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Supreme Court of Texas.  
Dallas Area Rapid Transit  
v.  
Amalgamated Transit Union Local No. 1338.  
No. 06-0034.

November 14, 2007

Appearances:

Jeffrey C. Londa, Ogletree Deakins, Houston, Texas, for petitioner.

Hal K. Gillespie, Gillespie, Rozen, Watsky & Jones, P.C., Dallas, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Scott A. Brister, Justice David Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument now in a 06- 0034, Dallas Area Rapid Transit versus Amalgamated Trust Union.

COURT MARSHALL: May it please the Court, Mr. Londa will present argument for the petitioners. Petitioner has reserve five minutes for rebuttal.

ORAL ARGUMENT OF JEFFREY C. LONDA ON BEHALF OF THE PETITIONER

MR. LONDA: My name is Jeff Londa, I represent Dallas Area Rapid Transit also known as DART. The Court of Appeals has erroneously concluded, in this case, the DART's governmental immunity would be-- would obstruct Congress' purposes and objectives in enacting Section 13(c) of the Urban Mass Transportation Act which is currently known as the Federal Transit Act. This statute was enacted by Congress in 1963, as a result of that conclusions, the Court of Appeals erroneously concluded-- or held that DART's governmental immunity is preempted by Section 13(c). In enacting Section 13(c), it's clear from the language of the statute, from the Jackson decision from the United States Supreme Court, and from the United States Supreme Court's decision in Donovan. That Congress had two purposes and objectives when it enacted

13(c). Purpose one, if a transit system had collective bargaining with its employees at the time it applied for federal assistance, then, as a condition of federal assistance, it must enter into what's called a "13(c) arrangement", approved by the Secretary of Labor, that held that the collective bargaining rights would continue. DART was not in that situation. As a public entity, at the time it applied for federal assistance, it did not have collective bargaining rights and in fact, entering into a collective bargaining agreement with its union, the appellee here would have been against government code 617.002, within the Texas statute. The second objective of Congress, of Congress was, in enacting 13(c), if a transit system applied for federal assistance, and it was in the situation of DART, that is it did not have collective bargaining. It then must enter into a 13(c) arrangement approved by the Secretary of Labor, that provided that the rights of its employees would not be worsened. That's the language in the statute and that's exactly what the 13(c) arrangement here provides. Jackson, the Supreme Court case that's largely at issue in this case, made a few things abundantly clear. One, 13(c) was not intended to provide a federal cause of action. Two, Section 607.002-- 617.002, which prohibits DART from entering into a collective bargaining agreement, is the type of state law that Congress did not intend to preempt when it enacted Section 13(c). Jackson said, "State Law controls labor relations." Jackson said, "That's the consistent theme throughout 13(c)." The other thing that Jackson said is the National Labor Relations Act's exemption for governmental employers is not affected by 13(c). The Donovan case makes a few things clear, it again says, "If a transit system did not have collective bargaining rights at the time it applied for federal assistance, then 13(c) does not require collective bargaining rights and does not insure them." All it does, according to Donovan, and these are the words used in Donovan, is "Protect the status quo, which in DART's case is a meet and confer system." The Court of Appeals says the following, "State law controls labor law as long as the workers' collective bargaining rights are preserved before a local government receives federal assistance, citing Jackson." It's referring to Objective 1 that I mentioned, that does not apply to DART. The Court of Appeals says, "Congress' intent in 13(c) is to preserve collective bargaining rights," that's not the case with respect to DART. With respect to DART, it's Objective no. 2, no worsening. That means the meet and confer system, which was consistent with state law, continued, and that's what the 13(c) arrangement in this case provides. The Court of Appeals finally said, "DART's 13(c) arrangement is consistent with Congress's intent to prevent federal funds from being used to destroy the collective bargaining rights of organized workers."

CHIEF JUSTICE JEFFERSON: What do you say about the language in Jackson suggest that you can enforce 13(c) arrangement by bringing a suit for breach of contract?

