In the Matter of Arbitration between: SOUTHWEST REGIONAL COUNCIL OF CARPENTERS and BOMBARDIER MASS TRANSIT CORPORATION and NORTH COUNTY TRANSIT DISTRICT (Section 13(c) Protections)	)	**ARBITRATOR'S** **OPINION** **AND** **AWARD** AAA Case No. 01-16-0004-1216

Impartial Arbitrator: Fredric R. Horowitz, Esq.

Appearances:

Union: Yuliya Mirzoyan, Esq.
DeCarlo & Shanley, APC

Bombardier: Bruno W. Katz, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP

District: G. Kent Woodman, Esq. and
Jane Sutter Starke, Esq.
Thompson Coburn LLP

Hearings Held: July 10 and 11, 2017
San Diego, California

Award Due: November 10, 2017

Award Date: October 31, 2017

This arbitration arises under Paragraph (15) of the Unified Protective Arrangement applicable to the parties pursuant to 49 U.S.C. §5333(b) ("UPA") [JX 1]. The parties concur the grievance at issue is properly before the undersigned for final and binding resolution in this proceeding [TR 10].

MATTERS AT ISSUE

The parties were unable to agree on a precise statement of the issues to be decided in this proceeding but stipulated the Arbitrator would have the authority to frame the issues after the case was submitted for decision [TR 10-11].

The Union has proffered the following statement of the issues [TR 11]:

1. Have the District and/or Bombardier violated 49 U.S.C. §5333(b) with respect to employees represented by the Union who used to work for Herzog and/or Kabler?

2. If so, what is the appropriate remedy?

The District and Bombardier jointly countered with a different statement of the issues [TR 11-12]:

1. Whether employees represented by the Union are entitled to 13(c) benefits under the facts of the case?

2. If yes, whether there was a valid and enforceable prior collective bargaining agreement between the Union and the prior employers?

3. If yes, the remedy should be an order for the Union and Bombardier to collectively bargain.

From the record presented, the issues presented for decision in this proceeding are determined to be those as framed by the Union:

1. Have the District and/or Bombardier violated 49 U.S.C. §5333(b) with respect to employees represented by the Union who used to work for Herzog and/or Kabler?

2. If so, what is the appropriate remedy?

BACKGROUND

The North County Transit District ("NCTD" or "District") is a public entity established to operate either directly or through contractors a public transit system in its area of jurisdiction. The District provides public transit services, including the COASTER commuter rail system, the hybrid rail diesel multiple unit system known as SPRINTER, and bus operations primarily in the northern half of San Diego County. The District serves more than 12.5 million passengers a year. Bombardier Mass Transit Corporation ("Bombardier") is the contractor handling all of the rail operations and maintenance services for the District. The Southwest Regional Council of Carpenters ("Carpenters" or "Union") is a labor organization representing certain classifications of Bombardier employees performing services for the District.

The COASTER and SPRINTER rail systems have been operated and maintained by third-party contractors for the District. Contractors are chosen through a competitive bid process and are responsible for employing the workforce and setting terms and conditions of employment with unions representing the employees. In 1994, COASTER was operated by Amtrak as a private contractor. In 2006, Herzog Technologies Inc. ("Herzog") and its entity Transit America Services, Inc. ("TASI") replaced Amtrak for the District with Kabler Construction Services, Inc. (Kabler") as a subcontractor until their contracts with the District terminated in 2016. Veolia Transportation (now known as Transdev) operated SPRINTER from 2008 until its contract terminated in 2016. Veolia employees were not represented by a union.

Prior to 2006, the United Transportation Union ("UTU"), now known as Sheet Metal, Air, Rail and Transportation Workers ("SMART") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET") represented workers employed by Amtrak. According to the Carpenters, Herzog/TASI and Kabler voluntarily recognized the Carpenters as the labor organization for certain classifications of employees and entered into collective bargaining agreements in effect from 2008 until the contractors' contracts with the District expired in 2016 [UX 1-2]. On June 8, 2016, after Bombardier assumed operations at the District, the Union filed a petition for an election with the NLRB [BX 12]. On or about July 12, 2016, the Union was certified as the labor organization representing certain groups of employees formerly employed by Herzog and Kabler performing maintenance of way and signal service for the SPRINTER and COASTER operations as well as maintenance of equipment for COASTER. The conductors

and engineers hired by Bombardier who were formerly employed by TASI selected SMART to be their certified bargaining representative and are not covered by this dispute.

