



SEP 21 1994

Mr. Louis F. Mraz
Regional Manager
Federal Transit Administration
Region VIII
Federal Office Building
1961 Stout Street
Room 520
Denver, Colorado 80294

Re: FTA Application
Regional Transportation
Commission of Clark County,
(Las Vegas) Nevada
Operating Assistance: FY 1994
Capital Assistance: 15 ADA 40'
Buses; 54 ADA Vans; 5
Articulated ADA Buses;
Fareboxes; Radios; Support
Vehicles
(NV-90-X021)

Dear Mr. Mraz:

This is in reply to the request from your office that we review the above captioned application for a grant under the Federal Transit Act (Act).

The Service Employees International Union (SEIU) Local Union 1107, the International Brotherhood of Teamsters (IBT) Local Union 631, and the Amalgamated Transit Union (ATU) Local Union 1637 have negotiated separately with the Regional Transportation Commission of Clark County, Nevada (RTC) over protective arrangements to be made applicable to both the capital and operating portions of the above grant.

In regard to the RTC and the SEIU, the parties executed a Section 13(c) agreement dated January 13, 1994, which provides to employees represented by the union protections satisfying the requirements of Section 13(c) of the Act.

In regard to the RTC and the IBT, the parties, on August 22, 1994, agreed that the terms and conditions of their previous Section 13(c) Agreement, dated November 12, 1992, should be made applicable to the above captioned grant application. During the Department's initial review of the November 12, 1992 Agreement, the Department requested and received clarifications pertaining to certain provisions of that Agreement. With regard to paragraph (14)(b), the parties have agreed that the language concerning the remedial authority of the independent arbitrator was meant to include examples of the arbitrator's authority and not meant to limit it to those powers listed in that paragraph.

Further, with regard to the priority of employment addressed in paragraph (17), this paragraph calls for a "... priority of employment to fill any vacant position with any entity providing fixed route service under contract with the Public Body which is reasonably comparable... ." In the past, this language was deemed acceptable because the Department had been assured that fixed route service was the only service being provided under contract with the Public Body. The Department has since been advised that other service, including demand-response paratransit service, is now being provided. The Department, pursuant to its guidelines at 29 C.F.R. 215.3(e), has reviewed the protections and determined that, in order to satisfy the requirements of the Act, the relevant parts of Paragraph (17) shall instead read, "... priority of employment to fill any vacant position within the jurisdiction and control of the Public Body which is reasonably comparable... ." With this supplemental language, the November 12, 1992 Agreement provides to employees represented by the union protections satisfying the requirements of Section 13(c) of the Act.

In regard to the RTC and the ATU, the Department provided technical and mediatory assistance to the parties by correspondence, telephone discussions, and meetings. At the end of those meetings, the parties had resolved all but five issues. Therefore, as to these remaining issues, the Department has now completed its review and, as discussed below, has determined the protections to be made applicable to the instant grant. All other provisions are applied as agreed to by the parties.

The attached document, entitled "Arrangement Pursuant to Section 13(c) of the Federal Transit Act ... September 21, 1994," (Arrangement) contains the Department's determination of the terms and conditions which are applied to the above project on behalf of employees represented by the ATU and which satisfy the requirements of Section 13(c) of the Act.

DISCUSSION

Second "Whereas" Clause

The RTC has proposed a "whereas" clause which states that "the Public Body recently established the Citizens Area Transit System to provide new fixed route and paratransit services to the Las Vegas Valley." (Emphasis added.)

While many Section 13(c) agreements include information to identify the grantee as a provider of transit service to a particular geographic area, the RTC proposal added the modifiers "recently established" and "new". The ATU seeks to omit these modifiers and has proposed that the Citizens Area Transit system (CAT) be identified only as the "transit system." The phrase "transit system" is used by both the parties, thus the Department has included only that language.

Paragraph (5): Trigger for the Notice and Negotiation Provision

The RTC has proposed in paragraph 5(a) that the notice and negotiation provision be triggered "... in a rearrangement of the workforce that adversely affects employees represented by the Union" (Emphasis added.) The ATU proposes language used in many arrangements which requires notice and negotiation in the event of a rearrangement of the workforce without regard to any judgment as to whether such would be "adverse".

The RTC believes its proposal is appropriate since the objective of Section 13(c) is to protect employees from the adverse consequences of federal projects, and the RTC is required to provide advance notice and assure early and continuous public involvement regarding federally funded projects and activities.

The RTC also believes that the public disclosure process is sufficient to ensure that the union "will have known of the project or activity for months or even years" before it is implemented. Knowledge of the project, however, cannot replace the opportunity provided under Section 13(c) to negotiate over the application of the protective arrangement. Neither the Washington Job Protection Agreement nor Appendix C-1 includes the language proposed by the RTC. Therefore, the Department of Labor will not include the proposed language in its certification.

Paragraph (14): Trigger for Invoking Rights Arbitration

The RTC and the ATU proposals for paragraph (14) arose out of a controversy over the proper interpretation of the phrase "after such dispute first arises." The RTC has proposed language used in many arrangements to provide for the arbitration of disputes. In the RTC view, a determination of when a dispute arises depends

upon the individual case and is "similar to the concept of when an impasse occurs in collective bargaining under the NLRA." The ATU interprets this same language to mean that a dispute arises when there is "an allegation the [Arrangement] has been violated or a grievance questioning its interpretation or application." The ATU, to counter the RTC's interpretation, has proposed new language to address this issue.

