not direct that the Department certify the grants, although the plaintiffs had requested that relief. See Dist. Ct. Doc. 54-1 at 2, 20 (memorandum in support of plaintiffs' motion for partial summary judgment). The court also did not preclude the Department from relying on either section 13(c)(1) or section 13(c)(2) if the Department again decided against certification. Instead, the court identified perceived deficiencies in the Department's stated reasoning for previously denying certification. Under section 13(c)(2), the court concluded that the Department should not have reflexively applied *Donovan* or equated pensions with defined benefit plans and should have considered that rights under state law form a backdrop for collective bargaining negotiations and the realities of public sector collective bargaining. Under section 13(c)(1), the court concluded that the Department should not have

decided for itself, based on distinguishable NLRA decisions, that SacRTD's collective bargaining agreement covered new employees when bargaining here was constrained by PEPRA and the agreement, in the court's view, defines the bargaining unit as employees that have already started working in SacRTD's service.

Accordingly, and in light of the district court's remand decision, I hereby set out an analysis of sections 13(c)(1) and (2) that does not rely on *Donovan* or equate pensions with defined benefit plans. I then address decisions holding that rights under state law form a backdrop to collective bargaining and the realities of collective bargaining. I conclude that SacRTD's application of PEPRA prevents the "continuation of collective bargaining" as that phrase is used in section 13(c)(2). I also conclude, as an independent reason for denying certification, that SacRTD's application of PEPRA prevents "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements," contrary to section 13(c)(1).

Analysis of sections 13(c)(1) and (2)

1. Textual analysis

Sections 13(c)(1) and (2) require the Department to certify the existence of fair and equitable arrangements, which

> 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.

49 U.S.C. § 5333(b)(2)(A), (B).

The key terms in section 13(c)(1) are "preservation" and "existing." The term "preserve" means, "to keep from harm, damage, danger, evil; protect; save." *Webster's New World Dictionary of the American Language* 1153 (college ed. 1962). The term "existing," in the Department's view, refers to the collective bargaining agreement in effect when a transit agency applies for federal funding. Letter concerning UMTA Applications Regional Transportation District from John R. Stepp, Associate Deputy Under Secretary of Labor, to Lou Mraz, Regional Administrator, Urban Mass Transportation Administration at 5 (Mar. 19, 1987). Thus when a transit agency applies for federal funding, the Department has to certify the existence of provisions that protect the rights and benefits under collective bargaining agreements in effect when the transit agency applies for the funding. See AR 1420-22 (reviewing the effect of a Michigan law that, among other things, allowed an emergency financial manager to reject, modify, or terminate one or more terms of an existing collective bargaining agreement, and explaining that section 13(c) requires, among other things, preservation of rights under existing collective bargaining agreements and requiring assurances that the relevant state law provisions would not apply).

The key terms in section 13(c)(2) are "continuation" and "collective bargaining rights." The term "continuation" means "a keeping up or going on without interruption; prolonged and unbroken existence or maintenance." *Webster's New World Dictionary of the American Language* 319 (college ed. 1962). Thus, "when the transit employees had collective bargaining rights that could be affected by the federal assistance * * * these rights must be 'continued' before assistance will be awarded to the public transit authority." *United Transportation Union v. Brock*, 815 F.2d 1562, 1564-65 (D.C. Cir. 1987). The phrase "collective bargaining rights" refers to employees' right to designate a representative and to bargain collectively through that representative with the employer with respect to wages, hours, and other conditions of employment. *See* 29 U.S.C. § 158(d); *Allied Chemical and Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *cf. State of California v. Taylor*, 353 U.S. 553, 560 (1957) (under Railway Labor Act, "(E)ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions") . "Collective bargaining rights" are therefore not substantive terms of collective bargaining agreements. Instead, the phrase refers to a process that was universally understood in 1964, and now, "to require, at a minimum, *good faith* negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment." *Donovan*, 767 F.2d at 159.

Sections 13(c)(1) and (2) thus provide partially overlapping protection for transit employees covered by a collective bargaining agreement. Section 13(c)(1) preserves rights in an existing agreement, which means that an employer cannot change rights set out in the agreement except through collective bargaining, even if the employer was not a party to the agreement, as was the case when public transit agencies acquired operations of private entities. Section 13(c)(2) requires the continuation of collective bargaining rights without regard to whether there is an existing collective bargaining agreement.

In my September 4, 2013 decision, I interpreted the phrase "continuation of collective bargaining rights" in section 13(c)(2) to mean that the lessening or diminution of collective bargaining rights, even when they are not entirely eliminated, violates section 13(c)(2). AR 127-28. That interpretation is consistent with the Department's treatment of other grant applications. See AR 129-30 (September 4, 2013 decision, citing the Department's August 16, 2012 *Cover Letter for Referral for Michigan DOT Grant* (MI-04-0052-01) (AR 1412), the Department's May 3, 2011 *Initial Response* and May 20, 2011 *Final Response to Objections for Michigan DOT Grant* (MI-95-x065) (AR 1569, 1571), and the Department's June 23, 2011 *Response to Objections for MBTA DOT Grant* (AA-70-x001-01) (AR 1423)). Because the district court determined that I had incorrectly read *Donovan* to require this result, I reexamined the statutory language, discussed above, legislative history, and understanding of collective bargaining obligations concerning pensions close to the time section 13(c) was enacted. As discussed below, that reexamination leads me again to conclude that the lessening or diminution of collective bargaining rights, even when they are not entirely eliminated, violates section 13(c).

