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Office of Labor-Management Programs

29 CFR Part 215
Guidelines, Section 5333(b), Federal Transit Law; Final Rule

DEPARTMENT OF LABOR

Office of Labor-Management Programs

29 CFR Part 215

RIN 1294–AA14

Guidelines, Section 5333(b), Federal Transit Law

AGENCY: Office of Labor-Management Programs, Office of the American Workplace, Labor.

ACTION: Final guidelines.

SUMMARY: The Federal Transit law, Title 49 U.S.C., Chapter 53, provides, in general, at Section 5333(b) (commonly referred to as ''Section 13(c)'', that, as a condition of certain Federal financial assistance by the Department of Transportation's Federal Transit Administration (FTA) in financing mass transportation systems, fair and equitable arrangements must be made, as determined by the Department of Labor (the Department), to protect the interests of employees affected by such assistance. In conjunction with the Department's role in making such determinations, the Department is providing information concerning its procedures for processing applications for assistance under the Federal Transit Law, and certification by the Department of acceptable protective arrangements.

DATES: These Guidelines become effective January 8, 1996.

FOR FURTHER INFORMATION CONTACT: Kelley Andrews, Director, Statutory Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5411, Washington, DC 20210, (202) 219–4473.

SUPPLEMENTARY INFORMATION:

I. Background

Section 5333(b) of the Federal Transit law requires that arrangements be made to protect certain rights of mass transit employees affected by grants of Federal funds for the acquisition, improvement, or operation of a transit system. These rights include the preservation of rights, privileges, and benefits under existing collective bargaining agreements, the continuation of collective bargaining rights, the protection of individual employees against a worsening of their positions related to employment, assurances of employment to employees of acquired mass transportation systems, priority of reemployment, and paid training or retraining. In administering this program, the Department notifies relevant unions, if any, in the area of the proposed project and provides the grant applicant and the affected union(s) an opportunity to develop the terms and conditions of the protections. The Department provides technical and mediation assistance to the parties during the negotiations. These new guidelines replace guidelines which have been in effect since May 1, 1978.

The Department's Office of Labor-Management Programs' Notice of Proposed Rulemaking (NPRM), issued June 29, 1995 (FR Vol. 60, No. 125, pg. 34072), proposed to change the procedures for certifying employee protective arrangements which are required as a condition of assistance under the Federal Transit law, in order to expedite the process and make it more predictable to the parties.

Approximately 85% of the Department's certifications in the past five years have been issued within 90 days of the date they were received from FTA. The processing time for the remaining 15%, however, has been less predictable. The Department's objective in revising its procedures is to enhance the efficiency and predictability of the certification process for *all* transit grant applications while assuring that the required employee protections are in place. Where comments were submitted which supported this objective, the guidelines have been revised, as appropriate, to reflect the comments, and are discussed under Section II, Summary and Discussion of Comments.

Numerous comments were submitted which relate in a general way to the Department's administration of this employee protection program. The guidelines were said to contain loopholes which would undermine the effort to establish and meet deadlines for certification, create new legal standards resulting in a more arbitrary and time-consuming process, and establish protections and confer authority on the Department which exceed the statute.

The Department has carefully reviewed the new guidelines with these comments very much in mind to assure that its appropriate statutory mandate will be fulfilled, without creating unnecessary ''loopholes'' or legal standards which would result in a more arbitrary or time consuming process. Because the statute itself requires the Department to exercise discretion and flexibility in determining what is fair and equitable, the guidelines must also provide an appropriate level of flexibility. Where appropriate, the guidelines have been changed to reflect these concerns and in other instances, where no change was deemed necessary, the specific points raised are also discussed in Section II, Summary and Discussion of Comments.

The Department has also made a minor adjustment of a technical nature to § 215.2. This section, which addresses the required documentation to be included in the grant application, has been modified to reflect that the content of the grant application is as determined by the FTA. The Department is not requesting any information for processing of the grant that is not required by the FTA.

The new guidelines differ from the previous guidelines and the Department's practice by establishing strict time frames for the certification of protections in a more expeditious and predictable manner. The procedures established by these guidelines will assure that the required protections can be certified, within sixty days after the initiation of processing by the Department, permitting the release of the Federal transit grant funds.

The new guidelines continue to encourage local negotiations or discussions for the development of employee protection terms. The guidelines, in recognition of the fact that there are some states where bargaining is prohibited for public employees, allow for ''discussion'' where necessary to satisfy the Federal Transit law in a manner that does not violate state or local law.

The guidelines also eliminate referral of applications when the grant is for routine replacement of equipment and/ or facilities of like kind and character. In cases where referral to the unions is appropriate, the referral will include the intended terms of certification. The parties will be given 15 days from the date of the referral to submit objections, if any, to the referral terms. The Department will Determine within 10 days thereafter whether objections are sufficient. Should the Department find that the objections are not sufficient, the Department will issue its certification on the terms specified in the referral. When objections are found to be sufficient, negotiations may proceed and the Department may provide technical and mediatory assistance where appropriate. In the event the protections cannot be agreed to within 60 days from the original referral date, the Department will issue an interim certification, permitting the release of Federal transit grant funds. In the event that the parties are still not able to resolve their differences within 60 days after the Department has issued the interim certification, the Department will set forth the protective terms in a final certification.

