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TRANSIT LABOR RELATIONS GUIDE

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EXECUTIVE SUMMARY

THE PROBLEM

Transit organizations, both public and private, are under great internal and external pressures today to improve their organizational effectiveness. Studies have shown that the collective bargaining relationship between union and management, particularly the collective bargaining agreement, has a direct, measurable effect on organizational effectiveness. Both transit management and transit unions have begun to recognize that it is in their mutual interest to improve organizational effectiveness by turning toward a more cooperative collective bargaining relationship. Yet there is a scarcity of information as to why many of these experiments have failed. To the best of our knowledge, there is no up-to-date labor relations guide that is transit specific and emphasizes labor-management cooperative programs.

PURPOSE AND SCOPE OF STUDY

This report is intended to be a practical guide for transit managers, supervisors, union leaders, members of labor or management negotiating committees, joint labor-management committees, and anyone else who is involved in labor relations in the transit industry. This guide assumes that the reader has only modest experience with collective bargaining negotiations, or none at all. Readers who are experienced negotiators may wish to skip the section in this report called “Some Negotiating Basics” as well as the section near the end of this guide entitled “Glossary of Abbreviations, Acronyms and Terms.”

The information this report offers builds upon the studies of many individual authors, reports of government task forces, and interviews with experienced labor relations practitioners in transit. Major emphasis in this study is placed on the newer approaches to transit labor relations, namely interest-based bargaining and joint-labor management problem-solving committees.

What do we mean by *transit*? In trying to limit our investigation, we were guided by the following definition by the Subcommittee on Definitions of the Transit Research Board, which served us best in limiting the scope of our research project:

transit, public (mass transit)-passenger transportation service, usually local, that is available to any person who pays a prescribed fare; it operates on established schedules along designated routes with specific stops (e.g., bus, light rail, rapid transit).¹

We have further limited our discussion to *surface* transit, omitting ocean and air transportation of passengers. In addition, we decided to exclude

conventional railroads because they work under a different legal framework and have a different type of labor relations system than transit organizations. We have, however, included certain metropolitan *commuter* railroad operations when it seemed relevant to the topic of labor-management partnerships. We have also included some discussion of the devastating Greyhound strikes, even though Greyhound Lines provides *inter-city* passenger service and, strictly speaking, does not fit the definition of “transit” we have given above. We have done so because of the profound impact the Greyhound strikes had on local transit operations, particularly the major union in the transit field—the Amalgamated Transit Union (ATU).

This study utilized a wide variety of data collection techniques: literature review, Internet searches, formal and informal face-to-face interviews, telephone interviews, correspondence with knowledgeable authors and practitioners, and information gathered at conferences. Since both authors are also professional trainers for the National Transit Institute, they took advantage of the opportunities in many of their training sessions to gather information from transit practitioners participating in these training programs. Our interview sample may be called a “convenience sample” of experts and experienced practitioners.

TWO COLLECTIVE BARGAINING SYSTEMS

In the last two decades, profound changes have taken place in this country in the way unions and management deal with each other. The transit industry is no exception, although the changes there have been considerably slower. In the past, union and management in transit have negotiated their collective bargaining agreements largely through adversarial, even hostile, bargaining, sometimes called *distributive bargaining* or *positional bargaining*. They competed with each other over how big a slice of a fixed-size economic pie, or profits, each would get. They were willing to risk a strike or lockout, if necessary.

A threat to the economic or political survival to both parties caused some of them to re-evaluate their adversarial union-management relationship and try a more cooperative approach to collective bargaining. They began what is commonly called *interest-based bargaining*. Others maintained their adversarial collective bargaining relationship.

¹ *Glossary of Urban Public Transportation Terms*, Special Report 179, Subcommittee on Definitions, Committee on Public Transportation, Transportation Research Board, Commission on Sociotechnical Systems, National Research Council. Washington, DC: National Academy of Sciences, 1978, p. 34

Today both approaches co-exist, even though they seem to be diametrically opposed to each other. Both seem to work, at least for the time being. As a matter of fact, in some cases the same parties over time alternate between the two approaches, but usually not without at least one of them perceiving interest-based bargaining as a failure. In this study we have explored the reasons for these failures, perceived or real, as well as some of the factors that contributed to the success of the more cooperative approaches.

A BRIEF HISTORY OF TRANSIT LABOR RELATIONS

THE EARLIEST FORM OF TRANSIT: FERRY BOATS

The earliest form of transit in this country was ferryboats. Rivers were the forerunners of today's highways; however, they often presented formidable obstacles for those traveling on foot or on horseback. In the past, these travelers needed a ferryboat to get from one side of the river to the other because large bridges did not yet exist.

We can say that the earliest ferrymen were Native American Indians. Records show that they carried Spanish soldiers across the southern rivers as early as 1540.² We do not know whether in those days they worked for some type of compensation or not. Perhaps their only reward was that their lives were spared. Much later, they carried western settlers and traders across the waters. Still later, some of the settlers themselves became ferryboat operators. In those days, before huge bridges were being built, ferries linked many of the colonial settlements. Eventually, ferryboat operators started to work for wages, and later formed unions. Unfortunately, we do not know when they started to unionize. Early historians and economists had little interest in labor history and left us no records. We do know, however, that there already existed a fairly sizable union of ferryboat operators in California around the turn of the century. It was an independent union that called itself the *Ferryboatmen's Union*. In the early 1920s it became the first San Francisco Bay Area union to admit members of all races to its ranks. It later became the *Inlandboatmen's Union of the Pacific (IBU)*. In the 1940s, the IBU became affiliated with the Seafarers International Union (SIU), an action it came to regret, for the SIU infringed upon the autonomy the IBU was used to and often undermined its traditional occupational and geographic jurisdictions. In the 1970s, IBU members overwhelmingly voted to break the union's affiliation with the SIU. In order to enhance its economic and political power, the IBU affiliated in 1980 with the International Longshoremen Association, known for its militant unionism and political activism.

The reader may wonder where the term "longshoremen" comes from. In the old days, when cargo ships needed to be loaded or unloaded, labor was often simply recruited at the last minute on the shoreside by having a crier yell, "Men along the shore!" and hire the men needed to load or unload a ship on the spot. The union later changed its name to *International Longshore and Warehouse Union (ILWU)*.

² John Perry, *American Ferryboats*. New York: Wilfred Funk, Inc., 1957, p. 3.

Early ferryboat operators, as well as longshoremen, were forced to work under miserable conditions: wage cuts, kickbacks, speedups, blacklists, and other union-busting practices by employers. In 1980, about 700 members of the Inlandboatmen's Union (IBU) went on strike against the Washington State Ferry System. When the strike leaders were jailed, the ILWU came to their rescue by having their locals shut down the Puget Sounds ports for 24 hours on April 15, 1980. The work stoppage led to serious collective bargaining between the State Ferry System and the IBU, and the union won considerable improvements in working conditions. After the strike, the IBU decided to affiliate with ILWU, which had helped it win the strike. It has apparently been a very successful affiliation because the ILWU allowed the IBU considerable autonomy; the IBU won more strikes, increased its membership, and even participated in the ILWU's political activities. Today the Marine Division of the ILWU represents a large number of ferryboat operators.³

THE HORSE-DRAWN TRANSIT VEHICLE ERA

Transit, as we know the term today, did not really begin until the 19th century when the distances between home and work in the larger cities had become too large to walk on foot. Horse-pulled stagecoaches were introduced and were used by those who could afford them. This form of passenger transportation was first introduced on a large scale on the streets of New York City in 1827. It quickly grew in popularity, and by 1835 over a hundred such "omnibuses" ran in New York City.

By 1885, close to 600 horse-drawn omnibuses ran over 26 fixed routes in the city, and actually started to cause the first urban traffic congestion.⁴ Later, these horse-pulled stagecoaches were put on special wheels that ran on railroad tracks because there were no paved, or only poorly paved streets in those days. The earlier chroniclers of the labor movement claimed that the horses that pulled the streetcars were treated better than the drivers, who were on duty from the early morning hours until the horses were returned to the barn late at night. These drivers, more often than not, put in an 18-hour workday. The horses, on the other hand, worked only a four-hour day or less. It cost more money to replace a horse than a worker in those days.

Transit workers could be required to work as many as 20 hours a day for the

³ "The ILWU Story: Six Decades of Militant Unionism," (online), <http://www.ilwu.com/tis.htm>, pp. 1, 16-17.

⁴ Charles Luna, *The UTU Handbook of Transportation in America*. New York: Popular Library, 1971, p. 14.

same daily wage, without any additional compensation for the extra time worked. Transit workers had no benefits and no job security. They had no holidays, no vacations, no pension, and no health care. Absence from work, no matter what the reason, would often cost transit workers their jobs.

Dissatisfied with their working conditions, the early streetcar workers formed the first known labor union in the transit industry in this country. A driver on New York's Third Avenue Line by the name of John Walker is credited by labor historians as being the leader behind the formation of this union, regarded to be the forerunner of what is now known as the Amalgamated Transit Union (ATU). His success was short-lived. Powerful opposition by the streetcar company, and the outbreak of the Civil War, caused the union to falter. Attempts more than 20 years later to revive this and other transit unions did not fare much better. It was not until December 1885 that a rebuilt union proposed a labor contract to the management of the Third Avenue Line that was accepted. Soon after, the union also presented a list of grievances to the management of the Sixth Avenue Railway only to have it ignored for three weeks. When after three weeks the workers went on strike, the company signed a contract only five hours later. More union organizing and negotiating successes in New York City followed—first with the smaller, then with the larger companies. Word of the labor union's success spread throughout the country, and transit employees all over the U.S. joined organized labor's push to end the 18-hour workday and demanded an 8-hour workday. They eventually managed to get the 12-hour workday. Much to the dismay of many union leaders, many transit workers thought they had achieved their purpose and left their transit unions, leaving them once again powerless.⁵

In 1892, Samuel Gompers, president of the American Federation of Labor (AFL), the historic statesman of American labor, called a national convention of unionized transit workers in this country. The 50 representatives of 22 local unions from all over the United States formed the first nation-wide union of transit workers. They called it the *Amalgamated Association of Street Railway Employees of America*. Shortly afterwards, the name was changed to *Amalgamated Association of Street, Railway, and Motor Coach Employees of America*. In 1963, it was decided to shorten the name to *Amalgamated Transit Union*.⁶

⁵ Amalgamated Transit Union Staff, *A History of the Amalgamated Transit Union*. Washington, DC: Amalgamated Transit Union, 1992, pp. 3-5.

⁶ Darold T. Barnum, *From Private to Public: Labor Relations in Urban Mass Transit*. Bloomington, Indiana: Institute for Urban Transportation, Indiana University, 1977, chapter 2.

THE NEW TECHNOLOGY

Horse-drawn streetcars were followed by steam railroads and electric cable cars running on rails as technology developed. It was not until the 1910-1920 decade that improved street pavement and the emergence of internal combustion engines led to the introduction of bus traffic in the larger cities.⁷ With few exceptions, by 1939 most city transportation systems had been replaced by buses. In those days, most public transit services were provided by private firms operating for profit. During World War II, privately owned municipal transit systems grew because of the needs of the war industry and the shortage of fuel and rubber needed for the war effort. After World War II, highway expansion and increased availability of private automobiles led to a fast decline of public mass transportation throughout the 1950s and 1960s. Low ridership led to widespread financial crises for the private transit companies, and to wage cuts and layoffs all over the country. In many places bus drivers and maintenance workers struck in protest of the wage cuts. Finally, the continuing financial crises forced most private transit companies out of business.

After 1964 many transit unions, particularly the ATU, started to join forces with the local business community and local politicians to influence state legislators to pass “enabling legislation,” which created public transit systems. The passing of this type of state legislation generally provided state funding for the establishment and operation of these public transit systems. Often these state funding sources were supplemented or replaced by local tax funding sources. In addition to providing funds for publicly owned transit operations, this type of enabling state legislation also created public transit authorities to govern the public transit organizations, and generally set forth a number of collective bargaining protections for union members.⁸

By the 1970s, most public transit in the United States had become government-owned, but not without massive financial assistance from the federal government. That assistance did not come without strings attached. To be eligible for federal funds transit entities had to adhere to numerous conditions, requirements, and regulations. The federal government exercised enormous influence on transit operations.⁹ The Amalgamated Transit Unit grew rapidly in membership as a result of the passage of the 1964 Urban Mass

⁷ American Public Transit Association, *Transit Fact Book*, 50th edition, Washington, DC: APTA, 1999, pp.151-156.

⁸ Fernando E. Gapasin, *Union Organization and Changing Demographics*, unpublished Ph.D dissertation, University of California, Santa Barbara, 1994, chapter 3.

Transportation Act (UMTA) discussed in the chapter on the *Legal Environment of Transit Labor Relations*. The UMTA literally saved public mass transportation and with it boosted the strength of transit unions. The ATU and other transit unions had lobbied Congress aggressively to make sure that transit workers of private transit companies who became public employees of federally funded public transit authorities suffered no loss of collective bargaining rights in the takeover. These protections were in Section 13(c) of the UMTA of 1964, indeed a landmark in legal protections of unions and their members. These 13c protections, coupled with the enabling state legislation previously mentioned, greatly enhanced the power of transit unions by preserving all of the private sector union rights contained in the National Labor Relations Act protections as their members moved from private sector to public sector employee status. Following the passage of the UMTA, even the most conservative states, which had previously outlawed public sector collective bargaining, quickly changed whatever legislation needed to be changed to qualify for federal funding under the UMTA. Between 1964 and 1974, 40 states passed legislation creating public transit authorities, and most of them made sure that there was no interference in their transit legislation with 13c protections of the UMTA. When revised versions of the UMTA were passed by Congress between 1974 and 1991, the old collective bargaining protections, and with it the power of transit unions, were preserved.

THE GREAT GREYHOUND STRIKES

Although Greyhound passenger service is inter-city in nature, and therefore does not fit our strict definition of “transit,” we believe a discussion of two large strikes at Greyhound are relevant to labor management relations across the transportation industry. They made history in the entire transportation industry. They had profound impact on local transit operations as well, particularly the major union in the transit field, the Amalgamated Transit Union (ATU). They helped shape the future relationship between the ATU and transit facilities. They gave the national leadership of the ATU a powerful reason to champion interest-based bargaining in the transit industry, which was ready for a change.

A seven-week strike occurred at Greyhound in 1983. Another one started in 1990 and ended more than three years later. Both made history. Both had devastating consequences, for both the union and the company. Greyhound

⁹ *Mass Transit Management: A Handbook for Small Cities*, 3rd edition revised, Part I: Goals, Support, and Finance, Final Report February 1988. Bloomington, Indiana, Institute for Urban Transportation at Indiana University, Center for Transit Research and Management Development, p. 45.