In 2011, the District began a process which ultimately implemented the consolidation of the COASTER and SPRINTER services as a means to gain efficiencies and operate in a more integrated manner. At the time, the District utilized nine different contractors and subcontractors to operate its rail systems which resulted in inevitable conflicts in service and efficiency. NCTD Executive Director Matthew Tucker testified the decision to consolidate service into one contract at NCTD was motivated solely to provide more efficient management, services, and oversight by the District and was not caused or related to any federal grant or project.

Over the next few years, the District conducted an extensive study and review process to develop a comprehensive Request for Proposals ("RFP") from prospective contractors [DX 1]. In 2015, four companies submitted proposals: Bombardier, Herzog, First Transit, and Transdev. According to the District, Bombardier's proposal was the lowest cost and technically superior to the other bidders and was awarded the contract in December 2015 [DX 3-4]. In June 2016, Bombardier assumed the responsibility for the combined rail services.

Bombardier was required by the RFP to give priority to hiring the employees of the prior contractors, observe prevailing wage standards, and comply with Section 13(c) obligations under the UPA. According to Bombardier, all but two of the Herzog and Kabler employees were retained. Bombardier committed to retain or increase the wage rates paid the employees by Herzog and Kabler. Thereafter, Bombardier added 40-50 employees to its workforce in the bargaining unit represented by the Carpenters.

In January 2016, Bombardier requested information from the Union as to the wages, benefits, working conditions, collective bargaining agreements, and related agreements applicable at Herzog and Kabler. Several meetings were held. But by June 2016, Bombardier management became frustrated at what they perceived to be a lack of complete information from the Union about those wages and benefits. Moreover, Bombardier did not receive what they believed was any verification that the Union had actually been the legal authorized bargaining agent at Herzog or Kabler. At that point, Bombardier ceased negotiations with the Union and altered the offer letters it had sent to the former Herzog and Kabler employees [BX 11]. Those negotiations resumed after Carpenters was certified by the NLRB as the labor organization for certain classifications of employees, but no progress has been made due to

the dispute over whether Section 13(c) of the Federal Transit Act ("FTA") establishes a base-line for compensation and other benefits to those employees effective June 2016.

Public transit agencies with rail operations across the country uniformly use FTA grants to assist or supplement the funding of those rail systems. Section 13(c) of the FTA contains labor protections for employees at agencies who are affected by that assistance. Those provisions include a continuation of collective bargaining rights, protection against worsening of their positions related to employment, and priority for reemployment. The Union introduced five FTA grants in evidence as the basis for its claim those grants triggered the Section 13(c) protections at issue herein. Bombardier and NCTD acknowledged the District has received those grants but sharply disputes the claim the former Herzog/TASI and Kabler employees hired by Bombardier were affected such that a Section 13(c) obligation was triggered.

At arbitration, the parties were afforded a full and fair opportunity to call and cross-examine witnesses under oath, introduce documents, and present argument. A transcript of the proceedings was prepared. Upon receipt of post-hearing briefs, the case was submitted for decision. No useful purpose is served by summarizing the entire record of evidence and argument, all of which was carefully reviewed and considered. Only those matters deemed necessary in deciding the questions at issue are discussed herein.

SECTION 13(c) OF THE FEDERAL TRANSIT ACT ("FTA") 49 U.S.C. SECTION 5333(b) [DX 1]

(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 the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;

a. the continuation of collective bargaining rights;

b. the protection of individual employees against a worsening of their positions related to employment;

c. assurances of employment to employees of acquired public transportation systems;

d. assurances of priority of reemployment of employees whose employment is ended or who are laid off; and

e. 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.

EXCEPRTS FROM UNIFIED PROTECTIVE ARRANGEMENT ("UPA")
FOR APPLICATION TO CAPITAL AND OPERATING ASSISTANCE
PROJECTS PURSUANT TO 49 U.S.C. SECTION 5333(b)
JANUARY 3, 2011 [JX 1]

The following language shall be made part of the Department of Transportation's contract of assistance with the Grantee, by reference;

The terms and conditions set forth below shall apply for the protection of the transportation related employees in the transportation service area of the Project. As a precondition of the release of assistance by the Grantee to any additional Recipient under the grant, the Grantee shall incorporate this arrangement into the contract of assistance between the Grantee and the Recipient, by reference, binding the Recipient to these arrangements.