Finally, it seems clear from the comments received that several parties are concerned about and wish to discuss and resolve a number of substantive issues relating to this program. While this is an important matter, these are procedural guidelines and thus not the appropriate forum for the resolution of such substantive rather than procedural issues. The Department's policies on substantive issues are generally addressed through certifications and are discussed in the Department's determination letters.

II. Summary and Discussion of the Comments

Twenty comments were submitted and considered, including one from a private individual.

Two comments were received from the following public transit authorities and planning organizations:

—Northern Illinois Regional Transportation Authority
—Metropolitan Transit Commission, Oakland, CA

Twelve comments were received from the following public transit providers:

—Central Arkansas Transit Authority
—New York City Department of Transportation
—Metropolitan Transit Authority, New York, NY
—Triangle Transit Authority, Research Triangle Park, NC
—Public Works Office/Transit, Johnson County KS
—StarTran, Lincoln, NE
—Washington Metropolitan Area Transit Authority
—Los Angeles County Metropolitan Transit Authority
—Regional Transportation Commission, Clark County, NV
—New Jersey Transit Corporation
—North County Transit District, Oceanside, CA
—Metropolitan Atlanta Rapid Transit Authority

One comment was received from a state department of transportation:

—State of Michigan, Department of Transportation

Three labor organizations provided comments:

—Amalgamated Transit Union
—Transportation Trades Department, AFL-CIO
—Transport Workers Union of America

Finally, one public transit association provided comments:

—American Public Transit Association

The Department has carefully reviewed and considered all of the comments in developing these guidelines. The following provides a summary of the comments and the Department's response.

A. Definition of ''Irreparable Harm''

One comment indicated that the safeguard against irreparable harm to employees in § 215.3(d)(8) pending completion of the special dispute resolution process is an essential protection which should be included in the guidelines. Others, however, suggested that the language concerning irreparable harm would add a new substantive protection under section 5333(b), which they view as providing a ''remedial scheme to provide compensation'' when employees are affected by a project.

Section 5333(b), requires more than providing compensation for impacts upon employees. It is also intended to minimize the impact of Federal projects on employees. The restriction against causing ''irreparable harm'' in § 215.3(d)(8), however, is limited solely to any action which would ''result in irreparable harm to employees *if such action concerns matters subject to the steps set forth* in paragraph (e) of this section.'' (Emphasis added.) In specifying that no action may be taken which would result in irreparable harm, the Department intends for the recipient of funds to be able to take any necessary action that will not irreparably harm employees while allowing a project to move forward. The minimal restriction would remain in effect only until final terms and conditions are determined and certified.

B. Definition of ''Material Effect''

The § 215.3(b)(1) provision with respect to ''material effect'' states that the procedural requirements of § 215.3(b)(2) through § 215.3(h) will not apply ''absent a potentially material effect on employees.'' One comment indicated that the phrase ''material effect on employees'' should be limited in its scope to material adverse effects on employees so that if a project for routine replacement of equipment and/or facilities of like kind and character has a positive effect on employees, no referral would be required. Impacts, however, may be viewed by some individuals as positive while others view the same effect as contrary to their interests. Therefore, no adjustment need be made to accommodate this concern.

One comment noted that ''[i]t is not clear whether the substantive determination of materiality (material effect on employees) is to be a subjective judgment of the Department or a legal determination based on specific standards or precedents.'' The Department, however, will consult with FTA, where necessary, and will determine which projects have a ''potentially material effect on employees'' based on available applicable precedent and policy.

C. Definition of the Phrase ''Where Circumstances So Warrant''

Several comments were made indicating that the phrase ''where circumstances so warrant'' in § 215.3(h) enables the Department to retain the right to withhold certification at its discretion. One saw this as an expansion of the language of the law which would give the Department ''veto authority over the release of grant funds.'' The Department intends the phrase ''where circumstances so warrant'' to mean that certification will not be issued where circumstances inconsistent with the statute prevent the Department from certifying. For instance, in a situation involving the Metropolitan Atlanta Rapid Transit Authority (MARTA) in Georgia, the Department was unable to certify grants for a short time because state law prohibited MARTA from providing the requisite protections. Accordingly, given that at least one comment indicated this is an expansion of the current law, the Department will clarify the intent of this language by amending § 215.3(h) of the guidelines to read: ''Notwithstanding the foregoing, the Department retains the right to withhold certification where circumstances inconsistent with the statute so warrant until such circumstances have been resolved.''

D. Definition of ''Sufficient'' as Applied to Objections to Certification

In § 215.3(d)(2)(i), the guidelines provide that the Department will ''determine whether the objections raised are sufficient'' when one party objects to terms and conditions proposed by the Department as the basis for certification of a project. In § 215.3(d)(3), the guidelines set forth the criteria which the Department will consider in determining whether an objection will be considered sufficient.