2. Legislative history

The legislative history to section 13(c) shows that Congress intended to provide for a continuation of "collective bargaining rights" as that phrase was understood when section 13(c) was enacted. In 1963, a Senate committee reported a bill that provided only for "the encouragement of the continuation of collective bargaining rights." S. Rep. No. 82, 88th Cong., 1st Sess. 34 (1963). The committee nevertheless "expected that specific conditions normally will be the product of collective bargaining subject to the basic standard of fair and equitable treatment." *Id*. at 28. Going further than the committee, Senator Morse proposed an amendment providing for "the continuation of collective bargaining in any situation where it now exists." 109 Cong. Rec. 5627 (1963). He explained that the amendment would clarify and improve the protective arrangements of the reported bill by, in relevant part, "mak[ing] it clear that collective bargaining in any situation where it now exists will be continued." *Id*. He explained that the amendment raised a question of public policy:

> Should the Federal Government make available to cities, States, and local governmental units Federal money to be used to strengthen their mass transit system in those communities when the use of that money would result in lessening the collective bargaining rights of existing unions?

Id. (emphasis added). His position was, "we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system." *Id*. (emphasis added).

Opponents of Senator Morse's amendment also understood that the change from "the encouragement of the continuation of collective bargaining rights" to "the continuation of collective bargaining rights in any situation where it now exists" was "an important and significant change." *Id*. at 5683 (statement of Sen. Tower). They proposed an amendment providing for the continuation of collective bargaining rights where it was "not inconsistent with the laws of the State in which the project or a portion of the project is located." *Id*. at 5684. Senator Morse responded that if a state law prohibited a municipality from bargaining with its employees, federal funding could be available if the municipality established a private managerial commission to operate the transit line and bargain with the employees, as done in Memphis, Tennessee. *Id*. He also stated, however, that "[i]n rare cases in which local law prohibits collective bargaining, Federal money would not be available because it would be in conflict with the policy of the bill." *Id*. The Senate rejected the opponents' amendment and passed a bill with Senator Morse's amendment. *Id*. at 5684-85, 5692.

A House of Representatives committee similarly reported a bill that provided only for "the encouragement of the continuation of collective bargaining rights," although the Committee also pointed out that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." H.R. Rep. No. 204, 88th Cong., 1st Sess. 16 (1963). During debate on the bill, Representative Rains proposed an amendment that, among other things, deleted the

phrase "encouragement of." *See* 110 Cong. Rec. 14976 (1964). Opponents supported an amendment that would have permitted protective arrangements "only to the extent not inconsistent with State and local law." *Id.* at 14979. Representative Rains' amendment was adopted, and the opponents' amendment rejected. *Id*. at 14984-85. The House thus passed a bill that provided for "the continuation of collective bargaining rights," rather than one that only encouraged that continuation or one that allowed continuation only to the extent not inconsistent with state and local law. *Id*. at 14992.

The Senate accepted the House language ("continuation of collective bargaining rights," rather than the Senate language ("continuation of collective bargaining in any situation where it now exists"). *See* 110 Cong. Rec. 15465 (1964). Senator Morse explained that the House bill had "retained [the Senate's] job protection provisions intact," and that "[t]he substance of the provisions remains untouched." *Id*. at 15453; *see also id.* at 15454 (comparative analysis of the labor standards provisions of the two bills); *id*. at 15463 (statement of Senator Sparkman) (language of labor standards provisions boils down to one basic issue, whether responsibility should be completely with the Secretary of Labor, as in the House bill, or shared with the HHFA Administrator as in the Senate bill); *id*. (explanation of differences between bills, stating that except for this difference, the Senate and House provisions were "substantially identical").

This legislative history supports the Department's conclusion that Congress intended to protect "collective bargaining rights" as that phrase was understood when section 13(c) was enacted. Additionally, Senator Morse's use of the terms "lessening" and "worsening" to describe the amendment that was substantially enacted as section 13(c)(2) shows that the lessening or diminution of collective bargaining rights, even where they are not entirely eliminated, violates section 13(c). That is the same conclusion I reached in my September 4, 2013 decision, guided by *Donovan*. AR 128-29. Furthermore, the legislative history shows that state law does not determine the scope of negotiations about pension benefits. Legislators specifically rejected an amendment that required continuation of collective bargaining only to the extent not inconsistent with state law. The Senate and House committees also understood that conditions to protect workers would normally be the product of local bargaining and negotiation. If state law does not protect against a lessening or diminution of employees' collective bargaining rights, the state or municipality can either create and/or contract with a private entity with bargaining authority and thereby qualify for federal funding (*i.e.*, a "Memphis Plan") or forego federal funding. *See also Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, 25 n.8 (1982) (defeat of amendments "reflected a congressional intent that the Federal Government be able to seek changes in state law and ultimately to refuse financial assistance when state law prevented compliance with § 13(c)").

3. The prevailing law when section 13(c) was enacted shows that where employees had a right to bargain over pensions and other employee benefits, unilateral employer changes in these areas were precluded.

