To Be Argued By Gail M. Blasie, Esq.
10 Minutes Requested

New York Supreme Court
Appellate Division - Second Department

In the Matter of the Application of ALTHEA ADAMS, ET AL,
PETITIONERS-APPELLANTS,

Docket No.
2022-05162

-against-

VEOLIA TRANSPORTATION SERVICES, A/K/A TRANS-DEV,
and COUNTY OF NASSAU
Respondents-Respondents,

and

METROPOLITAN TRANSPORTATION AUTHORITY and
MTA-LONG ISLAND BUS,
Respondents.

APPELLANTS' BRIEF

GAIL M. BLASIE, P.C.
Attorneys for Petitioners-Appellants
300 Garden City Plaza, Suite 226
Garden City, New York 11530
(516) 457-9169
blaze@cal.net

Nassau County Supreme Court
Index No.: 614521/2021

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QUESTIONS PRESENTED

1. Did the Arbitrator exceed his powers and rewrite the agreement?
2. Did the Arbitrator's Award violate the public policy outlined in 49 USC 5333?

Petitioners-Appellants answer in the affirmative, and the Arbitrator's Award must be vacated and set aside.

PRELIMINARY STATEMENT

Petitioners-Appellants ("Claimants") appeal the decision of the lower Court's denial of their Article 75 petition to vacate the Arbitrator's Opinion and Award ("Arbitrator's Award"), dismissing their claims in arbitration, finding that only the union could assert the Claimants' statutory 13(c) rights provided in the 13(c) Agreements, and that the Claimants lacked standing to assert their own claims. R-4.

The Arbitrator's finding that the represented[1] individual transit workers lacked standing to enforce their rights under the 13(c) Agreements, violated the public policy embodied in 49 USC 5333, which provides protections to transit employees from having their compensation and benefits worsened as the result of transportation projects funded with federal transit

[1] Represented employees members of a union. Non-represented employees are not members of a union.

funds. R-89. By not permitting the individual transit workers to assert their statutory claims under 49 USC 5333, embodied in the 13(c) Agreements, the Arbitrator gutted the statute, rendering the statutory protections meaningless.

The Arbitrator's Award also rewrote the 13(c) Agreement in three places. Paragraph (20) states that the 13(c) Agreement is "binding and enforceable by and upon the parties hereto, and by any covered employee or his/her representative." R-120. The Arbitrator rewrote that provision to state that the Agreement is "binding and enforceable by and upon the parties hereto and by any unrepresented covered employee and the covered represented employees' union only."

The Arbitrator's Award also added an express provision negating Claimants' rights as intended third-party beneficiaries to enforce the 13(c) Agreement on their own, without the assistance of the union. R-106, 121, 123.

The Arbitrator's Award also turned permissive provisions of the agreement into mandatory provisions requiring that only the union could assert the Claimant represented transit workers' 13(c) rights under the 13(c) Agreement.

STATEMENT OF FACTS AND PROCEDURE

Claimants brought a special proceeding under CPLR 7511(a)(4) and Section 10 of the Federal Arbitration Act, 9 USC 10, to vacate the Opinion and Award on Post Discovery Dispositive Motions ("Arbitrator Award"), by Martin Scheinman, Esq., issued on August 17, 2021. R-47. Arbitrator Scheinman's Award violated the public policy embodied in 49 USC 5333, and rewrote the 13(c) Agreement to include a new provision that only a union, could assert a represented transit worker's rights under the 13(c) Agreement, and that the represented transit workers lacked standing to assert their rights under the 13(c) Agreement.

Brief Overview of 13(c)

Pursuant to Section 13(c) of the Urban Mass Transportation Act, as amended, 49 USC 5333(b), passed in 1964, before any federal transportation assistance is provided for transit purposes, the grant recipient must enter into a "fair arrangement," agreeing to protect the transit employees from losing any benefits or rights and to ensure that transit employees will not suffer from a worsening of their employment positions as the result of the receipt of the federal transportation funds.

These certified arrangements, also referred to as "employee protective arrangements" (as coined by the actual language of the

statute), or “13(c) Agreements”, or “Unified Protective Arrangements” or “Certified Protective Arrangements”[2] are contracts between the federal government and the grant recipient (Respondent Nassau County). In these agreements, the grant recipient (Respondent Nassau County) promises that if the transit workers’ compensation, benefits or conditions of employment are worsened as the result of the receipt of the federal transportation funds, that the transit workers are entitled to “13(c)” benefits, or compensation. The Claimant transit workers are the expressed intended third-party beneficiaries of the 13(c) Agreement.

The Department of Labor is responsible for certifying that a 13(c) Agreement is “fair and equitable” and comports with the statutory requirements under Section 13(c), now 49 USC 5333.