Comments indicated concern that the transit agencies would not be given the same opportunity as would be provided to the employees to object to the referred terms and conditions, citing as an example where it believed that existing protections include provisions that are no longer legally required or that are burdensome. Such objections, if raised by the transit agencies, would require the Department to make a determination as to whether they are sufficient. The definition does not favor either party over the other.

Another comment indicated that, in order to avoid challenges as to whether legal or factual circumstances have changed, the Department should modify § 215.3(d)(3) so that it will consider an objection to be sufficient when: (ii) the objection ''concerns legal or factual issues relating to the terms proposed to be certified that *may* materially affect the rights or interests of employees.'' The current proposed language requires that the Department consider an objection to be sufficient when: (ii) the objection concerns changes in legal or factual circumstances that materially affect the rights or interests of employees.

In response to this comment, the Department has determined that there is a need to clarify § 215.3(d)(3)(ii) and accordingly we have added the word ''may'' before ''materially affect.''

E. Definition of the Term ''Appropriate'' in § 215.3(b)(3)

One comment noted that this section sets forth procedures where there is a new applicant or where the previous arrangements are ''not appropriate to the current projects'' without providing guidance as to what would be considered ''appropriate.'' This section further specifies that the Department will refer such grants to the parties based on terms and conditions similar to either the Model Agreement for operating projects or the Special Warranty for capital projects.

There are several situations in which it would not be appropriate to refer a project on the basis of previously certified arrangements. It is not possible to anticipate all the factual circumstances where the current terms would no longer be appropriate. However, referral on the basis of existing arrangements is not appropriate in a situation where the Department is aware that the terms and conditions of the existing arrangements do not satisfy the conditions of the statute in the circumstances presented, perhaps because of a change in the state law or a change in the manner in which the transit system is operated (*e.g.,* the public body decides to operate services previously provided through a management company drawing into question how specific protections required by the statute will be provided). Another situation might be one in which the parties have, for instance, negotiated a capital agreement, but have not developed an agreement for application to operating assistance projects.

F. Standards for Operating and Capital Grants Where Protections Do Not Already Exist

One comment noted that the ''Model Agreement was developed to provide a template for parties who wished to use it, but was never intended to be a 'standard' or 'default' option.'' It was further suggested that the details of the protective arrangements should be largely left to the parties. Another comment noted that the proposed § 215.3(b)(3)(i) references ''terms and conditions similar to those of the Model Agreement,'' and questioned which ''similar'' terms and conditions would be specified by the Department. Other questions included: Will the parties be given the opportunity to negotiate? Will the Department abrogate a party's right to withdraw from the Model Agreement?

Although the Model Agreement was not originally developed for application to all operating assistance grants, the agreement has been certified as meeting the requirements of the statute, and is applied with the agreement of the parties in the majority of operating assistance projects. The Department intends to expedite the certification process by basing its initial referral of operating assistance grants on terms and conditions similar to those of the Model Agreement when no other existing arrangement is applicable. As with referrals for applicants with previously certified arrangements, the parties will have 15 days from the date of the referral and notification letters to submit objections to the referred terms. The parties will be afforded the opportunity to negotiate alternative terms if the Department determines an objection to be sufficient in accordance with § 215.3(d)(3).

The Department will not ''abrogate'' the right of any party to withdraw from the Model Agreement in a timely manner. However, if a party withdraws from the Model Agreement, referral of the next operating project involving that party, in accordance with § 215.3(b)(3)(i), will be based on terms and conditions ''similar'' to the Model Agreement because there will be no previously certified arrangements ''appropriate to the current project.'' The parties will then need to negotiate terms and conditions, under the procedures and timeframes outlined in the guidelines, to substitute for those which they object to from the Model Agreement.

Another comment suggested that, in order to make the standards for protections required under capital grants and operating grants conform with each other, § 215.3(b)(3)(i) should be redrafted to require that for operating grants, the terms and conditions will be based on arrangements no less protective than those of the Model Agreement. The Department has concluded that such consistency could more appropriately be obtained by including language in § 215.3(b)(3)(ii), which indicates that ''for capital grants, the terms and conditions will be based on arrangements similar to those of the Special Warranty applied pursuant to section 5311.'' This language affords the Department greater latitude in incorporating the language of prior Departmental determinations into referrals.

One comment noted that ''one of the paragraphs ((b)(3)(ii)) cited as being applicable to (b)(1) projects specifically states that it applies to grants other than those referenced in (b)(1).'' We have deleted the phrase ''other than those for replacement equipment or facilities referenced in paragraph (b)(1) of this section,'' from § 215.3(b)(3)(ii) to clarify that the Special Warranty will be used for new applicants which apply for routine replacement of equipment and/ or facilities of like kind and character.

Comments also questioned using the Special Warranty as the basis for certification of capital grants. As with the Model Agreement, the Special Warranty has been previously certified by the Department as meeting the requirements of the statute and will serve as a starting point for the parties to develop protections should sufficient objections be submitted to the proposed terms. This will expedite the processing of section 5333(b) certifications while continuing to ensure the right of the parties to negotiate appropriate protective arrangements.