Bus Lines had experienced strikes before 1983, but they were generally only local strikes with relatively modest impact on the company's labor relations and its financial health. Generally speaking, the relationship between company and union had been good, and both sides had prospered. All that changed dramatically in November of 1983, when contract negotiations between the company and the ATU broke down and a bitter, highly publicized nationwide strike erupted. It was a strike marked by physical violence between striking employees and the company's newly hired striker replacements. It was a seven-week long strike that the ATU could not win. Some 12,700 ATU members walked off the job. Many of them regretted it, especially as Christmas drew closer and closer.

Before 1982, Greyhound was a prosperous company that prided itself on paying the highest wages in the industry. Greyhound all but ignored its competition, including a company named Trailways, its main competitor, which paid considerably lower wage rates than Greyhound. Considering Trailways' frail financial situation and the prospect of losing union members' jobs, the ATU agreed in early 1982 to a wage freeze at Trailways. Lower wages enabled Trailways to launch a major price war against Greyhound, well publicizing its lower bus fares.

At first Greyhound ignored Trailways' discounted fares and price war publicity. During spring of 1983, however, Greyhound began to experience a sharp decline in ridership. Passengers had become more price conscious. As a result, Greyhound had no choice but to drop its fares. Deregulation of the transportation industry made the competition for passengers even stiffer. New entrepreneurs who paid low wages entered the business and offered fare prices much lower than the more established inter-city lines.

The newly deregulated airline industry made things even worse for Greyhound. Low-cost passenger airline carriers sprang up after deregulation of the industry and gave intercity bus lines a run for their money. People Express, for example, charged only \$23 for a flight between New York City and Buffalo. Greyhound charged \$41 for the trip. A flight by Southwest Airlines from San Francisco to Phoenix was only \$60, compared to a Greyhound's bus ticket to the same location costing \$79. By the middle of 1983, Greyhound showed an operating loss of \$18 million. Greyhound's operating costs were 30 to 50 percent higher than that of other major bus lines. The company was paying about \$62 million a year more for salary and benefits of its nearly 7,500 bus drivers than other bus companies. The difference in wage and benefit cost for mechanics, service personnel and office employees between Greyhound and its competitors showed a similar disparity.¹⁰ No wonder during the 1983

contract negotiations with the ATU, Greyhound insisted on a 9.5 percent wage cut. Union leaders and union members were outraged, and a bitter strike ensued. Unfortunately for the union, it came during a period of high nationwide unemployment and only weeks before Christmas.

The company was ready. It had already recruited more than 1,300 new hires in anticipation of the strike. Many of them were experienced drivers of other bus companies. The company announced that it would replace all striking employees with new hires at the lower, prevailing industry wage rate. The company gave its all in resisting the strike and kept the buses rolling. It trained new drivers, sent hundreds of executives to do field work, video taped acts of violence on the picket line, and did everything in its power to fight the union in the courts. Still, replacing the entire workforce on strike was costly and time consuming. Both sides felt the economic pressure. Greyhound had to cut back on its passenger service. The company had lost much business, and the union many jobs.

In an attempt to get striking employees to return to work, Greyhound lowered its proposed pay cut to 7.8 percent. The union leaders submitted the offer to a vote of its 12,000 members but recommended strongly against it. As one might expect, the overwhelming majority of those voting rejected the offer. Federal mediators entered the picture. They eventually managed to broker a tentative agreement on December 2, 1983. The union agreed to send the last offer of the company, including the 7.8 percent wage cut, to the homes of its members for a vote, to be returned by mail. The vote count on December 19, 1983, showed that this time an overwhelming majority of striking employees decided to return to work. A painful seven-week strike had come to an end just a few days before Christmas. But the ATU had suffered a major defeat that would haunt it for years to come. It had to settle for the same 7.8 percent wage cut the company had insisted on way back in November. In addition, the union had to swallow a cut in pay from ten to eight percent per year; a four percent cut in pension benefits, and a two-tier pay schedule that paid new hires 20-25 percent less than employees under the old contract.¹¹ Greyhound, on the other hand, boasted that it had gained the wage parity it had been seeking, yet at the same time paid the highest wages in the industry. At that time, labor costs amounted to about 62 percent of total operating costs. The union's concessions had

¹⁰Oscar Schillgall, *The Greyhound Story*. Chicago: J. G. Ferguson Publishing Co., 1985, pp. 293-300.

¹¹ Ronald J. Peters, *The Greyhound Story: Rebuilding a Relationship Through a Joint Training Process*, Paper presented at the National Labor Management Conference, May 29-31, 1996, Chicago, Illinois, pp. 2-5

brought the company about an eight- percent reduction in bus line operating expenses over the life of the new three-year contract.¹²

The company's victorious feelings were short-lived. Economic pressures kept increasing. The deterioration of economic conditions in the inter-city bus industry in general continued to get worse, and with it the strength of the ATU deteriorated further. In 1984 Greyhound laid off about 1,500 employees, including 400 supervisors, and in 1985 sold 120 bus terminals, terminating 2,000 more employees, and franchised many routes to lower-cost bus companies. Amongst economic chaos, in 1987 a group of Greyhound investors, led by Fred Currey, acquired Trailways, Greyhound's major competitor, in a leveraged buyout. Approximately 1,400 Trailways bus drivers were absorbed into ATU bargaining unit at Greyhound. Greyhound gave them full seniority for their years at Trailways. In the contract negotiations that followed, ATU members suffered further wage cuts, even greater than before. In addition, they had to agree to another two-tier pay schedule, under which new hires would be making even less than they did already.¹³

By the time the next contract negotiation between the ATU and Greyhound Lines came around in 1989, the company's profits had improved, although it still had a large debt burden. With the news of improved profits in 1989 came employee expectations of higher pay. The company strenuously resisted union demands for a wage increase citing its heavy debt burden, claiming that its profit in 1989 was modest, and that it had incurred losses amounting to \$20 million the previous two years. In addition, the company emphasized its need to keep its labor cost down because of the heavy competition from railroads and airlines.¹⁴ The union claimed that the company had understated its profits, and that its heavy debts were due to poor management. The acquisition of Trailways alone had increased Greyhound's debt by \$80 million, bringing the company's total long-term indebtedness to \$300 million. Given its increased profits in 1989, the ATU claimed that the company could afford higher wages.¹⁵ Yet by June 1990, Greyhound had declared bankruptcy.

By the time the collective bargaining agreement had expired on March 2, 1990, the parties were still hopelessly deadlocked. Greyhound management refused

¹² "If Anyone Won the Strike, Greyhound Did," *Business Week*, December 1983, pp. 39-40.

¹³ *A History of the Amalgamated Transit Union*. (Washington, DC: Amalgamated Transit Union, 1992, pp. 146-147.

¹⁴ Peters (1996), p. 6.

¹⁵ *A History of the Amalgamated Transit Union*, (1992), pp. 147-148.

to extend the current contract, and a bitter strike ensued. It was the most violent strike the industry had ever seen, marred by dozens of shootings, over 100 bomb threats, and even one striker being killed by a bus driven by a striker replacement. Close to 9,000 Greyhound employees were out of work, and the company once again hired a large number of striker replacements. The ATU claimed, with a good deal of justification, that Greyhound was out to bust the union. Greyhound CEO Fred Currey certainly was no friend of organized labor. The ATU filed unfair labor practices charges with the National Labor Relations Board (NLRB), which were later upheld. The ATU pointed out that Greyhound had already advertised that it was hiring permanent striker replacements while it was still in negotiations with the union, and had already hired and trained hundreds of non-union strike breakers well before the strike began.

As the strike progressed Greyhound continued operations, using more than 2,450 strike-breakers. The union successfully enlisted public and government support by pointing out that striker replacements were poorly trained and presented a danger to public safety. It also publicized injuries of strikers on the picket line and blamed the company for inciting the violence.¹⁶

Union attempts to get legislation passed to make the hiring of strike-breakers illegal were unsuccessful. Both the union and the company, however, filed a large number of unfair labor practice charges with the NLRB, and even initiated lawsuits in the courts. They accused each other of inciting violence on the picket lines and illegal collective bargaining practices. One of the most shocking examples of strike violence occurred in Redding, California, when a striking ATU member was killed by a Greyhound bus driven by a newly hired strike-breaker. In March 1990, Greyhound broke off further negotiations. As time went on, and no end seemed to be in sight, the strikers became more and more weary. The picket lines at Greyhound bus terminals around the country grew thinner and thinner. Drivers started to cross the very picket lines they had staffed earlier. In 1993, near the second anniversary of the strike, when about 1,500 striking employees had already returned to work, the ATU capitulated and told its members that they were free to return to work.¹⁷

LESSONS LEARNED

Did Greyhound "win" the strike? Certainly not. Both sides had lost, and lost badly. Before the 1990 strike, Greyhound had employed 6,300 drivers. When

¹⁶ *A History of the Amalgamated Transit Union*, pp. 148-149. See also Janice Castro, "Labor Draws An Empty Gun," *TIME*, March 26, 1990, pp. 56-59.

¹⁷ "Business Briefs," *Wall Street Journal*, May 10, 1993, page B3.

the dispute ended, there were only 3,300.¹⁸ The ATU suffered devastating losses in membership. The company was already bankrupt by the middle of 1990. CEO Fred Currey lost his job, and he was replaced by Frank Schmieder, who had a reputation of being less hostile to unions than his predecessor. The company lost its appeals to the NLRB. Both sides had filed over a hundred charges, claiming unfair labor practices by the other during the strike. On the major issues, the NLRB ruled in favor of the union. It decided that the strike had been caused and delayed by the illegal practices of the company—practices that included bargaining in bad faith, illegally giving striker replacements seniority over striking drivers, making unlawful bargaining proposals, interfering with employees' rights to engage in lawful union activities, and unlawfully discharging over 200 striking drivers nationwide.

But the union lost also. Although the NLRB awarded \$22 million in back pay to ATU employees, the bankruptcy courts severely limited the back pay to which striking workers were entitled.¹⁹ The NLRB rulings, and a more conciliatory attitude of the new Greyhound CEO Frank Schmieder, however, led to renewed contract negotiations between the ATU and Greyhound. This resulted in an agreement reached in April 1993, more than three years after the previous contract had expired. The ATU had reestablished its right to represent Greyhound workers, but Greyhound gained the right to retain the replacement workers it had hired during the strike. The ATU won the recall of 550 drivers still on strike and the reinstatement of workers the company had fired for violence related incidents. The contract, which the ATU membership ratified in May 1993, called for a 20 percent wage increase for employees over the life of the six-year contract, in addition to the \$22 million in back pay to eligible strikers which the NLRB had previously awarded the union.²⁰

It is difficult to overestimate the impact these two Greyhound strikes had on labor relations in the entire transportation industry, including transit. The realization that strikes of this magnitude could ruin both union and company brought about a greater willingness on both sides to engage in interest-based bargaining and other forms of union-management cooperation. We have encountered union leaders in transit facilities who used to work for Greyhound

¹⁸ Peters (1996), p. 5.

¹⁹ Michael H. Cimini, Susan L. Behrmann, and Eric M. Johnson, "Labor-Management Bargaining in 1992," *Monthly Labor Review*, January 1993, pp. 19, 29-30.

²⁰ Michael H. Cimini, Susan L. Behrmann, and Eric M. Johnson, "Labor-Management Bargaining in 1993," *Monthly Labor Review*, January 1994, pp. 29-30. See also "Business Briefs," *Wall Street Journal*, May 10, 1993, page B3. See also Peters, *The Greyhound Story*.

and who still remember the hardships the Greyhound strike brought to striking drivers and mechanics. Said one interviewee, the chair of the union negotiating committee at a transit facility:

When the company and the national VP of the ATU suggested that we try interest-based bargaining here at this transit facility, I was ready. I have been through three strikes in 10 years, including the big one at Greyhound. I am a middle-aged woman, a single parent. I knew I couldn't afford another strike...Nobody ever wins in a strike, even if you get what you want. By the time the strike gets settled, for the most part you have lost a lot, and it takes years to recoup it. As far as I was concerned, strike was not an option...there had to be a better way...The others [who once worked at Greyhound] felt the same way.²¹

The losses suffered during the Greyhound strikes also caused the national leadership of the ATU to re-evaluate its bargaining relationship with transit companies. Jim LaSala, president of the ATU, became a champion of interest-based bargaining. Terry Van der AA, founder of and CEO of Vancom Transportation, which owns a number of transit companies in this country, spoke of a meeting he had with Jim LaSala in Washington in 1993:

I have to give Jim LaSala credit. He had just been through the Greyhound strike for three years. ATU had lost two-thirds of its membership, and the strike almost ruined Greyhound. When I was in his office in Washington, he said that the ex CEO of Greyhound had sat in the same chair I was sitting in and had told him the same thing that I was telling him about working together. LaSala said: "I should have listened." He now recognized, because of the Greyhound strike, that whoever ATU's employees worked for had to be successful, or else ATU was not successful. The Greyhound contract now has some elements of participation in it, and LaSala was introduced to those by Greyhound. When the whole thing was settled, Secretary of Labor Reich was at the final signing of the contract and gave both sides accolades for reinventing, if you will, labor relationships. It's possible that LaSala liked that sense of being a pioneer.²²

²¹ Interview at a transit facility with chair of union negotiating committee, who wanted to remain anonymous, April 28, 1995.

²² Louis B. Barnes, Vancom Transportation (A), Harvard Business School Case N9-494-127, April 13, 1994, pp. 8-9.

There are lessons to be learned by transit management and transit unions, not only from the Greyhound strikes, but strikes in the airline industry as well—particularly those experienced by Eastern Airlines. Kenneth Jennings, distinguished labor relations scholar, has noted that Eastern Airlines failed to learn from the Greyhound experience, and as a result, suffered the same fate. According to Jennings, there are several lessons we need to learn from the Eastern Airline and Greyhound experiences, lessons that apply to the entire transportation industry:

- Destructive labor relations have adverse effects on a company's financial and marketing position, which can only be reversed by the parties themselves, not by government intervention.
- Management must be proactive in its dealings with union officials if it wants to reverse hostile labor relations. It cannot wait for the union to make the first move toward a more conciliatory approach.
- Striker replacement policy creates horrendous legal problems, and legal problems have a habit of dragging on and on.

A weak and fragmented union typically offers more disadvantages than advantages for management. A weak union cannot facilitate the collective bargaining process because union officers, when faced with this situation, typically spend most of their time and energies quelling political rivals and appeasing the various factions within the union, and while negotiating, management cannot be sure that union negotiators really speak for the union membership. Agreements reached with union leaders at the bargaining table will easily unravel when a competing faction within the union convinces the membership that the proposals are not in their best interests.²³

As we shall see in our discussion on examples of cooperative relationships between unions and management in the transit industry, such relationships tend to avoid the above pitfalls.

²³ Kenneth M. Jennings, "Eastern's Final Days: Labor Relations Lessons for Managers in other Organizations, *Transportation Journal*, Vol. 20, No. 3 (Spring 1992), pp. 33-36.