Brief Overview Of The Nassau County Bus System

In 1972 and thereafter, Nassau County applied for and received federal transportation funds, and entered into 13(c) Agreements as a condition of the receipt of the federal transit assistance. R-30, ¶ 17.

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[22] For clarity purposes, Claimants refer to these protective arrangements as “13(c) Agreements”.

Between 1973 and December 31, 2011, the MTA, through a wholly owned subsidiary MTA- Long Island Bus ("LI Bus") [3], operated the Nassau County bus system. R-30, ¶ 18.

During that time, Respondents Nassau County, MTA and LI Bus, together or separately, applied for and received grants for millions of dollars in federal transportation funds. The federal transportation funds were used to carry out various transit Projects, ranging from the acquisition of other transportation systems which created LI Bus, to the purchase of buses and other equipment, to the funding of the operations of the Nassau County bus system. R-30, ¶ 19.

The Relevant 13(c) Agreements

In 2011, Nassau County entered into a 13(c) Agreement which was certified by the Department of Labor. R-106, 126.

Paragraph (2) of the 2011 13(c) Agreement specifically states that "any covered employee or his/her representative" can enforce the 13(c) Agreement. R-120. As used in the 13(c) Agreement, a "covered employee" means any employee covered by the 13(c) Agreement, which includes all of

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[3] Metropolitan Authority (MTA), and the MTA-Long Island Bus ("LI Bus") were named as parties in the arbitration and in the Article 75 proceeding. However, Claimants agreed to not appeal that part of the Arbitrator's award dismissing the claims against LI Bus and the MTA ("MTA Respondents"). R-21.

the represented Claimant transit workers. See Page 2 of Agreement, second paragraph, Paragraphs (2), (3), (4), (11a), (23) and (25). R-107, 109, 114, 121.

The 2011 13(c) Agreement and Certification Letter specifically and repeatedly state that "Transit employees are also third-party beneficiaries to the protective arrangements incorporated in subsequent contracts of assistance, pursuant to the Department [of Labor's] certification, between the Grantee and any Recipient." R-106, 121, 127.

The 2011 13(c) Agreement outlines procedures that a union may avail itself when asserting claims on behalf of its members. There is nothing in the agreement that states that only the union can assert a represented transit worker's rights under the 13(c) Agreement.

The Takeover By Trans-Dev

In 2011, the MTA did not renew the License Agreement with Nassau County, and MTA ceased operating LI Bus on December 31, 2011. R-3, ¶ 20.

On January 1, 2012, Veolia Transportation Services ("Veolia") now Trans-Dev, took over the operation and management of the Nassau County bus system, and entered into a "License Agreement" with Nassau County. R-130.

Pursuant to the License Agreement, Trans-Dev was given the full use of all of the assets and goodwill that comprised the Nassau County bus system which had been created through the receipt of millions of dollars of federal transportation funding since 1972. R-146-148. The License Agreement also provided that all federal transportation funds which had been earmarked for LI Bus, would be paid out for the benefit of Trans-Dev for the operation and management of the Nassau County bus system. R-142-143.

As part of the takeover by Trans-Dev, Claimants, who were members of the Transportation Workers Union, Local 252 ("TWU") were told that if they did not agree to the inferior terms and conditions of employment being offered by Veolia (now Trans-Dev), that they would be out of jobs. R-31, ¶ 23.

A new collective bargaining agreement was entered into between Veolia Transportation Services (now Trans-Dev) and TWU, which contained inferior benefits and compensation than the employees previously enjoyed as employees of LI Bus. R-31, ¶ 24. The collective bargaining agreement did not waive the employees' rights to assert 13(c) claims for damages resulting from the decreased compensation and benefits, pursuant to the 13(c) Agreements. R-31, ¶ 24.

TWU would not assert the Claimants' 13(c) claims for the same compensation and benefits they had enjoyed with LI Bus. R-31, ¶ 25.

Claimant bus drivers, organized by shop steward Nicholas Viola, took steps to assert their 13(c) claims without the union's assistance. R-371, 385, 390, ¶ 23.

The Arbitration Proceedings

Claimants demanded that Nassau County, MTA and Trans-Dev (formerly "Veolia"), arbitrate these disputes pursuant to Paragraph (15) of the 13(c) Agreement. R-117. Respondents refused. Claimants brought a proceeding to compel Respondents to arbitrate these claims. The Supreme Court ordered the Respondents to arbitrate the Claimants' 13(c) claims. Respondents appealed the decision. The Second Department upheld the Supreme Court's decision. R-190.

Thereafter, the parties chose Arbitrator Martin Scheinman, with the American Arbitration Association, to preside over the arbitration proceedings. R-47.

Discovery was conducted and the parties submitted post discovery dispositive motions to the Arbitrator. The submissions were extensive, consisting of over 4,000 pages covering a large number of issues. R-55-56.