MR. LONDA: I agree with that. Jackson makes clear that kind of lawsuit can be brought in State Court, but that's not the kind of lawsuit that we have here. In this case, there was a general grievance resolution signed. The plaintiff's second amended petition, which is the operative petition in the record, says, "That what they are suing for breach of contract under is the general grievance resolution." The general grievance resolution contains language consistent with state law that says, "DART retained the right to unilaterally set wages." It also contained the provision that says, "If DART backs off of what is stated in the general grievance resolution, then the union can file a general grievance resolution." To directly answer your question, your

Honor, if this lawsuit had been brought under the 13(c) arrangement to enforce the process, the process of meet and confer, that is the status quo that Donovan talks about. If the lawsuit had been brought to do that, for example, what the union should have done in this case is file a general grievance saying that DART had not abided by what it considered to be the terms of the general grievance resolution, filed it under the 13(c) arrangement, it would have gone to fact-finding. Fact-finding-- a panel then makes a decision, it's advisory. The union's recourse, if it does not like fact-finding is in the public political arena. It does not establish collective bargaining. If DART had not allowed the union to go to fact-finding, then the union could have brought the type of lawsuit which Jackson's talks about. A lawsuit to enforce the process of the 13(c) arrangement. What the union is trying to do here is to sue under the general grievance resolution, which set wages, and if the Court were to agree with the union's position regarding the general grievance resolution, it would indeed be in essence, a collective bargaining agreement. That is not what 13(c) requires be continued.

JUSTICE HECHT: And you say they can pursue those complains through the administrative system?

MR. LONDA: Correct. Union makes much of a case called "Plummer" out of the Dallas Court of Appeals several years ago. In that case, a bus driver had come to work possessing a firearm in violation of Dallas' and DART's policies. In that case, a Trial Board, which is different from fact-finding, heard the case much like an arbitrator would, and reinstated that driver without back pay. There was a lawsuit involved as to whether DART needed to comply with reinstating that bus driver. The 13(c) arrangement in effect at the time, which is different from today, but at the time, had individual grievances listed as an attachment and how they would be handled. And that attachment said, the trial board's decision is final. So the distinguishing factor between that case and this case is, in Plummer, the union sued to enforce a Trial Board's decision, which was the final step under the 13(c) arrangement. The union claimed that DART had not followed the process of the 13(c) arrangement. That bus driver was reinstated without back pay so there was no immunity issue there, anyway.

JUSTICE WILLETT: Explain to me how the current 13(c) grievance procedure works?

MR. LONDA: The current 13(c) grievance procedure has individual grievances which are like discharges that go to a Trial Board. That individual grievance procedure, though, at Plummer's time was part of the 13(c) arrangement. It is not now. Mr. Gillespie attached it to his filing with Court but the records shows that the 13(c) arrangement in effect, at the time we're talking about here had only the general grievance procedure attached to it. How it works is this, if the union wants to discuss wages or does not like the wages that DART is paying, then the union files a general grievance. The union and DART then meet and confer just like they did before 13(c) arrangement, the 13(c) arrangement. They meet and confer, if they're unable to reach an agreement, it goes to a fact-finding panel. They make a decision. The decision is public. DART can reject the decision because the 13(c) arrangement says it's advisory and Union's recourse is then a political one. The same thing as the Union had before the 13(c) arrangement was signed. And keeping in mind 13(c) protects status quo. It does not void Texas' restrictions on collective bargaining. The 13(c) arrangement itself has an attachment A with some terms on it. Attachment A, paragraph 4 says, "The existing rights of employees covered by this



agreement to present grievances concerning wages shall be preserved consistent with Article 514(c), that's the predecessor number for 617.002." And it also says consistent with three decisions of the Court of Appeals. One of those decisions is Beverly. Beverly says, "Texas law will not allow DART to enter in to a bilateral, enforceable contract over wages." It allows the unilateral setting of wages. There's a Attorney-General opinion in the record also, where the Attorney-General, consistent with Beverly, says, "DART must maintain the right to unilaterally set wages."

JUSTICE MEDINA: Now the Court of Appeals seems to allow, on this case, Alden versus Maine in its -

MR. LONDA: The Court of Appeal-- Yes, your Honor. The Court of ...

JUSTICE MEDINA: - in the decision of 13(c).

MR. LONDA: Well, I think what the -

JUSTICE MEDINA: I have a question for you.

MR. LONDA: Excuse me. I think what the Court of Appeals did was rely on Jackson then on the last page of the decision, it mentions Alden.

JUSTICE MEDINA: But misplaced.