The RTC's interpretation is inconsistent with the Department's interpretation and applicable law. The Department interprets the language, "... any dispute ... regarding the application, interpretation, or enforcement of any of this [Arrangement] ... which cannot be settled within ... days after such dispute first arises ..." to mean that a dispute "arises" when relief is first sought under an arrangement. This is consistent with Section 113(b) of the Norris LaGuardia Act, 29 U.S.C. Section 113(b), and Section 2(9) of the National Labor Relations Act, as amended, 29 U.S.C. Section 152(9).

Although the Department has included in this certification the language proposed by the RTC for paragraph (14), it is with the caveat that it is to be interpreted consistent with the Department's interpretation as referenced above. Also, the Department has specified that arbitration may be invoked forty-five (45) days after a dispute arises rather than thirty days. This will allow the RTC sufficient time to respond in accordance with the procedures included at paragraph (17) prior to arbitration being invoked.

Proposed Paragraph (15): Carryover of Employees and Labor Contract

The parties disagree over whether to include language in the proposed Section 13(c) arrangement which would guarantee a preference in hiring for employees represented by the ATU if the RTC contracts with a new entity to provide the existing Citizens Area Transit service. Such a preference, assurance, or guarantee of employment for existing employees at a time of transition in ownership, operation, or management of transit services is sometimes referred to as "carryover obligations" or "contractor-to-contractor rights." The ATU has proposed a new paragraph (15) to provide such rights, while the RTC maintains that a hiring preference is not required by Section 13(c) in this case. The Department has not included the ATU language, for the reasons discussed below.

Section 13(c), at (c)(4), does, in fact, require "assurances of employment to employees of acquired mass transportation systems." (Emphasis added.) And, while the ATU did argue that an acquisition or takeover occurred, it relied principally on Section 13(c)(1) and (2) for the protections it sought. Section 13(c)(1) and (2), which require the preservation of rights,

privileges, and benefits and the continuation of collective bargaining rights, are not, in and of themselves, sufficient to ensure a right to jobs. In other words, no exclusive job right or preference is derived solely from (c)(1) and (2) absent the protections afforded by Section 13(c)(4) under an acquisition. This is not to say that Section 13(c)(1) and (2) only apply in the context of acquisitions. They remain as required protections as do all other provisions of Section 13(c).

The RTC correctly captures this point when it states that neither Section 13(c)(1) nor (c)(2) provide guaranteed jobs, but rather ensure that rights achieved through collective bargaining with an employer are preserved and that the process for negotiating labor contracts is continued with the employing entity. These provisions standing alone do not operate to create new employment relationships with a third party, nor do they require the hiring of a predetermined workforce.

Employees of the transit system would be entitled to assurances of employment if it were determined that Federal assistance was used to acquire the LVTS transit system. Section 13(c)(4) ensures such protections to affected employees in the context of an acquisition. In addition, the Act provides further guidance at Section 3(e), which calls for the Secretary's certification of protections as a condition for "... directly or indirectly acquiring any interest in, or purchasing any facilities or other property of a private mass transportation company" (Emphasis added.) Clearly the Congress envisioned the possibility of situations other than the simple and direct purchase of a local bus company.

In support of their respective positions, the parties presented voluminous information and numerous arguments relating to the question of whether or not the service provided by LVTS was acquired by the RTC¹.

To determine whether an acquisition occurs for purposes of Section 13(c), and thus to certify that the protection of employees is "fair and equitable," the Department weighs various considerations as it conducts its review of the issue. The review and analysis considers not only the purchase of assets, but also factors affecting the extent of control exercised over transit operations. These factors include, but are not limited to: control or operation of assets through lease, contract, or

¹The RTC submitted an approximately 675-page appendix to its reply brief. After the Office of the Solicitor of Labor made a determination that all but one document in the submission was clearly appropriate within the page limitations set, the remaining materials were included as part of the record.

other arrangement; subsidies for the purchase or operation of assets (without which service would not be provided); direct or indirect control or authority over operations by the granting of exclusive license, franchise, or charter from a government authority; the ability to determine or influence routes, schedules, headways, and equipment to be employed; and the ability to determine or influence internal management decisions, such as the allocation of financial/capital or human resources. These considerations or criteria are not independently determinative, but they must be considered to ascertain whether an acquisition has occurred which would require Section 13(c)(4) assurances.

Following a review of the information presented in this case, the Department has determined that no acquisition took place (see Sections (3)(e) and 13(c)) and, therefore, the language proposed by the ATU is not appropriate. The facts presented do not indicate that the RTC directly purchased the assets of LVTS or that it exercised sufficient control over LVTS to support a determination that the LVTS system was acquired with Federal assistance. Among the determinative factors considered were that LVTS was operated independently of the RTC; although LVTS leased certain assets from the RTC, it was not dependent upon the RTC to conduct its operations; LVTS was chartered through the state and did not lose the right to continue to provide service upon the establishment of the RTC service; and LVTS continued to operate in competition with the RTC for a period of time before it ceased its operations. Accordingly, the Department has determined in this instance that neither a direct nor indirect acquisition has occurred which would require continued assurances of employment under Section 13(c)(4).

References also were made to using "Memphis Plan" arguments to ensure the continuation of collective bargaining and the preservation of rights in order to secure the argued for job rights. The application of a Memphis formula, as envisioned by the Congress, was specifically intended to address a public sector prohibition on collective bargaining in the context of an acquisition. Any broad reference to a Memphis "type" situation which focuses on the use of a contractor and omits the critical factor of an acquisition is not an accurate characterization of a Memphis formula. Here the protections being sought cannot be derived from the application of the Memphis formula.