When section 13(c) was enacted, it was well established that pensions were a mandatory subject of bargaining under the NLRA. The NLRB had reached that conclusion in 1948, its decision had been affirmed by the Seventh Circuit, and other courts of appeals had agreed with the Seventh Circuit or reached the same conclusion on their own. *See, e.g. Inland Steel Co.*, 77 N.L.R.B. 1

(1948), *aff'd*, *NLRB v. Inland Steel Co.*, 170 F.2d 247 (7th Cir. 1948); *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 877-78 (1st Cir. 1949); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683-84 (2d Cir. 1952); *NLRB v. Black-Clawson Co.*, 210 F.2d 523, 524 (6th Cir. 1954); *Pacific Coast Ass'n of Pulp & Paper Mfgrs. v. NLRB*, 304 F.2d 760, 761 (9th Cir. 1962); *Retail Clerks Union, No. 1550 v. NLRB*, 330 F.2d 210, 215 (D.C. Cir. 1964); *accord*, *Allied Chemical*, 404 U.S. at 159 (under the NLRA, "mandatory subjects of collective bargaining include pension and insurance benefits for active employees"). This bargaining obligation meant, among other things, that "an employer's mid-term unilateral modification of such benefits constitute[d] an unfair labor practice." *Allied Chemical*, 404 U.S. at 159; *see* 29 U.S.C. 158(d); *NLRB v. Katz*, 369 U.S. 736, 743-44 (1962). Similarly, a unilateral modification after a collective bargaining agreement expired was an unfair labor practice unless the employer had bargained to impasse on the issue. *See, e.g., Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983); *NLRB v. Hinson v. NLRB*, 428 F.2d 133, 136-37 (8th Cir. 1970); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 449-50 (4th Cir. 1969); *Industrial Union of Marine & Shipbldg. Workers of Am. v. NLRB*, 320 F.2d 615, 620 (3d Cir. 1963).

Cases near the time of section 13(c)'s enactment show that this obligation to bargain over pensions was not restricted to changes that completely eliminated or replaced an existing pension or other employee benefit plan. In *Inland Steel*, for example, an employer unilaterally changed its existing pension policies to require employees to retire at age 65 instead of considering retirement on a case by case basis, and also increased the employer's own pension obligations. 77 N.L.R.B. at **9-**10. The NLRB held that these actions violated the NLRA and ordered the employer to cease and desist from making any unilateral changes without prior consultation with the union representing the employees. *Id*. at **10. In *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 876 (3d Cir. 1968), an employer changed the formula used to allocate company profits in a supplementary compensation plan. The only change "was to reduce the employees' share of company profits in excess of a level which it had attained only twice in its history." *Id*. The NLRB held that the unilateral change violated the employer's duty to bargain collectively, and the court of appeals affirmed, stating that "[t]he effect of the change is not neutralized because the employees might still receive the same dollar amount from the Plan as they received in preceding years." *Id*. at 879. Similarly, the NLRB held that an employer violated its duty to bargain by unilaterally adding a "nonduplicating" provision to a health insurance policy that prevented double recoveries by employees who were covered by the employer's policy and another policy. *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 885-86 (7th Cir. 1968). The court of appeals affirmed, stating that the reductions "were not without substantial impact although they affected only those of the employees who were the beneficiaries of additional employer-participating coverage and who happened to incur medical or hospital expenses covered by both of the insurance programs." *Id*. at 887; *see also Allied Chemical*, 404 U.S. at 159 n.2 (citing *Scam Instrument* as support for its statement that an employer's mid-term unilateral modification of pension and insurance benefits is an unfair labor practice).

These decisions are not anomalies under the NLRA. Instead, they are applications of a general rule that "basic terms which are vital to the employees' economic interest" may not be altered unilaterally by the employer without bargaining. *Leeds & Northrup*, 391 F.2d at 877; *see W.W. Cross*, 174 F.2d at 878 ("we think that Congress intended to impose upon employers a duty to bargain collectively with their employees' representatives with respect to any matter which might in the future emerge as a bone of contention between them, provided, of course, it should be a

matter 'in respect to rates of pay, wages, hours of employment, or other conditions of employment'"). That rule continues to apply under the NLRA. *See Mississippi Power Co. v. NLRB*, 284 F.3d 605, 615 (5th Cir. 2002) ("retirement benefits, although prospective, are considered part of an employee's compensation package, and changes in the computation of such benefits do constitute significant changes"); *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357 (D.C. Cir. 2008) (court has "no trouble" rejecting argument that bargaining was not required because a modification of retiree benefits "did not amount to much"); *Georgia Power Co.*, 325 N.L.R.B. 420, 420 n.5 (1998) (rejecting argument that bargaining was not required over changes to retiree benefits that affected a small number of employees because "if a change involves the terms and conditions of employment of unit employees, it is a mandatory bargaining subject even if only a relatively few employees are affected"), *aff'd*, 176 F.3d 494 (11th Cir. 1999) (table).