MR. LONDA: I think so. I don't think Alden has anything to do with this case. Alden is case dealing with, whether the Constitution of the United States gave the Federal Government the right to enact a statute that affected the State of Maine. It was not a preemption case and I think that last paragraph of the Court's decision is really not in play here. The ...

JUSTICE HECHT: So you're, you're arguing though, to be sure I understand, that you could-- they already had the right-- Union already has the right under Jackson Transit to sue to enforce the process.

MR. LONDA: Correct.

JUSTICE HECHT: And so, you know the local government code was amended several years ago to allow for Waiver of Immunity on suits on contracts against local governments. In some circumstances. And that wouldn't affect your argument one-way or the other here because if they were suing to enforce the process then I can already do that and if they're not they don't have any right to do that.

MR. LONDA: That's correct. The, the-- if, if I am thinking of the same statutory amendment ...

JUSTICE HECHT: It's 271.151160, it was I think House Bill 2390 but ...

MR. LONDA: I think that applies to goods and services and wouldn't come into play here anyway. But yes, your Honor's correct. The Union in this case initially said, "The sole basis of jurisdiction was the language in DART's enabling legislation which is Transportation Code Chapter 452, the sue and be sued language, was the sole basis for jurisdiction" obviously with recent Court decisions out this Court, that argument is no longer there. And the Court of Appeals decided this case based on preemption. I would like to point to, in addition to language contained in the 13(c) arrangement itself which basically says, DART's meet and confer system continues, consistent with 16-- 617.002 and consistent with the three cases specifically mentioned there. I'd like to also mention the grievance resolution itself, which the union is suing here about. The language in there is pretty clear too. It says in the event-- DART makes a unilateral change to the wages and so forth, as it did for budgetary reasons, such change relieves Local 1338 of its commitment not to file a general grievance. In the managerial section, it talks about DART retaining overall control of its budget and that is what happened here. A second ground for the

pleaded-- the jurisdiction filed in this case was, and it's an additional ground, is that there's no jurisdictional evidence that the Union was harmed in anyway by a project funded with federal money. The Union has in the record some information that DART received federal funds. But it has nothing in the record that indicates that DART used any of the federal funds at anytime as operational funds to pay wages. And it's very clear from the 13(c) arrangement it says, "If someone is to sue for a breach of the 13(c) arrangement, and keep in mind I'm saying they're not even suing for that, but if you could consider this a suit for that, they haven't identify a federal project that was used to harm them with respect to this."

CHIEF JUSTICE JEFFERSON: And that's jurisdictional?

MR. LONDA: I think it's jurisdictional because it's an essential element of the claim. There is no claim ...

CHIEF JUSTICE JEFFERSON: Well, essential element-- I mean that could be ...

MR. LONDA: No. I mean, the jurisdictional element, because the statute says that it must as a result of the project. The, the actual arrangement itself says, "Provided after it talks about if there is claim here under it, it must be as a result of the project. Volume rises and falls or business changes in volume and character of employment brought about solely by causes other than the project, including economics and deficiencies unrelated to the project." These are not within the purview of this arrangement. It's clear here from the record that a decrease in sales tax is-- what resulted in the decision by DART to deviate from the general grievance resolution.

JUSTICE WAINWRIGHT: Of course, ...

JUSTICE WAINWRIGHT: ITU disputes that there needs to be causal connection between the Federal funding and employment detriments. Sounds like your argument is the language under the arrangements just doesn't support their position.

MR. LONDA: The language doesn't but also United Transportation Union vs. Brock, which is cited in the brief, specifically says, "The only interest protected by Section 13(c) are those affected by financial assistance sought," and we cite several other cases in the briefing that says, "There must be that time." Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor. The Court is now ready to here argument from the respondent.

THE COURT MARSHALL: May it please the Court, Mr. Gillespie will present argument for the respondent.

ORAL ARGUMENT OF HAL K. GILLESPIE ON BEHALF OF THE RESPONDENT

MR. GILLESPIE: Thank you very much. This is an important matter, it involves a question of whether preemption, the preemption ruling was correct, we assert that it was. It involves about \$126 million worth of federal funds a year. It flowed from the federal government to the, to the DART. And, and the DART argument is that they can have their cake and eat it too. That they can actually receive the federal funds and that they are not bound by the terms of 13(c) arrangements that they sign off on.