Paragraph (16)(b): Claims Handling Procedure

Paragraph (16)(b) includes language, agreed to by the parties, providing that the RTC will respond to a claim "not later than forty-five (45) days after the date of the filing of the claim." The parties also agree that "[i]n the event the claim is so rejected by the Public Body," the claim may be processed to arbitration pursuant to paragraph (14).

The RTC has also proposed and the ATU has agreed to a procedure for further joint investigation of the claim which may be invoked by the union. This agreement is dependent on the Department including language which would clarify that a claim may be processed to arbitration, pursuant to paragraph (14), forty-five days after being filed, notwithstanding the union's invocation of the procedures for further joint investigation set forth in paragraph (16) (b).

The Department will not include this procedure for further joint investigation absent language which insures neither party is impeded from invoking arbitration. Therefore, the Department has included the language proposed by the ATU which, consistent with the Department's interpretation of paragraph (14), as described above, permits the union to proceed to arbitration forty-five days after the filing of the claim.

With the issues so determined, the Department of Labor makes the certification required in the Act with respect to the instant project on condition that:

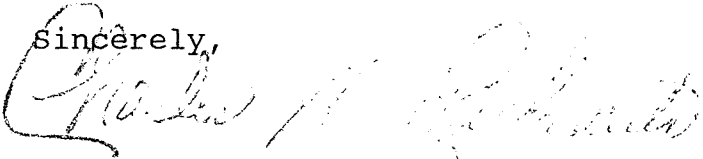
1. This letter and the terms and conditions of the agreements dated January 13, 1994, and November 12, 1992, as interpreted and supplemented in the above references, along with the attached Arrangement dated September 21, 1994, shall be made applicable to the instant project and made part of the contract of assistance, by reference;
2. The term "project" as used in the November 12, 1992 agreement shall be deemed to cover and refer to the instant project;
3. Disputes over the interpretation, application and enforcement of the terms and conditions of the protective arrangements certified by the Department of Labor, which include this letter of certification, shall be resolved in accordance with the provisions in the aforementioned arrangements which cover such disputes;
4. The 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. These employees are intended third-party beneficiaries to the employee protective arrangements of the grant contract between the Department of Transportation and the RTC,

and the parties to the contract so signify by executing that contract. Employees, or their representative on their behalf, may assert claims solely against the applicant. This clause creates no independent cause of action against the United States Government; and

5. Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local union which is a party to, or otherwise referenced in the protective arrangements, shall be afforded substantially the same levels of protection as are afforded to the employees represented by the unions under the above referenced arrangements and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

Should a dispute remain after exhausting any available remedies under the Section 13(c) arrangements, and absent mutual agreement by the parties to utilize any final and binding procedure for resolution of the dispute, the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination.

Sincerely,



Charles A. Richards
Deputy Assistant Secretary

cc: Donald Durkee/FTA
Earle Putnam/ATU
John Sweeney/SEIU
Ron Carey/IBT
Dennis Kist/Kist & Associates
Kurt Weinrich/RTC
G. Kent Woodman/Eckert Seamans Cherin & Mellott

ARRANGEMENT PURSUANT TO SECTION 13(c)
OF THE FEDERAL TRANSIT ACT
FOR
THE REGIONAL TRANSPORTATION COMMISSION
OF CLARK COUNTY, NEVADA
AND
THE AMALGAMATED TRANSIT UNION, AFL-CIO, LOCAL 1637
SEPTEMBER 21, 1994
(FTA GRANT # NV-90-XO21)

WHEREAS, the Regional Transportation Commission of Clark County, Nevada ("Public Body") has made application for operating and capital assistance under the Federal Transit Act ("Act"), as more fully described in the Project application ("Project") identified as NV-90-XO21; and

WHEREAS, the Public Body's Citizen's Area Transit System ("transit system") provides fixed route and paratransit services to the Las Vegas Valley; and

WHEREAS, the Public Body has contracted for the transit system's fixed route services by a private entity ("Contractor") under a fixed term, three year contract; and

WHEREAS, certain employees of the Contractor are represented for collective bargaining purposes by Local 1637, Amalgamated Transit Union, AFL-CIO, CLC (the "Union"); and

WHEREAS, sections 3(e)(4), 9(e)(1), and 13(c) of the Federal Transit Act ("Act") require, as a condition of Federal assistance, that suitable fair and equitable arrangements be made to protect urban mass transportation industry employees affected by such assistance; and

WHEREAS, with the exception of the provisions determined by the Department, the parties have agreed to the following protections as fair and equitable:

NOW, THEREFORE, the following terms and conditions shall apply and shall be specified in any contract governing such Federal assistance to the Public Body:

(1) (a) The term "Project", as used in this Arrangement, 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.

(b) The phrase "as a result of the Project", as used in this Arrangement, shall include events 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 or 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.

(c) The term "change in residence", as used in this Arrangement, means transfer to a work location which is either (1) outside a radius of twenty (20) miles of the employee's former work location and farther from the employee's residence than was the employee's former work location, or (2) more than thirty (30) normal highway route miles from the employee's residence and also farther from the employee's residence than was the employee's former work location.

(d) The term "days", as used in this Arrangement, means calendar days. In computing any period of time designated in this Arrangement, the day of the act or event from which the designated period of time begins to run shall not be included, but the last day of the period so computed shall be included, unless it is a Saturday, Sunday, or holiday observed in Clark County, Nevada, in which case the period runs to the next day which is not one of the aforementioned days.

