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

September 16, 2024

[redacted]

By Electronic Mail Only

RE: **DETERMINATION**
PENDING FTA GRANT APPLICATIONS [redacted]

Dear [redacted]

This is to provide the Department of Labor's determination of outstanding issues not resolved by the [redacted] and the [redacted] through negotiations ordered by the Department. As explained below, Florida legislation CS/CS/SB 256: Employee Organizations Representing Public Employees (CS 256), interferes with transit employees collective bargaining rights and a waiver of certain provisions of CS 256 is required to ensure [redacted] can comply with its 13(c) obligations.

BACKGROUND

A. Statutory Background

The Federal Transit Act (the Act) requires, as a condition of federal financial assistance, that the interests of employees affected by the assistance be protected under arrangements the Secretary of Labor certifies are fair and equitable, 49 U.S.C. § 5333(b)(1) (commonly referred to as Section "13(c)"). The Act specifically provides:

> Arrangements . . . shall include provisions that may be necessary for –

(A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
(B) the continuation of collective bargaining rights;
(C) the protection of individual employees against a worsening of their positions related to employment;
(D) assurances of employment to employees of acquired public transportation systems;
(E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and
(F) paid training or retraining programs.

49 U.S.C. § 5333(b)(2) (emphasis added).

CS 256 contains several relevant requirements and prohibitions regarding certain employee organizations that implicate Section 13(c). Section 3 prohibits employee organizations from having dues and uniform assessments deducted and collected by the employer. Section 4 augments the requirements in Florida law for employee organizations to register with the PERC and renew their registration annually. As part of the annual application for renewal of registration, a union must provide details regarding the number of dues-paying represented employees with valid signed membership authorization forms. If fewer than 60 percent of the employees eligible for representation in the bargaining unit pay dues during the union's last registration period, then the union must petition for recertification as the exclusive representative of all employees in the bargaining unit. Additionally, CS 256 provides that an employer may challenge the accuracy of the union's application for renewal of registration. If the PERC finds the application is inaccurate or does not comply with the law, then it shall revoke the union's registration and certification.

CS 256 allows the PERC to waive the applicability of these provisions to transit grantees. A grantee may petition the PERC for a waiver "after it has been notified by the Department of Labor that the [grantee's] protective arrangement covering mass transit employees does not meet the requirements of 49 U.S.C. s. 5333(b) and would jeopardize the employer's continued eligibility to receive Federal Transit Administration funding." CS 256, Section 2 (codified at Fla. Stat. § 447.207(12)). The PERC may waive the provisions listed above "to the extent necessary for the public employer to comply with the requirements of 49 U.S.C. s. 5333(b)." *Id.*

B. Background on [redacted] and [redacted] Collective Bargaining Agreement

[redacted] and [redacted] currently have a collective bargaining agreement that, by its terms, is effective from May 21, 2022 to May 20, 2025. Article 1 of the CBA recognizes [redacted] Council 79 as the sole and exclusive bargaining representative of employees within the bargaining unit concerning the matters of rates of pay, wages, hours, and other terms and conditions of employment. Article 2 of the CBA requires that [redacted] deduct union dues upon receipt of written authorization from an employee.

On August 7, 2023, [redacted] and [redacted] entered into a Memorandum of Understanding (MOU) "[t]o comply with current Florida law." The MOU states the parties agree "to delete [the article] concerning dues check off from the current collective bargaining in effect between the parties so

long as Florida SB 256 and the resulting Florida statutory provisions remain in effect and/or applicable to represented employees at [redacted] The parties also agreed that the MOU "will expire at midnight on May 20, 2025 or when Florida SB 256 and the resulting Florida statutory provisions are no longer in effect and/or applicable to represented employees at [redacted] whichever is sooner." Further, the MOU states it "is made on a non-precedent setting basis and will not be relied upon by either party as a past-practice for any purpose or under any circumstance."