These 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 incorporated by reference in the grant contract between the U.S. Department of Transportation and the Grantee, and the parties to the contract so signify by executing that contract. Transit employees are also third-party beneficiaries to the protective arrangements incorporated in subsequent contracts of assistance, pursuant to the Department's certification, between the Grantee and any Recipient. Employees may assert claims through their representative with respect to the protective arrangements under this provision. This clause creates no independent cause of action against the United States Government.

(1) The Project shall be carried out in such a manner and upon such terms and conditions as will not adversely affect employees of the Recipient and of any other surface public transportation provider in the transportation service area of the Project. It shall be an obligation of the Recipient to assure that any and all transportation services assisted by the Project are contracted for and operated in such a manner that they do not impair the rights and interests of affected employees. The term "Project," as used herein, shall not be limited to the particular facility, service, or operation assisted by Federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided. The phrase "as a result of the Project," shall, when used in this arrangement, include events related to the Project occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about solely by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this arrangement. An employee covered by this arrangement, who is not dismissed, displaced or otherwise worsened in his/her position with regard to employment as a result of the Project, but who is dismissed, displaced or otherwise worsened solely because of the total or partial termination of the Project or exhaustion of Project funding shall not be deemed eligible for a dismissal or displacement allowance within the meaning of paragraphs (6) and (7) of this arrangement.

(2) Where employees of a Recipient are represented for collective bargaining purposes, all Project services provided by that Recipient shall be provided under and in accordance with any collective bargaining agreement applicable to such employees which is then in effect. This Arrangement does not create any collective bargaining relationship where one does not already exist or between any Recipient and the employees of another employer. Where the Recipient has no collective bargaining relationship with the Unions representing employees in the service area, the Recipient will not take any action which impairs or interferes with the rights, privileges, and benefits and/or the preservation or continuation of the collective bargaining rights of such employees.

(3) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this arrangement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the Union involved to substitute other rights, privileges and benefits. Unless otherwise provided, nothing in this arrangement shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the applicable collective bargaining agreement.

(4) The collective bargaining rights of employees covered by this arrangement, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued. Provided, however, that this provision shall not be interpreted so as to require the Recipient to retain any such rights which exist by virtue of a collective bargaining

agreement after such agreement is no longer in effect. The Recipient agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining. If, 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.

* * *

(15) Any dispute, claim, or grievance arising from or relating to the interpretation, application or enforcement of the provisions of this arrangement, not otherwise governed by paragraph 12(c) of this arrangement, the Labor-Management Relations Act, as amended, the Railway Labor Act, as amended, or by impasse resolution provisions in a collective bargaining or protective arrangement involving the Recipient(s) and the Union(s), which cannot be settled by the parties thereto within thirty (30) days after the dispute or controversy arises, may be submitted at the written request of the Recipient(s) or the Union(s) in accordance with a final and binding resolution procedure mutually acceptable to the parties. Failing agreement within ten (10) days on the U.S. Department of Labor Office of Labor-Management Standards (OLMS) - Compliance Assistance - Employee Protections Under the Federal Transit selection of such a procedure, any party to the dispute may request the American Arbitration Association to furnish an arbitrator and administer a final and binding arbitration under its Labor Arbitration Rules. The parties further agree to accept the arbitrator's award as final and binding.

The compensation and expenses of the neutral arbitrator, and any other jointly incurred expenses, shall be borne equally by the Union(s) and Recipient(s), and all other expenses shall be paid by the party incurring them.

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. It shall then be the burden of the Recipient to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee.

POSITIONS OF THE PARTIES

The Union contends the District and Bombardier violated the protective arrangements 49 USC §5333(b) of the FTA (formerly Section 13(c) of the Urban Mass Transportation Act of 1964) by not extending the pay and benefits available under the Herzog and Kabler collective bargaining agreements to the bargaining unit in June 2016. The Union cites Subsection 1 of Section 13(c) as precluding an agency receiving federal grants from worsening the positions of

any individual employee related to employment. The Union maintains the District could not have operated without those federal grants, thus the abject refusal by Bombardier to recognize and extend such compensation and benefits violated the FTA. The Union thus requests a finding of violation and an order directing that the collective bargaining agreements with Herzog and Kabler serve as a baseline effective June 2016 for negotiations with Bombardier for a new collective bargaining agreement.