(e) The term "protective period", as used in this Arrangement, (unless the context requires otherwise), means that period of time during which an employee is to be provided protection hereunder and extends from the date on which an employee is displaced, dismissed, or worsened to the expiration of six (6) years therefrom; provided, however, that the protective period for any particular employee during which the employee is entitled to receive the benefits of these provisions shall not continue for a longer period following the date the employee was displaced, dismissed, or worsened than the employee's length of service, as shown by the records and labor agreements applicable to the employee's employment prior to the date of the employee's displacement, dismissal, or worsening.

(2) The Project shall be performed and carried out in full compliance with the protective conditions described in this Arrangement.

(3) All rights, privileges, and benefits (including pension rights and benefits) of employees represented by the Union (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 not

previously vested may be modified or altered by collective bargaining and agreement by the parties thereto to substitute other rights, privileges and benefits.

(4) The collective bargaining rights of employees represented by the Union, including the right to arbitrate or otherwise resolve 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 retention of any such rights which exist by virtue of a collective bargaining agreement after such agreement is no longer in effect, except as is required by applicable law, including Section 13(c) of the Act. The Public Body will arrange for the continuation of collective bargaining and shall arrange for collective bargaining agreements to be entered into with the Union, relative to all subjects which are or may be proper subjects of collective bargaining under Section 13(c) of the Act.

(5) (a) In the event of any contemplated action or change in the organization, operation, facilities, or equipment of its transit system which may result in the dismissal or displacement of employees represented by the Union, or in a rearrangement of the workforce represented by the Union, as a result of the Project, the Public Body shall give at least seventy-five (75) days' written notice of such intended action or change by posting a notice on bulletin boards convenient to the interested employees and by sending certified mail notice to the Union. Such notice shall contain a full and adequate statement of the proposed action or change to be effected, including an estimate of the number of employees of each classification affected by the intended action or change and the number and classification of any jobs with any entity providing transit service under contract with the Public Body available to be filled by such affected employees.

(b) At the request of the Union following notice under subparagraph (a), the Public Body and the Union shall immediately commence negotiations for the purpose of reaching agreement with respect to the application of the terms and conditions of this Arrangement to the intended action or change noticed under such subparagraph. Any such change or action involving a dismissal or displacement of employees represented by the Union or rearrangement of the workforce represented by the Union shall provide for the selection of forces from the employees represented by the Union on bases accepted as appropriate in the particular case; and any assignment of employees represented by the Union made necessary by the intended action or change shall be made on the basis of an agreement between the Public Body and the Union. In the event of a failure to agree within thirty (30) calendar days from the commencement of such negotiations, the dispute may be submitted to arbitration

by either party pursuant to Paragraph (14) of this Arrangement. In any such arbitration, the terms of this Arrangement are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act, as amended, codified at 49 U.S.C. § 11347.

(c) In the event of a dispute as to whether an intended action or change within the purview of this Paragraph (5) may be instituted at the end of the 75-day notice period, either party may immediately submit that issue to arbitration under Paragraph (14) of this Arrangement. For purposes of any such arbitration, the time periods and procedures specified in Paragraph (14) shall be modified as follows: the parties shall have five (5) days to agree upon the appointment of the independent arbitrator; if the parties are unable to agree on an independent arbitrator, the parties shall strike names from any list provided by the Federal Mediation and Conciliation Service within three (3) days of receipt; and the independent arbitrator shall render a decision within thirty (30) days from the date the independent arbitrator is selected. In any such arbitration, the arbitration board shall rely upon the standards and criteria utilized by the Interstate Commerce Commission to address the "preconsummation" issue in cases involving employee protections pursuant to section 5(2)(f) of the Interstate Commerce Act, as amended, currently codified at 49 U.S.C. § 11347. In such proceedings, it shall be the burden of the Public Body to prove that, under the standards and criteria of the Interstate Commerce Commission referenced above, the intended action or change should be permitted to be instituted prior to the effective date of a negotiated or arbitrated implementing agreement; provided, however, that if the Public Body demonstrates that the intended action or change is likely to have a minor impact on employees, similar to the impact of a trackage rights or lease, the burden shall then shift to the Union to prove that, under the standards and criteria of the Interstate Commerce Commission referenced above, the intended action or change should not be permitted to be instituted prior to the effective date of a negotiated or arbitrated implementing agreement. The action or intended change shall not be instituted during the pendency of any arbitration proceeding under this subparagraph (c). In the absence of a dispute as to whether an action or change within the purview of this Paragraph (5) may be instituted at the end of the 75-day notice period, nothing in this Arrangement shall affect the ability of the Public Body to proceed with the noticed action or change, provided that any employees adversely affected thereby shall be provided with the rights and benefits of subparagraph (d) of this Paragraph from the time that they are affected.

(d) If an action or change within the purview of this Paragraph (5) is instituted in accordance with subparagraph (c) of this Paragraph, before an implementing agreement is reached or a final decision of an independent arbitrator is

rendered pursuant to subparagraph (b) of this Paragraph, all employees affected shall be kept financially whole, as if the noticed and implemented action had not taken place, from the time they are affected until the effective date of an implementing agreement or final arbitration decision.

(e) If the action or change noticed under subparagraph (a) of this Paragraph involves the acquisition, installation and/or use of new or upgraded equipment which requires additional employee training, the Public Body shall provide for such training to employees retained in service at no cost to the employees.