G. Interim Certifications Under § 215.3(d)(7)

Several comments noted that the court has held that the Department does not have the statutory authority to issue conditional certifications. These comments suggest that the proposed interim certification would be a conditional certification. The conditional certifications rejected by the courts in *Amalgamated Transit Union* v. *Donovan*, 767 F.2d 939 (D.C. Cir. 1985), however, were not statutorily sufficient because they did not ensure that all requirements of the statute were satisfied prior to certification. In those instances, the Department had issued certifications which were lacking mandatory terms and conditions. The interim certification provided for in these guidelines will fully satisfy the requirements of the statute based upon

the information available at the time of certification. Because the terms of an interim certification will meet all the requirements of the statute, the interim certification does not constitute a ''conditional'' certification.

Other comments suggested that the receipt of Federal funds may affect a transit system's ability to later challenge different certification arrangements if such are subsequently imposed on it by the Department or that a system may prefer not to accept an interim certification because different arrangements could later be imposed. In the Department's view, the vast majority of applicants will benefit from the expedited certification procedure. The interim certification allows the transit authority to execute its grant contract with the FTA, thus avoiding, in certain instances, a potential lapse of funds. Moreover, the applicants will be aware of the disputed issues and thus be able to judge any potential liability if a project is implemented and the Department imposes language in the final certification that differs from that in the interim certification. In any event, under the guidelines, final certification will be issued within 60 days of the interim certification, thus limiting any period of uncertainty for transit systems.

H. Time Limits Under § 215.3(d)(1) for the Parties To Submit Objections

Several comments indicated support for the Department's ''progress towards procedural reform'' and noted that strict time limits for processing and issuance of certifications ''would truly expedite the grant application and approval process for many grantees. Still others commented that ''the proposed changes are consistent with the basic purposes of 13(c).''

Comments also suggested that there should be consequences if the Department or the parties fail to act within established timeframes. The Department recognizes the need to ensure compliance with the deadlines established in these guidelines. Funding cannot be released in the absence of a certification that employee protections are in place since the statute mandates the Department's certification as a precondition to the release of Federal funds.

If objections by the parties are not timely, the Department will proceed with certification on the basis proposed in the referral. To accommodate objections from multiple parties, however, the Department has made a technical correction to § 215.3(d)(2) to indicate that a determination regarding the sufficiency of objections will be made within 10 days of the date for submitting objections.

I. Procedures Under § 215.3(b)(1) for Routine Replacement of Equipment and/or Facilities of Like Kind and Character Exempting These From Referral

Section 215.3(b)(1) of the proposed guidelines specifies that grants for routine replacement of equipment and/ or facilities of like kind and character will be certified without a referral to labor organizations absent a potentially material effect on employees. Several comments were made in support of this proposal. One comment indicated that eliminating the referral of applications for grants for routine replacement of equipment and/or facilities ''would benefit our agency immediately if approved and implemented.''

One comment ''strongly object[ed] to exempting capital grants for routine replacement of equipment of like kind and character and/or facilities of like kind and character from the modified procedural requirements.'' The comment requested that this exclusion be removed from the final guidelines and that routine replacement grants be processed under the modified grant procedures applicable to all other projects.

Three comments indicated that the proposed guidelines failed to establish a procedure for the parties to provide positions on the issue of ''material effect on employees'' to the Department and, also, that the proposed guidelines did not establish a time frame for the Department's determination of whether a referral would be made.

It is not necessary for labor organizations to receive referrals of grants for ''routine replacement'' projects. In instances where no referral is made, the Department will apply existing protective arrangements which have been deemed satisfactory for similar projects in the past. For new applicants seeking ''routine replacement'' capital items, the Department will apply protections based upon the Special Warranty. The Department will only proceed with a certification in such instances where all capital items are clearly ''routine replacement'' items of like kind and character. The Department will consult with the FTA if necessary to determine whether a grant includes only routine replacement items.

No opportunity has been provided in the guidelines for input from the parties with regard to any ''potentially material effect'' on employees. However, where there is routine replacement of capital items, which will be used in the same locations and in the same manner as the original capital items, it is unlikely that there will be an impact upon employees which would not be covered by the existing protective arrangements.

Routinely seeking input on this issue from the parties in advance of the Department's determination would require nearly as much time as a routine referral. Should the Department deem it necessary, however, the Department could seek the input of the parties on the issue of ''potentially material effect.''

It is not necessary for the guidelines to include a time frame for the Department's determination of whether a referral would be made. FTA is responsible for identifying in its transmittal to the Department that a grant application is for the purpose of purchasing routine replacement equipment and/or facilities of like kind and character. If the information in the grant application is sufficient for the Department to concur in this designation, the Department will promptly proceed with its certification, absent a finding of ''potentially material effect'' pursuant to § 215.3(b)(1). If the information in the grant application does not support a conclusion that the project is for routine replacement equipment and/or facilities of like kind and character, the Department will refer the project to the appropriate parties in accordance with the procedures in § 215.3(b) within 5 days of receipt from the FTA.