I recognize that Congress did not incorporate the NLRA into section 13(c). As the D.C. Circuit stated, "Congress neither imposed upon the states the precise definition of 'collective bargaining' established by the NLRA and the case law that has developed under that Act, nor did it employ a term of art devoid of all meaning, leaving the states free to interpret and define it as they saw fit. Instead, Congress used the phrase generically, incorporating within the statute the commonly understood meaning of 'collective bargaining.'" *Donovan*, 767 F.2d at 949. The NLRA cases discussed above show what that commonly understood meaning of collective bargaining means when applied to issues concerning pensions. For these reasons, I conclude that as a general rule, section 13(c) certification is unavailable to a transit agency that unilaterally sets or changes the terms of pensions covering employees in a collective bargaining unit.

PEPRA is not the kind of background state law that can remove issues from collective bargaining

As the district court recognized, not all state laws that "form a backdrop to" public employee collective bargaining interfere with section 13(c) rights, even if they affect the scope of the parties' negotiations. However, after examining the Supreme Court cases that the district court relied upon to define the proper interpretation of the "intersection between federal labor policy and a state's system-wide changes in some aspects of public employment" (2014 WL 7409478, at *16), and other preemption decisions, I conclude that PEPRA is not the kind of state law that can remove issues from the collective bargaining obligation established by section 13(c). I also note, that although the Department's Unified Protective Agreement allows modification of "rights which are not foreclosed from further bargaining under applicable law or contract," it does not address the kind of laws that can have this effect.[3]

Two of the cases the district court relied upon hold that minimum labor standards do not impermissibly interfere with collective bargaining and are not preempted by the NLRA under the *Machinists* preemption doctrine. Under *Machinists*, the NLRA preempts state regulation of conduct that Congress intended to be unregulated because it should be left to be controlled by the free play of economic forces. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment*

[3] The Department uses the Unified Protective Arrangement when an applicant for federal financial assistance does not have protective terms and conditions set out in other arrangements. 29 C.F.R. § 215.3(b)(2).

Relations Comm'n, 427 U.S. 132, 140 (1976). Such conduct includes actions that an employer or union may take to put economic pressure on the other side to agree to some proposal during collective bargaining negotiations. *Id*. at 140-147. The two cases holding that minimum labor standards are not preempted under *Machinists* are *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987), and *Metropolitan Life. Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The third case the district court relied on involved a state law that established minimum standards for the funding and vesting of employee pensions, *Malone v. White Motor Corp*., 435 U.S. 497 (1978). The Court in *Malone* held that the NLRA does not preempt the state law because the federal law that governed pensions at the time, the Welfare and Pension Plans Disclosure Act (WPPDA), preserved state authority to regulate the operation and administration of those plans. *Id*. at 505-14 (discussing WPPDA's limited reporting and disclosure requirements and Congressional intent for state law otherwise to govern the plans). Congress repealed the WPPDA in 1974 and replaced it with the Employee Retirement Income Security Act (ERISA), a federal law that imposes substantive requirements on plans and generally preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a).

These cases are consistent with my conclusion, shared by the court in *Donovan*, that the demarcation line between state laws that form a permissible "backdrop" to transit employees' collective bargaining and those that interfere with section 13(c) rights is found in federal labor policy, not in state law. *Donovan*, 767 F.2d at 948. As discussed above, and as *Donovan* points out, the legislative history behind section 13(c) reveals that it was "Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy." 767 F.2d at 948. That is understandable because if states could define collective bargaining obligations by reference to their own laws, they could drastically reduce the collective bargaining rights of transit employees simply by passing a law to that effect. Therefore, I reject SacRTD's continued argument that state law defines the scope of collective bargaining and gives employees whatever rights the state decides to give them.

The cases cited by the district court also show that the *Machinists* preemption doctrine provides important guidance in determining what state laws are consistent with federal labor policy. I have therefore examined cases applying this doctrine in addition to the cases cited by the district court. I conclude that PEPRA is not a law setting background minimum labor standards that is permissible under federal labor policy. Instead, it more closely resembles the laws that are inconsistent with federal labor policy because they intrude on collective bargaining.

At the time Congress enacted section 13(c)(2), the Supreme Court had held that the NLRA preempts a state anti-trust law as applied to a collectively-bargained agreement that set minimum rental charges when a motor vehicle is leased to a freight carrier by an owner who drives the vehicle in the carrier's service. *Local 24 of Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959). The purpose of the minimum rental charge was to protect the drivers' wage scale, which could have been undermined by the carrier paying rental charges that were less than the driver's actual cost of operation. *Id*. at 293-94. The Supreme Court concluded that the state law, which was passed under the guise of a price regulation, was not a "remote and indirect approach to the subject of wages," as the state court had held, but rather, was a "frontal attack" on union wages that "threaten[ed] the maintenance of the basic wage structure established by the collective bargaining contract." *Id*. at 294. Accordingly, the Court stated "that there is no room in this

[federal] scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id*. at 296 (citing *California v. Taylor*, 353 U.S. 553, 566, 567 (1957)). More broadly, the Court stated, "[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." *Id*. The Court repeated that broad statement from *Oliver* in *Machinists*.