THE ECONOMIC AND POLITICAL ENVIRONMENT OF TRANSIT LABOR RELATIONS

SOME ECONOMIC REALITIES

Labor relations in the transit industry are shaped by both economic and political realities. They are realities that may be unique to the entire transit industry or only to certain districts. Nevertheless, they govern the behavior of union and management representatives at the bargaining table and in their day-to-day relationships.

The transit industry is a highly labor intensive industry. About 80 percent of transit operating cost is labor cost. Yet fare box collections cover only about 50 percent of operating cost. It is extremely difficult to render almost any kind of mass transportation service as a profit-making enterprise in the United States today. Both operating cost and capital improvements require public funds. In addition to fare box revenues, funds to operate a public transit system will most likely come from a variety of other sources, such as sales taxes, property taxes, and government subsidies. The justification for supporting transit with public funds is that transit benefits not only the passengers but also the community as a whole. Real estate developers, for example, benefit from having transit services provide access to their developments, retail merchants benefit from having access provided to their sales outlets, residents of high density areas benefit from a reduction of automobile congestion, and employers may need smaller size parking lots because of employee access to their work places by public transit.²⁴

Most states provide aid for mass transit either in the form of direct contribution to the transit facility or as a budget allocation that is part of “enabling legislation.” This means that state legislation, which creates local transit authorities also sets forth their powers and conditions to which transit authority policies must conform. Such state legislation is almost always drafted in such a way that it enables local transit authorities to qualify for federal funding. Typically the amount of state funding that is granted depends on the percentage of the cost that local transit authorities must bear of the cost for federally supported capital improvements.²⁵ Local government subsidies for

²⁴ Institute of for Urban Transportation at Indiana University, *Mass Transit Management: A Handbook for Small Cities*, 3rd edition revised February 1988, Part 1: Goals, Support, and Finance. Washington, DC: Urban Mass Transportation Agency, US Department of Transportation, 1988, p. 59.

transit operations may come from local sales tax or allocations from municipal and county governments. All of this external funding is in the interest of both transit management and transit unions. It is in the interest of local transit management to seek close cooperation with its unions in trying to influence state legislators, state and federal regulators, local politicians, as well as taxpayers to support their requests for funding, favorable legislation and favorable interpretation of rules and regulations. In modern labor relations, an important role of unions is to help the employer enhance its ability to pay for wage and benefit increases for its membership. A financially healthy employer is needed to assure income and job security for union members.

THE RATIONAL COMMUTER

In transit organizations, whether private or public, labor relations are heavily influenced by how well the transit facility is doing financially. The employer's ability to pay for wage and benefit increases is heavily influenced by ridership. Transit planners and policy makers often assume that the modern urban AmericanS should gladly use mass transit transportation to and from work. They claim it is cheaper, more convenient, and reduces the overcrowding of highways and city streets. They rack their brains over how they might entice commuters to go to and from work by bus or light rail, rather than in their own automobile.

Yet commuters are consistently rational in the mode of transportation they choose. What matters most to them is convenience and price.²⁶ It is quite rational for people with reasonable incomes to travel to and from work by car, rather than subject themselves to the discomfort and inconveniences of standing in line at bus or rail stops, standing up like cattle in crowded transit vehicles with poor heating or air conditioning, and taking twice as long to get to work or home than in their automobile. Indeed, they are quite willing to pay for the difference in comfort and convenience. In fact, only lack of parking space, exorbitant parking fees and unbearable traffic congestion are likely to make them change their commuting habits.

Transit organizations, on the other hand are under great political pressure to keep fares low. Without new sources of revenue, they find it difficult to improve the comfort and convenience of transit commuter travel. As we shall see in the chapter on labor-management partnerships, jointly administered employee participation programs can do a lot to solve the dilemma, and to find

²⁵ Institute of for Urban Transportation at Indiana University, 1988, Part 1, p. 64.

²⁶ Thomas E. Lisco," The Problems of Transit Systems," in Diana Reische (ed), *Problems of Mass Transportation*, New York: H. W. Wilson Co., 1970, pp.47-57.

creative ways to make it more attractive for commuters to travel in transit vehicles, without charging exorbitant fares. But it takes an innovative spirit on both sides, great patience, and persistence to be successful. These efforts require changes in the organizational culture of both management and union.

Air pollution has become a major crisis in many of our cities and the nation in general. It is here that transit organizations and their unions can make a difference. The personal automobile is a far greater contributor to air pollution than mass transit vehicles. Buses and light rail vehicles contribute only a very small fraction to total city air pollution compared to the personal automobile for the same passenger volume. By the same token, during peak traffic hours the fuel consumption of transit buses and rapid rail vehicles per passenger mile is far, far less than that of personal automobile consumption.²⁷

We all know that, but tend to do little about it. Transit unions and management can work together for mutual gain in this area in appealing to legislators, local politicians and community groups to lend financial support to transit organizations to upgrade transit vehicles and service in order to make transit more attractive to commuters, increase ridership and to reduce air pollution and fuel consumption.

NEGOTIATED INCENTIVES

In recent years it has become increasingly apparent that both transit unions and transit management must play a greater role in helping their transit organization remain economically competitive. For that reason, it has become more common to negotiate employee incentive plans into the collective bargaining agreement. Most of these reward employees for good attendance, a crucial element in a transit organization's overall performance. In addition, these kinds of performance incentive plans have found their way to the bargaining table:²⁸

- Bonuses rewarding on-time performance.
- Bonuses rewarding accident-free driving.
- Hourly wage increases based on meeting ridership goals
- Wages for service workers based on number of buses cleaned and fueled.
- Mechanic's wages or bonuses based on percentage of vehicle fleet

²⁷ American Public Transit Association (1999), pp. 20-24.

²⁸ Institute of for Urban Transportation at Indiana University, 1988, Part 3: Operations, p. 198-199.

available for service.

- Drivers' wages or bonuses related to fare box recovery ratio.

These incentives, designed to enhance the competitiveness of transit employers, are usually "mandatory subjects" of collective bargaining. This means that the law requires that if one side wants to negotiate the issue, the other must demonstrate a willingness to do so. The legal obligation to *negotiate*, of course, does not mean there is a legal obligation to *agree*.

PART-TIME LABOR

Transit unions have traditionally opposed the use of part-time transit vehicle operators. They have tended to view part-time labor as a threat to their members' job security and hard-won collective bargaining gains, particularly overtime pay, holiday pay and other fringe benefits. Transit organizations, on the other hand, have sought to meet peak time staffing needs, internal and external pressures for productivity improvements, and labor cost reductions by employing part-time operators.

The typical transit organization has about twice as many vehicles running during commuter peak hours as during the rest of the day. As a result, transit agencies have fought bitter fights at the bargaining table to get unions to agree to the use of part-time operators to deal with these staffing and payroll problems. Since the use of part-time labor directly affects the working conditions of union members who hold the same jobs, the part-time staffing of operators' jobs is a "mandatory subject of bargaining." As we have said before, mandatory subjects of bargaining are those issues which, by law, must be negotiated if either side insists on it. In other words, neither side can refuse to negotiate over it if the other side brings it up. The legal obligation to negotiate, of course, does not mean that there is an obligation to agree. And indeed it has not been easy in past decades for transit unions and transit management to agree on the part-time labor issue. Strikes have occurred, and transit agencies have often made heavy concessions during contract negotiations to get unions to agree to the use of part-time operators. As a result, since the early 1980s, contract provisions allowing the use of part-time transit vehicle operators have become practically universal.²⁹

For example, the collective bargaining agreement between ATU Local 1309 and the San Diego Transit Corporation covers part-time drivers, and contains

²⁹ Kenneth M. Chomitz, *Fiscal and Organizational Impact of Part-Time Labor in Public Transit*, Washington, DC: Urban Mass Transit Administration and US Department of Commerce, 1985, p. xi.

specific, elaborate provisions for them. It defines “part-time driver” as someone who drives no more than 30 hours per week. The same union-management contract also limits the hiring of part-time drivers to no more than 15 percent of full-time operators and only if there are at least 425 full-time operators employed. The agreement also specifies the conditions under which a part-time driver must be given an opportunity to advance to full-time status. Part-time drivers may not work more than 6 hours a day, and have to be paid the same hourly rate as full-time operators, but are not eligible for overtime or holiday premium pay. Nor are they eligible to accrue such fringe benefits as vacation, sick leave, death benefit, holidays, pension, or health benefits. When part-time drivers become full-time employees, they receive proportionate credit for their part-time employment toward wage progression and seniority. No full-time operator can be laid off while part-time drivers are still employed. At the close of each pay period, the company must furnish the union with an accounting of hours worked by each part-time employee.³⁰

We can see in this example, and many others that could be cited, that whatever productivity improvements have come from the use of part-time operators have come largely from a decrease in fringe benefit cost, not direct wages. Part-time operators generally receive fewer fringe benefits than full-time operators do. There is also some evidence that part-time operators have less absenteeism and lower accident rates. According to one reputable study, however, it is questionable that, when all things are considered, transit organizations save more money by the use of part-time operators than they give away to the union in concessions at the bargaining table. The benefit of the use of part-time operators comes more from greater efficiencies in scheduling, greater customer satisfaction and lower absenteeism than lower wages and lower fringe benefit costs.³¹ As a matter of fact, most transit unions will oppose a two-tier wage system: one pay rate for full-timers and a lower one for part-timers. Whatever labor cost savings there are may come from paying little or nothing for benefits for part-timers. Transit unions that vigorously oppose a two-tier wage system sometimes create one by ignoring the benefit “tier.” One transit labor professional said:

I have seen unions say no to two-tiered wage agreements, and the same union will negotiate a clause for part-timers working 35 hours a week without benefits—which turns out to be a two-tiered wage

³⁰ *Agreement Between San Diego AFL-CIO Bus Drivers Local 1309 of the Amalgamated Transit Union and San Diego Transit*, Section 21

³¹ Chomitz (1985), p. xv.

structure.³²

The use of part-timers in transit operations continues to be a controversial issue. No doubt, we will see some changes in the benefit packages for part-timers in the future, most likely toward more, rather than less, benefits.

PRIVITIZATION

Privatization and outsourcing (subcontracting) of certain public transit services traditionally rendered by state and local governments have been in vogue for a number of decades. Privatization refers to the transfer of an entire organization into private individual or corporate ownership. “Subcontracting” or “outsourcing” is usually more limited in scope and refers to public agencies subcontracting only certain jobs or services to private sub-contractors, but retaining tight controls as primary contractors over the way these services are performed. Discussions over the topic of privatization sometimes become confusing because writers do not always distinguish between privatization of the entire transit property and subcontracting only certain parts of its operation.³³

The debates over privatization and subcontracting of transit services have been going on for decades, and volumes have been written on the subject. Unions have been very active participants in this debate, and rightfully so. Obviously, privatization and subcontracting deeply affect union members’ job security, working conditions, and collective bargaining rights. Many writers would have us believe that there is a very strong trend toward privatization of transit services. The evidence is mixed. According to an elite task force appointed by the U.S. Department of Labor, the trend toward privatization of government services has been exaggerated. According to that task force, the increase in subcontracting by public agencies to private contractors is far less dramatic than popular reporting suggests. New subcontracting is actually quite limited and normally restricted to only a few services, and usually affects relatively few employees. Furthermore, contrary to popular opinion, the cost of providing public services through private enterprises is not necessarily lower than providing the same services by a government agency. Some projected costs actually represent merely cost shifting from one budget to another, or

³² E-mail communication with Frank Shipman, Vice President of Human Resources & Employee Relations, San Diego Transit Corporation, February 24, 2000.

³³ For a rigorous discussion of the various forms of outsourcing in the transit industry see Darold T. Barnum, “Institutional Requirements for Competition: Labor Issues.” *Transit Administration and Planning Research*. Transportation Research Record 1209. Washington, DC: Transportation Research Board, National Research Council, 1989, pp.40-48.

present budget to future budget. For example, a payroll saving in one jurisdiction may actually show up as added health and welfare costs in someone else's budget. Real cost savings depend largely on managerial leadership and imagination of employees, and union officials, no matter whether they are in a private or government organization.³⁴

One reason that contracting out of public agency services is not as widespread as often assumed is that the process is not as easy as it appears. Developing effective bidding procedures, evaluating the bids, monitoring the contracts, and measuring the performance of contractors is far more complicated than meets the eye. The study results of the task force appointed by the U.S. Department of Labor suggest that there is generally a lack of adequate data to measure cost and quality in order to determine whether contracting out was an improvement or not. Most public jurisdictions do not collect the kind of financial data needed to allow those comparisons. It is a mistake to assume that wage and benefit levels differ drastically between private and public employers. It is a mistake, says the previously mentioned task force, to assume that the quality of services performed by government employees is lower than the quality of services rendered by private enterprise employees. Excellent work is performed in both sectors, and poor quality services are also found in both sectors. The crucial difference is not what type of organization is providing the services, but whether employees are given the proper tools to do their work and management is doing its job. Where public employees have been given a full and fair chance to preserve their jobs by helping change the system, they have most often been able to demonstrate their ability to improve the quality of services and reduce costs. Most commonly this is accomplished through cooperative union-management relationships, particularly where employees and their union representatives have a free hand in making improvements, and participate in defining the ground rules for measuring cost savings and quality improvements.

THE UNIONS

The Union as a Political Organization

People who are unfamiliar with labor unions often fail to deal with an important reality: Unions, by their very nature, are political organizations.

³⁴ US Department of Labor, *Working Together for Public Service*, Report of the US Secretary of labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation. Washington, DC: US Department of labor, May 1996, pp.47-49. (Note: In their discussion on privatization, the authors do not always distinguish between "privatization" of the entire transit facility and "subcontracting" only a few jobs or services within the facility).

Union leaders are elected; managers are appointed. This simple reality has profound impact on the behavior of unions, their leaders, and rank and file members. While all unions are political organizations, in the public sector their goals, strategies, and tactics are even more political than in the private sector. They have to be. Public-sector unions have learned decades ago that without influencing voters, political officials, legislators, school boards, commissions, agency directors and trustees the unions are like fish out of the water. Political officials control the purse strings of the labor management organizations; these same politicians put pressure on the labor management individuals who will ultimately deal with union concerns.

In our interviews, we encountered transit labor relations practitioners who reported that their union made an “end-run” to the board of directors of the transit authority, demanding that the general manager of their transit operations be fired. In some cases, they were let go; in others the general managers found themselves in such a severe crisis that they re-evaluated their relationship with the union and actually initiated a program of union-management collaboration within their operation. We also found a fair number of examples in which members of the transit board were bothered by press reports of poor labor-management relations in the transit organizations under their jurisdiction and put pressure on the transit organization to adopt a more cooperative strategy toward their unions.

In the public sector, transit union leaders must be doubly skillful in their political maneuvering. Local union leaders normally work hard to lobby the board of directors of transit authorities to put pressure on the management of the transit operating organization to treat the union well in contract negotiations and other dealings. From a management standpoint, the political power that transit unions wield is not all bad. That political power is often being used by transit unions to influence legislators and government regulators, particularly at the state level, to give favorable consideration to funding requests by their transit district.