(6) (a) Whenever an employee, retained in service, recalled to service, or employed pursuant to Paragraphs (5), (7)(e), or (17) of this Arrangement, is placed in a worse position with respect to compensation as a result of the Project, the employee shall be considered a "displaced employee," and shall be paid a monthly displacement allowance to be determined in accordance with this Paragraph. Such displacement allowance shall be paid each displaced employee during the protective period following the date on which the employee is first displaced, and shall continue during the protective period as long as the employee is unable, in the exercise of the employee's seniority rights, to obtain a position producing compensation equal to or exceeding the compensation the employee received in the position from which the employee was displaced, adjusted to reflect subsequent general wage adjustments, including cost-of-living adjustments where provided for; provided that notice concerning such positions is posted on bulletin boards convenient to the interested employees.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee, including vacation allowances, pay for time lost on account of on-the-job injury, and monthly compensation guarantees, and the employee's total time paid for during the last twelve (12) months in which the employee performed compensated service more than fifty per centum of each such months, based upon the employee's normal work schedule immediately preceding the date of the employee's displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation and the average monthly time paid for. If the employee's length of service is less than twelve (12) months, the average monthly compensation and average monthly time paid for shall be computed by dividing separately the total compensation and total time paid by the number of months in which such employee performed compensated service more than fifty (50) per centum of each such month. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost-of-living adjustments where provided for. If the displaced employee's compensation in the employee's

current position is less in any month during the employee's protective period than the aforesaid average compensation (adjusted to reflect subsequent general wage adjustments, including cost-of-living adjustments where provided for), the employee shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that the employee is not available for service equivalent to the employee's average monthly time, but the employee shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. If a displaced employee fails to exercise the employee's seniority rights to secure another position to which the employee is entitled under the then existing collective bargaining agreement, and which carries a wage rate and compensation exceeding that of the position which the employee elects to retain, the employee shall thereafter be treated, for the purposes of this Paragraph, as occupying the position the employee elects to decline.

(c) Any employee placed in a worse position with respect to hours, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during the employee's employment as a result of the Project shall be considered a "worsened employee" and shall be entitled to offsetting make-whole benefits. Reasonable efforts should be made to restore the precise right, privilege or benefit lost or affected. If such efforts are unsuccessful or would be unsuitable, it may be acceptable to provide an alternative remedy which either: (1) awards offsetting benefits where such an award would result in a fair and equitable substitute; or (2) provides compensatory damages where the harm has a readily ascertainable economic value and such an alternative remedy would result in a fair and equitable substitute.

(d) The displacement allowance or offsetting make-whole benefits under this Paragraph shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, or dismissal for cause in accordance with any labor agreement applicable to the employee's employment.

(e) If any employee who is entitled to a monthly displacement allowance served as an agent or a representative of employees on either a full or part-time basis in the twelve (12) months immediately preceding the employee's being adversely affected and took uncompensated time from such employee's normal work schedule to serve in that capacity, the employee's monthly displacement allowance shall be computed on the basis of what the employee's compensation would have been (accounting for rate of pay and hours likely to have worked, based on the employee's prior work record) had the employee not worked as an agent or a representative of employees on a full or part-time basis during that period.

(7) (a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, in accordance with any collective bargaining agreement applicable to the employee's employment, the employee shall be considered a "dismissed employee" and shall be paid a monthly dismissal allowance to be determined in accordance with this Paragraph. Such dismissal allowance shall first be paid each dismissed employee commencing not later than the thirtieth (30th) day following the day on which the employee is dismissed or within thirty (30) days of the date of an arbitration award establishing that the employee is a dismissed employee and shall continue during the protective period, as follows:

| <u>Employee's length of service prior to adverse effect</u> | <u>Period of protection</u> |
|---|-----------------------------|
| 1 day to 6 years | equivalent period |
| 6 years or more | 6 years |

The monthly dismissal allowance shall be equivalent to one-twelfth (1/12) of the total compensation received by the employee in the last twelve (12) months of the employee's employment in which the employee performed compensated service more than fifty per centum of each such months based on the employee's normal work schedule to the date on which the employee was first deprived of employment as a result of the Project. If the employee's length of service is less than twelve (12) months, the monthly dismissal allowance shall be computed by dividing the total compensation by a number equal to the number of months of the employee's employment in which the employee performed compensated service more than fifty (50) per centum of each such months based on the employee's normal work schedule to the date on which the employee was first deprived of employment as a result of the Project. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost-of-living adjustments where provided for.

(b) An 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 exercise of seniority rights by an employee whose position is abolished as a result of the Project or as a result of the exercise of seniority rights by other employees brought about as a result of the Project, and the employee is unable to obtain another position, either by the exercise of the employee's seniority rights, or through requirement by the Public Body to accept reasonably comparable employment in accordance with subparagraph (e) of this Paragraph. In the absence of proper notice followed by an agreement or decision pursuant to Paragraph (5) hereof, no

employee who has been deprived of employment as a result of the Project shall be required to exercise seniority rights to secure another position in order to qualify for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Public Body informed as to the employee's current address and the current name and address of any other person by whom the employee may be regularly employed, or if the employee is self-employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when the employee is absent from service, the employee will be entitled to the dismissal allowance when the employee is available for service. The employee temporarily filling such position at the time it was abolished will be given a dismissal allowance on the basis of that position, until the regular employee is available for service, and thereafter shall revert to the employee's previous status and will be given the protections of this Arrangement in such position, if any are due the employee.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by the employee's former employer after being notified in accordance with the terms of the then-existing collective bargaining agreement. Prior to such call to return to work, the employee may be required by the Public Body to accept reasonably comparable employment for which the employee is physically and mentally qualified, or for which the employee can become qualified after a reasonable training or retraining period, provided it does not require a change in residence or infringe upon the employment rights of other employees under then-existing collective bargaining agreements. An employee who accepts other reasonably comparable employment will not thereby lose the employee's seniority rights under the collective bargaining agreement applicable to the position the employee occupied at the time the employee was deprived of employment, nor will such rights be otherwise adversely affected.