PEPRA resembles the preempted state anti-trust law in *Oliver*. Just as the law in *Oliver* was used to override a collectively-bargained solution that protected employees' wages and working conditions, PEPRA is used here to rollback collectively-bargained pensions. *Oliver* therefore supports the conclusion that PEPRA is inconsistent with federal labor policy. Nothing in *Malone* suggests a broad exception from *Oliver* for laws that involve pensions. Instead, the Supreme Court in *Malone* viewed its decision as consistent with *Oliver* because although *Oliver* affirmed the "general rule" that the collective-bargaining process is independent from state interference, *Oliver* recognized an exception to the general rule "where it is evident that Congress intends a different result." *Malone*, 435 U.S. at 513. As discussed above, the Court in *Malone* found such Congressional intent in the now repealed WPPDA. *Id.* at 514. Later, the Court cited *Oliver* as bolstering the Court's conclusion that the WPPDA's successor statute, ERISA, preempts a state law prohibiting the offset of workers' compensation benefits by pension payments. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). "Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate pension terms," the Court stated. *Id*.

In *Metropolitan Life*, the Court held that the NLRA does not preempt a state law requiring insurance policies to provide mental health coverage as applied to collectively-bargained benefit plans that purchased insurance policies. 471 U.S. at 727, 751-58. The Court reached this conclusion based on the NLRA's declared purpose to remedy the inequality of bargaining power between employees and employers and resolve the problem of depressed wage rates and purchasing power of wage earners. *Id*. at 753-754. The mandated-benefits law was consistent with this purpose, the Court reasoned, because it was a minimum labor standard designed to ensure adequate mental health treatment to less wealthy residents of Massachusetts, affected union and non-union employees equally, neither encouraged nor discouraged the collective-bargaining processes, and had at most an indirect effect on employees' right of self-organization or collective bargaining. *Id*. at 753, 755-58. In *Fort Halifax*, the Court applied these principles in holding that the NLRA does not preempt a state law requiring employers to provide a one-time severance payment to employees affected by a plant closing. 482 U.S. at 20-22.

Unlike the laws in *Metropolitan Life* and *Fort Halifax*, PEPRA sets no minimum labor standard. Rather, it establishes ceilings on certain negotiated pension benefits and prohibits the parties from negotiating over other aspects of defined benefit pensions. It therefore affects collective bargaining directly and in a way that disadvantages employees. Thus, I conclude that, unlike the laws in *Metropolitan Life* and *Fort Halifax*, PEPRA does not establish a permissible backdrop to public sector bargaining between transit worker unions and transit agencies. Instead it impermissibly interferes with transit employees' collective bargaining rights in violation of federal labor policy and therefore of section 13(c).

The Ninth Circuit's decision in *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (1995), supports this conclusion. In *Bragdon*, the court found *Machinists* preemption applicable to a county ordinance that applied "prevailing wage" requirements to non-governmental construction projects within the county. The Ninth Circuit reasoned that the *Machinists* principle (that the collective bargaining process should be controlled by the free play of economic forces) "can be frustrated by the imposition of substantive requirements," and that some substantive requirements could "virtually dictate the results of the contract." *Id*. at 501. The court concluded that the ordinance was preempted under this reasoning because it did not merely require a "general" minimum wage for such projects, but imposed detailed wage and benefit requirements for a variety of crafts. *Id*. at 502-04. There is, of course, some debate on where to draw the line between preempted and non-preempted state prevailing wage or similar laws. *Compare Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 n.8 (2d Cir. 2015) (distinguishing *Bragdon*), and *Associated Builders & Contractors v. Nunn*, 356 F.3d 979, 990-91 (9th Cir. 2004) (same), with *520 South Michigan Avenue Associates, Ltd. v. Shannon*, 549 F.3d 1119, 1129-32 (7th Cir. 2008) (agreeing with reasoning in *Bragdon* in finding preemption). Nevertheless, *Bragdon* supports a conclusion that even when a law favors employees, unlike PEPRA, it is preempted if it virtually dictates the results of a collective bargaining contract. *See Nunn*, 356 F.3d at 990-91. PEPRA virtually dictates the results of collective bargaining with respect to defined benefit pension plans by preventing employees from obtaining the favorable terms they had achieved through past bargaining and forcing them to accept rollbacks.

The Eleventh Circuit's decision in *Hull v. Dutton*, 935 F.2d 1194 (1991), also supports my conclusion that PEPRA is not the kind of background law that can remove issues from collective bargaining. Hull was an employee of a state agency responsible for operating port facilities at a switching railroad. Because the agency was a carrier under the Railway Labor Act, it was required to bargain collectively with its employees, unlike other state departments. Hull sought longevity pay benefits provided by state law but not provided by the governing collective bargaining agreement and argued that the state law was a background minimum labor standard under the rationale of *Metropolitan Life* and *Fort Halifax*. The Eleventh Circuit rejected that argument because the laws in *Metropolitan Life* and *Fort Halifax* applied not only to union and nonunion members "but also to those workers not employed by the state," while the state longevity statute applied "only to [the state's] own employees and not to its citizens generally." *Id*. at 1198. The court explained:

> [Th]e state, *when acting as an employer*, has a much narrower latitude to enact laws that trench upon the terms of a collective bargaining agreement negotiated under the regime of federal labor laws. The 'state civil service relationship,' as the Supreme Court has noted, 'is the antithesis of that established by collectively bargained contracts throughout the railroad industry [citing *California v. Taylor*, 353 U.S. at 560]. Indeed, the logic of Hull's argument would give the State tremendous liberty to abrogate collective bargaining contracts with its own employees under the guise of enacting a 'minimum labor standard.' The State, for example, could just as easily unilaterally *lower* the wages of employees set by contract, as well as *raise* them if the longevity pay statute were applied to employees of the Docks Department. Such latitude would have a pernicious effect on the collective bargaining process and would directly implicate the concern recognized in both *Metropolitan* and *Fort Halifax* that this mechanism should be shielded from intrusive state laws.