Who Are the Unions?

The transit industry is almost completely unionized. Close to 95 percent of transit operating and maintenance employees belong to unions.³⁵ The majority of them today are represented by three major unions:

- **Amalgamated Transit Union (ATU)**, which was founded in 1892, has a claimed membership of about 170, 000 members in 286 local unions in 46 states in the U.S. and nine provinces in Canada. It represents bus, subway,

³⁵ Barnum (1983), p. 14.

light rail, and ferry operators, as well clerks, mechanics and others in urban mass transit. Until 1974, the ATU accepted only urban mass transit employees for membership. In March of that year, it changed its policy and began organizing non-transit employees as well, particularly when transit workers were part of a larger city or county government bargaining unit that included crafts outside the transit field. ATU locals have always had the power to formulate their own bargaining demands and, for the most part, control contract negotiations on a local level. This does not mean that they may not request assistance from national headquarters of the union during local bargaining. Nationally speaking, the ATU is definitely the largest union in the country representing *transit* employees. The other two unions below represent primarily railroad and airline workers, but do have concentrations of transit employees in different regions of the country.

- **Transportation Workers Union (TWU)** claims more than 140,000 members in the U.S. and Canada, including many railroad and airline workers. It has heavy concentrations of transit union members in New York and Philadelphia and was founded in 1934 by subway workers in New York City. Its traditional slogan “One for All, All for One,” is practically a war cry in the union’s militant history.
- **United Transportation Workers Union (UTU)**, which was founded in 1932, claims around 125,000 members, including a large number of members working in the railroad industry. Its Local Transit Division represents only about 8000 members who are bus drivers, bus maintenance mechanics, and other *transit* workers.³⁶

When trying to interpret these figures, it is good to remember that these are all self-reported statistics. Furthermore, when reporting their membership figures, unions tend to include both active as well as retired members. These pensioners may generally participate in the election of local union officers but not on collective bargaining matters. We must also remember that there are other major unions that represent significant numbers of transit workers. Many of them cut across a wide range of occupations and industries other than transit, or they represent only a limited number of job classifications within a given transit organization. Among these other major unions are the Transportation Communication Union (TCU), the Service Employees International Union (SEIU), the International Brotherhood of Teamsters (IBT),

³⁶ Source: Internet web pages of the respective unions, accessed between June and November 1999. Also, C.D. Gifford, editor, *Directory of U.S. Labor Organizations*, 1999 edition. Washington, DC: Bureau of National Affairs, 1999. Also, Darold T Barnum (1983), chapter 2.

the International Brotherhood of Electrical Workers (IBEW), the International Association of Machinists & Aerospace Workers (IAM), the American Federation of State, County and Municipal Employees (AFSCME), and a number of smaller associations representing transit police and security employees.

Some unions prefer the old adversarial type of collective bargaining; some are actively pursuing a policy of interest-based bargaining and other forms of union-management collaboration. The national leadership of the ATU has a definite policy of encouraging union-management collaboration on the part of its national leaders. One further characteristic of the ATU is that its national union leadership heavily favors *interest arbitration*, which involves a final and binding decision by third-party neutral when union and management reach an impasse in contract negotiations. Unions in other industries that have the legal right to strike tend to shun interest arbitration.

THE STRIKE ENVIRONMENT

In the 1930s, when the Wagner Act with its sweeping labor union protections was passed, union members could strike without fear of losing their jobs. Private sector transit employees and their unions still have that right. Public sector transit employees and their unions, on the other hand, with few exceptions,³⁷ do not have the legal right to strike. State law usually prohibits state and local government employees from striking; in practice, some of them strike anyway. Many states, however, give the governor of that state the right to seek a court injunction against the striking transit union, private or public sector, when the strike in the private transit enterprise is believed to seriously endanger public health and welfare. As an example, under California law, when in the governor's opinion a threatened or actual strike endangers public health, safety or welfare, he may appoint a board to investigate the labor dispute. While the investigation is going on, any strike is prohibited. When the governor receives the report from the investigative report, the governor may instruct the state's attorney general to petition the court to enjoin such a strike. The court must issue an injunction if it finds that the strike will significantly disrupt public transportation services *and* endanger public health, safety or welfare. The California law, however, carefully points out that nothing in this special emergency law "shall be construed to grant or deprive employees of a

³⁷ One such exception is California, where the state's enabling legislation that created transit districts and transit authorities specifically allows the strike. Note, however, that the Amalgamated Transit Union is philosophically opposed to the strike and favors contractually required interest arbitration in case of an impasses in contract negotiations.

right to strike.”³⁸

If a strike is legal, can transit employers hire strike-breakers? In the 1930s shortly after the passage of the Wagner Act, the courts said the law did not allow employers to hire permanent striker replacements. A little more than three years after the passage of the Wagner Act, however, the U.S. Supreme Court in 1938 ruled that employers could hire permanent replacements for workers who were striking for economic reasons, as opposed to workers striking because of an unfair labor practice committed by the employer. Typically, such an unfair labor practice would be a clearly demonstrated failure of an employer to bargain in good faith with the union. Still, for more than four decades, employers used this right to hire permanent striker replacements very sparingly. Employers feared violence from striking workers walking the picket line, adverse reactions from pro-union consumers, unionized suppliers, the community, and even government intervention. President Reagan's firing of 11,500 illegally striking air traffic controllers in 1981 changed all that.

Air traffic controllers are federal employees, and federal employees do not have the legal right to strike. In the past, federal employees had struck many times anyway. President Reagan, effectively the CEO of all federal employees, took drastic action. When after a stern warning, even an ultimatum, the air traffic controllers' union continued the strike, Reagan ordered all strikers to be fired, and he immediately authorized the hiring of striker replacements. Employers all over the country followed his example. In addition, union power in this country had already started to decline, making political retaliation in case of striker replacements unlikely. At that time, plenty of cheaper non-union workers had become available because of wage stagnation. Employers like Greyhound, Eastern Airlines, and Caterpillar argued publicly that they were in dire financial straits, and privately they found it profitable to replace strikers with new hires who were promised permanent employment. The mere threat of permanently replacing strikers broke a five-month old month strike by UAW at Caterpillar in 1992. In 1988, International Paper Corporation reduced its workforce by 20 percent and abolished premium pay after replacing strikers permanently. Two years later, 80 percent of its workforce consisted of replacement workers.³⁹ As was discussed regarding the two Greyhound strikes, Greyhound Lines followed a similar strike replacement strategy, but

³⁸ B. E. Witkin, *Summary of California Law*, 9th edition, vol. 2. San Francisco: Bancroft-Whitney Co, 1987, p. 444.

³⁹ Arthur A. Sloane and Fred Witney, *Labor Relations*, 9th ed. Upper Saddle River, N. J.: Prentice Hall, 1997, pp. 133-135.

still went bankrupt.

Today the mere threat of permanently replacing striking workers with new hires has become a source of negotiating power for employers. Despite years of aggressive political lobbying, organized labor has been unsuccessful in trying to get legislation passed that would outlaw permanent strike replacements. Yet transit employers, whether private or public sector, still find it risky to adopt a permanent striker replacement strategy. In the first place, public opinion counts heavily in the transit industry, more so than in many others. Unions have become more and more skillful in influencing public opinion during a labor dispute. Profitable transit operation depends heavily on good community relations. Secondly, the hiring and training of new drivers, dispatchers, and maintenance mechanics is costly and filled with risks. Transit unions are quick to point out to the press that public safety has been endangered when a transit facility has put poorly trained new hires in jobs previously held by employees with many years of experience. Any preventable accident by a replacement bus or trolley driver is surely going to be blown out of proportion in a press interview with a transit union representative. It's smart politics. Management has a legal right to keep operating during an *economic* strike by hiring temporary or permanent striker replacements (See "Unfair Labor Practices Strike" below). The U.S. General Accounting Office states that in about one-third of strikes, employers announce that they would hire permanent replacements if striking employees do not return to work by certain date—and estimated that in about 17 percent of all strikes the employer actually did hire permanent replacements—and about four percent of striking workers were replaced.⁴⁰

There are risks for both employers and strikers when strike replacements are hired. For the replacement worker who is hired on a *temporary* basis during a strike it means that he or she will be out of a job again when the strikers go back to work after a settlement. If replacement strikers are hired with an implied or expressed promise of *permanent* employment and are let go again after a settlement with the union is reached, they may sue the employer for misrepresentation or breach of contract. Usually it is not easy to permanently replace *all* striking employees. During and after the strike, tensions between strikers and strike replacements may lead to violence and community disorder.

In 1993 Congress considered legislation introduced by the Democrats prohibiting the hiring of permanent striker replacements. The Democrats could

⁴⁰ William H. Holley, Jr., and Kenneth M. Jennings, *The Labor Relations Process*, 6th edition. New York: The Dryden Press, 1997, p. 277-282.

not overcome the Republican opposition and the bill failed. In 1995, President Clinton tried to issue an executive order that would make employers who hire permanent strike replacements ineligible for federal contracts. It too failed after a U.S. Court of Appeals struck it down in February 1996 by saying that the Executive Order “undermines the National Labor Relations Act, under which, the courts have held, employers may permanently replace strikers.”⁴¹

In Unfair Labor Practices Strikes, should the NLRB find that a strike was caused by an employer’s unfair labor practice, such as a refusal to bargain in good faith, and the employer is found to be guilty the unfair practice, strikers may be entitled to reinstatement with back pay.

However, strikers engaging during the strike in illegal misconduct need not be reinstated; for example, strikers physically preventing other employees to enter the plant, jumping in front of moving cars or trucks, stalking non-striking employees, throwing rocks, eggs, and other disruptive misconduct. The main criterion defining illegal conduct is whether the action or misconduct coerced or intimidated non-strikers in the exercise of their legal rights.

THE POLITICAL ROLE OF THE TRANSIT STRIKE

A strike, or threat of a strike, plays a strong political role in the transit environment, much more so than in most other industries. Whether a transit worker strike is legal or illegal in a given state or locale is not the point. History shows that strike prohibitions do not eliminate strikes. A union leader who has been thrown in jail for violating a strike prohibition is twice as likely to win the next few union elections than one who doesn’t have martyr status. More often than not, the threat of a strike is just as powerful a weapon as an actual strike. A strike, or threat of a strike, may actually place an important political tool in the hands of transit managers. Politically skilled transit managers in both the private and public sector know that a strike, threatened or real, may help them in their request to political bodies for additional funding or approval for fare increases. Barnum (1977) stated:

So even in those cases where the strike is illegal, the threat of a strike is seldom absent from the bargaining table. This fact has been confirmed by numerous interviews by this author.

In both privately and publicly owned transit companies, the strike is primarily a politico-economic weapon. That this is so in the public sector requires little elaboration. A public sector strike puts

⁴¹ “Clinton Order Discouraging Striker Replacement Is Voided,” *New York Times*, February 3, 1996, Section 1, p. 9.

economic pressure on the voters who benefit from the service. The voters put political pressure on their elective representatives to settle the disputes. As the elected representatives generally have direct control over the transit system, or appoint its decision makers, they can take action to resolve the impasse.

When a strike occurs in a privately owned transit system, both economic and political pressures are placed on the private managers. The potential of lost profits exerts economic pressure. But by far the strongest pressure on management is politico-economic. Recall that a transit system can generally maintain a fair rate of return as long as fare increases are granted by the public utilities commission or city council. But these are public bodies, generally appointed by local or state politicians or directly elected. Hence they are susceptible to political pressure. And a transit strike typically arouses the citizens and results in pressures to end it.⁴²

There are times when the political pressure of a strike threat takes more subtle forms. In private transit systems, a contract settlement between union and management may be conditional. The settlement may be tied to the transit system receiving financial assistance from a political body or approval for a fare increase. No experienced management negotiator would make such an offer to a union without having explored with the political body the likelihood of such requests being granted. Nor would he or she neglect to point out to the political body or political officials the consequences of denial of the request. No union negotiator would negotiate such a settlement without having made it clear that there would be a strike if the terms of the conditional settlement would not be met. In reality, what both parties may have done in cases like this is to buy some time for the political processes to be played out, without having to face a strike. That political process most likely would involve the union using its political power to influence political bodies and political officials to approve the request for fare increase or direct financial assistance to the transit system, among other things.⁴³

THE POLITICAL COMPLEXITIES OF THE PUBLIC SECTOR

Collective bargaining in publicly owned transit facilities takes place in a complex political environment. External political pressures from state, municipal, and county governments, as well as community interest groups, are

⁴² Barnum (1983), p. 92.

⁴³ For a more extensive discussion of the political functions of the strike, or threat of strike, in the transit industry, see Barnum (1983), pp. 92-95.

enormous, and they often frustrate negotiators and other labor practitioners to no end. One public official said:

The Transit Authority pretty much gets its orders from the mayor's office, and it [the Transit Authority] tells the negotiators for the transit facility what they can and cannot do. There are so many issues that are "off-limits." For example, pension benefits may be governed by the state and can't be bargained over at the local level. The county government may tell you what you can negotiate in the way of employee health benefits, if your transit employees are county employees. The county government won't let you negotiate anything that's not in parity with other county employees. And the list goes on and on.⁴⁴

Many public transit operations are subject to political pressures from at least three local sources. First, there is the Transit Authority, created by state-enabling legislation (to be discussed later). It is usually governed by a Transit Board, a Board of Directors, or a Board of Trustees. Its functions are usually spelled out by the enabling state legislation that created the transit district and its transit authority. Transit board members may be elected or appointed. Theoretically, its functions are similar to the Board of Directors of a private corporation. In practice, there is a world of difference because transit board members tend to be political appointees; they are put into office by politically oriented individuals or groups.

Transit board members may be appointed by the mayor of a city, city council, county board of supervisors, or other political body. A board typically exercises tight control over public transit operations, particularly budget matters, passenger fares, bus or train routes and schedules. In addition, many cities or metropolitan transit districts have so-called City Transit Commissions, Transportation Commissions, or Citizens Advisory Committee. They are even more political in nature. Members usually represent certain interest groups in the community. Typically the commission is supposed to provide advice to the Transit Board regarding the community's wants and needs.⁴⁵ While it is not meant to interact directly with officials who run the transit operation, but merely give advice to the elected or appointed board, its influence on transit operations can be significant and often politically biased.

⁴⁴ Telephone interview with a staff member of the American Public Transit Association, January 14, 2000.

⁴⁵ Interview with Trixie Johnson, Research Director, Mineta Transportation Institute, San Jose State University, March 8, 2000.

Finally, a special case is transit districts that are created by so-called “Joint Power Agreement.” They are basically transit districts that cut across two or more transit authority jurisdictions and involve two or more local governments. This condition complicates the political implications of transit labor relations even further. A more detailed discussion of this aspect would go beyond the scope of this report.