The parties submitted extensive papers to the Arbitrator, outlining in detail their positions. While not relevant to this special proceeding, it was Claimants' position that they were entitled to 13(c) benefits under three provisions of the 13(c) Agreements.

First, under Section 22 of the 2001 13(c) Agreement, Claimants, as employees of the Nassau County bus system, were assured the continued employment as affected employees, with no decrease in salary or benefits for six (6) years following the acquisition of the federally funded bus system by another entity. R-121.

Claimants argued that Trans-Dev's complete takeover of the operations and management of the Nassau County bus system, via a License Agreement between Trans-Dev and Nassau County, was so complete that it was a "de facto" acquisition, even if Nassau County continued to be the title holder of the various assets. R-121.

The takeover by Trans-Dev was assisted through the use of federal funds. Millions of dollars in federal transportation funds, previously promised for use by LI Bus, were subsequently used for the benefit of Trans-Dev. Without these federal funds, the takeover by Trans-Dev would not have occurred.

Claimants also argued that under Sections 21 and 25 of the 2011 13(c) Agreement, and the License Agreement with Nassau County, Trans-Dev stepped into the shoes of the former bus operator (LI Bus), and under the License Agreement, Trans-Dev agreed to have successor liability under the 13(c) Agreements. R-120-121.

Thirdly, Claimants argued that they were harmed as the result of a federally-funded Project, and under the terms of the 2011 13(c) Agreement, they were entitled to 13(c) damages. R-107.

The Arbitrator made no decision on these arguments, and instead simply dismissed the Claimants' claims, and found that the represented transit workers were required by the 13(c) Agreement to "file their claims through their TWU [union] representative," and that the Claimants lacked standing to pursue their 13(c) claims in arbitration. R-89.

The only issues on this appeal are whether the Arbitrator rewrote (1) Paragraph (20) of the 13(c) Agreement,)which explicitly states that covered employees or his or her union representative have the right to enforce the 13(c) Agreement, to state that only non-represented covered employees or the union have the right to enforce the 13(c) Agreement; (2) to negate Claimants' rights as third-party beneficiaries to enforce the agreement; (3) to include a new provisions that only the union could invoke a represented transit

workers' rights under the 13(c) Agreement; and (4) whether precluding the represented transit workers from invoking their 13(c) rights violated the public policy behind 49 USC 5333 to protect the transit workers' terms and conditions of employment from worsening as the result of the receipt of transit funds.

ARGUMENT

POINT I

THE PUBLIC POLICY ENUMERATED IN 49 USC 5333(b) REQUIRES THAT ALL TRANSIT WORKERS HAVE STANDING TO ASSERT THEIR CLAIMS INDIVIDUALLY WHETHER THEY ARE REPRESENTED BY A UNION OR NOT

The Arbitrator's interpretation of the 2011 13(c) Agreement eviscerates the public policy underlying 49 USC 5333, and the statute itself, and must be vacated.

"[A] court may vacate an arbitral award where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator." *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York,* 94 N.Y.2d 321, 327 (1999); *Matter of Sprinzen [Nomberg],* 46 N.Y.2d 623, 631 (1979).

"The focus of inquiry is on the result, the award itself" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New*

York, 94 N.Y.2d at 327). Thus, a court may vacate an award on public policy grounds "where the final result creates an explicit conflict with other laws and their attendant policy concerns" (*Id. at* 327). *Civ. Serv. Emps. Assn., A.F.S.C.M.E. Loc. 1000, A.F.L.-C.I.O. by Loc. 830 v. Nassau Healthcare Corp*., 188 A.D.3d 1043, 1045–46 (2d Dept. 2020).

49 USC 5333(b) [also known as Section 13(c) of the Urban Mass Transportation Act], was enacted to protect transportation workers' conditions of employment when a transportation system -- built and acquired with federal transportation funds -- is taken over by another entity.

Congress wanted to prevent the very situation that is occurring here; i.e., the diminution of salary and benefits for the workers who built the transportation system, with the assistance of federal transportation funds, only to have the federally-funded transportation system change hands, and the new owner or operator decrease the salaries and benefits and to maximize profits, while taking advantage of the assets, infrastructure and goodwill built with the federal funds.

The employee protective arrangements, or 13(c) Agreements, are not collective bargaining contracts, but are contracts required by federal statute and provide protections to transit employees. If the represented transit workers are not entitled to assert these protections on their own when the

union will not support them, then the public policy behind the statute – to protect the transit workers' terms and conditions of employment from worsening as the result of the receipt of federal transportation funds – is thwarted.

The policy outlined in the statute repeatedly emphasizes that it is the individual transit employees who are to be protected by the statute, regardless of union affiliation.

The express language of the statute states that it is for the "protection of individual employees against a worsening of their positions related to employment" – not the union's interests, not the Respondents' interests, but the individual employee's, regardless of union status. 49 USC 5333(b)(2)C).

