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How the Labor Department Can Bring Common Sense to a Rail Contract

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The Federal Transit Administration (FTA), part of the U.S. Department of Transportation (DOT), requires that transit agencies receiving federal funds competitively procure all contracts. To ensure that taxpayers receive the best service for the lowest cost, the FTA requires that these services be put out to bid at least every five years. However, as the case of Boston's commuter rail system demonstrates, federal government policy is often at odds with the goal of ensuring cost-efficient service delivery.

Commuter rail services are often contracted out, with 11 out of 15 U.S. systems being operated by outside contractors. The Massachusetts Bay Transportation Authority (MBTA) provides 1.2 million daily riders in eastern and central Massachusetts with services that include heavy rail, light rail, buses, trackless trolleys, and ferries. Amtrak has operated the MBTA's commuter rail service since 1987.

To boost competition and comply with the FTA's competitive bidding requirement, the MBTA split its commuter rail operations into three segments. In 1999, after a competitive bidding process, Bay State Transit Services emerged as the low bidder and was awarded the contract for train cleaning and maintenance, the smallest of the three parts. Bay State's proposal also earned the highest quality rating.

However, the effort to contract with a new company met opposition. As a result of intervention in 1999 from the U.S. Department of Labor (DOL) and Members of Congress, the MBTA was forced to forgo $116 million in savings that the five-year Bay State contract would have provided and instead sign a three-year extension with Amtrak—although Amtrak's bid was the highest of the four and its proposal received the lowest rating for quality.

The stumbling block to open competition was a 38-year-old provision of federal law known as "13(c)." The DOL under President Clinton continued and accelerated the long-standing practice of interpreting the law to provide increasingly expansive labor protections. As the MBTA prepares for another round of bids, interpreting the statute as it was intended and staying within the letter of the law would represent an important step toward the

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FTA's stated goal of ensuring that taxpayers receive the best service at the lowest possible cost.

Given that a genuine competitive procurement of even the smallest of the three contracts was projected to bring $116 million in savings over five years, opening the MBTA's entire commuter rail operation to competition could have yielded more than $500 million in savings. With the contract coming up for renewal next year, Congress and the Bush Administration have a chance to rectify the injustice that occurred in 1999.

A STUMBLING BLOCK TO COMPETITIVE BIDDING

In 1987, the MBTA contracted with Amtrak to provide commuter rail service in the Boston area. In 1996, the FTA informed the MBTA of the requirement that its grantees engage in competitive procurement and urged the Authority to put its commuter rail contract out to bid.[1]

In 1998, the MBTA began this process by separating its commuter rail operations into three parts to maximize competition. Mechanical services (i.e., train cleaning and maintenance) was the smallest of the three commuter rail contracts and the first to be put out to bid. The FTA responded to the initiation of the procurement process in a November 1998 letter from its regional administrator, Richard H. Doyle, to MBTA General Manager Robert Prince, stating: "We strongly support this solicitation as well as other future competitive actions you intend to undertake."[2]

Three companies submitted bids for the mechanical services contract that ranged from $175 million to $199 million. Amtrak bid $291 million for a five-year contract that was scheduled to take effect in 2000. In May 1999, the MBTA board of directors voted to award the contract to Bay State Transit Services, a joint venture between Herzog Transit Services and Boise Locomotive. In addition to being the low bid, Bay State's $175 million proposal earned the highest quality rating from MBTA reviewers. (Amtrak's proposal, which was the most expensive, received the lowest quality rating among the four bids).

After Bay State's bid was selected, attention focused on the future of Amtrak's mechanical services employees. With a workforce of 552, Amtrak used more workers per passenger car and per locomotive than seven other comparable North American commuter rail systems. Though Bay State planned to hire existing Amtrak employees, a number would lose their jobs since Bay State planned to hire a smaller workforce. Even with the 415 employees Bay State planned to hire, the Boston system would have a higher ratio of workers to equipment than any of the comparable commuter operations in the nation, except the New York area's Metro North railroad.[3] The other two bidders anticipated a workforce similar in size to the one Bay State proposed.

An unparalleled level of federal labor protection makes it extremely difficult to cut unnecessary positions within the transit industry. Section 13(c) of the Federal Transit Act of 1964[4] became law during a time when many private transit companies were going out of business and mass transit was becoming a service that was provided for the most part by government and its employees. Since many jurisdictions throughout the country prohibited public-sector collective bargaining at the time, Section 13(c) was designed to protect the rights of workers who might be adversely affected by changes in the industry that resulted from the introduction of federal funding. Ironically, this law, which was designed to protect workers from the adverse effects of public-sector employment, is today the single biggest impediment to the efforts of public transit officials striving to achieve greater efficiency through private-sector competition.