C. Administrative Proceedings

On April 29, 2024, [redacted] objected to the Proposed Terms for Employee Protection Certification contained in the Department's respective referral letters for the above captioned grants for [redacted] asserted that CS 256 "prevents [redacted] from making the bargained-for dues deductions required by its CBA" and "from engaging in negotiations in future CBAs concerning dues checkoff clauses. Furthermore, by creating a restrictive system of annual recertification elections for public sector unions . . . CS 256 []interferes with the exclusive representation [rights] of bargaining unit employees."

In response, in a letter dated May 13, 2024, [redacted] asserted that it and [redacted] entered into a Memorandum of Understanding (MOU) on August 17, 2023, that rectified any conflict between CS 256 and 49 U.S.C. § 5333(b) (13(c) or the Act). [redacted] asserted that in the MOU, the parties agreed to delete from the collective bargaining agreement all language providing for dues checkoff for as long as CS 256 was in effect. [redacted] further stated that [redacted] "ha[d] not shown, or even alleged, that it has moved for recertification and that Florida has denied recertification." Arguing that "[u]nless and until that happens, [redacted] claim that employee rights, privileges, and benefits under existing collective bargaining agreements or the continuation of existing collective bargaining rights has somehow been harmed by SB 256's amendment to §447.305 is premature."

On May 13, 2024, the Department found [redacted] objection sufficient and directed the parties to engage in negotiations for a period not to exceed 30 days. The parties were to address:

1. Whether the Grantee will request a waiver of provisions from the PERC of the state statute's applicability to public employers whose eligibility for federal assistance is compromised. CS 256, Section 2 (to be codified at Fla. Stat. § 447.207(12)).
2. Whether there are any other provisions in CS 256 that cannot be waived which prevent the Grantee from complying with the requirements of 49 U.S.C. § 5333(b).
3. Whether the failure of Grantee to comply with the dues deductions provision of its collective bargaining agreement with AFSCME can be remedied by obtaining a waiver from PERC or otherwise.

The parties were unable to reach a resolution of the issues. Therefore, on June 27, 2024, the Department ordered briefing on the issues. The parties were directed to address the following issues:

1. During the MOU negotiations, did the parties discuss the possibility of seeking a waiver of CS 256's provisions from PERC? If so, what were the positions of the parties at that time about seeking a waiver and the effect of the MOU on this possibility?
2. The MOU appears to be a temporary and limited agreement in that it states it "will expire at midnight May 20, 2025, or when Florida SB 256 and the resulting Florida statutory provisions are no longer in effect and/or applicable to represented employees at [redacted] whichever is sooner." Explain how an agreement limited in this manner does or does not allow a Grantee to abide by its Section 13(c) obligations, which extend for the life of the project to which the Department's certification applies, whether that is the period over which operating assistance is used to pay salaries or the useful life of a funded vehicle or facility.
3. Provide a justification for how bargaining can or cannot continue regarding dues deductions in light of CS 256's restrictions.
4. Explain how CS 256's amendments to registration and recertification requirements do or do not interfere with Section 13(c)'s protection of collective bargaining rights.

In accordance with the Department's Briefing Order, the parties submitted initial briefs on July 19, 2024. [redacted] also submitted a reply brief on August 2, 2024. JTA did not submit a reply brief.

POSITIONS OF THE PARTIES

A. [redacted]

[redacted] initial brief outlined its positions on the four issues raised by the Department.

First, [redacted] argues that the parties did not discuss the PERC waiver process or 13(c) as part of the MOU since no grant referral was pending at the time. [redacted] interprets the absence of discussion on the PERC waiver process in CS 256 to mean that the MOU was not a privately negotiated protective agreement concerning 13(c), and the matter has not reached a mutually accepted resolution.