49 USC 5333(b)(2)(D) requires that the employee protective arrangements shall include provisions that provide "assurances of employment to employees of acquired public transportation systems" -- assurances of employment for all employees, without differentiating between union and nonunion employees.

49 USC 5333(b)(4) requires the "fair and equitable arrangements to protect the interests of employees. . .", again emphasizing the individual employees regardless of union status.

The purpose of the statute is to "preserv[e]" rights, privileges, and benefits under collective bargaining agreements "and otherwise", which can only be meant to mean that the statute is meant to protect rights that arise outside of a collective bargaining agreement. 49 USC 5333(b)(2)(A).

The public policy is "the purpose of the statute," which is to protect all transit employees' individual rights and conditions of employment from being worsened as the result of the grant of federal transportation assistance, regardless of union status.

By stripping Claimants of their right to assert their individual 13(c) claims when their union would not, the Arbitrator's Opinion violates the public policy behind the statute, which is protect the individual transit workers.

The legislative intent of a statute is to be ascertained from the words and language used in the statute. Stat. Law 94 . The clear language of 49 USC 5333(b) mandates that Claimants have standing to bring 13(c) claims on their own, without the support of their union.

If the Arbitrator's Award is left to stand, then Nassau County and Trans-Dev – the recipients or successors of the federal transit funding that was used to build the Nassau County bus system – will have avoided their obligations to Claimant bus drivers under the various 13(c) Agreements simply by transferring the operation and management to a private entity. The

intention, spirit, and plain language of the statute and underlying legislative history, are completely eviscerated by the Arbitrator's Award and it cannot stand.

Claimants' 13(c) claims are not part of a collective bargaining agreement, but arise under the statute. There is a clear distinction between a collective bargaining agreement and a 13(c) Agreement.

On point is *Amalgamated Transit Union v. Toledo Area Regional Transit Authority,* 2 N.E.3d 289 (Court Appeals of Ohio, 2013). In *Amalgamated Transit Union,* the union sought to compel arbitration under the 13(c) agreements, and the transit company argued that Ohio's State Employee Relations Board (similar to PERB) had exclusive jurisdiction over terms and conditions of employment.

The Ohio appellate court stated, "While we conclude that section 13(c) of [Urban Mass Transportation Act] was not intended to replace state labor law, we also find that SERB's [State Employee Relations Board] jurisdiction to enforce the Public Employees Collective Bargaining Act does not authorize [the transit agency] to disregard the promises it made in the section 13(c) agreement as a condition of receiving federal funds."

The Court went on to state that "numerous state courts have concluded that 'arrangements under 13(c) of the Urban Mass Transportation Act are not collective bargaining contracts' but are 'contracts albeit contracts required by federal

statute,'" *citing to Dallas Area Rapid Transit v. Plummer,* 841 S.W.2d 870, 874 (Texas Ct. App. 1992).

The labor policy that employees must proceed through their union to promote stability and efficiency to the negotiated protections and procedures of a collective bargaining agreement do not pertain to the public policy undergirding 49 USC 5333, which provides separate contractual protections to individual transit workers from worsening conditions of employment as the result of the grant of federal transit funds.

POINT II

THE ARBITRATOR EXCEEDED HIS AUTHORITY AND REWROTE THE TERMS OF THE CONTRACT

A. The Arbitrator Rewrote The 13(c) Agreement To Include A New Provision That Only The Union Could Demand Arbitration Of The Represented Transit Workers' 13(c) Claims

Paragraph (20) of the 13(c) Agreement expressly states that the "arrangement," or the13(c) Agreement, "shall be independently binding and enforceable by and upon the parties thereto, and by any covered employee or his/her representatives". This provision clearly says that a covered employee or a union shall be able to enforce the Agreement.

By finding that the Claimants, who are covered employees, lacked standing to enforce the Agreement, the Arbitrator clearly rewrote Paragraph (20).

This is one of those "rare occasions when an arbitration award must be vacated on the ground that the arbitrator 'exceeded his [or her] power by ignoring the express terms of the agreement and rewriting the agreement.'" (Citations omitted.) *Bd. Of Educ. Of North Babylon Union Free School District v. North Babylon Teachers' Organization,* 104 A.D.2d 594, 596-597 (2d Dept. 1984).

Claimants agree that Courts should generally decline to vacate arbitration awards "unless the arbitrator's construction of the contractual provision in dispute is completely irrational, so that he [or she] has in effect, rewritten the contract for the parties." *Bd. Of Educ. Of North Babylon Union Free School District v. North Babylon Teachers' Organization,* 104 A.D.2d at 594.

Claimants also agree that an arbitration decision should not be vacated merely because a party disagrees with the arbitrator's "interpretation" of the agreement or even if the arbitrator made an error of law or fact.