JUSTICE BRISTER: That's not exactly his argument, is it?

MR. GILLESPIE: It's the effect of the argument. And I-- that's a point well taken, your Honor. The-- I gave you a handout which I think

is something I'd like to start with because the case under Jackson Transit is remarkably straightforward when viewed as a preemption question, and that was the question Mr., Mr. Londa said that we originally pled only, sue and be sued as a basis for jurisdiction. But in fact, we, we mentioned the 13(c) agreement and then in-- certainly in oral argument, we made the point and the Judge and I had a colloquy about it ...

JUSTICE BRISTER: Of course, Jackson Transit wouldn't-- was a different issue, could you sue in federal court? We're not concerned about it.

MR. GILLESPIE: It was a different issue but what Jackson ...

JUSTICE BRISTER: What part of 13(c) says, "They can't do this? You, you don't dispute that they're not resolved after they got the federal funds and the vote?"

MR. GILLESPIE: You're really mixing questions and I'll, and I'll try to parse them out and answer them. First part of your question dealt with whether or not there's something in the 13(c) agreement that says that we are entitled to sue. Second part of your question is, is whether or not there has to be a showing that the harm flowed from the receipt of federal funds. So let me, let me answer those separately. Jackson Transit is absolutely critical because Jackson Transit was the US Supreme Court interpreting the intent of Congress. Justice Jefferson has, in the Delta Airlines case made the ruling that, or written the opinion, that said the ultimate touchstone in deciding what the-- whether or not preemption will apply is the intent of Congress, and in doing that you look at the entire purpose of the statute. Here, Jackson Transit does that for us. Even though the, the issue in Jackson Transit was whether you could bring a suit to enforce a 13(c) arrangement or the Collective Bargaining Agreement that flowed from it. It went on to, to delve directly into the question of what was the intent of the UMTA, the Urban Mass Transit Act. And in doing it, it said, and this is where the handout deals with it, "It is reasonable to conclude that Congress expected the Section 13(c) agreement and the collective bargaining agreement, like ordinary contracts, to be enforceable in private suits upon a breach." And then they, they deal with the issue that was directly involve by saying, Federal Court isn't where you go because UMTA doesn't preempt state law dealing with labor law. Now it didn't say what-- I think Counselor is suggesting and that is that, "All federal-- all state law. No state is preempted." Because it goes on to say the Union-- there are all possible remedies for the violation of 13(c) agreements and Collective Bargaining Agreements. The Union, of course, can pursue a contract issue in State Court. In addition, the federal government can respond by threatening to withhold additional financial assistance.

JUSTICE HECHT: But the petitioner's position, I as understand it, is that sure you can sue but only for the process that the agreement promises.

MR. GILLESPIE: The process argument is interesting, Mr. Londa has said, if the suit is brought to enforce the process, such a suit would be proper, that's essentially what he said. And, and this suit obviously was brought to enforce the process. There's a real interesting thing that's going on here.

JUSTICE HECHT: Well, should we-- I mean to be-- so I understand that.

MR. GILLESPIE: Yes.

JUSTICE HECHT: There was a general grievance filed or ...

MR. GILLESPIE: Yes there was. And Justice Willard asked a really



great question and I want ...

MR. GILLESPIE: There's part of your Honor's question I haven't answered yet.

JUSTICE BRISTER: I'm still waiting.

MR. GILLESPIE: I realize that.

MR. GILLESPIE: I got, I got another one.

JUSTICE WILLETT: He took the mike for a question.

MR. GILLESPIE: Justice Wallace and I'm, I'm going to-- get back to the, to the federal projects questions. In fact, let me answer that. Go ahead and just nail that down. 13(c) itself was referenced by Mr. Londa several times, but as luck would have that is 49 U.S.C Section 5333(b) and your Honor can look at that statute, and that statute does not have a single word in it, in it about the need for the arrangements to be a - concern the arrangement to be based upon a worsening due to the receipt of federal funds. It doesn't say that.

JUSTICE BRISTER: [inaudible] What I'm looking at, which is from the Jackson Transit case, says that the condition of assistance is fair and equitable arrangements and that such protected arrangements shall include the preservation of whatever you had before, continuation of what ever you had before, protection against getting any worse than it was before. I mean all the detail things all do relate to, are them worse off than they were before? And my question was, you're not any-- your client's not any worse of than they were before.