For information purposes only, applications for ''routine replacement'' items will continue to be transmitted to the labor organizations representing employees in the service area of the projects.

J. Procedures for Protective Arrangements as to States That Pass Through Funds to Subrecipients

Two comments indicate that the Department has previously introduced policies and procedures for processing of statewide grant applications which are not reflected in its earlier guidelines. They further suggest that procedures recently developed by the Department for processing of grants to States which pass through funds to subrecipients, particularly to small urban and rural recipients, be reflected in the new guidelines in a separate section. In response to these comments, the Department has determined that it would be appropriate to add a new § 215.3(a)(3) to clarify that protections generally will be provided by the subrecipients which receive funds through a State administrative agency.

Accordingly, the following section has been added:

215.3(a)(3) If an application involves a grant to a state administrative agency which will pass through assistance to subrecipients, the Department of Labor will refer and process each subrecipient's respective portion of the project in accordance with this section. If a state administrative agency has previously provided employee protections on behalf of subrecipients, the referral will be based on those terms and conditions. These procedures are not applicable to grants under section 5311.

It was also suggested that the Department should automatically certify section 5309 (formerly section 3) projects for rural providers on the basis of the Special Warranty. Under the guidelines, referrals for rural providers receiving funds under section 5309 will be based upon terms and conditions similar to those of the Special Warranty, unless there are previously certified arrangements which have been applied to the section 5309 projects. However, although the guidelines at § 215.3(b)(3)(iii) indicated that referrals for projects under section 5311 (formerly section 18) will be made on the basis of the Special Warranty, the Department will amend the proposed guidelines to continue to provide for automatic certification of applications pursuant to section 5311 for rural providers.

K. Procedure for Dispute Resolution to Determine Terms and Conditions of Final Certifications, § 215.3(e)(4)

One comment stated that ''[t]he regulations explicitly decline to establish the manner of dispute resolution by the Department of Labor.'' Another indicated that § 215.3(e)(4) appears to give the Department the authority to utilize alternative methods of dispute resolution, noting that the statute does not allow the Department to delegate this authority to a third party. Section 215.3(e)(4) specifically reserves to the Department the sole authority to render the final determination. The statute does not mandate that the Department use a specific dispute resolution procedure.

L. Protections for Employees Not Represented by a Labor Organization

One comment indicated that § 215.4 improperly expands the protections afforded to employees not represented by a labor organization by affording such employees ''the same protections'' as those afforded to employees represented by a labor organization rather than ''substantially the same protections.''

The concerns raised by this comment that rights have been expanded have been clarified by amending the language in § 215.4(b) to eliminate any reference to the terms and conditions authorized in § 215.3(b). Instead, § 215.4(b) will provide, as in the prior guidelines, that the protective terms and conditions in the letter of certification will be set forth by the Department. There is no expansion of rights provided in these guidelines.

M. Procedures for Processing Amendatory Grant Applications

One comment suggested that ''[t]he special processing exemption for 'amendatory applications' in § 215.3(c) as amplified in § 215.5 should be eliminated in its entirety.'' It argued that, since all grants are subject to only a 15 day review period for the purpose of filing any objections, and any grant amendment which revises a project in only ''immaterial respects'' would not give rise to an objection considered sufficient under the new procedures, turnaround is expedited and employee representatives should have the opportunity ''to provide their views within the narrow time frame specified to ensure that the agency is fully informed regarding the potential effects of each project.''

The automatic certification of amendatory grants is limited to those where changes are immaterial. If there is a change in the scope of a project, amendatory grants should not and will not be processed under this expedited procedure. The revised procedures for processing other grants should not give rise to new procedures for processing of amendatory grants containing immaterial changes which would have the potential for delaying their approval. Thus, the suggested changes to the proposed guidelines are not necessary.

N. Other Comments

1. One comment suggested that the proposed guidelines be withdrawn because they appear to draw substantial content from union proposed reforms. Another comment indicated that the ''proposed rule has been undertaken without the input of the transit industry'' and that State and local public body transit systems were not involved in the development of the NPRM. Several comments suggested that the regulations be withdrawn and that the rulemaking process be undertaken with greater consideration for the procedures set forth in Executive Order 12866 which ''provides that interested parties should be involved prior to issuance of a proposed rule.'' The Department's decision to provide 30 days rather than 60 days for a comment period was also raised.

The Department developed language based on concepts favored by both unions and transit management. As demonstrated by the numerous comments received from interested parties from across the country, the rulemaking process in this instance has afforded all the interested parties with ample opportunity to provide comments and input on the procedural issues which are the subject of these guidelines.

2. One comment noted that the Department may view these procedures as ''guidelines'' rather than ''rules.'' The comment further notes that ''rules are binding on parties, including Federal agencies, and subject to specific rulemaking procedures; in contrast, ''guidelines'' are generally considered informal in nature and presumably are not binding on parties.'' There is no statutory authority to issue regulations under section 5333(b). The guidelines, however, are intended to be binding in administering this employee protection program.

