DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

8641

FILE: B-192303 DATE: December 18, 1978

MATTER OF: Employee Protective Benefits under the Urban Mass Transportation Act

DIGEST: 1. New Jersey State Commissioner of Transportation is not relieved of obligation to make fair and equitable employee job protection arrangements for employees as determined by the Secretary of Labor as prerequisite to award of emergency Federal financial assistance under the Urban Mass Transportation Act (UMTA) 49 U.S.C. § 1601 et. seq., even though some employees may already be covered by employee protective arrangements under the Regional Rail Reorganization Act, (RRRA), 45 U.S.C. § 701 et. seq. Employee protective requirement under UMTA is mandatory and cannot be waived.

2. Eligible employees of State railroad operating agency are not required to exhaust protective benefits under Regional Rail Reorganization Act before applying for similar benefits under the Urban Mass Transportation Act. Neither statute requires such an election of remedies.

3. The Railway Labor Executives' Association (RLEA), a labor organization representing railway employees which negotiated employee protective arrangements with New Jersey State Commuter Operating Agency (COA), pursuant to requirements in the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq. (UMTA), questions the Comptroller General's authority to rule on certain legal issues raised by the New Jersey Commissioner of Transportation concerning UMTA. Under provisions of 31 U.S.C. §§ 44, 71, 74, and 82d, the Comptroller General has been charged with the responsibility of rendering decisions concerning the legality of appropriated fund expenditures involved in the issue raised by the Commissioner.

This action is in response to a request from the Honorable Louis J. Gambaccini, Commissioner of Transportation, State of New Jersey, for a ruling on certain issues involving the statutory entitlement to job protection and benefits of railway employees who are adversely affected by adjustments made by grantees with funds received under the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § 1601 et. seq.

The facts and circumstances involved in this case may be summarized as follows. The Commuter Operating Agency of the New Jersey Department of Transportation (COA) applied to the United States Department of Transportation for emergency financial assistance under 49 U.S.C. § 1601 et. seq. These funds were sought to offset the "additional costs" referred to in 49 U.S.C. § 1613, which were incurred by COA in contracting with the Consolidated Rail Corporation (Conrail) for rail passenger commuter service. However, in order for the COA to qualify for emergency financial assistance, the Secretary of Labor was required to determine, pursuant to 49 U.S.C. § 1609(c), that COA had made fair and equitable arrangements to protect the interests of railroad employees affected by such assistance.

CNG00180

The COA concluded an employee protective agreement with the Railway Labor Executives' Association (RLEA) in connection with Urban Mass Transportation Administration Project No. NJ-17-0001. At the time the agreement was executed, COA advised RLEA of its intention to seek a ruling from an appropriate Federal authority as to whether affected employees are required to exhaust possible remedies under Title V of the Regional Rail Reorganization Act of 1973 (RRRA), as amended, (45 U.S.C. § 771 et. seq.), which provides statutory protections for employees of railroads reorganized under that Act, before they could claim benefits under the employee protective agreement negotiated pursuant to 49 U.S.C. § 1609(c) of the UMTA.

Accordingly, the New Jersey Commissioner of Transportation has requested this Office to decide whether he is required to negotiate new employee protective arrangements pursuant to 49 U.S.C. § 1609(c), when the employees are already covered by protective arrangements under 45 U.S.C. § 771 et. seq. of the RRRA. If it is necessary to negotiate new arrangements, the Commissioner desires us to rule on whether the employees must first exhaust benefits under the RRRA before relying on benefits contained in the agreement negotiated pursuant to the UMTA.

In order to consider the positions of interested parties, we solicited the views of the Secretary of Labor, who has the responsibility under 49 U.S.C. § 1609 of determining whether employee protective arrangements are fair and equitable, and of the RLEA, the employees' organization that is a party to the agreement with the COA. We have received their views and have taken them into account in our decision.

At the outset, RLEA contends that the Comptroller General does not have statutory authority to issue a decision on the questions presented by the Commissioner of Transportation. We find no merit in this contention inasmuch as the Comptroller General has been charged with the duty under the provisions of 31 U.S.C. §§ 44, 71, 74, and 82d (1970) to

render decisions on questions involving the expenditure of appropriated funds, and such decisions are binding and conclusive on the Executive branch of Government. Pettit v. United States, 203 Ct. Cl. 207 (1973). Because the matter at issue involves the possible expenditure of appropriated funds, the above-cited statutory provisions authorize this Office to decide the questions presented.

The essence of the issue is which of two separate employee protective arrangement statutes that arguably extend coverage to the same employees, must the employees use should they qualify for employee protection benefits by virtue of some management action that worsens their employment situation.

The New Jersey Commissioner of Transportation states that the principal, if not the only, group of employees who may be adversely affected by the emergency operating assistance grant under 49 U.S.C. § 1613 are members of the rail brotherhoods employed by Conrail. Most of these same employees were previously employed by the predecessor bankrupt railroads, such as the the Penn Central and the Erie railroads, and as a result of the reorganization process, were granted employee protection benefits under provisions of the RRRA, (45 U.S.C. § 775), designed to preserve their conditions of employment or to compensate them in the event their employment conditions worsened.