MR. GILLESPIE: Well, they are. Because before they had the right to pursue a grievance and get it resolved. And this is Justice Wallace's question, he asked what is the general grievance process. I'll walk through it. That's-- there was step that they missed. I had the-- maybe this is hard to read-- I, I it could be and if so I'll take some of the blame. Literally helped negotiate this language with the federal government and DART, back when DART took over from DTS, I'm that old. And, and the language in it is, is, is existing and has several places-- there's two prongs of a grievance procedure. One prong is general grievance and the other prong is other grievances. Not, not individual grievances as Mr. Londa said, it's other grievances. And you can tell that by looking at Section 8.8 where, where it lists five different categories of grievances. Category No. 1 is a general grievance. Category 4, 5-- 2,3,4,5 is other grievances which includes a group grievance. We're talking-- and so there's two prongs, there's general grievances and other grievances. Now both allow for a file of resolution. And Plummer was a case that-- where another grievance, in fact it was a discharge case.

JUSTICE BRISTER: Talk about your case.

MR. GILLESPIE: All right. In our case ...

JUSTICE BRISTER: - your claim is what?

MR. GILLESPIE: Our claim is that DART has failed to honor a 13(c)

...

JUSTICE BRISTER: No, no, no. I mean, your claim is, your employees are not being-- all our employees aren't being paid enough, none of our emplo-- how many employees are not being paid enough or what's, what's, what's-- what are you mad about?

MR. GILLESPIE: We're, we're mad because DART did not adhere to this no grievance resolution that, that it issued in this case. And, and I'm still trying to, to, to explain how the general grievance process work.

JUSTICE BRISTER: If, if DART ignored the agreement and decided to double everybody's salary, you'd probably would be here.

MR. GILLESPIE: I'm sure of that.

JUSTICE BRISTER: Well, what you-- aren't you-- they're not-- what did they do ...

MR. GILLESPIE: Well, we wouldn't be here for a different reason.

JUSTICE BRISTER: - why do you care that they're not-- what did they do, they're not paying somebody enough?

MR. GILLESPIE: They-- We have a right.

JUSTICE BRISTER: Paid a lots and it will-- what did they do?

MR. GILLESPIE: There were three other things they did besides not give the 3 percent increase that was due in October.

JUSTICE BRISTER: No 3 percent increase, that's something I can sink my teeth into.

MR. GILLESPIE: Right.

JUSTICE BRISTER: You didn't a 3 percent increase, anything else?

MR. GILLESPIE: Yes, they-- there are four things. One of them was the SIP which they-- that's Service Incentive Pay, which they cut-off.

JUSTICE BRISTER: So yours, so yours is a employee-wide. Everybody didn't get 3 a percent.

MR. GILLESPIE: Exactly, DART unilaterally changed the policy ...

JUSTICE BRISTER: I mean is that a general or another grievance?

MR. GILLESPIE: If this was a general grievance and, and it was resolved. The point that I need to explain to ...

JUSTICE BRISTER: [inaudible] some fact before, you know, I know you there's a lot of things you want to explain but you have 75 pages in briefs to do that. This is our chance to ask about that question.

MR. GILLESPIE: Got you. Yes, sir.

JUSTICE BRISTER: And so you're-- before-- you're saying before the federal funds came in if we had a complaint, you owe everybody a 3 percent raise and we didn't get it, what did you file before? You didn't have-- that's not an individual grievance? What could you do before that you can't do now?

MR. GILLESPIE: You could file a grievance and if it got result they would honor it. The general grievance process has several places that can be resolved and what they point you to is the fact-finding. But in fact, the general grievance procedure can, can, can result, this doesn't give away sovereignty, it can result in a resolution. And look, if you will, at page 287 of the record. Page 287 of the record is where the general grievance process is laid out. And what it says is that, "You filed a general grievance, any dispute that remains following this decision of the Assistant to the Executive Director, may be appealed to fact-finding." Well, under the express language of, of the general grievance procedure, which part of the 13(c) arrangement expressly. We can go to fact-finding but we can't go to fact-finding with a dispute unless it remains. Here the dispute did not remain, we, we have a success story. We filed a grievance. DART heard the grievance. DART issued a resolution. And that resolution said, we'll do these things. We'll give you pay increases. We will, we will keep everything in place for three years that-- except things that we'll specifically lists that we may still mess with. And they-- and despite that, they changed things that they, that they promised they would not change.