However, this is not a matter of "interpretation" of the 13(c) Agreement. The Arbitrator ignored the explicit plain language of the

agreement and rewrote Paragraph (20) of the Agreement to state that only non-represented employees and the union can enforce the workers' rights under the 13(c) Agreement.

B. The Arbitrator Rewrote The Contract To Include A Provision Negating Claimants' Rights As The Expressed Third-Party Beneficiaries To Enforce The Agreement

An expressly named intended third-party beneficiary in a contract has standing to enforce the contract unless the contract expressly states otherwise. *Matter of Revson*, 86 A.D.2d 872, 875 (2d Dept. 1982) (as a named third-party beneficiary in the agreement, the movant had standing to enforce the claim); *Silverman v. Miranda,* 116 F.Supp.3d 289, 297 (S.D.N.Y. 2015) *referring to Silverman v. Teamsters Local 210 Affiliated Health Ins. Fund,* 761 F.3d 277 (2d Cir. 2014) (the Second Circuit upheld the lower court's finding that the fund, as an expressly named third-party beneficiary, was entitled to enforce the agreement); *Lawrence v. Fox,* 20 N.Y. 268 (1859) ("[A] third party may sue as a beneficiary on a contract made for his [or her] benefit.")

Third-party beneficiaries have standing to bring enforce a contract as long as (1) there is a valid and binding contract between other parties, (2) that the contract was intended for their benefit and (3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by

the contracting parties of a duty to compensate them if the benefit is lost. *Lawrence v. Fox*, 20 N.Y. at 268.

Applying this standard, pursuant to the actual terms of the 2011 13(c) Agreement, Claimants were clearly intended third-party beneficiaries to the 13(c) Agreements with the right to enforce their individual rights of the union.

The plain and unambiguous language of the 13(c) Agreement and the Certification Letter states four times that the individual workers are the intended third-party beneficiaries of the Agreement.

The first page of the 13(c) Agreement states that the "protective arrangements are intended for the benefit of transit employees in the service area of the project, who are considered as third-party beneficiaries to the employee protective arrangements." R-106.

Then in bold lettering, the paragraph on the first page continues, "**Transit employees are also third-party beneficiaries to the protective arrangements. . .**" (Emphasis in original.) R-106.

Paragraph (21) of the 13(c) Agreement states in bold lettering, ". **Transit employees in the service area of the project are third-party beneficiaries to the terms of this protective arrangement. . .**" (Emphasis in original.) R-120-121.

The Department of Labor's Certification Letter states "[t]hese protective arrangements certified by the Secretary of Labor are intended for the primary and direct benefit of transit employees in the service area of the project", and "[t]hese employees are intended third-party beneficiaries to the employee protective arrangements referenced in the grant contract" and "[s]uch transit employees are also third-party beneficiaries to the protective arrangements incorporated in any subsequent contracts." R-127.

As a matter of New York law, expressly named third-party beneficiaries have standing to sue under the contract. "A beneficiary of the promise, a laborer or materialman for whose protection it was given, has a right of action for the damages resulting from the breach." *Lawrence v. Fox,* 20 N.Y. 268.

The 13(c) Agreement's language repeatedly and expressly declaring Claimants as third-party beneficiaries, conferred upon Claimant transit employees the right to enforce the contract and to invoke arbitration under the 13(c) Agreement. *In Re Generali COVID-19 Travel Insurance Litigation*, 576 F.Supp.3d 36 (S.D.N.Y. 2021) (The language in the agreement that explicitly stated that "companies offering products or services through [VRBO]. . . are the beneficiaries of this arbitration agreement" which "clearly express[ed] an intent to confer on companies offering their products through VRBO the right to invoke the arbitration agreement.")

Only where there is an express provision negating or limiting away a named third-party beneficiary's right to enforce the contract does a third-party beneficiary lack standing to enforce the contract.

There is nothing in the contract negating Claimants' rights as the expressly named third-party beneficiaries to enforce the 13(c) Agreement on their own, without the approval of the union.

"Where, as in the contract which the arbitrator was here called upon to interpret, 'the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation. Effect must be given to the intent as indicated by the language employed.'" *Western Union Tel. Co. v. American Communications Assn, C.I.O.,* 299 N.Y. 177, 184 (1949), *quoting Settle v. Van Evrea,* 49 N.Y. 280, 281 (1872).

In the case at bar, there was nothing for the Arbitrator to interpret. The express language of the contract specifically conferred third-party beneficiary status upon the Claimant transit workers, which as a matter of law, conferred upon them standing to enforce the agreement absent a provision negating the parties' intent to permit enforcement by third-parties.

By finding that Claimants could not assert their claims under the contract without the assistance of the union, the Arbitrator rewrote the contract to include provisions to negate the Claimants' rights as the intended third-party beneficiaries

to enforce the Agreement, and to limit their right to enforce the contract exclusively to the union.