Id. That rationale applies here. SacRTD is established by California state law to carry out transportation functions within a certain area. Cal. Pub. Util. Code § 102000 *et seq*. Its employees have been subject to PEPRA, a law that applies to public sector employees, not to citizens or employees generally. By unilaterally reducing pension benefits, PEPRA exemplifies the "pernicious effect on the collective bargaining process" that concerned the Eleventh Circuit in *Hull*.

The Realities of Public Sector Collective Bargaining

The district court also concluded that the Department erred by not "considering the realities of public sector bargaining," including the fact that any modifications to state pension plans "must be ratified by the state legislature." *California*, 2014 WL 7409478, at *16-*17. SacRTD adds that in the public sector, terms and conditions of employment are public decisions shaped by political processes and realities outside the direct control of a particular public sector employer and must operate within legislatively-imposed budget constraints and be consistent with the legislature's policy direction. SacRTD Response 11. In SacRTD's view, PEPRA is a legislative policy that California's public employers take to the bargaining table. *Id*. at 12. The ATU says that the reality of public sector collective bargaining adverted to by the district court is legally irrelevant because SacRTD is an independent agency authorized by state law to negotiate and enter into collective bargaining agreements, and nothing in California law requires submission of those agreements for ratification by the California legislature or any other higher authority in California with the power of the purse. ATU Response 15 & n.8.

SacRTD admits that it is required by state law to bargain collectively, and cites nothing in state law that requires the state legislature to ratify the agreements it reaches through collective bargaining. SacRTD Response 6; AR 725-27 (SacRTD's discussion of tis authority to maintain an independent, collectively-bargained pension plan, and the review and ratification process for collective bargaining agreements). Thus, I agree with the ATU that ratification by the state legislature is not an issue for SacRTD.

The concerns raised by the district court and SacRTD are also not new; they existed when section 13(c) was enacted. Then, as now, state legislatures could exercise control over the terms and conditions of employment outside the direct control of a particular public sector employer. Congress recognized that reality in considering state agencies that were prevented by state law from collective bargaining. As discussed above, Congress decided not to make collective bargaining contingent on state law but instead gave states a choice: provide for a continuation of existing collective bargaining rights directly, allow transit agencies to contract with a private entity to manage a transit system and continue collective bargaining through the private entity (the "Memphis" arrangement), or forego federal funding. Congress accommodated states by not continuing a right to strike. *See* 109 Cong. Rec. at 5672-73 (Statement of Sen. Morse); *Donovan*, 767 F.2d at 953-54. Congress also did not require any particular form of binding arbitration, but did require some process that avoids unilateral control by an employer over mandatory subjects of collective bargaining. *Donovan*, 767 F.2d at 955.

Similarly, budget constraints are and have been an issue for many employers, public and private. The solution is for parties with collective bargaining obligations to bargain within budget constraints, not for an employer to use budget constraints as a reason for unilaterally removing a subject from bargaining. As the Court in *Donovan* recognized, "the substantive provisions of collective bargaining may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat." 767 F.2d at 953; *see also id*. at 957 (Ginsburg, J., concurring) ("a collective bargaining scheme that would have been characterized 'unfair' or 'inequitable' in 1972 might appear just and adequate in 1990. But Congress did not provide for sunsetting section 13(c) and said nothing in the text of the provision to suggest that the essential process entailed in 'the continuation of collective bargaining rights' should come to mean less as time goes by.").

For these reasons, the realities of public sector collective bargaining are not a sufficient reason to permit section 13(c) certification of a transit agency that has implemented PEPRA.

Application of section 13(c) in this case

1. SacRTD does not continue collective bargaining rights under section 13(c)(2)

In my September 4, 2013 decision I concluded that PEPRA has had an immediate effect on SacRTD's "new" employees by, among other things, requiring them to pay at least 50% of normal pension plan costs when the collective bargaining agreement required SacRTD to pay all costs, by reducing the benefits they would receive from the plan in a number of ways, and by eliminating a collectively-bargained "25 and out" provision. AR 132-34. I also concluded that PEPRA affects rights of current employees under the negotiated pension plan by prohibiting the purchase of service credit for years not worked ("airtime"), prohibiting benefit enhancements for service performed prior to the operative date of the enhancement, and preventing certain new supplemental defined benefit plans. AR 134-35.

Since then, SacRTD reports that it has stopped applying PEPRA to new employees and returned to them any funds collected during the period of PEPRA's applicability. SacRTD Response 17. The ATU states that, although SacRTD has not taken a public position on whether the October 4, 2013 exemption from PEPRA remains in effect, SacRTD has not applied PEPRA to its ATU-represented employees. ATU Response 1. The parties also negotiated a new collective bargaining agreement, effective April 1, 2014 through March 31, 2017, that includes what SacRTD describes as "PEPRA-like" provisions. SacRTD Response 4. The ATU terms the existence of the agreement irrelevant but states that it requires employees hired after January 1, 2015 to pay 3% of compensation to the pension plan until the plan becomes fully funded and that the payment was in direct exchange for higher wages for those employees. June 10, 2015 e-mail from Jessica Chu.