JUSTICE GREEN: Are you saying, are you saying that under the new system, they are allowed to not honor their-- the outcome and in the old system they could, they had to honor it?

MR. GILLESPIE: I'm saying under the old system and under the new system they have to honor the outcome of the general grievance process.

JUSTICE GREEN: In both, in both cases.

MR. GILLESPIE: Yes.

JUSTICE GREEN: Whether it is-- to follow to Justice Brister's



comment, they're still not worse off?

MR. GILLESPIE: Now thirteenth-- Now, we are all worse off. 13(c) says, "We have a right to enforce the arrangement." The arrangement says, "What you had before you get to keep." What we had before was a two-prong procedure. This is with DTS. We could have general grievances. We could have other grievances. Where we had other grievance, there was a final resolution by a, essentially, trial board. Under the general grievance, it was-- you go, you go to the DTS and if you get a result you like, you got a result. You got something to hang on to.

JUSTICE WILLETT: So you're saying that, under the grievance procedure, you know, then and now, they're no worse off, but the enforcement of that decision, you are worse off?

MR. GILLESPIE: Exactly. They're saying that is not enforceable now. They're saying that you can't-- that you could file general grievance but we don't have to listen to you. We can listen to you, we can say that you got to-- you've got something from DART. We've that list to you. But it doesn't-- it's not worth the paper it's written on. You can't enforce in the court.

JUSTICE WILLETT: The Court in Jackson Transit said, "You've got to have fair and equitable arrangements." You agree with that, right?

MR. GILLESPIE: Yes

JUSTICE WILLETT: And those arrangements primarily would be enforced through private litigation and State Court, but when the Court also imagined "other possible remedies" -

MR. GILLESPIE: Right.

JUSTICE WILLETT: - to protect collective bargaining rights. And why is procedure not an other possible remedy that might be sufficient?

MR. GILLESPIE: Well, it, it, it's, it's another possible remedy but it won't be sufficient and the reason for that is that didn't literally didn't get to that point. If you'll look at general grievance procedure, on page 287 of the process, the fact-finding can result in a final resolution. This language is very critical. Page, page, it says "In dispute that remains-- this is page 287 in the record, following the decision of the assistant may go fact-finding." Then it says on fact-finding, "You go to fact-finding and the fact-finder issues a recommendation." And paragraph-- sub-paragraph 6 says, if neither side, that's DART or the Union, files a dissent, the recommendation shall be deemed agreed upon as a final resolution of the issues submitted. So you can, in fact, get a final resolution through fact-finding. And then it goes on to say in sub-paragraph 9, "Except as provided in sub-paragraph 6, that's the one I just read to you, the fact-finder report and recommendation shall be advisory only." So we can get something that we can hang our head on. In two places in the general grievance process. We can win, if you want to call it that, by having DART say, we agree with you. You don't have to go to fact-finding. You got this. We're granting this.

JUSTICE HECHT: Okay. But you reached a breach-- you reached a resolution agreement?

MR. GILLESPIE: We did.

JUSTICE HECHT: And now you claim they breached it?

MR. GILLESPIE: Yes, sir.

JUSTICE HECHT: And why don't have to go back to the administrative process to air that claim?

MR. GILLESPIE: Because, because that's not-- that process isn't for when they break the deal that they, that they made. And this is not a bilateral agreement, this is DART without any loss of sovereignty saying, "We're give-- we're going to grant your grievance." And once

the say we're going to grant your grievance that grievance is over with. The grievance doesn't go on up, because that grievance is resolved. The same way that, that if went to fact-finding, fact-finder issues his report. DART can dissent. The Union can dissent. If neither side follows the dissent it is vital.

JUSTICE MEDINA: Which enforcement mechanism if ...