Second, [redacted] argues that the expiration of the MOU is not an acceptable protective agreement because CS 256 prevents the parties from engaging in collective bargaining over dues deductions. [redacted] also notes that the Department has previously stated that the grantee must continue the collective bargaining process through the life of the grant, which in this case would extend beyond the expiration of the MOU.

Third, [redacted] contends that CS 256's prohibition of dues deduction bars the implementation of any agreement between the parties until [redacted] obtains a waiver from PERC. In [redacted] view, the dues deduction prohibition prevents the organization from engaging in good faith collectively bargaining on dues checkoff, as CS 256 directly obstructs these negotiations.

Last, [redacted] argues that the registration and recertification requirements of CS 256 would prematurely terminate the legal collective bargaining rights of unions due to the burdensome requirements imposed annually. Additionally, [redacted] argues that these new requirements have already diminished the collective bargaining rights of [redacted] represented transit employees, and the Department should not wait until a union is decertified before providing a protective agreement to preserve all legal collective bargaining rights.

[redacted] also provided a reply brief to the arguments (discussed below) presented by [redacted] first notes that [redacted] consistently conceded that the MOU did not contain any consideration of a 13(c) waiver and was done to comply with CS 256, and as such it materially affects and diminishes collective bargaining rights of [redacted] members. Without the waiver, [redacted] argues that [redacted] cannot deduct dues and that potential substantive discussions are not enough at the moment. AFSCME also countered that there was no discussion of a waiver because there was no pending [redacted] transit grant at the time, and [redacted] was just following a previous pattern in waiting for the federal transit grant before requesting a waiver.

[redacted] also argues against [redacted] contention that the expiration date of the MOU has no impact. [redacted] reiterates that the planning for future discussions alone does not resolve the 13(c) conflict. [redacted] argument on the employer's duty to reach an agreement on dues deduction also misses the point, according to [redacted] as [redacted] refusal to obtain a PERC waiver prevents the implementation of dues deductions even with both parties' agreement. [redacted] argues that nothing in the MOU changes the fact that dues deduction is a mandatory subject of bargaining under Florida Law, that CS 256 removed the prior right to bargain such a provision, and that DOL has already determined that a prohibition on dues deductions does not comply with 13(c). Finally, [redacted] argues that [redacted] contention that recertification requirements are not burdensome contradicts DOL findings and states that CS 256's draconian reporting requirements present an annual existential threat to transit unions above and beyond other certification requirements.

B. [redacted]

[redacted] addressed the issues ordered by the Department in its initial brief.

First, [redacted] argued that neither party had raised the possibility of [redacted] seeking a waiver of CS 256's provisions from PERC. Rather, [redacted] asserts, the parties entered into the MOU on the agreement that [redacted] was amenable to remove the dues checkoff requirements if [redacted] agreed that the MOU would expire if CS 256 no longer applied.

Second, [redacted] provided several arguments as to why the MOU is not a temporary and limited agreement that diminishes the collective bargaining rights of employees: (A) the parties agreed to the MOU with an expiration date aligned with the CBA with the understanding that negotiations would occur before expiration, and that, under DOL's theory, most dues checkoff provisions would likewise violate 13(c) if they are contained in a CBA with an expiration date; (B) that the NLRB previously found that employers may not unilaterally stop union dues checkoffs after a CBA expires, and this same principle applies to MOUs which also reflect an understanding of dues checkoffs; and (C) that under the NLRA, an employer may unilaterally

discontinue dues checkoffs with a legal basis, a principle that [redacted] argues should also apply to Section 13(c) given the statute's silence on dues checkoffs.

Third, [redacted] argued that bargaining could continue even with CS 256 restrictions because nothing prohibits it, and [redacted] continued to bargain with AFSCME over how the parties should proceed under the new law. Additionally, [redacted] believes bargaining will continue given the parties' long bargaining relationship that will allow for substantive discussions on CS 256 restrictions.