These developments show that PEPRA's effect on collective bargaining rights is much less now than when I issued my September 4, 2013 decision. Nevertheless, the developments are insufficient for me to certify that protective arrangements exist for the continuation of collective bargaining rights. SacRTD states that it will not "fully" apply PEPRA until the current collective bargaining agreement expires or is amended. The term "fully" suggests that SacRTD may

partially implement PEPRA. See SacRTD Response 4 n.2 (explaining that pursuant to Cal. Gov. Code § 7522.30(f), SacRTD can delay compliance with PEPRA's cost-sharing requirements and not mentioning other PEPRA requirements). SacRTD also takes the position that PEPRA governs the rights of newly hired employees. SacRTD Response 8-9, 14-15. Thus, SacRTD appears to view it sufficient under section 13(c)(2) that the collective bargaining process will continue, albeit under the substantive limitations that PEPRA applies. Because I have determined that PEPRA fails to provide the continuation of collective bargaining rights required by section 13(c)(2), SacRTD's assertion that it only has to bargain within PEPRA's constraints also fails to provide for the continuation of such rights.

SacRTD is therefore in a different position than transit agencies that could provide assurances either directly or through the state Attorney General that state laws restricting collective bargaining would not result in a diminution of collective bargaining rights or failure to preserve terms of an existing collective bargaining agreement. *See, e.g.*, AR 645, 647 (9/5/12 Suburban Mobility Authority for Regional Transportation, Grant MI-90-X756-02); AR 669, 670 (9/9/11 New Jersey Transit Corporation, Grant NJ-05-0027-01 et al); AR 1571, 1572-73 (5/20/11 Capital Area Transportation Authority, Grant MI-95-X065); AR 1583-92 (12/21/12 and 6/10/13 Monterey-Salinas operating assistance grants CA-90-Z022 and CA090-Z022-01). In those cases, the transit agencies committed to complying with section 13(c)'s requirements and not applying a state law that the Department viewed as potentially precluding such compliance. SacRTD has not made that commitment and asserts a right to apply PEPRA.

My conclusion that PEPRA prevents the continuation of collective bargaining rights under section 13(c)(2) does not mean that section 13(c) incorporates all of the NLRA law on collective bargaining. *See Donovan*, 757 F.2d at 749. As discussed above, section 13(c) does not preserve a right to strike and leaves open a number of options for public employers on how to resolve bargaining disagreements. My decision here is also not saying that every unilateral change to a collective bargaining agreement will preclude certification under section 13(c). As I explained in my earlier decision, however, the Department cannot certify a grant when a change in state law significantly reduces existing benefits and precludes negotiations over many aspects of employees' pension plans, as is the case with PEPRA. AR 135; *cf. Carrier Corp.*, 319 N.L.R.B. 184, 1995 WL 597269, at **19 (NLRB Sept. 29, 1995) (for a unilateral mid-term alteration of a collective bargaining agreement to violate the NLRA, "it must involve a change that is material, substantial, and significant, affecting the terms and conditions of employment of bargaining unit employees"). Thus, I do not view my decision here as adopting a rigid rule that prevents certification under section 13(c)(2) any time a state law addresses an issue that is also a subject of collective bargaining. *See also supra* (discussing background state laws that can remove issues from collective bargaining).

Contrary to SacRTD's argument, SacRTD Response 6-7, the fact that some form of bargaining can continue post-PEPRA, as shown by the experience of the San Francisco Bay Area Rapid Transit District (BART) and its unions, does not mean that such bargaining provides the "continuation of collective bargaining rights" required by section 13(c)(2). The BART unions reportedly bargained over pensions within the constraints of PEPRA while PEPRA was in effect.

Dist. Ct. Doc. 26-2 ¶¶ 3-5 (Decl. of Victoria R. Nuetzel). Such bargaining does not provide for the continuation of collective bargaining rights required by section 13(c)(2) because the continuation of collective bargaining rights means, as discussed above, that a transit agency generally cannot change pension terms during the term of or after the expiration of a collective bargaining agreement without bargaining to impasse. In some instances, a union may waive its right to bargain. *Cf. Local Joint Executive Board v. NLRB*, 540 F.3d 1072, 1079 (9th Cir. 2008); *Pacific Coast*, 304 F.2d at 765. Whether or not the unions in BART waived their right to bargain over PEPRA, the unilateral changes required by PEPRA prevent the continuation of unions' right to bargain over the changes. Moreover, the BART unions eventually reached an agreement that did not comply with PEPRA after California passed legislation suspending PEPRA's applicability to employees protected by section 13(c). *See* Dist. Ct. Doc. 26-2, ¶ 6 (Decl. of Victoria R. Nuetzel). BART's experience thus shows that the results of bargaining are different when PEPRA is in effect than when it is not in effect and thus confirms the impact that PEPRA has on collective bargaining.