3. Numerous comments addressed administrative processes followed by the Department and raised matters concerning the Administrative Procedures Act. It was suggested that procedural safeguards against what the parties characterize as ''*ex parte* contacts'' with labor representatives in pending matters should be addressed in the guidelines. Similarly, comments proposed that the guidelines address how final decisions on disputed issues would be made available under § 215.3(e)(5) and address the matter of the procedural ability to have access to and to rely on matters previously ruled upon by the Department. Finally, comments indicated that the proposed guidelines did not require the Department to ''articulate the underlying legal rationale for its decisions'' nor did they provide for meaningful judicial review for parties who receive an adverse ruling from the Department.

The Department does not believe that it is appropriate to restrict contacts with individual parties in the processing of certifications of employee protections. In processing FTA grant applications, the Department's role includes providing technical and mediatory assistance to the parties. As contemplated by the legislative history, the efforts of the Department are directed toward facilitating an agreement between the transit authority and the union in order to ensure that the requirements of the statute are satisfied. During mediation the Department's

representative may discuss issues separately with each party, suggest bases for settlement in an effort to resolve the dispute, and respond to requests for technical assistance. If the parties do not reach an agreement and the Department must make a determination of the terms and conditions upon which a certification will be based, the standard for communications with the parties shifts to a more formal process, where outstanding issues are specified and schedules for briefs and counterbriefs are committed to written instructions. No exploration of options or issues occurs at this time absent the initiation or consent of the other party.

Under the guidelines, the Department will take steps pursuant to § 215.3(e)(5) to assure the parties' access to the final decisions it renders on disputed issues. The Department will continue to send copies of its final decisions to the FTA and the affected applicant and labor organizations. Similarly, the guidelines address the matter of access to Departmental decisions by making available the Department's final determinations on disputed issues. In fact, during efforts to facilitate agreement, these decisions are regularly provided to parties involved in negotiations when their negotiations have addressed related subjects.

The parties will continue to be able to rely on previously issued determinations to the extent that circumstances are similar to those in the prior determinations. Certifications will continue to be developed on a case by case basis to ensure that protections are statutorily sufficient in the circumstances presented by the specific project and under any applicable state law.

In establishing ''fair and equitable'' protections under the statute in those circumstances where the parties are unable to reach agreement, the Department provides the underlying rationale for the terms and conditions upon which certification is based. The Department will continue to provide the rationale in these cases to explain the basis of its decisions to the parties and to facilitate other parties' efforts to reach agreement in cases where the circumstances are comparable. In addition, judicial review of the Department's certification is available to the parties. See, *e.g., Amalgamated Transit Union* v. *Donovan,* 767 F.2d 939 (D.C. Cir. 1985).

4. One comment indicated that the guidelines do not define whether the ''days'' referred to in the various deadlines means calendar or business days. The Department intends for the term ''days'' to refer to calendar days. When a deadline expires on a date that is not a business day, the deadline will then be considered to be the next business day.

5. One comment suggests that, to minimize legal expenses, the briefing schedule, if one is adopted, should be shortened and a one-step process instituted rather than requiring reply briefs. The guidelines at § 215.3(e)(3) provide for some flexibility in determining the briefing schedule. In the past, the Department has typically provided up to 30 days for briefs and for reply briefs, which were routinely required, up to 10 days. The proposed guidelines specify ''*no more than* twenty (20) days for opening briefs and *no more than* ten (10) days for reply briefs, *when the Department deems reply briefs to be beneficial.*'' (Emphasis added.) The guidelines, therefore, already provide for an expedited process which the Department can accelerate when appropriate. The guidelines balance the need for an expedited process with the need for a full disclosure of pertinent information to facilitate the determination process.

6. One comment requested that the Department address the procedures for processing claims determinations under the statute. This is not an appropriate issue to be addressed under these guidelines. These are procedural guidelines and thus not the appropriate forum for resolution of such issues.

III. Administrative Notices

A. Executive Order 12866

These guidelines have been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

B. Regulatory Flexibility Act

The Agency Head has certified that these guidelines are not expected to have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act.

C. Paperwork Reduction Act

These guidelines contain no information collection requirements for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

List of Subjects in 29 CFR Part 215

Grant administration; Grants—transportation; Labor-management relations; Labor unions; Mass transportation.

Signed at Washington, DC this ——— day of —————————, 1995.

Charles L. Smith,

Deputy Assistant Secretary.

Accordingly, 29 CFR Chapter II is amended by revising Part 215 to read as follows:

PART 215—GUIDELINES, SECTION 5333(b), FEDERAL TRANSIT LAW

Sec.
215.1 Purpose.
215.2 General.
215.3 Employees represented by a labor organization.
215.4 Employees not represented by a labor organization.
215.5 Processing of amendatory applications.
215.6 The Model Agreement.
215.7 The Speciality Warranty.
215.8 Department of Labor contact.

Authority: Secretary's Order No. 2–93, 58 FR 42578, August 10, 1993.

§ 215.1 Purpose.