C. The Arbitrator Rewrote The Contract, Changing Permissive Terms Into Mandatory Terms

In addition to rewriting Paragraph (20) which clearly states that the employee or the union can assert the transit workers' 13(c) rights [R-120], the Arbitrator also rewrote permissive terms of the contract into mandatory terms.

Page 1, Paragraph 3 of the 13(c) Agreement states "Employees may assert claims through their representative." R-106. The Arbitrator changed the permissive nature of this sentence to state that represented employees must assert their claims through the union.

Paragraph (15) of the 13(c) Agreement states that "any party to the dispute may submit the controversy to final and binding arbitration. . . [T]he Recipient or the union may request the American Arbitration Association to furnish an arbitrator and administer a final and binding reslution of the dispute under its Labor Arbitration Rules. If the employees are not represented by a union for purposes of collective bargaining, the Recipient or employee(s) may request the Secretary of Labor to designate a neutral third party or appoint a staff member to serve as artibrator and render a final and binding determination of this dispute." R-118.

The Arbitrator rewrote this paragraph to state that if a transit worker is represented by a union, then the union must make the claim, and only if the employee is not represented by the union, then the employee may request the Secretary of Labor to appoint an aribtrator.

Paragraph (16) of the 13(c) Agreement states that the grant Recipient will make the necessary arrangements so that any employee affected, as a result of the project, may file a written claim through his/her Union representative with the Recipient within sixty (60) days of the date the employee is terminated or laid off as a result of the Project." R-118.

The Arbitrator rewrote this provision to state that "any represented employee affected must file a written claim through his/her Union representative."

Paragraph (16) continues that "(t)he Recipient will fully honor the claim, making appropriate payments, or will give written notice to the claimant and his/her representative of the basis for denying or modifying such claim, giving reasons therefore. In the event the Recipient fails to honor such claim, the Union may invoke the following procedures for further joint investigation of the claim by giving notice in writing of its desire to pursue such procedures." R-118.

The Arbitrator rewrote this paragraph to state "only the Union may invoke procedures for joint investigation of the claim for represented transit workers."

Many other sections of the 2011 13(c) Agreement invoke the word "shall". It was error to infer a mandatory duty from permissive language in the employee protective agreement, and upon that inference, strip away Claimants' statutory rights to assert claims under the very statute that was passed to protect transit workers, regardless of union status.

While the 13(c) Agreement allows the union to make the 13(c) claims on behalf of its members, it does not preclude members from making the claims themselves. Nor does it require the represented transit worker to go through his or her union representative.

If the 2011 13(c) Agreement contained such a provision, it would be unenforceable as violative of the clear public policy encased in the statute, which is meant to protect all transit employees, regardless of their union status and regardless of whether the union would assert their claims on their behalf or not.

D. The Arbitrator Rewrote The Agreement To Treat Represented Transit Workers Differently From Non-Represented Transit Workers

The 13(c) Agreement and the Certification Letter repeatedly refer to the transit workers as "employees" without differentiating between represented employees and non-represented employees. By finding that the represented transit workers lacked standing to enforce the contract without the approval of the union rewrites all of the provisions of the 13(c) Agreement that apply to "employees", without differentiation to union status.

Paragraph (4) states that "[i]f at any time, applicable law or contracts permit or grant to employees covered by this arrangement the right to utilize any economic measures, nothing in this arrangement shall be deemed to foreclose the exercise of such right", without differentiation between union and non-union employees. R-108.

Paragraph (6)(a) states that whenever "an employee" is "placed in a worse position with respect to compensation as a result of" a federally-funded Project, "the employee shall be considered a 'displaced employee'" shall be paid "displacement allowance" for up to six years. R-110. There is no differentiation between represented and unrepresented employees.

Paragraph (7)(b) of the 13(c) Agreement states that "[a]n employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position the employee holds is abolished as a result of

the Project, or when the position the employee holds is not abolished but the employee loses that position as a result of the federally-funded Project," again, without differentiation. R-112.

Paragraphs 8, 9, 10, 11, 12 and 13 all refer to the "employee" without differentiating between union and non-union employees.

Paragraph (15) states that in the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be the employee's obligation to identify the Project and specify the pertinent facts of the Project relied upon." R-118. It does not say it is the union's responsibility to do so for represented employees.

Paragraph (22) states that "[i]n the event of the acquisition, assisted with Federal funds, of any transportation system or services, or any part or portion thereof, the employees of the acquired entity shall be assured employment, in comparable positions." R-121. This right is conferred on all employees, regardless of union status.

The Arbitrator rewrote the agreement to treat represented and non-represented transit workers differently.

E. Claimants Asserted Their 13(c) Claims Through Union Representative Shop Steward Nicholas Viola

Section (16) of the 2011 13(c) Agreement states that "any employee affected as a result of the project, may file a written claim through his/her

Union representative." R-118. The term "representative" in Section (16) is not defined.