(f) When an employee who is receiving a dismissal allowance again commences employment in accordance with subparagraph (e) of this Paragraph, such allowance shall cease while the employee is so reemployed, and the period of time during which the employee is so reemployed shall be deducted from the total period for which the employee is entitled to receive a dismissal allowance. During the time of such reemployment, the employee shall be entitled to the protections of this Arrangement to the extent they are applicable.

(g) The dismissal allowance of any employee who is otherwise employed, except by the Public Body, shall be reduced to the extent that the employee's combined monthly earnings from

such other employment or self-employment, any benefits received from any unemployment insurance law, and the employee's dismissal allowance exceed the amount upon which the employee's dismissal allowance is based. Such employee, or the Union, and the Public Body shall agree upon a procedure by which the Public Body shall be kept currently informed of the earnings of such employee in employment other than with the employee's former employer or with the Public Body, including self-employment, and the benefits received.

(h) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service in accordance with the applicable collective bargaining agreement, or to accept employment as provided under subparagraph (e) of this Paragraph or under Paragraph (17) thereof, or in the event of the employee's resignation, death, retirement, or dismissal for cause in accordance with any collective bargaining agreement applicable to the employee's employment.

(i) A dismissed employee receiving a dismissal allowance shall actively seek and not refuse other reasonably comparable employment offered the employee, other than in the employment of the Public Body, for which the employee is physically and mentally qualified and which does not require a change in the employee's place of residence. Failure of the dismissed employee to comply with this obligation shall be grounds for discontinuance of the employee's allowance; provided that such dismissal allowance shall not be discontinued until final determination is made either by agreement between the Public Body and the employee or the Union, or by final arbitration decision rendered in accordance with Paragraph (14) of this Arrangement, that such employee did not comply with this obligation.

(j) If an employee receiving a dismissal allowance returns to active service, the period during which such employee received a dismissal allowance shall be counted as employment for purposes of determining such employee's eligibility for vacation days thereafter; provided that such employee shall not accrue actual vacation days for the period during which the dismissal allowance was received.

(8) In determining length of service of a displaced or dismissed employee for purposes of this Arrangement, such employee shall be given full service credits in accordance with the records and labor agreements applicable to the employee and the employee shall be given additional service credits for each month in which the employee receives a dismissal or displacement allowance as if the employee were continuing to perform services in the employee's former position.

(9) No employee shall be entitled to a displacement or dismissal allowance or offsetting make-whole benefits under Paragraphs (6) or (7) hereof because of the abolishment of a position for which, at some future time, the employee could have bid, been transferred, or been promoted.

(10) No employee receiving a dismissal or displacement allowance shall be deprived, during the employee's protective period, of any rights, privileges, or benefits attaching to the employee's employment, including, without limitation, group life insurance, hospitalization and medical care, free transportation for the employee and the employee's family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workers' Compensation, and unemployment compensation, as well as any other benefits to which the employee may be entitled under the same conditions and so long as such benefits continue to be accorded to other employees of the bargaining unit, in active service or furloughed, as the case may be.

(11) (a) Any employee covered by this Arrangement who is retained in the service of the employee's employer, or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of the employee's employment as a result of the Project in order to retain or secure active employment with the employee's employer, or employment pursuant to Paragraphs 7(e) or (17), in accordance with this Arrangement, and who is thereby required to make a change in residence, shall be reimbursed for all expenses of moving the employee's household and other personal effects, for the traveling expenses for the employee and members of the employee's immediate family, including any necessary living expenses for the employee and the employee's immediate family, and for the employee's own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter, not to exceed five (5) working days. The exact extent of the responsibility of the Public Body under this Paragraph, and the ways and means of transportation, shall be agreed upon in advance between the Public Body and the affected employee, or the Union.

(b) If any such employee is laid off within three (3) years after changing the employee's point of employment in accordance with Paragraph (12) hereof, and elects to move the employee's place of residence back to the employee's original point of employment, the Public Body shall assume the expenses, losses and costs of moving to the same extent provided in subparagraph (a) of this Paragraph and Paragraph (12)(a) hereof.

(c) No claim for reimbursement shall be paid under the provisions of this Paragraph unless such claim is presented to the Public Body within ninety (90) days after the date on which the expenses were incurred. The Public Body shall make

payment for such claim within forty-five (45) days after receipt, unless the claim is disputed by the Public Body.

(d) Except as otherwise provided in subparagraph (b) of this Paragraph, changes in residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this Paragraph.

(12) (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the employee's employer (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of the employee's employment as a result of the Project in order to retain or secure active employment with the employee's employer or employment pursuant to Paragraphs 7(e) or (17) of this Arrangement and is thereby required to make a change in residence.