PEPRA's restrictions on defined benefit plans also harm employees despite the possibility of bargaining over defined contribution plans. A defined benefit plan, as its name implies, provides an employee a fixed periodic payment on retirement. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999); *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024, 1029 (9th Cir. 2008). "[T]he employer typically bears the entire investment risk" in a defined benefit plan. *Id*. In contrast, a defined contribution plan is one where employees typically contribute a fixed amount to an individual account, sometimes with employer contributions, and the employee on retirement receives whatever level of benefits these contributions and investment returns, after fees and expenses and other adjustments, will provide. *Id.*, U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan*, Ch. 1, *available at* http://www.dol.gov/ebsa/publications/wyskapr.html. In a defined contribution plan, the employee therefore bears the investment risk, and often must decide how much to contribute, how to invest, what kind of investment return to expect, and how to transform whatever account balance the employee has on retirement into retirement income. *See, e.g.*, U.S. Government Accountability Office, *Retirement Income, Ensuring Income Throughout Retirement Requires Difficult Choices*, GAO-11-400 (June 7, 2011), *available at* http://www.gao.gov/products/GAO-11-400.

Employees faced with these investment risks and decisions in a defined contribution plan quite reasonably may prefer to keep an existing defined benefit plan, particularly if their union has been able to negotiate generous terms. When a law like PEPRA makes fundamental changes and substantial benefit rollbacks to defined benefit plans, Office of Governor Edmund G. Brown Jr. - Newsroom (Aug. 28, 2012), *available at* http://gov.ca/gov/news.php?id=17694, employees can also reasonably view the possibility of a defined contribution plan as insufficient to make up for those losses. *See* ATU Response 13 n.5 (viewing a defined contribution plan as "not a pension plan at all; it is nothing more than a tax advantaged forced savings plan" that may not be sufficient to sustain employees throughout their retirement). As I explained in my September 4, 2013 decision, PEPRA therefore differs from a Massachusetts law that transferred group health insurance coverage from a transit agency to an insurance commission because the Massachusetts

law placed no hard caps on health care benefits and no restrictions on negotiating supplemental plans. AR 131. PEPRA puts hard caps on defined benefit plans and restricts parties' ability to negotiate supplemental defined benefit plans, even if such plans do no more than supplement (such as by establishing a guarantee of minimum benefit) a defined contribution retirement plan such as those envisioned by PEPRA.

2. SacRTD has not preserved rights under an existing collective bargaining agreement, as required by section 13(c)(1)

In addressing the collective bargaining agreement in effect when SacRTD applied for federal funding, the district court rejected the Department's September 4, 2013 conclusion that the agreement applied to employees who are new employees under PEPRA, i.e., those hired after January 1, 2013. The court appears to have concluded that the agreement does not apply to new employees based on the court's interpretation of the agreement's definition of the bargaining unit as employees in SacRTD's service. 2014 WL 7409478, at *18; see AR 349 (Section A, Art. 2 sec. 3, "For the purposes of applying this contract, the bargaining unit shall include all employees within the service of the DISTRICT in the following classifications ***"). The court reasoned that "[a]n employee cannot be 'in service' before he or she has started work." 2014 WL 7409478, at *18 (citing Oxford American Dictionary Online). Thus, the court's decision can be read to mean that this agreement applies only to employees who were already working for SacRTD when the agreement was signed or became effective and not to employees who were later hired, including employees hired after PEPRA's January 1, 2013 effective date.

To the extent the district court's decision was predicated on a conclusion that the agreement does not apply to new employees, it was in error. Both SacRTD and ATU stated that the agreement applies to new employees. AR 719 (SacRTD), 757 (SacRTD), ATU Response 18. The agreement also repeatedly refers to new employees. See AR 372, (CBA Art. 50 § 1, stating that "[a]ll new employees shall be on probation . . . All rights, benefits, and privileges, including the application of grievance and arbitration procedure, shall be applicable to probationary employees"); *id.* (CBA Art. 49 § 2 ("New employees shall be placed on the Seniority List in accordance with the date they are placed on the payroll"); AR 350 (CBA Art. 3 § 1 (requiring "[n]ew employees" to apply for union membership before commencing work). The pension plan confirms that new hires are covered by crediting service from an eligible employee's date of hire and providing that an employee becomes an eligible employee on the date he or she first becomes an employee of SacRTD and is a member of the bargaining unit represented by ATU. AR 411 (Plan Art. 3.1, 4.2).

Accordingly, I hereby conclude that SacRTD has not preserved the rights of employees under the agreement as it is properly construed, and 'I therefore deny certification for failure to include fair and equitable arrangements under section 13(c)(1). The agreement provided that its terms were to remain in full force until the parties negotiated a new agreement. AR 360; see also AR 719 n.3 (SacRTD brief). SacRTD admittedly hired employees after January 1, 2013 and applied

PEPRA to them. SacRTD Response 17. The result was a failure to preserve rights under the agreement. See AR 132-34 (September 4, 2013 decision, discussing some of the ways that SacRTD's application of PEPRA affected new employees). SacRTD's reported reimbursement of affected employees does not retroactively cure this section 13(c)(1) violation because, as discussed above, SacRTD continues to assert a right to apply PEPRA and to bargain only within PEPRA's constraints.

Sincerely,

Michael J. Hayes

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