(a) The purpose of these guidelines is to provide information concerning the Department of Labor's administrative procedures in processing applications for assistance under the Federal Transit law, as codified at 49 U.S.C. chapter 53.

(b) Section 5333(b) of title 49 of the United States Code reads as follows:

Employee protective arrangements.—(1) As a condition of financial assistance under sections 5307–5312, 5318(d), 5323 (a)(1), (b), (d), and (e), 5328, 5337, and 5338(j)(5) 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, 5318(d), 5323 (a)(1), (b), (d), and (e), 5328, 5337, and 5338(j)(5) shall specify the arrangements.

(2) Arrangements under this subsection shall include provisions that may be necessary for—

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

(B) the continuation of collective bargaining rights;

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

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

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

(F) paid training or retraining programs.

(3) Arrangements under this subsection shall provide benefits at least equal to benefits established under section 11347 of this title.

§ 215.2 General.

Upon receipt of copies of applications for Federal assistance subject to 49 U.S.C. 5333(b), together with a request for the certification of employee protective arrangements from the Department of Transportation, the Department of Labor will process those applications, which may be in either preliminary or final form. The Federal Transit Administration will provide the Department with the information necessary to enable the Department to certify the project.

§ 215.3 Employees represented by a labor organization.

(a)(1) If affected employees are represented by a labor organization, it is expected that where appropriate, protective arrangements shall be the product of negotiation/discussion, pursuant to these guidelines.

(2) In instances where states or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law. For example, employee protective terms and conditions, acceptable to both employee and applicant representatives, may be incorporated into a resolution adopted by the involved local government.

(3) If an application involves a grant to a state administrative agency which will pass assistance through to subrecipients, the Department of Labor will refer and process each subrecipient's respective portion of the project in accordance with this section. If a state administrative agency has previously provided employee protections on behalf of subrecipients, the referral will be based on those terms and conditions. These procedures are not applicable to grants under section 5311.

(b) Upon receipt of an application involving affected employees represented by a labor organization, the Department of Labor will refer a copy of the application to that organization and notify the applicant of referral.

(1) If an application involves only a capital grant for routine replacement of equipment of like kind and character and/or facilities of like kind and character, the procedural requirements set forth in §§ 215.3(b)(2) through 215.3(h) of these guidelines will not apply absent a potentially material effect on employees. Where no such effect is found, the Department of Labor will certify the application based on the terms and conditions as referenced in §§215.3(b)(2) or 215.3(b)(3)(ii).

(2) For applicants with previously certified arrangements, the referral will be based on those terms and conditions.

(3) For new applicants and applicants for which previously certified arrangements are not appropriate to the current project, the referral will be based on appropriate terms and conditions specified by the Department of Labor, as follows:

(i) for operating grants, the terms and conditions will be based on arrangements similar to those of the Model Agreement (referred to also as the National Agreement);

(ii) for capital grants, the terms and conditions will be based on arrangements similar to those of the Special Warranty applied pursuant to section 5311.

(c) Following referral and notification under paragraph (b) of this section, and subject to the exceptions defined in § 215.5, parties will be expected to engage in good faith efforts to reach mutually acceptable protective arrangements through negotiation/discussion within the timeframes designated under paragraphs (d) and (e) of this section.

(d) As part of the Department of Labor's review of an application, a time schedule for case processing will be established by the Department of Labor and specified in its referral and notification letters under paragraph 215.3(b) or subsequent written communications to the parties.

(1) Parties will be given fifteen (15) days from the date of the referral and notification letters to submit objections, if any, to the referred terms. The parties are encouraged to engage in negotiations/discussions during this period with the aim of arriving at a mutually agreeable solution to objections any party has to the terms and conditions of the referral.

(2) Within ten (10) days of the date for submitting objections, the Department of Labor will:

(i) Determine whether the objections raised are sufficient; and

(ii) Take one of the two steps described in paragraphs (d)(5) and (6) of this section, as appropriate.

(3) The Department of Labor will consider an objection to be sufficient when:

(i) The objection raises material issues that may require alternative employee protections under 49 U.S.C. 5333(b); or

(ii) The objection concerns changes in legal or factual circumstances that may materially affect the rights or interests of employees.

(4) The Department of Labor will consult with the Federal Transit Administration for technical advice as to the validity of objections.

(5) If the Department of Labor determines that there are no sufficient objections, the Department will issue its certification to the Federal Transit Administration.

(6) If the Department of Labor determines that an objection is sufficient, the Department, as appropriate, will direct the parties to commence or continue negotiations/discussions, limited to issues that the Department deems appropriate and limited to a period not to exceed thirty (30) days. The parties will be expected to negotiate/discuss expeditiously and in good faith. The Department of Labor may provide mediation assistance during this period where appropriate. The parties may agree to waive any negotiations/discussions if the Department, after reviewing the objections, develops new terms and conditions acceptable to the parties. At the end of the designated negotiation/discussion period, if all issues have not been resolved, each party must submit to the Department its final proposal and a statement describing the issues still in dispute.