If the employee owns the employee's own home in the locality from which the employee is required to move, the employee shall, at the employee's option, be reimbursed by the Public Body for any loss suffered in the sale of the employee's home for less than its fair market value, plus conventional fees and closing costs customarily paid by the seller in that area, such loss to be paid within thirty (30) days of settlement or closing on the sale of the home unless a dispute arises in connection with such loss. In each case, the fair market value of the home in question shall be determined as of a date sufficiently prior to the date of the sale so as to be unaffected by the Project. The Public Body shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person and to reimburse the seller for the employee's conventional fees and closing costs.

If the employee is under a contract to purchase a home for occupancy by the employee, the Public Body shall protect the employee against loss under such contract, and in addition, shall relieve the employee from any further obligation thereunder.

If the employee holds an unexpired lease of a dwelling occupied by the employee as the employee's home, the Public Body shall protect the employee from all loss and cost in securing the cancellation of such lease.

(b) No claim for loss shall be paid under the provisions of this Paragraph unless such claim is presented to the Public Body within one year after the effective date of the change in residence.

(c) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through a joint conference between the employee, or the Union, and the Public Body. In the event they are unable to agree, the dispute or controversy may be referred by the Public Body or the Union to a board of competent real estate appraisers licensed by the Nevada Commission of Appraisers of Real Estate, who shall be selected in the following manner: one (1) to be selected by the representatives of the employee, and one (1) by the Public Body, and these two, if unable to agree within thirty (30) days upon the valuation, shall endeavor by agreement within ten (10) days thereafter to select a third appraiser or to agree to a method by which a third appraiser shall be selected. The jurisdiction of the board of appraisers shall be limited to determination of the issues raised in this Paragraph. A decision of a majority of the appraisers shall be required and such decision shall be final, binding, and conclusive. The compensation and expenses of the neutral appraiser, including expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(d) Except as otherwise provided in Paragraph (11)(b) hereof, changes in residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this Paragraph.

(13) A dismissed employee entitled to protection under this Arrangement may, at the employee's option within thirty (30) days of the employee's dismissal, resign and (in lieu of all other benefits and protections provided in this Arrangement) accept a lump sum payment computed in accordance with section (9) of the Washington Job Protection Agreement of 1936:

| <u>Length of Service</u> | <u>Separation Allowance</u> |
|------------------------------|-----------------------------|
| 1 year and less than 2 years | 3 months' pay |
| 2 years " " " 3 " | 6 " " |
| 3 " " " " 5 " | 9 " " |
| 5 " " " " 10 " | 12 " " |
| 10 " " " " 15 " | 12 " " |
| 15 " " over | 12 " " |

In the case of an employee with less than one year's service, five days' pay, computed by multiplying by 5 the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied, for each month in which the employee performed service, will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 7(b) of the Washington Job Protection Agreement, as follows:

For the purposes of this agreement, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve (12) such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization, he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(b) One month's pay shall be computed by multiplying by 30 the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied prior to time of the employee's dismissal as a result of the Project.

(14) (a) In the event of any dispute involving the Public Body and the employees covered by this Arrangement regarding the application, interpretation, or enforcement of this Arrangement, not otherwise governed by paragraph (12)(c) of this Arrangement, which cannot be settled within forty-five (45) days after such dispute first arises, such dispute may be submitted at the written request of either the Public Body or the Union to an independent arbitrator selected as hereinafter provided. The party making the arbitration demand shall request the Federal Mediation and Conciliation Service (FMCS) to furnish a list of seven (7) persons from which the independent arbitrator shall be selected. The parties shall, within fourteen (14) days after the receipt of such list, determine by lot the order of elimination, and thereafter each shall, in that order, alternately eliminate one name until only one name remains. The remaining person on the list shall be the independent arbitrator.

(b) The decision of the independent arbitrator shall be final, binding and conclusive and shall be rendered within forty-five (45) days after the hearing on the dispute has been concluded and the record closed. The remedial authority of the independent arbitrator shall include the power to award full back pay, allowances, or offsetting make-whole remedies to employee-claimants where justified. The fees and expenses of the independent arbitrator shall be borne equally by the parties to the proceedings, and other expenses shall be paid by the party incurring them. The arbitration shall be conducted pursuant to the Nevada Uniform Arbitration Act, Nev. Rev. Stat. §§ 38.015-38.205, as supplemented by the provisions of this Paragraph.

(c) 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 Public Body 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 (Hodgson's Affidavit in Congress of Railway Unions v. Hodgson, 326 F. Supp. 68 (D.D.C. 1971)).

(d) Nothing in this Paragraph, or Arrangement, shall be construed to enlarge or limit the right of the employees covered by this Arrangement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law.

(15) Nothing in this Arrangement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or arrangements by collective bargaining agreement or law where applicable; provided, that there shall be no duplication or pyramiding of benefits to any employee, and, provided further, that the benefits under this Arrangement, or any other agreement or arrangement, shall be construed to include the conditions, responsibilities, and obligations accompanying such benefits. This Paragraph shall be construed consistent with the Hodgson Affidavit in Congress of Railway Unions v. Hodgson, 326 F. Supp. 68 (D.D.C. 1971) and the Federal court's interpretation of the concept of "pyramiding" in New York Dock Railway v. United States, 609 F.2d 83, 99-101 (2d Cir. 1979).