MR. GILLESPIE: Has to be court. And the reason it has to be in court that-- gets us back to Jackson Transit. It's because Jackson Transit it's a real interesting decision says a lot of things. One of the things it says is, "You could go to Department of Labor and ask them to enforce the 13(c) agreement." And in Jackson Transit, the Union actually tried that. And the Department of Labor said, "No we're not going to do it." And the, the Supreme Court says, the Union itself has the right to enforce the 13(c) agreement. Now, a straw-- there's a straw, there's a straw man argument that DART is making here, talking about collective bargaining. Collective bargaining is not, is not the point here. DART and ATU 1338 had meet and confer. We got-- we're not-- and the, the, the granting of a general grievance is not collective bargaining. It is the result of the meet and confer process that is mandated by the, by the Federal Law. I would like to ask the Court to look very carefully at page 270 of the record, which I think is absolutely critical. It is the second page of-- or the fifth page, I'm sorry, of the letter that is the 13(c) arrangement. And on that page, the Department of Labor is stating, "Language in Item 3 below indicates that its employees, represented by the ATU, are intended third party beneficiaries of the employee protection provisions of the grant contract. By executing the grant contract with the Department of Transportation, DART acknowledges that it assumes to the terms therein. Agreement to the terms and conditions certified by the Department is a binding prerequisite to DART's release of federal assistance to DART." And then in goes and lists this three things, and it specifically says in Item 1, this letter, the terms and conditions of the arrangement in Attachment A and B shall be applied to insta-project, and shall be made part of the contract of assistance by reference. Attachment B is the general grievance procedure itself. It's literally part of the 13(c) arrangement. Item 3, which is critical here says, "The terms and conditions of the aforementioned protective arrangements are intended for the primary and direct benefit of the transit employees in the service area of the project." The employees are intended third party beneficiaries to the employee protective arrangements of the grant contract. The employees' representative may assert a claims on their behalf. That's what we're doing. The reason that we are now in Court is that we got this two-prong procedure. This isn't another grievance, this is a general grievance. We filed it as such. We were trying - - we, being in the union, were trying to resolve a number of, of areas of concern. We went to DART and we said here are our grievances. And DART, at that very first step, issued a resolution and that's, that's in your record at page 82, I'm sorry these are hard to read, these page numbers. Page 88 is the general grievance resolution. And, and page 88 starts the general grievance resolution and includes language that says, that "The resolution of the general grievance filed April 24, 2001 constitute a final resolution of the issues raised in the general grievance."

JUSTICE MEDINA: How are you been, been able to resolve your differences with DART?

MR. GILLESPIE: Sir?

JUSTICE MEDINA: Have you-- How you've been able to resolve your

differences prior to this?

MR. GILLESPIE: Up until now ...

JUSTICE MEDINA: - [inaudible] problems, something unique?

MR. GILLESPIE: Up until now they honored it. If they, if they issued-- that's what's unthinkable about this really. They issued a resolution and they took the position that it didn't matter. That, that we can't enforce that resolution. If we-- if they do it-- they've resolved the grievance. And we, we accepted that. We did not go forward. We, we put an end to it. And so the answer to your question, that's the ways it's been done. In the Plummer case, which I know, your Honor, doesn't want to speak very much about, about that, but that was a case where under the other prong, one time and one time only. DART says, we're not going to honor what the Trial Board does. When they did that, ATU intervened and we got a result that, that, that put that to an end. But, but our position is in order for the 13(c) arrangement to, to have meaning. DART has got to, to do something. It can just sign off on this assurance.

JUSTICE WILLETT: How can those arrangements be enforced in your view, how can they be enforced outside of State Court, if at all?

MR. GILLESPIE: The only other place is to go to Department -

JUSTICE WILLETT: Of Labor?

MR. GILLESPIE: - of Labor. And clearly under Jackson Transit, we have the right to go to State Court. And I think that that gets me back full circle ...

JUSTICE WILLETT: But when Jackson turned it talks about other possible remedies, you said the one and only other possible remedy is the Department of Labor?

MR. GILLESPIE: That's the only thing I can think of, because Jackson Transit says, you can't suit-- sue in Federal Court.

JUSTICE WILLETT: How about political?

MR. GILLESPIE: Well, political is-- you can always try to rewrite the statute but what we have got with Jackson Transit was UMTA being interpreted by US Supreme Court and it said that, that we can enforce in federal-- in state court.

JUSTICE BRISTER: But other political is, you could go to the legislature and ask for permission to sue DART. Anybody can. I could, if I wanted to sue.

MR. GILLESPIE: That's right, we could do that. But I think that the necessary implication of UMTA is we don't have to ...