Finally, [redacted] addresses the two main new requirements under CS 256 augmenting annual registration and recertification obligations by: (1) requiring unions to report the number of represented employees who are paying dues and, if their dues-paying members constitute fewer than 60 percent of represented employees, then the union must petition for recertification as the exclusive representative of bargaining unit employees; and (2) authorizing the PERC to ultimately revoke a union's registration and certification if a union submits an inaccurate application for re-registration or does not comply with the law. [redacted] argues these requirements do not diminish collective bargaining rights and can demonstrate continuing majority status for public sector unions each year. [redacted] states that 13(c) rights are not necessarily implicated by these new requirements, as other large businesses in the state must also register, and that the threshold reporting requirement has no substantive effect on the process of collective bargaining once the union's certification is approved in a presumably perfunctory manner each year.

DETERMINATION

In assessing whether collective bargaining rights are continued and benefits maintained in accordance with 13(c)'s requirements, DOL looks to "standards of collective bargaining established by federal labor policy." *See Amalgamated Transit Union, AFL-CIO v. Donovan*, 767 F.2d 939, 948 (D.C. Cir. 1985). "'The continuation of collective bargaining rights' means, at a minimum, that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." *Id.* at 951. "Collective bargaining does not exist if an employer retains the power to establish wages, hours and other conditions of employment without the consent of the union or without at least first bargaining in good faith to impasse over disputed mandatory subjects." *Id.*

Section 13(c)(2) prohibits infringement of collective bargaining processes during the entirety of a federally funded project. [redacted] must continue to abide by the commitments made in the certified protective agreements for the life of the project to which the Department's certification applies, whether that is the period over which operating assistance is used to pay salaries or the useful life of a funded vehicle or facility. *See* Boise, City of, Certification, ID-90-X013-A, November 24, 1987, p. 4, item 6 (explaining that the grantee "must continue to abide by the commitments made in the [13(c)] agreement for the life of the grant contract or contracts to which the agreement was applied"). Even if the collective bargaining agreement expires mid-project, [redacted] assurance to continue collective bargaining pursuant to 49 U.S.C. § 5333(b)(2)(b) does not. For as long as the grantee is using federal funds conditioned on abiding by the Act's protections, the grantee must continue its collective bargaining process, even following the expiration of a collective bargaining agreement. *See City of Macon v. Marshall*, 439 F. Supp. 1209 (1977) (upholding

Department's refusal to certify where city failed to continue collective bargaining rights after acquisition and expiration of the collective bargaining agreement); *see also Donovan*, 767 F.2d at 957 (Ginsburg, J., concurring) ("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.").

The protections of 13(c), ensure that the processes of representation and collective bargaining continue and are not at the mercy of changing state laws while federal funds (and the benefits flowing from those funds) are in place. In other words, "[t]he substantive provisions of collective bargaining agreements may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat." *Donovan*, 767 F.2d at 953.

CS 256, via state fiat, makes several changes that interfere with transit employees' collective bargaining rights absent a waiver from the PERC. First, CS 256, Section 3 removes longstanding collective bargaining rights by prohibiting a public employer from deducting union dues and uniform assessments from the salaries of transit employees (i.e., dues checkoff). In doing so, CS 256 removes a critical mandatory subject of collective bargaining. As the NLRB explained:

> "An employer's unilateral cancellation of dues checkoff when a collective-bargaining agreement expires both undermines the union's status as the employees' collective-bargaining representative and creates administrative hurdles that can undermine employee participation in the collective-bargaining process. Cancellation of dues checkoff eliminates the employees' existing, voluntarily-chosen mechanism for providing financial support to the union. By definition, it creates a new obstacle to employees who wish to maintain their union membership in good standing. This is significant, because employees who fail to take proactive steps to maintain their membership in the face of this new administrative hurdle lose their right to participate in the union's internal affairs, including matters directly related to the negotiations, such as the choice of a bargaining team, setting bargaining goals, and strike-authorization and contract-ratification votes. Such a change also interferes with the union's ability to focus on bargaining, by forcing it to expend time and resources creating and implementing an alternate mechanism for dues collection during a critical bargaining period. Finally, an employer that unilaterally cancels dues checkoff sends a powerful message to employees: namely, that the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them."