Even if the 2011 13(c) Agreement required that union members assert their claims through a union representative, and even if such a requirement did not violate the public policy behind 49 USC 5333, Claimants complied with that provision as they asserted their claims through shop steward Nicholas Viola, who signed the petition in the proceeding to compel arbitration. R-371. As outlined in the Reply Attorney Affirmation in further support of petition to compel arbitration, "[t]through the assistance of shop steward and union representative Nicholas Viola, who is also a Petitioner herein, Claimants sought legal assistance to invoke their 13(c) claims." R-387.

This was put before the Arbitrator as part of Claimants' opposition to Respondents' motion to dismiss for lack of standing. As one of the attorneys representing Claimants from the beginning, Gail M. Blasie had personal knowledge that Nicholas Viola was a shop steward, and that it was through him that the Claimants sought legal assistance to invoke their 13(c) rights because the union would not.

Attached to the Verified Petition to compel arbitration is the "DOL Office of Labor-Management Standards, Questions and Answers", at Page 3,

under heading "How Does A Transit Employee File A Claim Under Section 13(c)", the DOL stated:

> A transit employee who is represented by a union should contact his [or her] union representative for a copy of the Section 13(c) arrangements and for guidance as to how to file a claim. R-375.

The Claimants inquired of Nicholas Viola, a union member and shop steward, regarding their 13(c) claims. Nicholas Viola in turn contacted legal counsel, who filed the claim on their behalf. Therefore, Claimants were assisted in their claims by a "representative" who was a union member and steward, organization.

Therefore, even if the Arbitrator is correct that the 2011 13(c) Agreement requires that only the union can assert represented transit workers' 13(c) rights, and if such a provision is not violative of the statute and public policy, the Claimants did bring their claims through the assistance of shop steward Nicholas Viola.

The Arbitrator found that Mr. Viola's participation was insufficient, as the assertion of the claims had to have the support of the union. R-95. The Arbitrator rewrote the 2011 13(c) Agreement to state that "claims must be brought by any covered employee or his/her representative only with the union's approval". R-120, ¶ 20. That is not what Paragraph (20) states. R-120.

Claimants do not assert that Claimants' attorneys acted on behalf of the union or were authorized by the union to assert Claimants'13(c) claims. However, the Claimants' 13(c) claims were brought to union representative Nicholas Viola, who in turn facilitated Claimants' assertion of their 13(c) rights through legal counsel.

The Arbitrator then opined that even if Claimants had standing to bring their 13(c) claims on their own, they had to go through the Department of Labor and could not seek arbitration with the American Arbitration Association, and therefore Claimants' claims must be dismissed. R-99.

In support of this proposition, the Arbitrator points to Paragraph 5 of the Certification Letter, which states:

> Should a dispute remain after exhausting any available remedies under the protective arrangements and absent mutual agreement to utilize any other final and binding resolution procedure, any party to the dispute may submit the controversy to final and binding arbitration. With respect to a dispute involving a union not designated above, if a component of its parent union is already subject to a protective arrangement, the arbitration procedures of that arrangement will be applicable. If no component of its parent union is subject to the arrangments, the Recipient or the union may request the American Arbitration Association to furnish an arbitrator and administer a final and binding reslution of the dispute under its Labor Arbitration Rules. If the employees are not represented by a union for purposes of collective bargaining, the Recipient or employee(s) may request the Secretary of Labor to designate a neutral third party or appoint a staff member to serve as artibrator and render a final and binding determination of this dispute. R-128.

However, the Secretary of Labor only gets involved if the claims are raised by unrepresented workers. Since Claimants are members of a collective bargaining unit, and the 2011 13(c) Agreement is silent as to what body the represented workers whose union will not assert their 13(c) claims can go, the Claimants were entitled to arbitrate this dispute through the American Arbitration Association.

CONCLUSION

The Arbitrator rewrote the provisions of the 13(c) Agreement and Certification Letter (1) to negate Paragraph (20) which specifically states that employees or their union representatives can enforce the 13(c) Agreement; (2) to include a provision negating the Claimants' third-party beneficiary right to enforce the 13(c) Agreement without the assistance of the union; and (3) transforming permissive provisions of the 13(c) Agreement into mandatory provisions, requiring represented transit workers to assert their rights under the 13(c) Agreement through the union.

This is incorrect, and antithetical to the public policy principles and the actual language of 49 USC 5333(b) which is meant to protect the individual transit workers, regardless of union status. The Court below erred when it denied Claimants' Petition to Vacate The Arbitrator's Award.