The Commissioner points out that Congress indicated that Conrail's rail passenger service was not to be subsidized by its rail freight service. Thus, 45 U.S.C. § 744(e) provides that where rail passenger service requires subsidization which is not provided by the State or local transportation authority, Conrail may under certain circumstances discontinue such service and thereby adversely affect the transit employees involved. The Commissioner notes that, since the time of the reorganization, the COA has financed the continuation of commuter rail service in accordance with 45 U.S.C. § 744(e), and argues that without such local financial assistance, Conrail would have already discontinued such commuter services, thereby adversely affecting its transit employees. Also he says that possible future curtailment of local financial assistance would provide Conrail the continuing opportunity to discontinue rail passenger service.

The Commissioner then concludes that the Federal financial assistance funnelled to Conrail through local agencies such as COA cannot adversely affect Conrail employees but "merely delays the otherwise inevitable worsening" of the employees' situation which would have occurred as a direct result of the regional rail reorganization process under the RRRA. Thus, "since Congress has provided exhaustive

and comprehensive statutory labor protections under Title V, * * * the COA contends that fair and equitable labor protection arrangements are already in place," making the requirement in 49 U.S.C. § 1609(c) for protective arrangements for employees of UMTA grantees unnecessary.

In consideration of the arguments made by the Commissioner, we have reviewed the statutory employee protective requirements in the RRRA contained in 45 U.S.C. 777 et. seq. and those in the UMTA contained in 49 U.S.C. § 1609. We have been unable to find any evidence to support the contention that these statutes were in any way designed to be integrated or mutually supporting, or that the availability of benefits under the RRRA eliminates the requirement for compliance with the UMTA. Rather, it appears that the statutory provisions were designed to be independent and self-sufficient so as to support the different purposes of the RRRA and the UMTA.

An employee becomes qualified to claim benefits under the RRRA, 45 U.S.C. § 771 et. seq. when he is adversely affected by a "transaction" as defined in the RRRA. Further, that statutory provision specifically describes each benefit to which an employee may become entitled. On the other hand, an employee under the UMTA becomes qualified to claim benefits when he is adversely affected by Federal assistance under that Act. The benefits under this program are determined through negotiation of an agreement by the applicant for funds and the labor organization representing the affected employees, with the approval of the Secretary of Labor.

Moreover, there are considerable differences as to coverage of the two provisions. In order to be covered under the RRRA, an employee must have been employed by one of the bankrupt railroads on the date the rail property was conveyed to Conrail. An employee hired by Conrail subsequent to the conveyance would not be covered by the RRRA. On the other hand, any employee adversely affected by the Federal financial assistance would be covered under the UMTA without regard to the length of his employment.

Had Congress intended the employee protective arrangements of the RRRA to apply to grants under the UMTA, it could have easily so provided. Compare section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, February 5, 1976, 90 Stat. 33 (45 U.S.C. § 836(a)). There, Congress required that fair and equitable arrangements be provided for employees not otherwise covered by protective arrangements under the RRRA. Accordingly, it may be inferred that Congress would have enacted a similar provision for the UMTA if it had intended the law to operate in that manner, and the absence of

such provision creates the presumption of negative intent. Botany Worsted Mills v. United States, 278 U.S. 282 (1929), United States v. MacCollom, 426 U.S. 317, 321 (1976).

On the basis of the foregoing discussion, we conclude that a public body such as the COA is not relieved of its obligation to make acceptable labor protection arrangements as determined by the Secretary Labor as a prerequisite to the receipt of UMTA funds merely because some or even a majority of its employees are covered by the protective arrangements of the RRRA or any other benefit statute. As indicated above, 49 U.S.C. § 1609 requires the Secretary of Labor to determine that fair and equitable arrangements are made to protect the interests of employees affected by such assistance. In addition, 49 U.S.C. § 1613(c) conditions the award of Federal financial assistance under that Act on the Secretary of Labor having made this determination and the Secretary has no authority to suspend a statutory requirement.

The Commissioner's final question is:

> "* * * if the public body has already entered into such an agreement as a condition to receiving federal funds can it be assured that the eligible employees' first source of benefits must be Title V [of the RRRA, 45 U.S.C. § 771 et. seq.]?"

This question is answered in the negative. Neither statute contains any requirement, express or implied, that employees covered under both laws must elect RRRA coverage initially before pressing an UMTA claim. The Secretary of labor does point out, however, that paragraph (2) of the agreement executed by the RLEA and the COA precludes employees from pyramiding and duplicating benefits for the same purpose received under other protective statutes.

Although there is no requirement that employees covered by the RRRA employee protective provisions, who are also adversely affected by Federal financial assistance under the UMTA, must routinely first exhaust entitlements under the RRRA, there may be a question as to whether a particular adverse effect was caused by assistance under the RRRA or the UMTA. The Department of Labor has indicated that the following procedure should be utilized in resolving such questions of appropriate coverage:

> * * * upon receipt of any employee claim an initial determination would have to be made as to whether the employee was affected by a transaction as defined in Title 45 or whether the employee was affected by the Federal assistance under UMTA. The question of coverage

of the employee's claim would involve the interpretation and application of the protections afforded by either Title 45 or by the Section 13(c) [49 U.S.C. § 1609(c)] arrangement. If the parties cannot agree regarding coverage, 45 U.S.C. 777 provides for the settlement of disputes through arbitration. Similarly, Paragraph (8) of the arrangement between the COA and the RLEA contains a provision to resolve disputes arising over the interpretation, application and enforcement of the provisions of that arrangement."

R.F.Keller

Deputy Comptroller General
of the United States