The District and Bombardier deny any violation of Section 13(c) because the Union has not shown any alleged adverse impact on employees was a result of a federal grant. The District and Bombardier contend that Department of Labor and private arbitration decisions have consistently held a claimant must establish a causal connection between a federal grant and an employee worsening to prevail in a Section 13(c) claim. The District and Bombardier also contend the Union may not establish an enforceable Section 13(c) claim by relying on expired and legally unenforceable collective bargaining agreements with Herzog and Kabler. The District and Bombardier further maintain even if those labor contracts were valid, nothing in Section 13(c) requires Bombardier to assume those terms and conditions. Accordingly, the District and Bombardier urge the grievance be rejected.

OPINION BY THE ARBITRATOR

The parties agree that labor protective provisions in Section 13(c) of the FTA as incorporated into the UPA are applicable to Bombardier as contractor to a transit district receiving federal grants [JX 1]. The Union contends there has been a worsening since June 2016 of the terms of employment for the members of its bargaining unit formerly employed by Herzog and Kabler in violation of Section 13(c). The District and Bombardier deny there has been any material worsening of employment conditions or, if so, the protections in Section 13(c) are applicable because the Union has failed to demonstrate a causal connection between the grants and the assumption of service by Bombardier. A review of all the competing evidence and argument in this record fails to establish a violation of Section 13(c) as alleged by the Union. The grievance will accordingly be denied.

Section 13(c) provides in paragraph (2)b. that the “preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements or otherwise” extends to “individ-

ual employees against a worsening of their positions related to employment" [DX 1]. The obligation is amplified in the Paragraph (1) of UPA [JX 1]:

> It shall be an obligation of the Recipient to assure that any and all transportation services assisted by the Project are contracted for and operated in such a manner that they do not impair the rights and interests of affected employees.

Paragraph (2) makes it clear these protections apply to employees even without a collective bargaining relationship with a union as the Union's purported contracts with Herzog and Kabler had expired [JX1].

Paragraph (15) of the UPA frames the parties' respective burdens of proof for disputes arising under its terms [JX 1]:

> 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. It shall then be the burden of the Recipient to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee.

The mere existence of a federal grant, thus, is not sufficient to establish a claim for labor protective provisions. Should an agency or contractor claim the challenged action was not related to any federal grant, Paragraph (1) of the UPA specifies the standard to be met for a claimant to prevail [JX 1]:

> The term "Project," as used herein, shall not be limited to the particular facility, service, or operation assisted by Federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are *a result of* the assistance provided [emphasis added].

Paragraph (1) then defines "as a result of the Project" shall [JX 1]:

> . . . include events related to the Project occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about solely by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this arrangement.

The Union has satisfied its initial burden for establishing a claim under Section 13(c). First, for purposes of this arbitration, it is assumed *arguendo* there has been some worsening since June 2016 in the terms of employment for members of the Union's current bargaining unit who were formerly employed by Herzog and Kabler.[1] Second, the Union has cited five federal identified below as evidence the District had recently been the recipient of significant federal funding subject to the FTA and UFA [UX 19].

Grant CA-54-0035-00 ("State of Good Repair Rail Capital")

- Date: 7/21/15
- Sum: $6,282,817
- Federal statute: Section 5337
- Purpose: Capital Improvement Program: SPRINTER fiber upgrade signal work, rail replacement, preventive maintenance for rail operations

Grant CA-90-Z241-00 ("Capital Projects and PM")

- Date: 7/23/15
- Sum: $11,528,711
- Federal statute: Section 5307
- Purpose: Capital Improvement Program: BREEZE vehicle replacements, information management system upgrades, preventive maintenance for bus and rail operations, overhaul of COASTER locomotives, rehabilitation of COASTER passenger cars, rehabilitation of SPRINTER rail cars, rehabilitation of COASTER maintenance of way, rehabilitation and renovation of administration building, maintenance facility rehabilitation and upgrades to prevent workers from falling

Grant CA-2016-068-00 ("Capital Projects and PM")

- Date: 3/24/16
- Sum: $5,268,878
- Federal statute: Section 5307
- Purpose: Capital Improvement Program: BREEZE vehicle replacements, information management system upgrades, preventive maintenance for bus and rail operations, rehabilitation and renovation of administrative building

[1] Bombardier and the District dispute there has been any worsening of employment conditions sufficient to trigger Section 13(c) liability as well the claim by the Union that the collective bargaining agreements with Herzog and Kabler were valid. Because the grievance is being denied on other grounds, the evidence and argument on these questions will not be addressed or resolved herein.