Dated: December 8, 2022
Garden City, New York

GAIL M. BLASIE, PC

____
By: Gail M. Blasie, Esq.
Attorney for Petitioners-Appellants-Claimants
300 Garden City Plaza, Suite 226
Garden City, New York 11530
(516) 457-9169
blaze@cal.net

PRINTING SPECIFICATIONS STATEMENT

I, Gail M. Blasie, attorney for Petitioners-Appellants, does hereby certify pursuant to the rules of the Appellate Division as follows:

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Dated: December 8, 2022

___________/s/______________

GAIL M. BLASIE, ESQ.

CPLR 5531 STATEMENT

New York Supreme Court
Appellate Division - Second Department

In the Matter of the Application of ALTHEA ADAMS, ET AL,
PETITIONERS-APPELLANTS,

Docket No.
2022-05162

-against-

VEOLIA TRANSPORTATION SERVICES, A/K/A TRANS-DEV,
and COUNTY OF NASSAU
Respondents-Respondents,

and

METROPOLITAN TRANSPORTATION AUTHORITY and
MTA-LONG ISLAND BUS,
Respondents.

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1. The Index No. in the Court below is Nassau County Supreme Court, Index No. 614521/2021.

2. The full names of the parties to the action below have not changed, except Petitioners-Appellants have agreed to not appeal that part of the Supreme Court's Decision denying vacatur of the Arbitrator's decision dismissing the action against Metropolitan Transportation Authority and MTA-Long Island Bus.

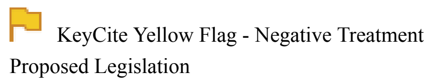
3. The special proceeding was commenced in Nassau County Supreme Court on November 15, 2021 by the filing of a Notice of Petition and Petition.

4. All Respondents appeared.

5. The Nature And Object Of The Action to vacate an arbitrator's award.

6. This appeal is from (1) the Decision of the Hon. Thomas Rakemaker, dated March 28, 2022 (Supreme Court, Nassau County), and entered in the Nassau County Clerk's Office on April 13, 2022.

7. This appeal is on the Record method.


KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle III. General and Intermodal Programs (Refs & Annos)
Chapter 53. Public Transportation (Refs & Annos)

49 U.S.C.A. § 5333

§ 5333. Labor standards

Effective: October 1, 2012
Currentness

(a) Prevailing wages requirement.--The Secretary of Transportation shall ensure that laborers and mechanics employed by contractors and subcontractors in construction work financed with a grant or loan under this chapter be paid wages not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor under sections 3141 through 3144, 3146, and 3147 of title 40. The Secretary of Transportation may approve a grant or loan only after being assured that required labor standards will be maintained on the construction work. For a labor standard under this subsection, the Secretary of Labor has the same duties and powers stated in Reorganization Plan No. 14 of 1950 (eff. May 24, 1950, 64 Stat. 1267) and section 3145 of title 40.

(b) Employee protective arrangements.--(1) As a condition of financial assistance under sections 5307-5312, 5316, 5318, 5323(a)(1), 5323(b), 5323(d), 5328, 5337, and 5338(b) of this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections 5307-5312, 5316, 5318, 5323(a)(1), 5323(b), 5323(d), 5328, 5337, and 5338(b) shall specify the arrangements.

(2) Arrangements under this subsection 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;

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(B) the continuation of collective bargaining rights;

(C) the protection of individual employees against a worsening of their positions related to employment;

(D) assurances of employment to employees of acquired public transportation systems;

(E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and

(F) paid training or retraining programs.

(3) Arrangements under this subsection shall provide benefits at least equal to benefits established under section 11326 of this title.

(4) Fair and equitable arrangements to protect the interests of employees utilized by the Secretary of Labor for assistance to purchase like-kind equipment or facilities, and grant amendments which do not materially revise or amend existing assistance agreements, shall be certified without referral.

(5) When the Secretary is called upon to issue fair and equitable determinations involving assurances of employment when one private transit bus service contractor replaces another through competitive bidding, such decisions shall be based on the principles set forth in the Department of Labor's decision of September 21, 1994, as clarified by the supplemental ruling of November 7, 1994, with respect to grant NV-90-X021. This paragraph shall not serve as a basis for objections under section 215.3(d) of title 29, Code of Federal Regulations.

CREDIT(S)

(Pub.L. 103-272, § 1(d), July 5, 1994, 108 Stat. 835; Pub.L. 104-88, Title III, § 308(e), Dec. 29, 1995, 109 Stat. 947; Pub.L. 105-178, Title III, § 3029(b)(9), June 9, 1998, 112 Stat. 372; Pub.L. 107-217, § 3(n)(3), Aug. 21, 2002, 116 Stat. 1302; Pub.L. 109-59, Title III, §§ 3002(b)(4), 3031, Aug. 10, 2005, 119 Stat. 1545, 1625; Pub.L. 112-141, Div. B, § 20030(h), July 6, 2012, 126 Stat. 731.)

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49 U.S.C.A. § 5333, 49 USCA § 5333
Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

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