LEADERSHIP STYLE

Generally speaking, the management of public transit organizations tends to be rather traditional in their leadership style. In practice this means that management tends to be hierarchy-oriented and values stability more than change, tends to lean toward centralization more than decentralization of authority, and often lacks the flexibility needed to launch innovation labor relations programs.⁴⁶

First-line supervisors often lack the leadership training needed to relate well to the people they supervise. According to a national survey, almost all supervisors of bus operators are promoted from the ranks of bus operators. It is practically the only promotional opportunity for the vast majority of transit bus operators without additional education or experience. Realistically, there is little in the job as bus operator that prepares them for the job of leading others. The system expects first-line supervisors to be control oriented, to enforce rules and punish non-compliance. Bus operators frequently complain that the only time they hear from their supervisor is when they are in trouble.⁴⁷ These conditions make innovative labor relations practices and changes in leadership styles very difficult. Many transit organizations have recognized this and have in recent years initiated large-scale training programs for supervisors, emphasizing leadership skills and communications skills more than technical and administrative skills. The National Transit Institute, which offers a wide range of transit specific courses in these areas, has been of great help to many transit organizations that have been trying to fill this gap.⁴⁸ Where transit

⁴⁶ Mercer Management Consulting and TAB Associates, Inc., *Innovative Labor-Management Practices*, unpublished draft of Final Report. Washington, DC: Transit Cooperative Research Program, Transit Research Board, 1997.

⁴⁷ Gayland K. Moffat and Diane R. Blackburn, *Changing Roles and Practices of Bus Field Supervisors*. Synthesis of Transit Practice 16, Transit Cooperative Research Program, Transit Research Board. Washington, DC: National Academy Press, 1996, pp. 1-2.

⁴⁸ Readers who are interested in these programs may contact: National Transit Institute Rutgers University, 120 Albany Street, Suite 705, New Brunswick, NJ 08901-2163 Tel 732-932-1700, Fax 732-932-1707

organizations have successfully embraced interest-based bargaining and joint labor-management problem solving teams, these programs have almost always been accompanied by extensive leadership training at all levels, by efforts to change the organizational culture, and efforts to decentralize decision making and enhance employee empowerment.

THE NEW LABOR ECONOMICS

Although there have been many exceptions, the transit industry has been slower than many others in forming labor-management partnerships in order to solve the economic problems on both sides. As we shall see in a later chapter on that topic, however, there have been dramatic success stories of union-management cooperation in transit.

Years ago, market competition in the transit industry was minimal. Starting in 1974, the Arab oil embargoes created severe gasoline shortages and increased gasoline prices, which impacted transit ridership substantially. Commuters and shoppers looked more and more toward transit systems for their transportation needs, particularly in cities where traffic congestion became an added problem. Transit ridership soared to the point where transit providers had a hard time keeping up with the demand for transportation. Transit ridership increased in 1973 for the first time, after 27 years of declining ridership. In many places, local politicians became friends of transit systems again. Buses became more modern and stylish. Customer service and transit marketing efforts improved.⁴⁹ Environmentalists were pleased to see buses use alternative fuels to reduce air pollution. Ridership continued to grow even after the oil embargo was lifted. Light rail transit also made a strong comeback, particularly in California.⁵⁰ Union-management contracts contained generous benefits for workers during this period. During the first half of the 1970s, wage levels in transit had increased 47 percent faster than the cost of living.⁵¹

All that has changed. In the last two decades or so, our nation's economy and workplaces have changed in response to ever increasing global competition, deregulation of major industries, rapid technological innovations, and the end of the Cold War. While transit industry competition may not be global, the

⁴⁹ Darold T. Barnum (1983), p. 9

⁵⁰ Bob Blymer, "Transit in California: A Chronological History," *Transit California*, November 1996, pp. 18-26.

⁵¹ Gordon F. Fielding, *Managing Public Transit Strategically*, San Francisco: Jossey-Bass Publishers, 1987. Also, Charles A. Lave, "Is Part-time Transit a Cure for Transit Deficits?" *Traffic Quarterly*, Vol. 34 (1980), pp. 61-62.

threat of competition certainly exists. The competitive threats may take the form of privatization, competition for public funding, competition from other transit organizations, competition from para-transit, or other forms.

In the past, union and management have dealt with the economic issues largely through adversarial, even hostile, collective bargaining. Labor and management were in competition with each other. They competed over how big a slice of a fixed-size economic pie, or profits, each would get. Both were willing to endure a strike, if necessary. The old way worked for both sides, at least most of the time. It worked largely because the parties could take labor cost out of the competition. That has changed. Now labor cost is a bigger factor than ever for transit employers to remain financially solvent and for unions to protect the income and job security of their members. The old model, often called *distributive bargaining*, seems to be unable to deal with increasing competition, global or otherwise. The old model seemed to have been unable to adapt to the new economic environment.

A new model emerged—that of *interest-based bargaining*, or *integrative bargaining*.⁵² It is called interest-based because the parties focus on each other's interests and needs, rather than on positions. It is called integrative because each party integrates into its own goals and objectives the needs and problems of the other side and seeks to solve them in a mutual problem-solving approach.⁵³ When that process endures over time and expands into a wide range of non-economic interests and problems, we call it *labor-management partnership*. As we shall see in a later chapter, it has worked well for many private and public sector organizations and their unions. The thinking and organizational cultures of both union and employer have moved away from the idea of competing over the largest possible piece of a fixed pie, toward enlarging the pie through mutual effort, and thereby both sides benefiting from having a larger pie to share.

It appears that both approaches co-exist today, even though they are diametrically opposed. Both seem to work, at least for the time being. As a matter of fact, in many cases the same negotiators alternate between the two approaches.⁵⁴ At the beginning of new contract negotiations, on the easier

⁵² For the originators of this model which contrasts *distributive* and *integrative* bargaining, see Richard E. Walton and Robert McKersie, *A Behavioral Theory of Labor Negotiations*. New York: McGraw-Hill, 1965.

⁵³ This approach is often called *win-win* negotiations. Professional trainers generally avoid that term because they want to keep the concept of “winning” out of that process, and more toward “problem solving.”

issues, they may genuinely collaborate with each other in a mutual problem-solving type of approach. Later on in the negotiations, when the parties have to face the harder economic issues, such as wage and benefit increases or shutting down a certain part of the operations, the negotiators may return to the old, traditional way of adversarial bargaining. When contract negotiations are concluded, they may again return to mutual problem solving in year-round labor-management committees. And in some cases one side or the other may decide that interest-bargaining was a failure and abandon the process. In our research we even encountered cases in which the parties abandoned the partnership only to go back to it again a year or two later, with or without a change in management or union leadership.

With this coexistence of the two processes in mind, John Calhoun Wells, the former director of the Federal Mediation and Conciliation Service, has come up with a new “transitional” model, which he calls “Conflictive Partnership.”⁵⁵ He believes that his model, at least for the time being, is a realistic alternative to the traditional, adversarial model of collective bargaining, and an equally realistic alternative to the cooperative model. He points out that in response to competitive pressures, labor-management relations have expanded into diametrically opposed directions. The traditional, adversarial approach is on one extreme end, and the cooperative approach is on the other. The cooperative model, he points out, requires trust, achieving common ground, information sharing, joint problem solving, risk taking, and innovation. But the amount of trust required is enormous; it must be slowly earned over time, and is very easily lost. He points out that there are distinct institutional differences between unions and management, and differences in interest, which will inevitably lead to conflict. But the two sides also have certain interests in common. Among them are mutual concerns for employee safety and health, income and job security for employees, quality of work life, and, of course, the bottom line—the financial stability of the employer. It is these shared interests that make labor-management partnerships possible.

Conflict need not destroy a cooperative relationship. On the contrary, conflict may make the parties work harder to find solutions to problems that affect both sides. Both sides need to respect the institutional differences between union

⁵⁴ Harry C. Katz and Thomas A. Kochan, *An Introduction to Collective Bargaining and Industrial Relation*, 2nd ed. Boston: Irwin-McGraw-Hill, 2000, pp. 191-192.

⁵⁵ John Calhoun Wells, *Conflictive Partnership: A Strategy for Real-World Labor-Management Cooperation*. Presentation at the Tenth National Labor-Management Conference, Chicago, Illinois, April 26, 2000. The paper also appeared in the *1996 IRRA Spring Meeting Proceedings*, as well as in the August 1996 issue of the *Labor Law Journal*.

and management, which inevitably create conflict over differences in interests. At the same time they need to develop and maintain a recognition of their common interests and find creative ways of mutual problem solving to meet these interests. Wells calls these interests “mutual self-interests.” The most basic of these are “profits and jobs.” Less obvious are safety and health, quality of work life, workforce education and training, quality of product and service, productivity, and customer satisfaction. As the parties experience success and mutual trust in putting these ideas to work, the basic question of “what’s in it for me” becomes “what’s in it for us.” When the parties reach that point, they have achieved the shared vision, shared goals, and shared strategy needed for a successful labor-management partnership. That partnership must involve shared decision-making and willingness on both sides to “run the business together.” That, of course, is the ideal labor-management partnership. We may never fully realize this ideal, but we can be successful in trying. Conflict, however, will always be there. It’s not a question of how we can eliminate it, but how we deal with it.

THE LEGAL ENVIRONMENT OF TRANSIT LABOR RELATIONS

INTRODUCTION

There is no uniform labor law that governs the entire transit industry. The legal framework of labor relations in the transit industry is a hodgepodge of state and federal statutes, local ordinances, executive orders, and court decisions. Even the experts find it difficult to sort out the pieces. One huge problem is that the industry is split into private and public-sector enterprises, each with its own complicated and very diverse legal framework. While the private sector is not quite as complicated as the public sector, it is still difficult to get a handle on the many legal restrictions placed on the transit employer, and the legal protections afforded unions and employees in the private transit sector. The chapter on the history of transit labor relations and the chapter on the economic and political environment of transit labor relations shed some light on how these overlapping legal aspects of the industry evolved. The complicated legal framework developed over time was that small private transit companies found it impossible to compete with the private automobile and local, state, and federal government had to come to their rescue. More on this later in this chapter in our discussion of the “Memphis Formula” and “Section 13(c) Collective Bargaining.” To add to the complication, some states still prohibit collective bargaining for state and local government workers. In order to qualify for federal transit subsidies, they passed complicated state legislation to exempt transit workers from the prohibitions against other public sector employees in their state. It is interesting to note that these complicated legislative measures are in many cases precisely what drove transit unions and transit management into close cooperation in collective bargaining.

PRIVATE SECTOR TRANSIT EMPLOYERS AND EMPLOYEES

As was discussed in the history chapter, the earliest transit services were rendered by small private companies. Then, starting in the 1960s, the trend was for the small as well as the large private companies to be taken over by public transit authorities because they could not remain financially viable. Whether or not private transit is more efficient and cost effective has been discussed in the chapter “The Economic and Political Environment of Transit.”

When a transit organization is in the private sector, its legal status is reasonably well known. Private-sector employers, employees, and unions are covered by the National Labor Relations Act, as amended.⁵⁶ The original version of that law, popularly called the Wagner Act of 1935, only protected the collective

bargaining rights of *employees* and their unions. It did not protect employers. It guaranteed private sector employees the right to self-determination through collective bargaining and prohibited employers from interfering with those rights. At the core of the Wagner Act were five unfair labor practices, or prohibitions, for employers, often simply called “ULPs.”

- To interfere with employees' rights to bargain collectively through unions of their own choosing.
- To dominate the formation or administration of labor unions, by financial support or the creation of *company unions*. ("Company unions" are unions created by the employer, usually for the purpose of keeping out "legitimate" unions.)
- To discriminate or retaliate against employees or job applicants because of union membership or union sympathy.
- To discriminate against employees because they filed charges under this law.
- To refuse to bargain collectively and in good faith with unions of their employees' choosing.

The Wagner Act also created a powerful federal agency, the National Labor Relations Board (NLRB), to interpret and enforce the law. The NLRB investigates alleged violations of these Unfair Labor Practices and may issue a cease and desist order if a complaint is found justified. Unless they choose to appeal the order in federal court, employers must obey the order. The NLRB normally does not have the power to impose fines or other penalties upon employers, except it may award back pay plus interest to employees who have suffered financial harm as the result of an employer's unfair labor practice. If an employer ignores a cease and desist order, the NLRB takes him to court. The cease and desist power of the NLRB should not be underestimated, however. It has given the board far more power than the ability to simply apply the law. It can interpret and reinterpret the law and thereby make public policy. New board members are appointed by the President of the United States with the advice and consent of the Senate.

A second major function of the NLRB is to conduct secret ballot elections to let employees decide whether they want collective bargaining and, if so, which union they want to serve as their exclusive bargaining representative. In past decades, these elections have resulted in widespread union organization and

⁵⁶ Railroads and Airlines are covered by a different law

representation.⁵⁷

One of the problems with these appeals, from a union point of view, is that while the employer appeals a NLRB unfair labor practice decision in court, the employer need not obey these cease-and-desist orders. Of course, each of these appeals is subject to a higher-level review by another court. The appeals process is so long that by the time it has been exhausted and the cease-and-desist order must be obeyed, most employees who are affected by it have already left the company or are retired.

As one can well imagine, the one-sidedness of the Wagner Act raised a storm of protests and years of aggressive lobbying efforts by employers. Employers were incensed that the Act spelled out illegal ULPs only for employers and not for unions. In other words, unions could resort to unfair practices like intimidation of employees in union organizing campaign, but employers could not. Nevertheless, the Wagner Act stood unamended for 12 years, until 1947. In the meantime, unions grew by leaps and bounds and gained enormously in power. Employers complained bitterly that the Wagner Act was an unfair, one-sided law. The very practices employers were prohibited to engage in could be pursued by unions freely and legally. It was illegal for employers to coerce or intimidate employees in their choice of unions and collective bargaining, but it was not illegal for unions to coerce employees into joining their ranks. It was illegal for employers to refuse or neglect to bargain in good faith, but unions could say "no" all day long.

By 1947 unions had become very strong, too strong in the eyes of the average citizen and the government. Unions had become so powerful that a whole industry could be shut down. After World War II, a wave of strikes hit the country. From the standpoint of an impassioned unionist, it was a normal development. During wartime, strikes are usually prohibited by law so as not to inhibit the war effort. Wages and benefits are frozen. The union leadership is anxious to appear patriotic and complies with the law. When the war is over, unions want to "catch up." They want to make up for the wage and benefit increases sacrificed during the war. Employers do not share this view and regard the new union demands as outrageous. Massive and widespread strikes become inevitable.

⁵⁷ Contrary to popular misconception, the NLRB generally does not get involved in contract administration, such as grievance handling and grievance arbitration. Disputes over the application or interpretation of the collective bargaining agreement between the parties are usually handled through private arbitration procedures. Federal or state government agencies may aid the parties in finding qualified private arbitrators but generally do not do arbitration themselves.