(16) (a) The Public Body shall be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee affected as a result of the Project may file a claim in writing individually or through the Union with the Public Body within sixty (60) days of the date the employee is terminated or laid off as a result of the Project, or within eighteen (18) months of the date the employee's position with respect to the employee's employment is otherwise worsened as a result of the Project; provided, in the latter case, if the events giving rise to the claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event; provided, further, that no benefits shall be payable for any period prior to six (6) months from the date of the filing of the claim. Unless such claims are filed with the Public Body within such time limitations, the Public Body shall thereafter be relieved of all liabilities and obligations related to such claims.

(b) Not later than forty-five (45) days after the date of the filing of the claim, the Public Body will fully honor the claim, making appropriate payments, or will give notice to the claimant or the Union of the basis for denying or modifying such claim, giving reasons therefor. In the event the Public Body 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. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be requested of them relevant to the disposition of the claim, and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual material as may be relevant. In the event the claim is so rejected by the Public Body, the claim may be processed to arbitration as hereinabove provided by Paragraph (14) of this Arrangement. In addition, notwithstanding the invocation of the above procedures by the union, a claim may be processed to arbitration pursuant to paragraph (14) forty-five (45) days after such was filed and the pendency or status of any of the above procedures shall have no impact upon or in such arbitration. Prior to the arbitration hearing, the parties shall exchange a list of intended witnesses.

(c) Nothing included herein as an obligation of the Public Body shall be construed to relieve any other urban mass transportation employer of the employees covered hereby of any obligations which it has under existing collective bargaining agreements, including but not limited to obligations arising from the benefits referred to in Paragraph (10) hereof, nor make any such employer a third-party beneficiary of the Public Body's obligations contained herein, nor deprive the Public Body of any right of subrogation.

(17) (a) During the employee's protective period, a dismissed employee shall, if the employee so requests in writing, be granted priority of employment to fill any vacant position with any entity providing transit service under contract with the Public Body which is reasonably comparable to that which the employee held when dismissed, for which the employee is, or by training or re-training can become, qualified; not, however, in contravention of collective bargaining agreements relating thereto. In the event the employee requests such training or re-training to fill such vacant position, such training or re-training shall be provided at no cost to the employee. The employee shall be paid the salary or hourly rate provided for in the applicable collective bargaining agreement for such position, plus any displacement allowance or offsetting make-whole benefits to which he or she may be otherwise entitled. If such dismissed employee who has made such request fails, without good cause, within ten (10) days to accept an offer of a position comparable to that which the employee held when dismissed, for which the employee is qualified or for which the employee has

satisfactorily completed such training, such employee shall, effective at the expiration of such ten-day period, forfeit all rights and benefits under this Arrangement.

(b) Not later than forty-five (45) days after the date of the filing of the claim, the Public Body will fully honor the claim, making appropriate payments, or will give notice to the claimant or the Union of the basis for denying or modifying such claim, giving reasons therefor. In the event the Public Body 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. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be requested of them relevant to the disposition of the claim, and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual material as may be relevant. In the event the claim is so rejected by the Public Body, the claim may be processed to arbitration as hereinabove provided by Paragraph (14) of this Arrangement. In addition, notwithstanding the invocation of the above procedures by the Union, a claim may be processed to arbitration pursuant to paragraph (14) forty-five (45) days after such was filed and the pendency or status of any of the above procedures shall have no impact upon or in such arbitration. Prior to the arbitration hearing, the parties shall exchange a list of intended witnesses.

As between employees who request employment pursuant to this Paragraph, the following order shall prevail where applicable in hiring such employees:

(a) Employees in the craft or class of the vacancy shall be given priority over employees without seniority in such craft or class;

(b) As between employees having seniority in the craft or class of the vacancy, the senior employees, based upon their service in that craft or class as shown on the appropriate seniority roster, shall prevail over junior employees;

(c) As between employees not having seniority in the craft or class of the vacancy, the senior employees, based upon their service in the crafts or classes in which they do have seniority as shown on the appropriate seniority rosters, shall prevail over junior employees.

(18) This Arrangement shall be binding upon the successors and assigns of the Public Body and the Union, and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of the arrangements made by or for the Public Body to manage and operate the transit system.

Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management and/or operation of the transit system, or any part or portion thereof, shall agree to be bound by the terms of this Arrangement and accept the responsibility for full performance of these conditions.

(19) The employees covered by this Arrangement shall continue to receive any applicable coverage under Railroad Retirement, Social Security, Workers' Compensation, unemployment compensation, and the like. In no event shall these benefits be worsened as a result of the Project.

(20) In the event any provision of this Arrangement is held to be invalid or otherwise unenforceable under Federal, state, or local law, in the context of a particular Project, the remaining provisions of this Arrangement shall not be affected and the invalid or unenforceable provision shall be renegotiated by the Public Body and the Union for purpose of adequate replacement under section 13(c) of the Act. If such negotiation shall not result in mutually satisfactory arrangement, any party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this Arrangement only as applied to that Project, and any other appropriate action, remedy or relief.

(21) If any employer of the employees covered by this Arrangement rearranges or adjusts its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which the employee should be entitled under this Arrangement, the provisions of this Arrangement shall apply to such employee as of the date when the employee was so affected.

(22) In the event any Project to which this Arrangement applies is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the Federal government and the Public Body or other applicant for Federal funds; provided, however, that this Arrangement shall not merge into the contract of assistance but shall be independently binding and enforceable by and upon the parties hereto, and by any covered employee or the employee's representative, in accordance with its terms, nor shall any other employee protective arrangement or agreement, nor any collective bargaining agreement merge into this Arrangement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.