Grant CA-2016-069-00 ("State of Good Repair Rail Capital 2")

- Date: 3/30/16
- Sum: $3,061,150
- Federal statute: Section 5337
- Purpose: Capital Improvement Program: SPRINTER fiber upgrade signal work, preventive maintenance for bus and rail operations

Grant CA-2016-113-00 ("Capital Projects and PM")

- Date: 6/9/16
- Sum: $14,461,489
- Federal statute: Section 5307
- Purpose: Capital Improvement Program: BREEZE engine and transmission rebuilds, replacement of bus wash systems, information technology enhancements, management system upgrades, improvements to rail structures, bus and rail preventative maintenance

According to the Union, Bombardier could not operate the District's transit systems without the funding from these grants. The District and Bombardier, however, maintain those grants played no role in the reorganization of service that resulted in establishing Bombardier as sole contractor. The District and Bombardier thus cite the proviso in Paragraph (1) excluding "economies or efficiencies unrelated to the Project" as precluding the Union's claim for protection herein. Under this scenario, the burden shifts back to the Union to demonstrate a sufficient nexus between the federal grants and the worsened conditions to satisfy the standard for protection in Section 13(c).

The Union recognizes that a causal connection must be established but insists there is no requirement that federal grants be the only reason for the worsening of conditions. The Union cites in this regard a 1971 affidavit by Secretary of Labor James Hodgson who stated, "a claiming employee shall prevail if it is established that a discontinuance [of rail passenger service] had an effect upon the employee, even if other factors may also have affected the employee." Civil Action No. 825-71 at D-41. This principle was reaffirmed by Assistant Secretary of Labor William P. Hobgood in King v. Connecticut Transit Management, Inc., DEP Case No. 78-13c-1 at A-74 (1979):

> "The petitioning employee shall prevail if it is established that the project had an effect upon the worsened employment conditions of Petitioner, even if other factors also may have affected such worsening of conditions."

The Union argues the mere changing of contractors is sufficient to trigger Section 13(c) protections because without federal funds the COASTER and SPRINTER operations at issue could not be maintained. The Union maintains the facts the District operates at zero profit and federal grants in FY 2016 accounted for 14% of its operating budget evidence heavy reliance on federal funds to support the services now supplied by Bombardier [UX 21-22]. Moreover, according to the Union, payments to Bombardier were expressly conditioned in the RFP on availability of federal funding [UX 18]. The Union therefore claims the District could not have changed contractors to Bombardier without the existence of federal funds.

While acknowledging the federal grants cited by the Union, the District and Bombardier maintain the change of contractors was wholly unrelated to their existence. NCTD Executive Director Tucker and members of his staff testified without contradiction that the seeds of this reorganization were sown in 2011 when the District recognized the business need to eliminate the conflicts in service and inefficiency occasioned by nine separate contractors operating various portions of the District's transportation services. There is no evidence during the ensuing five years taken to study the problem, draft and issue an RFP, and approve and install the successor that this decision was related to or dependent upon the issuance or receipt of any federal grant used to assist in funding transit services. The District and Bombardier thus urge these facts fit within the proviso excluding Section 13(c) protection for "economies or efficiencies unrelated to the Project."

The District and Bombardier cite several decisions from the Department of Labor, arbitrators, and a court which found an insufficient nexus between a federal grant and the challenged adverse employment action to sustain a Section 13(c) violation. In each of these cases, the mere fact the agency had federal grants, without more, was deemed inadequate to support a finding the challenged worsened term or condition of employment was eligible for labor protection under the Act.