Section 13(c) requires that the Department of Labor certify that fair and equitable labor arrangements are in place before the Department of Transportation makes grants to transit agencies. The

1. Testimony of Nuria I. Fernandez, Acting Administrator, Federal Transit Administration, U.S. Department of Transportation, in hearing, *Delays in Funding Mass Transit*, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, S. Hrg. 106–1006, April 25, 2000, pp. 43 *et seq.*
2. Hearing, *Delays in Funding Mass Transit*, p. 45.
3. Materials provided by Bay State Transit Services, available from the author upon request.
4. 49 U.S.C. §5333(b).

statute requires that five specific issues be addressed in the protective arrangements:

1. **Preservation** of rights, privileges, and benefits under existing collective bargaining agreements;
2. **Continuation** of collective bargaining rights;
3. **Protection** of employees against a worsening of their positions with respect to employment;
4. **Assurances** of employment to employees of *acquired* mass transportation systems and priority reemployment for employees terminated or laid off; and
5. **Paid** training or retraining programs.[5]

The DOL ensures that these protections are in place through a transit agency's 13(c) agreement, which is negotiated by the transit agency and employees' unions and approved by the Department as part of an earlier federal funding request by the agency. If there are no objections that the DOL deems valid, it certifies that appropriate labor protections are in place and allows the grant to go forward.

Unions may object to subsequent agency grant requests. If the DOL upholds the objection, a transit agency's grant request is denied. In theory, a transit agency that finds the DOL's terms and conditions unacceptable may forgo federal funds. However, this is rarely a realistic option, given that few large transit agencies can survive for long without federal assistance.

Under 13(c), displaced employees receive up to six years of full pay and benefits, while adversely affected but still-employed workers receive the difference between their prior pay and new compensation levels for up to six years. When Amtrak took over the MBTA's commuter rail operations in 1987 and the DOL certified that fair and equitable labor protections were in place, the Boston-area commuter rail system was not classified as an "acquired mass transportation system" and Amtrak was not required to provide "assurances of employment" to all existing employees. Workers moving from the Boston and Maine Railroad to Amtrak took pay cuts of more than 10 percent, and the MBTA paid the difference between employees' previous and current wages for up to six years under the generous provisions of 13(c).

Though 13(c) is written to give employees the benefit of the doubt, workers do have the initial burden of proving a causal relationship between the worsening of their employment status and federal financial assistance. In 1999, when the MBTA selected Bay State for its mechanical services contract, it noted that no such causal relationship existed. The Authority had long received federal funds, and those funds were unrelated to its decision to change contractors.

Bay State and the MBTA nevertheless sought to treat Amtrak's employees fairly. They would be first in line for union jobs and would have compensation packages comparable to what they earned with Amtrak. The Authority identified 55 MBTA positions that could be filled by former Amtrak employees, and the remaining workers were to be given priority for future MBTA jobs. The MBTA also offered a $10 million severance package for displaced employees.

At the union's urging, most of Amtrak's existing workforce forwarded Bay State's job offers unopened to the Coalition of Rail Labor Unions, an umbrella organization of unions representing the Amtrak employees. Under Section 13(c), workers who refuse comparable employment forfeit their right to benefits available to displaced or adversely affected employees; but this provision was clouded by the fact that (as is often the case with politically charged legislation) the policies and procedures for implementing Section 13(c) were so complex that they ignored the letter of the law and allowed for multiple interpretations.

THE POOREST QUALITY AT THE HIGHEST COST

The unions filed an objection with the DOL claiming that the MBTA was in violation of its 13(c) agreement and urging that the Authority be denied federal funding. In previous years, the Labor Department typically had upheld approximately one-third of objections. In the election year of 2000, however, with a sitting Vice President seek-

5. G. Kent Woodman, Jane Sutter Starke, and Leslie D. Schwartz, "Transit Labor Protection—A Guide to Section 13(c)," *Legal Research Digest*, June 1995.

ing organized labor's support in his quest for the presidency, the DOL upheld virtually every one of labor's objections, including this one.[6]

Not only did the Labor Department rule that 13(c) protections applied, but it also ruled that the MBTA's commuter rail operation was an "acquired mass transportation system" and that Amtrak workers should also be protected under provision (4) of 13(c). Specifically, the DOL ruled that the MBTA's 1976 "acquisition" of the Boston and Maine Railroad entitled Amtrak employees to assurances of employment in perpetuity. Clearly, when Congress included protections for employees of acquired mass transportation systems in the 1964 legislation, its intention was not to ensure employment for an entirely different set of employees affected by a change in contractor 23 years after the acquisition.