JUSTICE BRISTER: You probably represent a lot of voters. So what's so bad if you go ask the legislature for private bill that allows you to sue DART on precisely this agreement.

MR. GILLESPIE: Well, the federal purpose would be thwarted. If, if, if Congress enacts an Act, we don't have to go, we don't have to go to the State to get permission to do what Congress says we've got to do. Any further questions?

JUSTICE HECHT: I just have one. You, you earlier argued sue and be sued and now we're talking about the preemption issue.

MR. GILLESPIE: Your-- this Court has ruled on that and, and we're not pursuing that argument.

JUSTICE HECHT: I understand. Do you have any other argument about why immunity is waived that is not-- still pending in the Court of Appeals or not enforce anymore.

MR. GILLESPIE: Well, we, we showed the, the District Court that the, that DART had agreed that it could be sued in the-- in another case and that's in the record. And, and-- so we think that they, they've waived that issue. But we've square, square before you by



saying that the preemption ruling was correct. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF JEFFREY C. LONDA ON BEHALF OF PETITIONER

MR. LONDA: Just a couple of points in response, if I might. Mr. Gillespie was asked questions about what the general resolution did. What it actually did was to call for 4 percent wage for bargaining unit employees, basically drivers and mechanics represented by the Union, over three years, 4 percent each year. DART paid the 4 percent the first year, paid it the second year and gave a bonus in lieu of the 4 percent roll into wages called for in the resolution. The resolution contemplated and states, that DART did not give up its unilateral right as a governmental entity under Texas law to set wages. It could deviate from the resolution. The resolution specifically said, in the event DART makes any unilateral change, except for the issues remaining open but-- that means any change to what was agreed in the resolution during the term of this resolution, such change relieves the Union of its commitment not to file a general grievance. So the Union could file a general grievance saying it was unfair for DART to not do the 4 percent roll into wages and to do a bonus instead. The resolution further says, matters of inherent managerial policy are reserved exclusively to DART under the law. This include but shall not be limited to, to such areas of discretion or policy as the functions and programs of DART, standards of services and its overall budget.

JUSTICE HECHT: Now suppose those provisions were not there, and there was just the 4 percent provision.

MR. LONDA: If those provisions were not there, your Honor, I don't think legally it would make any difference. If those provisions weren't there, Jackson still says, that-- and 13(c) itself says, that the Union could sue in State Court for the process. They should go to fact-finding. They didn't.

JUSTICE HECHT: Why should they go through it again when they've gone through it before and now they just claim we won't honor the decision?

MR. LONDA: They did not go it-- through it before. They went-- they filed a general grievance, got a resolution. They got paid two years under resolution, DART did not pay the third year. They never went to fact-finding, which involves a neutral person and two appointed representatives, making a decision like a tribunal. It's advisory, correct. But that the same right DART had before. DART has, under Texas law, the unilateral right to set wages. It was not given up in the resolution. To further answer your question, what the union would be asking basically, even if this provisions weren't in here, was for the Court to say that there's been a waiver of immunity by contract. This Court has said, it said so in the Texas A&M - Kerrville case, I think it's versus Lawson in, I think 2002. "A governmental entity like DART cannot contract away immunity." That is up the Texas Legislature to do.

JUSTICE HECHT: But you agree with 13(c), as construed by Jackson Transit, it does waive immunity, at least, for a suit to require the process.

MR. LONDA: To require the process, but we would not be here before you on an immunity claim then because it would not be a suit for money damages, and that's where immunity applies under state law. One further

thing and then I will conclude. Justice Brister asked the question about 13(c) and Mr. Gillespie, I think, said 13(c) doesn't say anything about worsening, it does. It says, "Arrangements under this subsection shall include provisions that may be necessary for, then it says, preserving of existing Collective Bargaining Agreements or otherwise. The continuation of collective bargaining," and the Court said that means where it existed before. And it says here in (c), "The protection of individual employees against a worsening of their positions related to employment." And that's what the 13(c) agreement did, it protected DART's bargaining Union employees against a worsening of their conditions of employment. It gave them fact-finding. It preserves DART's rights under state law and if there'd been a violation of the process, there could be a Jackson suit. Thank you all very much.

CHIEF JUSTICE JEFFERSON: Thank you, Counselors. The cause is submitted and the Court will take a brief recess.

COURT MARSHALL: All rise.

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