In UTU v. Brock, 815 F.2d 1562 (DC Cir. 1987), the UTU challenged the Secretary of Labor's decision to certify labor protective arrangements which did not provide for the continuation of collective bargaining rights. A public agency assumed control of a privately operated transit operation. Seven years later, the agency applied for federal grants and UTU notified the agency it had signed authorization cards from a majority of the employees. These facts were deemed by the appellate court insufficient to trigger Section 13(c) protection for the

Union. In Fuller v. Greenfield, DEP Case No. 81-18-16 (1987), Deputy Under Secretary of Labor Stephen I. Schlossberg found that layoffs caused by a loss of tax revenue to the agency and loss of the contract to the contractor did not support a violation of Section 13(c).

In Atlantic Richfield Co. 5 ICC 2d 934 (1989), the Interstate Commerce Commission rejected a claim for Section 13(c) protection where, one year after a railroad was acquired by ARCO, copper prices dropped causing a reduction in traffic and layoffs. In Mid Mon Valley Transit Authority (1992), Arbitrator Herbert Fishgold similarly rejected a claim for protection where a lack of revenue and decrease in funding resulted in loss of schedules, benefits and pay raises. In Santa Clara County Transit District (1996), Arbitrator Bonnie Bogue also denied a claim for protection. That agency experienced significant reduction in sales tax revenues in 1992-3 due to economic downturn in Silicon Valley. As a result, the agency reduced service by 10%, closed a maintenance yard, and laid off 100 employees. Even though the agency altered its bus routes to accommodate a new rail system funded by federal grants, the Arbitrator held these facts were held insufficient to establish a nexus.

Subsequent decisions were consistent with those listed above. For example, in City of Dubuque (2002), Arbitrator Lisa S. Kohn denied a claim where the transit agency transferred certain maintenance functions to City garage due to loss of ridership and not the acquisition of new busses funded by federal grants requiring less maintenance. In Massachusetts Bay Transportation Authority, OSP Case No. 92-13(c)-1 (2002), the Assistant Secretary of Labor for Employment Standards denied coverage to transit employees who were laid off after service awarded to another private contractor. In Massachusetts Bay Transportation Authority (2017), Arbitrator James M. Litton rejected a Section 13(c) claim for labor protection filed by a Union that objected to outsourcing the tire shop and money room and reassignment of workers because lack of facts establishing a sufficient nexus to the federal grants.

The cases cited by the Union do not persuade that a different result should be reached here. In Giampaoli v. San Mateo County Transit District, DEP Case. No. 77-13c-30 (1981), Assistant Secretary of Labor William P. Hobgood found the sole laid off employee claimant prevailed on the question of causation because federal funds were the result of the expansion and integration of services causing the abolishment of his position. These facts, however, were not present at NCTD when Bombardier was installed as contractor. In ATU Local 691 v. City Utilities of Springfield, OCS Case No 91-13c-18 (1999), Assistant Secretary of Labor

Bernard E. Anderson found the Union made a *prima facie* claim for protection of collective bargaining rights under Section 13(c) but did not in the decision identify the fact or facts relied upon to establish causation. Absent such facts, this case also does not convince the Union has satisfied the standard in the UPA to demonstrate the assumption of service by Bombardier was the result of the federal grants cited.

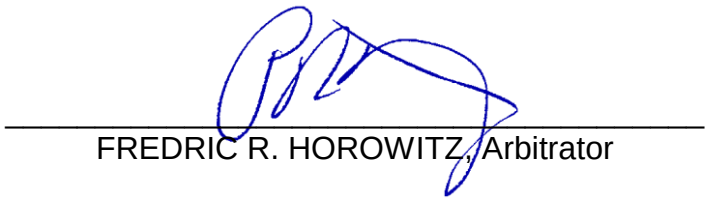
In conclusion, based upon the language of the FTA, the UPA, and the authorities cited thereunder, the labor protective provisions of Section 13(c) were not applicable in June 2016 upon the assumption of service by Bombardier because the evidence in this proceeding fails to establish the alleged worsening in terms and conditions of employment affecting members of the Union's bargaining unit was the result of a federal grant or grants. The claim for relief is denied.

AWARD

1. Neither NCTD nor Bombardier violated 49 U.S.C. §5333(b) with respect to employees represented by the Union who used to work for Herzog and/or Kabler.

2. The grievance is denied.

DATED: October 31, 2017
Santa Monica, California



FREDRIC R. HOROWITZ, Arbitrator