In addition to these circumstances, the 1946 election brought a relatively conservative Congress to power. It reflected the increasingly negative attitude of the public toward unions. As a result of all these factors, in 1947 Congress passed dramatic amendments to the 1935 National Labor Relations Act. The amendments turned out to be more voluminous than the original 1935 law. The amendments were therefore given the name of a separate law, the *Labor-Management Relations Act*, also known as the *Taft-Hartley Act* (named after its authors, Senator Robert Taft and Congressman Fred Hartley). Since the 1947 law incorporated all of the union protection provisions of the older 1935 law, lawyers and textbooks frequently regard the two laws as one, and simply refer to it as the *National Labor Relations Act, as Amended*.

The 1947 amendments sought to balance the power between labor and management by adding a number of unfair and prohibited practices of unions to the law. Among the major prohibited union practices are these:

- Coercing employees into joining a union or interfering with their choice to be or not to be represented by a union for the purpose of collective bargaining. An exception to this is the "union shop" agreement in the collective bargaining contract to be discussed later.
- Coercing employers to discriminate against employees because they refuse to join a union. Again the union shop agreement to be discussed later is an exception.
- Interfering with the rights of employers to choose their own bargaining representatives. This prohibition includes attempts to force employers to bargain or not to bargain through an employers association, an outside law firm, or any member inside their own organization.
- Refusal to bargain in good faith with employers. In practice this means unions, as well as employers, must demonstrate a willingness to reach agreement. They cannot present the other side with a "take it or leave it" ultimatum, but must demonstrate good faith by making alternate proposals and counter proposals.
- Jurisdictional strikes by unions, meaning strikes to force an employer to assign certain jobs to members of one union instead of members of another union. This is a frequent tactic that was used in the construction trades.
- Secondary boycotts, meaning boycotts against an employer not directly involved in a dispute with a particular union. As an example, a union refusing to let the employees it represents work on parts or products produced elsewhere by a non-union company or a by a company with whom another union has a dispute.

- Featherbedding demands by unions, which are demands for pay for work not actually performed, or demands on employers to have employees perform unnecessary work.
- Excessive or discriminatory union initiation and membership fees. The judgment of what is excessive or discriminatory is left to the NLRB.

In addition to these prohibited union practices, the Taft-Hartley Act imposed a number of restrictions on both parties in what they could include in the collective bargaining agreement. Among these restrictions are:

- A ban on the *closed shop* agreement. Such an agreement is a negotiated contract clause in the collective bargaining contract, requiring employers to hire only union members. In other words, a job applicant has to be a union member *before* hire. In effect, employers surrender the hiring function to the union under this type of agreement. The union determines who gets admitted to union membership, hence the union controls hiring. The *closed shop* is not the same as a *union shop* agreement. The latter does not require union membership before hire but after hire, which is usually 30 days. The union shop is legal under federal law in the private sector, but often outlawed in the public sector. A very controversial section in the Taft-Hartley Act, however, makes it possible for individual state laws to outlaw the union shop even in the private sector within their borders. Such state laws prohibiting the union shop and other union security provisions in the union-management agreement are usually called "right-to-work laws," and states that have such laws on the books are referred to as "right-to-work states."
- A second restriction on the content of collective bargaining agreements is concerned with dues check-off. It is a negotiated contract clause requiring employers to collect union dues through payroll deduction. Payroll deduction for union dues is now allowed only for those employees who have voluntarily signed a payroll authorization to that effect.

Another amendment of the National Labor Relations Act makes it possible for the federal government to invoke a "cooling-off period" when a strike threatens national health and safety. After satisfying certain procedural requirements, the President of the United States may request the Attorney General to seek an 80-day strike injunction in a U.S. district court. If granted, employees are required to return or continue to work for that period. In the meantime a variety of government-aided settlement attempts are launched. If a settlement has not been reached at the end of the 80-day period, unions are free to strike and employers free to lock out.

The original Wagner Act of 1935 excluded from its coverage all public employees (mostly government employees), airline and railroad employees, agricultural employees, and domestic employees. The Taft-Hartley Act of 1947 added supervisors to that list of exclusions.

As far as federal law is concerned, today's private sector transit employers, employees and their unions are still covered by the protections and prohibitions of the National Labor Relations Act, as amended, and fall under the jurisdiction of the NLRB. Keep in mind that other federal laws, such as ERISA, Title VII of the Civil Rights Act, and others, must also be considered. In addition they may also be subject to state legislation created specifically for the entire transit sector in the state or only for certain transit districts. For transit employers, employees and their unions who belong to the public sector, the legal environment is a different one.

PUBLIC SECTOR TRANSIT EMPLOYERS AND EMPLOYEES

When we talk of *public sector* employers and employees, we generally refer to those who work for federal, state and local governments, and also those who work for specially created districts, such as transit and water districts. There is no uniform, all inclusive labor law covering the entire public sector, as we have in the private sector. There is no equivalent of the National Labor Relations Act in the public sector. There is only a hodgepodge of separate state laws, local government ordinances, and a federal law governing only agencies and employees of the federal government.

Collective bargaining rights for public employees in this country came relatively late-- much later than in most other developed nations. What hindered the development of collective bargaining legislation of any kind in this country was the so-called sovereignty doctrine to which public officials and other influential Americans subscribed to for many years. That doctrine basically said government is a sovereign ruler accountable only to the electorate and the legislature, which hold the ultimate power. Government cannot share that power with any special interest groups. Unions are considered to be special interest groups. Collective bargaining rights for public employees and their unions would mean sharing decision making with unions and thereby surrendering the sovereignty of government and violating public trust in government. A few states still subscribe to that philosophy and continue to prohibit collective bargaining for state and local government employees. The civil rights movement of the 1960s began to erode support for the sovereignty doctrine and the notion that government employees are citizens that ought to have the same rights as those in the private sector began to gain support.

In 1962 President Kennedy issued Executive Order 10988 which granted federal government employees and their unions permission to engage in a limited scope of collective bargaining with their respective federal agencies. President Kennedy's support of collective bargaining for government employees gave a tremendous impetus to states following the example of the federal government. State after state issued executive orders or passed legislation giving limited collective bargaining rights to certain groups of state and local government employees. The limits that were usually spelled out included a ban on the right to strike and a ban on the union shop.⁵⁸

Since we do not have a single law or a single enforcement agency to govern public sector labor relations in this country, a consistent state and local government labor policy toward public sector bargaining does not exist. Some states even continue to prohibit collective bargaining in government, while in others virtually all civil service employees are in one bargaining unit. Most states forbid public employees to strike, but some permit strikes under certain conditions. Such extreme legal variations are in stark contrast to other industrialized nations, which tend to have a single national collective bargaining law for all public workers.⁵⁹ Public policy toward labor-management relations is even more complicated in the public transit sector.

THE MEMPHIS FORMULA

The so-called Memphis Formula is a clever device to bypass a state's legal restrictions on public sector collective bargaining by having public transit authorities contract out its transit services to a privately owned transit company. In the city of Memphis, Tennessee, bus service had been provided since 1896 by a private transit company called the Memphis Street Railway Company. But starting in the mid 1940s, that private transit company had experienced financial problems. By 1960, bus ridership and revenues had declined so much that the stockholders wanted to sell the company. One of the major factors in the company's inability to operate profitably was the constant refusal of the City Commission to approve fare increases.⁶⁰ The restrictions and pressures that the two major investment companies who owned the Memphis Street Railway Company placed upon the company did not help its performance either. The city of Memphis, however, had great

⁵⁸ The *union shop* means that a clause in the collective bargaining contract has been negotiated between management and the union which requires employees in the bargaining unit to join the union within a certain number of days after hire, usually 30 days.

⁵⁹ Richard C. Kearney, *Labor Relations in the Public Sector*, 3rd edition. New York: Marcel Dekker, Inc., 2001, chapter 3.

confidence in the management of the Memphis Street Railway Company, but realized that the transit system needed significant capital improvements, which the company could not afford. In addition, the city recognized that public ownership of the transit company would give it significant federal and state tax advantages.⁶¹ The more the city analyzed the situation, the more it became convinced that it could improve customer service and at the same time operate the transit system at a profit. In December 1960, Memphis finally purchased the private Memphis Street Railway Company, but retained its management and employees. The city negotiated a contract whereby the transit system would be run on a contract basis by the same management as before, as a private management company, but supported by public funds.

The city had confidence in the competence of the private sector management of the company and thought the officers could run the operation more efficiently without the restrictions the previous owners had put upon them. In addition, the old company management had a good relationship with the union. As a matter of fact, the local union, the Amalgamated Transit Union, urged the Memphis mayor to retain the old company on a contract basis to continue running the transit operations. And the city of Memphis did just that. The City Transportation Commission was glad to disassociate itself from the day-to-day problems of the transit system, including customer complaints about transit service, fares and routes. The old Board of Street Transportation Commissioners reorganized itself and became the Memphis Transit Authority. The new transit authority then hired the management of the previous company to form a new private management company to continue transit operations with the same personnel and the same union as before. But the city made sure that day-to-day transit operations, including labor relations, were kept out of the hands of the Transit Authority and out of city politics. The Transit Authority, however, retained close financial control over the management company and the right to formulate policy.

Had the city of Memphis chosen to have the Memphis Transit Authority oversee transit operations itself, the collective bargaining rights of its transit employees would have been voided because the Tennessee Supreme Court had

⁶⁰ The original *City Commission* in Memphis was much different from what it became later. The original Commission had direct budget control over the *Memphis Street Railway Company* and thereby great control over its labor relations. All that changed in 1960 when the Commission turned these controls over to the Memphis Transit Authority and its governing board.

⁶¹ Under the previous private ownership system, the revenues of the Memphis Street Railway Company were subject to 52% federal income tax alone, in addition to state and local taxes.

ruled in 1958 that its cities, counties, or other public agencies would violate the state's right-to-work laws if the city bargained collectively with a union. No wonder the Memphis local of the Amalgamated Transit Union pleaded with the mayor, the Transportation Commission, and anyone else who would listen to retain the services of the old private transit company after the public takeover. Indeed, this ingenious solution to the problem of preserving collective bargaining rights of private sector transit employees being taken over by public transit authorities in states which prohibit collective bargaining for public employees became a model for other states to follow and heavily influenced the U.S. Congress in drafting the labor provisions of the Urban Mass Transit Act of 1964.⁶²

The NLRB and state and federal courts, however, questioned whether the Memphis Formula really placed the transit management companies, controlled by public transit or transportation authorities, in the private sector and therefore under the National Labor Relations Act. For some time, the NLRB struggled with the question of whether these new transit management companies really qualified as "employers" under the definition in the National Labor Relations Act. Keep in mind that the NLRA specifically excludes public entities from its coverage. In trying to answer this question, the NLRB and the courts asked how much independent control these companies really have over labor relations and working conditions, and to what degree they were controlled by their respective transit or transportation authorities. Eventually the view that these contracted management companies qualified as private employers under the NLRA and came under the jurisdiction of the NLRB prevailed, even though these private transit management companies may be subject to significant budgetary controls and policies set by public transit authorities. The degree to which public transit authorities exercise control over the labor relations policies and practices of the private management companies depends directly on a state's *enabling legislation* that creates these public transit authorities.

EARLY ENABLING STATE LEGISLATION

In transit, enabling state legislation means state legislation that creates transit

⁶² James L. Stern, Richard U. Miller, Stephen A. Rubinfeld, Craig A. Olson, and Brian P. Heshizer, "Urban Mass Transit Labor Relations: The Legal Environment," *Industrial Relations Law Journal* (now *Berkeley Journal of Employment and Labor Law*), Vol. 2, No. 3 (Fall 1977), pp. 389-420. For a more detailed report by the same authors, see "The Legal Framework for Collective Bargaining in the Urban Mass Transit Industry," Report No. 76 Urban Mass Transportation Administration, University of Wisconsin, Industrial Relations Research Institute, November 1976.

or public utility districts and a certain funded public agency, usually a Transit Authority, is empowered to operate a transit system in its geographic area itself or hire or subcontract a private firm to do so. The labor relations portion of that piece of legislation commonly sets forth the collective bargaining rights and protections of employees who work directly or indirectly under the transit authority. Although there may be differences from state to state in the areas of unfair labor practices, and the right to strike, today these employee rights are often the same as the rights private-sector employees enjoy under the NLRA, as amended. But this has not always been so. Still, even in the early years, the labor provisions in the enabling state legislation have been different from what other non-transit public employees in the state had. Other public employees of the state or local government did not even have the right to form unions or seek collective bargaining.

At the time the city of Memphis took over the old Memphis Street Railway Company in 1960, it was already empowered by an old state law, Chapter 26 of the Tennessee Private Acts, to create the Memphis Transit Authority and to purchase or contract for a transit system which would be under the jurisdiction, control, and management of the Memphis Transit Authority.⁶³ The statute continues to spell out the powers of the Memphis Transit Authority if it chooses to contract with a private company to manage the transit system, directed and supervised by the Authority in all of its phases including the setting of rates, fares, and routes. Memphis circumvented the statutory provisions by drafting contractual agreements with everybody concerned that gave the new Memphis Transit Management Company maximum independence from the Memphis Transit Authority. While the Transit Authority retained a certain control over financial matters, including the determination of bus fares and bus routes, the record shows that the Authority stayed away from labor relations and other personnel matters. The Management Company continued to bargain freely with the union, signed union-management contracts, hired and fired its own personnel, and even made capital purchases, such as buses, without approval from the city or the Transit Authority.⁶⁴

Similar state-enabling legislation that created public transit authorities was passed as far back as the 1940s in other states when many private transit companies in the country, with their declining financial resources, could no longer meet the transportation demands of the rapidly expanding metropolitan

⁶³ 1943 Tennessee Private Acts, Ch. 26, as amended in 1961 by Ch. 319

⁶⁴ Stern (1977), p. 399.

areas. As implied, those early versions of state transit legislation tended to reflect the state's collective bargaining policy that was radically different from those for other public employees working for the state or its local governments. We must remember that in those days almost all states forbade the rest of its government agencies to bargain collectively with public employees and public employee unions. It should be noted that most of the relatively pro-collective bargaining transit statutes passed by the states before 1964 were enacted by Eastern and Midwestern states. Within these states, transit authorities were usually established in large metropolitan areas with strong labor unions. Furthermore, those large cities tended to be in states in which unions held considerable power and were able to influence the state legislature to protect union interests. Even at that, transit employees working for these transit authorities had far less collective bargaining protections than private sector employees. None of the earlier statutes really compelled the transit authorities to bargain with transit unions, but merely allowed them to do so if they wished. In other words, these early state enabling laws were improvements over other state civil service and public utility laws but they did not give transit employees hard and fast guarantees that their collective bargaining rights would be continued when their employers switched from private to public ownership. That came much later.⁶⁵

ENABLING STATE LEGISLATION SINCE 1964

Since 1964, enabling state transit legislation has taken on a different character. The success of the Memphis formula had a great influence on the passage of a federal transit law, the Urban Mass Transit Act of 1964 (UMTA), and, in turn, the UMTA had a profound influence on subsequent state transit legislation.