(7) The Department will issue a certification to the Federal Transit Administration within five (5) days after the end of the negotiation/discussion period designated under paragraph (d)(6) of this section. The certification will be based on terms and conditions agreed to by the parties that the Department concludes meet the requirements of 49 U.S.C. 5333(b). To the extent that no agreement has been reached, the certification will be based on terms and conditions determined by the Department which are no less protective than the terms and conditions included in the referral pursuant to §§ 215.3(b)(2) and 215.3(b)(3).

(8) Notwithstanding that a certification has been issued to the Federal Transit Administration pursuant to paragraph (d)(7) of this section, no action may be taken which would result in irreparable harm to employees if such action concerns matters subject to the steps set forth in paragraph (e) of this section.

(e) If the certification referred to in paragraph (d)(7) of this section is not based on full mutual agreement of the parties, the Department of Labor will take the following steps to resolve outstanding differences:

(1) The Department will set a schedule that provides for final resolution of the disputed issue(s) within sixty (60) days of the certification referred to in paragraph (d)(7) of this section.

(2) Within ten (10) days of the issuance of the certification referred to in paragraph (d)(7) of this section, and after reviewing the parties' descriptions of the disputed issues, the Department will define the issues still in dispute and set a schedule for final resolution of all such issues.

(3) The Department may establish a briefing schedule, usually allowing no more than twenty (20) days for opening briefs and no more than ten (10) days for reply briefs, when the Department deems reply briefs to be beneficial. In either event, the Department will issue a final certification to the Federal Transit Administration no later than thirty (30) days after the last briefs are due.

(4) The Department of Labor will decide the manner in which the dispute will be resolved. In making this decision, the Department may consider the form(s) of dispute resolution employed by the parties in their previous dealings as well as various forms of third party dispute resolution that may be appropriate. Any dispute resolution proceedings will normally be expected to commence within thirty (30) days of the certification referred to in paragraph (d)(7) of this section, and the Department will render a final determination, including the bases therefor, within thirty (30) days of the commencement of the proceedings.

(5) The Department will make available final decisions it renders on disputed issues.

(f) Nothing in these guidelines restricts the parties from continuing to negotiate/discuss over final terms and conditions and seeking a final certification of an agreement that meets the requirements of the Act prior to the issuance of a final determination by the Department.

(g) If, subsequent to the issuance of the certification referred to in paragraph (d)(7) of this section, the parties reach an agreement on one or more disputed issues that meets the requirements of the Act, and/or the Department of Labor issues a final decision containing revised terms and conditions, the Department will take appropriate steps to substitute the new terms and conditions for those previously certified to the Federal Transit Administration.

(h) Notwithstanding the foregoing, the Department retains the right to withhold certification where circumstances inconsistent with the statute so warrant until such circumstances have been resolved.

§ 215.4 Employees not represented by a labor organization.

(a) The certification made by the Department of Labor will afford the same level of protection to those employees who are not represented by labor organizations.

(b) If there is no labor organization representing employees, the Department of Labor will set forth the protective terms and conditions in the letter of certification.

§ 215.5 Processing of amendatory applications.

When an application is supplemental to or revises or amends in immaterial respects an application for which the Department of Labor has already certified that fair and equitable arrangements have been made to protect the interests of mass transit employees affected by the subject project the Department of Labor will on its own initiative apply to the supplemental or other amendatory application the same terms and conditions as were certified for the subject project as originally constituted. The Department of Labor's processing of these applications will be expedited.

§ 215.6 The Model Agreement.

The Model (or National) Agreement mentioned in paragraph (b)(3)(i) of § 215.3 refers to the agreement executed on July 23, 1975 by representatives of the American Public Transit Association and the Amalgamated Transit Union and Transport Workers Union of America and on July 31, 1975 by representatives of the Railway Labor Executives' Association, Brotherhood of Locomotive Engineers, Brotherhood of Railway and Airline Clerks and International Association of Machinists and Aerospace Workers. The agreement is intended to serve as a ready-made employee protective arrangement for adoption by local parties in specific operating assistance project situations. The Department has determined that this agreement provides fair and equitable arrangements to protect the interests of employees in general purpose operating assistance project situations and meets the requirements of 49 U.S.C. 5333(b).

§ 215.7 The Special Warranty.

The Special Warranty mentioned in paragraph (b)(3)(ii) of § 215.3 refers to the protective arrangements developed for application to the small urban and rural program under section 5311 of the Federal Transit statute. The warranty arrangement represents the understandings of the Department of Labor and the Department of Transportation, reached in May 1979, with respect to the protections to be applied for such grants. The Special Warranty provides fair and equitable arrangements to protect the interests of employees and meets the requirements of 49 U.S.C. 5333(b).

§ 215.8 Department of Labor contact.

Questions concerning the subject matter covered by this part should be addressed to Statutory Programs, U.S. Department of Labor, Suite N5411, 200 Constitution Avenue, NW., Washington, DC 20210; phone number 202–219–4473. (Secretary's Order 2–93, 58 FR 42578, August 10, 1993.)

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