After negotiations between the MBTA and Coalition of Rail Labor Unions yielded no agreement, MBTA officials received letters from the FTA and DOL in December 1999 informing them that their grant request had not been certified and threatening the Authority with a loss of federal funding. Unable to survive without the federal money long enough to vindicate its position in court, the MBTA was forced to sign a three-year extension with Amtrak at a price that was approximately $70 million higher than Bay State's bid.[7]

THE POWER OF LABOR UNIONS

As the MBTA commuter rail controversy attracted increasing attention, the Senate Committee on Banking, Housing, and Urban Affairs entered the fray, holding a pair of revealing hearings on the topic during the spring and summer of 2000. Led by Senator John F. Kerry (D–MA), the strategy of labor's supporters quickly emerged.

Specifically, in an April 25 hearing, Senator Kerry dismissed Bay State as a company in which "you have two employees and you are bidding $116 million below anyone else to do something that you have no workforce to do."[8] In a subsequent hearing on July 11 Kerry characterized Bay State variously as a "fiction of an entity," a "company that didn't exist," and a "fictional company."[9] In fact, Herzog and Boise are among the leading firms in the industry, together operating more than 750 locomotives.[10] In contrast, when Amtrak took over Boston's commuter rail service, it operated only one other small commuter rail system.

Both the DOL's own policy and the legislative history of 13(c) state a clear preference for locally negotiated agreements that comply with federal standards of fair and equitable treatment rather than DOL-imposed terms. However, although the MBTA's 13(c) agreement had been in effect since 1974, the DOL in 2000 unilaterally imposed a clause that made Bay State bound by and responsible for the Authority's 13(c) obligations. It supported the unions' contention that a carryover of all existing employees, unions, and collective bargaining agreements was required even though the Authority's 13(c) agreement contained no such carryover provision. The MBTA's request for proposals had stated that the Authority, not the contractor, would be responsible for any such obligations. Senator Kerry characterized this arrangement as an example of the MBTA's and Bay State's attempts at "union busting,"[11] ignoring the fact that Amtrak had long had the same provision in its contract with the Authority.[12]

Imposing 13(c) obligations on a company that was not a party to the MBTA's 13(c) agreement and did not yet have more than 10 employees is yet another example of just how far the DOL's interpre-

6. Testimony of John H. Anderson, Jr., Director, Transportation Issues, Resources, Community, and Economic Development Division, U.S. General Accounting Office, in hearing, *Delays in Funding Mass Transit*, pp. 4–6.
7. Amtrak's bid was $116 million higher than Bay State's for the five-year contract, but Amtrak's price was about $70 million higher over the term of the three-year extension.
8. Hearing, *Delays in Funding Mass Transit*, p. 23.
9. Taken from videotape of hearing to consider extending the contract for Amtrak's commuter rail service, Subcommittee on Housing and Transportation, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, July 11, 2000.
10. Testimony of James Stoetzel, Transit Safety Management, in hearing, *Delays in Funding Mass Transit*, p. 32.
11. Hearing, *Delays in Funding Mass Transit*, p. 23.
12. Testimony of James Stoetzel in hearing, *Delays in Funding Mass Transit*, p. 38.

tations of the statute have drifted from the legislation's original intent. Making contractors responsible for the costs associated with satisfying the DOL's ever-rising standards for 13(c) compliance achieves the ultimate goal of transit unions and their supporters—making the competitive bidding process so costly and unpredictable that it locks the status quo in place.

Under questioning from then-Chairman Phil Gramm (R–TX) at the Senate Banking Committee's April 25, 2000, hearing, DOL officials claimed that, because this case was deemed an acquisition, not even the six-year severance package was sufficient. To comply with 13(c), they said Bay State and the MBTA would have to recognize the existing union (rather than hiring a workforce and allowing the employees to choose which union would represent them) and hire every Amtrak employee, regardless of need.[13] This imposed requirement institutionalized featherbedding by making it impossible for transit agencies seeking greater efficiency to do anything more than change managers.