Valley Hosp. Med. Ctr., Inc., 371 NLRB No. 160, 2022 WL 5179877, at *12 (Sept. 30, 2022) (quoting *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1657, 2015 WL 5047778 (2015)).

The parties' MOU does not resolve this conflict with the collective bargaining rights protected by 13(c). The MOU is a modification to the parties' CBA induced by CS 256's prohibition on dues deduction. By its own terms, the MOU expires concurrently with the parties' CBA "or when Florida SB 256 and the resulting Florida statutory provisions are no longer in effect and/or applicable to represented employees at [redacted] whichever is sooner." The MOU also does not

appear to be an attempt to reach alternative arrangements pursuant to 13(c). The MOU does not address 13(c) rights and the parties did not discuss 13(c) during the negotiations. The MOU does not evidence that [redacted] agreed to permanently waive its right to negotiate over the subject of dues deductions in the future or to concede any rights pursuant to 13(c).

As such, in order for bargaining rights to continue under 13(c), [redacted] and [redacted] must be able to bargain over the critical subject of dues checkoff. JTA states it "plans to negotiate in the months before [the MOU's] expiration" and explains that, under principles of federal labor law, the parties' understanding about dues checkoffs may continue until replaced by a new CBA. But the fact remains that absent a waiver of CS 256's requirements, there is only one result of any such bargaining: prohibition of dues checkoff. As the NLRB observed in *Valley Hosp. Med. Ctr., Inc.*, 2022 WL 5179877, at *12, unilateral elimination of a union's ability to collect dues through a voluntary checkoff mechanism forces a union "to expend time and resources creating and implementing an alternate mechanism for dues collection during a critical bargaining period" thereby risking reducing its effectiveness in bargaining for employees' wages, hours and terms and conditions of employment, all to the potential detriment of workers.

DOL does not, as [redacted] alleges, presume that there is a duty for [redacted] to *agree* to dues checkoff in the future. But, "at a minimum," [redacted] must be able to engage in "'good faith' negotiations" with AFSCME regarding dues checkoff, and such minimum is not met when [redacted] is actually unable by law to agree to dues checkoff. *Donovan*, 767 F.2d at 951. Collective bargaining is, by its very nature, a process of considered trade-offs between parties, each of whom assesses their respective interests in the context of their respective "needs." What may seem important to one side may be unimportant to the other, and each may articulate the importance they give to a subject or may choose to leave their bargaining counterpart guessing. And each may or may not be willing to trade away something of substance in one area to obtain something of substance in another. In enacting CS 256, Florida unilaterally removed dues checkoff from bargaining and precludes [redacted] from bargaining in good faith to impasse about dues deductions. Under the principles of collective bargaining, an employer would have to negotiate with employees if it wished to do away with dues checkoff and would likely need to offer certain benefits, rights, or conditions of value to employees in exchange. In contrast, by enacting CS 256, the law mandates a result in favor of the employer without the prerequisite negotiations that would have encouraged employers to offer benefits of value to induce such a concession from employees. *Cf. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 167 (1st Cir. 2005) (explaining that the employer "cannot cure [a] violation with a post-hoc offer to negotiate," and offering to negotiate "after the decisions were made . . . represents essentially an offer to negotiate over a 'fait accompli'").