After 1964, enabling state legislation creating transit districts and transit authorities was no longer confined to eastern and midwestern states and to California. Even states in the deep south and other "right to work" states that did not grant public employees the right to collective bargaining started to pass enabling state legislation, making an exception for public transit employees. In many cases, it became easy to do so by simply empowering the regional public transit authorities to hire a private transit company to run transit operation, as Memphis did. As long as the transit authorities did not control these private management companies too closely and did not participate in its labor relations, they qualified as private employers coming under the National Labor Relations Act and the jurisdiction of the NLRB. In other cases, where a transit authority was expected to run transit operations itself, outright exceptions to

⁶⁵ Stern (1977), pp. 401-402.

the ban on public employee collective bargaining were made for transit authorities, public transit employees and their unions.

While deliberating the passage of the Urban Mass Transit Act of 1964, Congress debated long and hard over Section 13(c) of that act. That section was to guarantee employees of private transit companies acquired with federal funds the ability to retain the same collective bargaining rights and benefits they enjoyed before they were taken over by public transit authorities. But how would that be possible in states that at that time still prohibited collective bargaining in public employment? Congress saw in the example of the city of Memphis a way out of the dilemma. Senator Morse of Oregon sponsored the now famous Section 13(c) amendment to the UMTA. He predicted that the Memphis Formula would become the way of protecting the collective bargaining rights and benefits of transit employees whose private employers were being acquired by public transit authorities with federal funds. He was right.

Time and experience has taught us that he was correct in believing that the Memphis formula would become a politically useful tool in circumventing state laws that prohibit its public sector agencies to bargain collectively with their employees.⁶⁶ Dozens of cities and metropolitan areas followed the example of Memphis to qualify for federal capital grants under the UMTA. Today many states have transit legislation in which the labor protection provisions are practically identical to the collective bargaining protections in Section 13(c) of the UMTA. In California, for example, where transit-enabling legislation is contained in the Public Utilities Codes, one finds language like this to guarantee public sector transit employees practically the same collective bargaining rights as private sector employees.

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection.⁶⁷

Concerted activities includes strikes. In that respect, however, California is an exception. In most other states, all state and local government employees, including those working for transit authorities, are prohibited from striking.

Whenever a public transit authority acquires a private sector transit company,

⁶⁶ Stern (1977), p. 394.

⁶⁷ State of California Public Utilities Code, Section 10300.

those employees must not suffer any worsening of wages, seniority, pension, vacation or other benefits as a result of the acquisition if the transit authority wants to remain eligible for federal subsidies under the Urban Mass Transit Act. As a matter of fact, the transit authority is obligated to assume and observe all existing labor contracts of the acquired entity.⁶⁸ As just mentioned, in most states, the exception to this is the right to strike. When private sector transit employees become public sector employees, they almost always lose the right to strike.

UMTA Section 13(c)

By the time the 1960s had arrived, many private transit companies were no longer profitable, and were forced into takeover by state and local governments. Public transit authorities, however, were in no better shape financially than their private counterparts. The federal government had to come to the rescue. Congress passed the Urban Mass Transit Act (UMTA) in 1964, making significant capital grants available for public takeover of private carriers. As always, there were strings attached to federal assistance. Some of them were designed to preserve the collective bargaining rights and gains of private transit company employees about to become employees of the public sector, which up to that time had less legal protections of collective bargaining than the private sector.

The Urban Mass Transit Act of 1964 in Section 13(c) requires, among other things, that transit workers whose private places of employment are acquired by public agencies be protected against a worsening of their employment conditions, and that they be guaranteed the continuation of collective bargaining rights and benefits if state or local transit authorities wish to qualify for federal funding. When the act was written, many states and their courts were still vehemently opposed to collective bargaining by public employees. As a result of energetic lobbying by transit worker unions, Congress not only concluded that it had to preserve the collective bargaining rights of private transit company employees about to become public employees, but also the gains they had made up to that time under private sector collective bargaining. These protections apply not only when federal funds are used by state and local authorities to buy out private transit companies, but also when federal money is used to modernize transit facilities. For example, a transit authority using federal funds to automate transit facilities has to make sure that the transit workers displaced by the automation do not suffer a worsening of their employment conditions as a result of the changes. In practice, this often means that the affected workers are either assigned to jobs with equal or better pay,

⁶⁸ State of California Public Utilities Code, Section 10350.

retained for other jobs, or they are offered generous early retirement benefits.

These protective provisions in the 13(c) agreements, which are separate from the collective bargaining contract, require the approval of the U.S. Secretary of Labor before the U.S. Secretary of Transportation can release federal funds to transit authorities. Although these "13(c) agreements" are technically separate from the collective bargaining agreement, they set forth in rather specific terms how transit employee's collective bargaining rights and working conditions are to be preserved under the union-management contract. Since these separate 13(c) agreements require the consent of both union and management, the union has in effect considerable power in collective bargaining negotiations. The union's refusal to sign off on a 13(c) agreement in the legally appropriate time period can literally mean the financial downfall of a transit system and adverse political consequences for officials. As Matthew Bodah, who has written extensively on that subject, has observed: The threat of discontinuance of federal money seems far more frightening to a local political body than does union bargaining power.⁶⁹

Many of these 13(c) agreements provide for interest arbitration⁷⁰ in case of an impasse in collective bargaining negotiations, as does a model 13(c) agreement negotiated in 1975 by the Amalgamated Transit Union (ATU) and a transit employers association, the American Public Transit Association (APTA). The courts have held that interest arbitration is not required under the Urban Mass Transit Act (UMTA), that other mandatory impasse resolution procedures, such as mediation and fact-finding, satisfy the requirements of section 13(c) of the act.

The original Urban Mass Transit Act of 1964 has been amended many times.

In 1991 it was redesignated the Federal Transit Act.⁷¹ The labor protection provisions in Section 13(c) stayed the same. During the Reagan and Bush

⁶⁹ Mathew M. Bodah, "Twenty-five Years of Collective Bargaining under the Urban Mass Transit Act of 1964," *Labor Studies Journal*, Vol. 15, No. 3 (Fall 1990), p. 45.

⁷⁰ Interest arbitration differs from grievance or rights arbitration in that it deals with disputes over the *making of* a new contract. Grievance or rights arbitration, on the other hand, has to do with disputes over the interpretation, application, or alleged violation *of* an already *existing* contract. In any form of arbitration, when union and management reach an impasse, they submit the dispute to neutral party for a final and binding decision.

⁷¹ A more comprehensive guide to the labor protection provisions in this act than we have provided here can be found in the following Transportation Research Board publication: G. Kent Woodman, Jane Sutter Starke, and Leslie D. Schwartz, *Transit Labor Protection - A Guide to Section 13(c) Federal Transit Act*. Washington, DC: Transportation Research Board, Legal Research Digest No. 4, June 1995.

Administrations, federal transportation officials took a strong stand against maintaining the 13(c) labor protections. The Department of Transportation (DOT) even advocated a repeal of section 13(c). It testified to that effect before Congress and tried to negotiate with the Department of Labor, which oversees the administration of these labor protections, a way to weaken the implementation of these protections. During those years, the DOT and some other branches of the federal government were strongly in favor of privatization of transit. DOT officials argued that the 13(c) labor protections discourage privatization of transit operations, claiming that they raise the cost of transit operations, and increase federal subsidies for transit beyond what they need to be. A major independent survey, however, established that the 13(c) labor protections have not reduced the frequency of local transit agencies contracting with private companies for services. But the same source claims that these labor protections do tend to increase the cost of transit operations, mainly because they give unions significantly greater bargaining power. Although others may disagree, the authors of the same survey suggest that federal agencies may encourage privatization of transit services by spending less time and effort on fighting 13(c) and focusing more on providing technical assistance, training, and incentives to private vendors of transit services. It would not only make them more willing to bid on contracts, but it would also make them more competitive, lower the dollar amounts of their bids, and increase the quality of their services.⁷² During the Clinton Administration, officials in federal agencies significantly lowered their voices on the issue of privatization. It is almost a dead issue, as far as the federal government is concerned.⁷³ It certainly is not a dead issue with local governments. Indeed in many public transit districts, the possibility of privatization is still viewed by both management and unions as a threat to their survival.

STATES THAT STILL PROHIBIT PUBLIC SECTOR COLLECTIVE BARGAINING

As we have previously mentioned, there is no federal labor law that governs all government employees in this country. There is a federal law that governs all *federal* employees. The regulation of collective bargaining for state and local government employees, however, is still left up to the states.

Today, eight states still prohibit public employee collective bargaining. They

⁷² Michael I. Luger and Harvey A. Goldstein, "Federal Labor Protections and the Privatization of Public Transit," *Journal of Policy Analysis and Management*, Vol. 8, No. 2, Spring 1989, pp. 229-250.

⁷³ "Feds to Abandon Privatization," *TWU Express*, December 31, 1993, p. 3

are mostly southern states. Sometimes the *Memphis Formula*, discussed earlier, enables specially created districts to circumvent these prohibitions, sometimes not. One leading authority on public sector politics claims that in most cases these prohibitions are calculated decisions by the states or local government bodies in order to provide a good business climate by holding down public employee compensation. Despite these legal prohibitions, some sort of bilateral decision making between public sector unions and management still takes place simply because the unions have the power to force management into some form of collective bargaining.⁷⁴ In 1989, for example, bus drivers in the city of Charlotte, North Carolina staged a strike until their wage demands were met, forcing the city into negotiations through a federal mediator. Even though North Carolina has by far the strongest statutory prohibitions of public employee bargaining in the nation, the strike still occurred. The situation is similar in other southern states that prohibit public sector collective bargaining. Local jurisdictions in these states have also conducted informal negotiations with employee groups despite the states' prohibitions. They have discussed a wide range of issues including wages, hours, benefits, and other items. They may have even signed some sort of "Memorandum of Understanding," which sets forth the terms of their agreement, without calling it a contract, and carefully avoids anything that would fly directly into the face of the state's legal prohibition of public sector collective bargaining.

The lack of formal collective bargaining for public employees in states like North Carolina, however, has a number of less visible, but nevertheless important, consequences. First, experts believe that the public organization's system of handling conflict with its employees is inadequate. Secondly, the prohibitions of public employee collective bargaining leads to increasing privatization of the public services. This, in turn, has a negative effect on women and minorities, since the public sector has traditionally employed a larger percentage of these groups, and tends to protect the rights of women and minorities more than the private sector.⁷⁵

DRUG AND ALCOHOL TESTING

One of the most severe constraints upon transit facilities is legally mandated drug and alcohol testing of employees in safety-sensitive positions. These

⁷⁴ Richard C. Kearney (2001), chapter 3.

⁷⁵ Roger G. Brown and Terrel L. Rhodes, "Public Employee Bargaining Under Prohibitive Legislation: Some Unanticipated Consequences," *Journal of Collective Negotiations in the Public Sector*, Vol. 20, No. 1 (1991), pp.23-30.

constraints have far reaching effects on labor relations in transit. They are full of pitfalls for both union and management. Says Ed Wytkind, Executive Director of the Transportation Trades Department of the AFL-CIO:

Drug and alcohol testing is another concern. The Teamsters and the ATU and the TWU and others know all too well that there's not a day in a week when one of their members isn't subjected to some form of drug testing. Post-accident, pre-employment, return to service, random — I don't care what it is. For the transit industry, it was an unfunded mandate because it cost a lot of money and the federal government didn't finance it, so the public transit systems have to pay for it.⁷⁶ union officers, supervisors and managers in the transit industry who deal with employees in safety-sensitive positions it is important to be familiar with the government's requirements of drug and alcohol testing. While the Amalgamated Transit Union (ATU) strongly supports safety measures in transit, it is opposed to random drug and alcohol testing. Indeed, it is random testing that is the most controversial aspect of this issue, not testing for just cause.

The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing not only in transit but also in other transportation industries as well. They have a bearing on collective bargaining in transit, particularly grievance handling. The U.S. Department of Transportation (DOT) has published detailed rules that require employers in the transportation industry to have certain programs in place that control drug and alcohol abuse. These rules include required procedures for urine drug testing and breath alcohol testing.⁷⁷ More information on these procedures can be found in Appendix C of this report.

SUMMARY

The legal environment of transit labor relations is complex and often confusing, particularly when employees work in the public sector for a transit authority. Those who work for a private transit firm enjoy the same labor protections as other private sector employees, including the right to strike. When private firms are acquired by public transit authorities, those same employees, who now become public sector employees, lose that right under

⁷⁶ Ed Wytkind, in *Toward a Cooperative Future?* Symposium. Norman Mineta International Institute for Surface Transportation Policy Studies, IISTPS Report 97-2, May 1997, p.68

⁷⁷ US Department of Transportation Web Index, National Transportation Library, "Drug and Alcohol Testing: An Overview," http://www.fhwa.dot.gov/omc/drug_alc/html, June 1996.

most state laws. Public sector transit labor law is far more complicated than private sector labor law, and there is no uniformity in the public sector.

Both private and public sector transit organizations generally depend heavily on federal subsidies. The Urban Mass Transit Act of 1964, as amended, requires that when private transit firms are acquired by public transit authorities and want to be eligible for federal subsidies, there must be no worsening of collective bargaining rights, wages, hours and working conditions of those employees affected by the transfer of ownership. Section 13(c) of the UMTA also requires that both private and public transit employers negotiate so-called 13(c) agreements with their unions, which guarantee employees certain collective bargaining rights and benefits. These agreements are subject to the approval and control of the U.S. Secretary of Labor. Transit employers who cannot get their unions to sign off on such an agreement run the risk of losing their eligibility for federal funding. It is a situation that significantly strengthens the power of transit unions in this country.

In the case of publicly owned transit organizations, a 13(c) agreement has to contain certain impasse resolution procedures such as interest arbitration, mediation, and/or fact-finding. The ATU has favored interest arbitration. For this and other reasons, interest arbitration is widespread in the transit industry in this country. In this respect the transit industry, both private and public, distinguishes itself from the rest of private industry, which generally shuns interest arbitration.

This does not mean that strikes do not occur in the transit industry. They do, in both the public and private sector, whether the strike is legal or not. Even the ATU has a long-standing policy of favoring a strike over interest arbitration where there is a dispute over union recognition.

SOME NEGOTIATING BASICS

ANALYZING THE RELATIONSHIP

One of the keys to success as a negotiator is to have realistic expectations of the other party. That, in turn, requires a realistic perception of the type of relationship one can expect, or currently has, with the other side. Is it a highly hostile or highly cooperative relationship, or something in between? The relationship may or may not be beyond the control of a given negotiator. It takes two to make a relationship. It is that relationship that determines the atmosphere of negotiations and the negotiating strategies the parties choose or fall into. Knowing the relationship helps us plan appropriate strategies and minimize unpleasant surprises. One of those strategies might be trying to change the relationship.