The level of the DOL's acquiescence to organized labor was best illustrated by the disposition of a series of questions on 13(c) that Senator Gramm sent to former Transportation Secretary Rodney Slater in March 2000. At the April 25 hearing, Chairman Gramm disclosed that the written reply to his questions had come not from Secretary Slater, but directly from the counsel to the mass transit unions:

> I sent a letter to Rodney Slater on behalf of the Committee on March 8, posing a series of questions. Then on March 16, I received a letter from the representatives of the mass transit unions, the counsel for those unions. I want to read a part of the first paragraph. I am stunned by it.
>
> The first paragraph says—"Received a copy of a recent letter sent to Secretary Slater by Senator Phil Gramm. That letter requests that the Secretary respond to a series of questions. The rail unions have requested that, as their counsel in this matter, I respond to the questions posed by Senator Gramm."[14]

RECOMMENDATIONS

Although it is patently unfair for transit employees to have a level of job protection that exceeds that of workers in any other industry, past attempts have made it clear that repealing Section 13(c) would be exceedingly difficult. In the absence of repeal, the Labor Department can take several steps toward reform.

- **Interpret Section 13(c) as it was written.** This would at least return predictability to the process and could encourage private contractors to bid on public transit projects. It would allow the possibility of some cost savings, even though the savings would be diminished by the up-to-six-year severance packages paid to displaced workers.
- **Enforce the requirement that transit employees' losses are linked to federal funding.** When the Federal Transit Act of 1964 was passed, private transit companies were being absorbed by government entities that often prohibited collective bargaining for their employees. Section 13(c) of the law was designed to help workers who were adversely affected by the introduction of federal funds, not to provide redress every time a transit agency receiving federal support seeks to change vendors for a service it has routinely contracted out.
- **Disallow retrospective application of labor protections.** When Congress provided assurances of employment to employees of acquired mass transportation systems, its intent was clearly to provide employment for the workers who were adversely affected *at the time of acquisition*. It strains credulity to argue that lawmakers in 1964 intended that DOL officials should look back more than 25 years to determine whether an earlier transaction should be classified as an acquisition and then apply heightened protections for a workforce that was in

13. Testimony of Kelley Andrews, Director, Division of Statutory Programs, Office of Labor–Management Standards, Employment Standards Administration, U.S. Department of Labor, in hearing, *Delays in Funding Mass Transit*, pp. 50 *et seq.*

14. Hearing, *Delays in Funding Mass Transit*, pp. 47–48.

place a quarter century later and unaffected by the original transaction.

- **Enforce locally negotiated 13(c) agreements rather than imposing new terms.** The Labor Department should abide by its long-standing preference for locally negotiated 13(c) agreements. The MBTA's 13(c) agreement was negotiated in 1974, but more than 25 years and countless federal grants later, the Labor Department suddenly imposed clauses making a third party responsible for MBTA 13(c) obligations and mandating the carryover of all existing employees, unions, and collective bargaining agreements to the new contractor. Section 13(c) has not changed since 1964, but in 2000 an agreement that had met with the Labor Department's approval for 26 years was somehow deemed to be no longer sufficient.

As the MBTA prepares to re-bid the contract, a more reasonable interpretation of the statutory language of Section 13(c) of the Federal Transit Act of 1964 would allow transit agencies throughout the country to pursue the savings that can be achieved through competition in accordance with the goal of the FTA's competitive procurement requirement—providing taxpayers with the best service at the lowest cost.

CONCLUSION

At the urging of the Federal Transit Administration, the MBTA opened the operation of its commuter rail service to competitive procurement. Ironically, as a result of this compliance, the Authority was threatened with the loss of all federal funds and given no choice but to sign a three-year extension with the company that offered the lowest-quality service at the highest price.

A mechanical services contract with Bay State Transit Services could have saved taxpayers $116 million over five years—and mechanical services was the smallest of the three pieces into which commuter rail operations were to be split and competitively procured. If not for the perverse interpretation of a law that already provides transit workers with unparalleled labor protection, the competitive procurement of this one commuter rail system could easily have saved $500 million over five years.

Almost two years into the three-year extension of its contract, Amtrak has yet to provide the documents necessary to have the contract properly audited. It is time for the Bush Administration's Department of Labor to review the contract and achieve long-overdue savings for the American taxpayer.

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