[redacted] position is not akin to the employer's position in *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, 2019 WL 1752821 (2019), where the NLRB found the employer had a sound arguable basis for its belief that the CBA authorized the employer to discontinue dues checkoff. The CBA stated the employer would deduct union dues upon receipt of a signed authorization "conforming to applicable law." *Id.* at *1. After Wisconsin enacted legislation changing requirements for dues-checkoff authorizations, the employer stopped dues deduction based on its belief that existing dues deductions authorizations did not comply with the state law changes. Unlike the employer in *Metalcraft*, [redacted] is a public employer who has agreed to abide by 13(c)'s protections

for transit employees' collective bargaining benefits and rights. [redacted] inability to bargain over dues deductions was the direct result of Florida's decision to remove that subject from the collective bargaining between its sub-components and its public employees. Section 13(c)'s protections would be eviscerated if a state's unilateral actions were deemed a valid basis for a transit agency to refuse to abide by a CBA or to bargain in good faith or otherwise ignore transit employees' 13(c) protections. Such an interpretation of 13(c) would give states the authority to unilaterally eliminate collective bargaining benefits and rights available to public transit employees. Section 13(c) was enacted to prevent just such situations. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 25 n.8 (1982) (noting "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)").

Like the removal of bargaining over dues checkoff, CS 256, Section 4 also interferes with transit workers' collective bargaining rights. It undermines the presumption of the continuing majority status of a certified or recognized union, a foundational principle of collective bargaining relationships. The state law expands the methods by which transit employees lose their designated and exclusive bargaining representative without regard to the existence of any evidence that the union has lost its majority status. *Cf. Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 327 (D.C. Cir. 2015) ("The Board has long maintained a distinction between an employee's desire to be represented by a union, and his or her desire to be a member of a union. Whether a union has majority support turns on whether most unit employees wish to have union representation, not on whether most unit employees are members of a particular union." (internal quotation marks omitted)). This provision, standing alone, sufficiently interferes with transit employees' collective bargaining rights under Section 13(c), and it is unaddressed by the parties' MOU.

Contrary to [redacted] argument, [redacted] does not need to have already undergone and failed the annual recertification process for the Department to find that the provision fails to allow for the continuation of collective bargaining rights as required by 13(c). Additionally, the provision has an immediate impact on [redacted] in that it must redirect its resources toward ensuring it meets the re-registration requirements, including that sufficient members have paid dues (an effort compounded by the abrupt loss of dues checkoff), and potentially prepare for a re-certification campaign.

Moreover, Section 13(c) requires that arrangements that ensure continuation of collective bargaining rights be in place prior to certification. *See Amalgamated Transit Union, AFL-CIO v. Brock*, 809 F.2d 909, 917 (D.C. Cir. 1987). CS 256 is in conflict with those arrangements between [redacted] and [redacted] Without a waiver of CS 256's provisions, [redacted] will not be able to comply with their previously certified protections and continue their eligibility for federal assistance, which is subject to compliance with the Act. *See Donovan*, 767 F.2d at 947 n.9 ("hold[ing] that where a state, through its laws or otherwise, fails to satisfy the requirements of § 13(c), the Secretary must cut off funds by denying certification"); *Loc. Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass.*, 666 F.2d 618, 634 (1st Cir. 1981) (explaining that if a state currently receiving transit funds "chang[es] its laws contrary to the policy of s 13(c)," then the Secretary may enforce the statutory scheme by "halt[ing] the flow of funds").

CONCLUSION

The changes required by CS 256 impermissibly interfere with the collective bargaining rights of transit workers protected by 13(c) and a waiver of these requirements is required to ensure [redacted] can comply with its 13(c) obligations.

In the event that a waiver is obtained and submitted to the Department, the Department will issue final certifications that include the waiver as part of its protective arrangements for any pending grant applications. The Department will also include the waiver as part of the protective arrangements in referrals for all future grants. The Grantee will notify the Department if at any time the waiver expires or becomes inapplicable.

To avoid any *ex parte* communication, if you have any questions or need any additional information, please email OLMS-DSP@dol.gov, with a copy to all parties indicated in this letter.

Sincerely,

Karen Torre

Karen Torre, Chief
Division of Interpretations and Regulations
torre.karen@dol.gov

cc: [redacted]