In descending order from most to least hostile, negotiating relationships may be categorized as follows: stonewalling, or lose-lose bargaining; positional or win-lose ("distributive") bargaining; interest-based or win-win ("integrative") bargaining; or friendship ("attitudinal") bargaining. Relationships can and do change, gradually or abruptly. Occasionally the relationship, or at least the tone of the discussion, changes within the same negotiating session—for better or worse.

- **Stonewalling** relationships involve power struggles and extreme conflict between highly antagonistic parties. The other side is viewed as the "enemy" who has to be resisted no matter what the issue is. Proposals by the other side are viewed with extreme suspicion and are cleverly counteracted. Each side wants to avoid losing ground in the power struggle, and if possible to gain the upper hand. The participants in the conflict easily lose sight of the objective of the negotiations. Gaining power and resisting power becomes the goal, and substantive issues become irrelevant. In effect, both sides lose when it comes to settling substantive issues.
- **Positional or win-lose** bargaining relationships are highly competitive and basically adversary in nature. They may or may not involve hostile conduct by the parties. Reluctant compromise is possible. Its most important feature is that the parties believe that by definition "your gain is my loss," and vice versa. They engage in what some authors have called "distributive bargaining." They play a "zero sum" game, which rests on the "fixed pie" assumption. Whatever one side concedes is assumed to reduce its share of the pie; little thought is given to working together to enhance the size of the pie before dividing it up. Little thought is given to the idea that there might

be many different pies out there, and one side might like one kind of pie but not care much for another. In win-lose bargaining, each side is concerned only about its own problems, not the other's. Most contract negotiations between unions and management today still involve a win-lose attitude toward each other, at least on the more difficult issues. A more cooperative relationship may develop when the survival of both sides is threatened.

- **Interest-based** or **win-win** relationships are also called "cooperative," or "problem-focused," "integrative," or "interest-based" bargaining relationships. Fisher and Ury who wrote the best-known (and very readable) book on the subject, *Getting to Yes*,⁷⁸ call the negotiating style and strategies involved in this kind of relationship "principled" negotiations. While there may still be some degree of competition in this relationship, the parties focus on mutual problem solving. They believe that both sides can "win" something worthwhile by finding or creating "trade-offs" or settlement alternatives that will give each side what it needs the most.
- **Friendship** bargaining is also called "**attitudinal structuring**" by some authors. In this type of relationship, at least one side is more interested in the relationship than the substantive issues. The main goal of one or both of the parties is to change the attitude of the parties involved, or maintain a friendly attitude toward each other.

INTERNAL BARGAINING

What you see and hear at the bargaining table is only the proverbial tip of the iceberg. Contrary to popular beliefs, across-the-table bargaining is neither the most crucial nor the most time consuming part of bargaining. "Internal" or "intra-organizational" bargaining is usually of the utmost importance and requires time, patience and political savvy. Most parties need to negotiate internally to achieve unity and plan bargaining objectives and strategies long before across-the-table negotiations begin. Similarly, negotiating teams on either side often call "caucuses" or recesses in the midst of across-the-table bargaining to "regroup."

PLANNING FOR NEGOTIATIONS

It is safe to say that at least 80 percent of the work in effective negotiations is away from the bargaining table. Most of this is in the form of pre-negotiation

⁷⁸ Roger Fisher and William Ury, *Getting to Yes*, 2nd ed., Penguin Books, 1991. A sequel to this excellent book is the equally readable paperback by William Ury, *Getting Past No*, rev. ed., Bantam Books, 1993.

activity. The parties need to plan well in advance of actual negotiation with the other side what it is they want to get out of the negotiations, how they are going to do it, and who is going to do it. They need to:

- Select a **negotiating team** and assign roles on the negotiating team. One such role, of course, is the chief negotiator. While the chief negotiator is usually selected on the basis of professional expertise, others are often appointed for different reasons (e.g., political reasons, interpersonal skills, and prestige).
- They also need to establish their **bargaining objectives**, interests, expectations, or outcomes they want to achieve. In recent years, the objectives of some employers have included "take-backs" or "give-backs" from the unions they negotiate with. That is to say, employers make demands for wage reductions and elimination of restrictive work rules to increase productivity and to meet stiff foreign competition. These "take-back" oriented negotiations are often called "concessionary bargaining." They can be political nightmares for union leaders, whose members are rarely ready to give up benefits won in the past.
- Next they need to **prioritize** or rank order their expectations or objectives. For example, a union may decide that its first priority this year is a wage increase, second is improved medical plan coverage, third is improved vacation benefits, and so on. A purchasing agent may put an early delivery date and an extended warranty ahead of purchase price as an expectation in negotiating a purchase contract.
- **Bargaining strategies** have to be developed. You and your constituency may decide to "hang tough" on certain demands you expect to come from the other side, but be more compromising on others. One of the most important parts of strategy building in win-win negotiations is to stimulate creative thinking in the planning sessions to find good trade-offs that take the "real" interests of the other side into consideration.
- In a traditional, adversarial relationship where positional bargaining prevails, proposals **and counterproposals** need to be prepared in advance so that they can be submitted during negotiations with the other side.
- Proposal development often requires **costing out** these proposals. It involves calculating exactly how much a given proposal would cost you or the other side, and how much alternative proposals would cost.
- "Information is power." In proposal development, or "trade-off planning," it helps to have some idea of the demands and expectations of the other side before actual negotiations begin. In on-going relationships this may

not be a problem. One knows from experience or "precedent" set elsewhere what to expect. Sometimes the parties send signals to each other before negotiations begin (e.g., in press releases, speeches, hints dropped in casual conversation, "leaking" word to the press or through other channels). Sometimes it takes at least one preliminary meeting with the other side before serious trade-off planning can begin.

NEGOTIATING BEHAVIOR

In traditional bargaining, there is usually a good deal of showmanship, posturing, and bluffing at the bargaining table.⁷⁹ In many respects it resembles a stage show. Chief negotiators must impress their negotiating team and their broader constituency in the organization they represent. Particularly in adversary or competitive relationships, they cannot afford to appear to be "soft" on the other side, have their loyalty questioned, or cause leading union members to wonder "whose side are you on anyway?" Militant behavior at the bargaining table is therefore often staged, and professional negotiators do not take it personally. In fact, professional negotiators from opposing sides, like lawyers, can have an amicable relationship away from the bargaining table and be at each other's throat at the bargaining table, with the understanding that "it's nothing personal." Frequently a professional negotiator's greatest threat is not the professional negotiator across the table but some adversary in his own constituency or a radical novice across the table who hasn't learned to see things from the other side's perspective or learned how to read "sign language" yet.

Professional negotiators behave with a purpose in mind. They control their behavior without being impersonal, and they constantly remind themselves of the objectives to be reached during negotiations. They keep priorities and interests in mind. When they represent a client or organization, they swallow their pride even in the face of insults from the other side, when necessary, and are constantly aware of their obligations toward their constituency. They do not take personal attacks personally, and remind themselves "I'm not the enemy."

Professional negotiators seek to maintain or create a *working* relationship. "You don't have to love them, just work with them." Fisher and Brown, in their book *Getting Together: Building Relationships As We Negotiate*, offer some detailed suggestions for building working relationships by being

⁷⁹ In "*interest-based*" bargaining, a more recently advocated approach, which is strongly supported by the U.S. Department of Labor, however, bluffing and posturing is to be avoided. Instead, the parties emphasize mutual problem solving.

"unconditionally constructive."⁸⁰

MULTIPLE CONSTITUENCIES

We have said that what we see and hear at the bargaining table is only the "tip of the iceberg." The real power holders, the "ratifiers" and "closers of the deal" may be elsewhere. They may be part of the hierarchy of your own organization, the other side's organizational hierarchy, or some third or fourth "absentee party" to the negotiations. These multiple constituencies raise negotiations to a higher level of awareness and difficulty. The "diplomat" negotiator not only keeps his eyes and ears on his own multiple constituencies and their interests, but also on the multiple constituencies of the party across the table and their interests.⁸¹ They can make or break his chances for reaching agreement with the other side.

NEGOTIATING POWER

Negotiating power⁸² is a necessity in all bargaining relationships, only its expression varies. Both sides have power in any bargaining relationship, otherwise there would be no use for bargaining. In adversary or highly competitive relationships it takes more obvious and often more distasteful forms. Negotiations basically become power plays in adversary or highly competitive bargaining relationships, where win-lose negotiating styles prevail. Each side builds up its own power position before across-the-table negotiations begin so that it comes to the bargaining table with "clout." Furthermore, each side continually maneuvers to maintain or improve its power position during negotiation. In the past, most union-management negotiations, many merger or acquisition negotiations, and international diplomacy negotiations between adversary nations fell into this category.

The expression of negotiating power is more subtle and more gentle at the other end of the relationship continuum where win-win (or "interest-based") bargaining styles prevail. Nevertheless, even in cooperative bargaining relationships, negotiation power (or "influence") is a necessity.

⁸⁰Roger Fisher and Scott Brown, *Getting Together: Building Relationships As We Negotiate*, Penguin Books, 1988. Another book containing many helpful suggestions on how to negotiate with difficult people is the very readable paperback by William Ury, *Getting Past No*, rev. ed., Bantam Books, 1993.

⁸¹Perhaps the best book on this subject is the paperback by Thomas R. Colosi, *On and Off the Record: Colosi on Negotiation*, American Arbitration Association, Kendall/Hunt Publishing Company, 1993.

⁸²If you don't like the word "power," call it "leverage" or "influence."

Power is an elusive concept. It comes in many shapes and forms and from many sources. Particularly in win-win relationships, having something the other side wants or needs tends to be the most important source of negotiating power, a control of limited resources. Knowledge or information can mean power. Planning for negotiations is a way to gather power because it enables us to come to the bargaining table with knowledge and information the other side may or may not have. Humor can be power under certain conditions, perhaps by offsetting the other side's aggression or resistance by creating a congenial atmosphere that makes it easier for the other side to say yes. Being a potential threat to the other side, of course, may represent negotiating power also, although skilled negotiators carefully couch it in positive terms. Unity with and within your constituency, unity with and within your own negotiating committee, is power. Not having one's "ducks in a row" tends to undermine a negotiator's power severely. One of the reasons for internal negotiations, discussed previously, is to enhance one's negotiating power through unity.

Some writers distinguish between "power" and "influence." A colleague of ours says: "Power is potential influence, and influence is power in action." Putting it in another way, there is a difference between possessing power and exercising it. Some of the most powerful personalities we know rarely exercise their power. Wise negotiators use power sparingly. They don't "overpower." Everyone knows they have power, so they need not exercise it. Exercising power involves costs and risks.

Finally, we must not forget that power is elusive. It has a habit of slipping away from us. It changes frequently, from one moment to the next, from one issue to the next, from one response to the next. One side's mistake can literally change the power balance within minutes.

IMPASSE RESOLUTION

What happens when union and management negotiators reach an impasse during contract negotiations? In the private sector, it is common to let a strike by the union or a lockout by the employer settle the matter. In the public sector, strikes occur, often illegally, because state or federal law may make strikes by certain public sector employee groups unlawful. When a strike by an emergency-service sector employee group in the public sector may have catastrophic effects on public health or safety or welfare, the state may deem it necessary to pass legislation that makes it mandatory that the employer and the union of a group of employees make use of **compulsory interest arbitration**. A case in point is police and fire fighters.

Interest arbitration differs from grievance or rights arbitration in that it deals with disputes over the making of a new contract. Grievance or rights

arbitration, on the other hand, has to do with disputes over the interpretation, application, or alleged violation of an already existing contract. In any form of arbitration when union and management reach an impasse, they submit the dispute to a neutral party for a final and binding decision.

When interest arbitration is required by law, we call it **compulsory** interest arbitration. When union and management negotiators have contractually agreed to use interest arbitration in case of a deadlock of negotiations, we call it **voluntary** interest arbitration. Compulsory interest arbitration is a very controversial dispute settlement technique. Voluntary interest arbitration is not quite as hotly debated, but it still involves a good deal of controversy.⁸³ Opponents of interest arbitration often talk about its "chilling effect" on the earlier stages of contract negotiations. They claim that interest arbitration takes the voluntarism out of the concessions and makes the parties "hold back" concessions to maneuver the arbitrator into a decision that is more favorable to their side.

Opponents of interest arbitration also argue that it has a "chilling effect" on the negotiating parties. They become so dependent or addicted to an outside arbitrator making the decisions for them that they make a habit of settling by arbitration.

One attempt to lessen these effects has been the restriction of mandated interest arbitration in some states only to economic issues. Whether compulsory or voluntary, one further attempt to reduce the chilling effect of interest arbitration in the earlier stages of negotiations is the common practice of limiting the arbitrator's authority through a process called "final-offer" arbitration (sometimes also called "last-best-offer" arbitration). Under this form of interest arbitration, each party submits its last, best offer on the unresolved issues in package form. The arbitrator then has only two choices, making either the last package offer of the union or the employer the award, but cannot "split the difference" or decide on some other settlement in between. The theory behind this arbitration procedure is that both parties to the deadlocked contract negotiations are provided an incentive to appear as the most reasonable of the two, and they will make every effort to come forth with their best possible concession. The parties may even narrow their differences so much that they might settle among themselves before the arbitrator needs to make a choice.

⁸³ For the source of the discussion which follows, see: Herbert Oestreich, "Compulsory Interest Arbitration for Police and Firefighters." *California Labor and Employment Law Quarterly*, Vol. 3, No. 2, Spring 1984, pp. 11-13.

Despite some of the disadvantages of interest arbitration, *voluntary* interest arbitration is quite widespread in the transit industry, but not very common in other industries. One reason for its widespread acceptance in transit may be that it is not quite as "voluntary" as its name implies. As we have pointed out in the chapter on the "Legal Environment of Labor Relations," there is tremendous political pressure on both transit unions and management to agree among themselves to such an interest dispute resolution procedure in their 13(c) agreements. As we have pointed out earlier, transit properties wishing to be eligible for government funding under the Urban Mass Transit Act must enter into a 13(c) agreement with their transit unions. The government guidelines for these 13(c) agreements require some sort of impasse resolution procedure in case of deadlock in contract negotiations. There is considerable political pressure on both union and management to adopt the format of a model 13(c) agreement recommended in 1975 by the influential American Public Transit Association (APTA). That model agreement favors interest arbitration. Another reason is the long-standing philosophy of the national leadership of the ATU that has favored interest arbitration throughout its history. William D. Mahon, powerful president of the ATU from 1893 to 1946, did much to spread the use of interest arbitration in the transit industry. He argued that the public's dependence on transit compelled the parties to settle impasses in contract negotiations not by strikes but interest arbitration. As Darold Barnum, in his landmark study of labor relations in transit pointed out, that in its very first constitution, as far back as 1892, the ATU declared that its objective was to encourage the settlement of all disputes between transit employees and employers by arbitration. But, as Barnum also observes, ATU locals had trouble carrying out this philosophy, particularly in clearly defining the issues to be arbitrated and limiting the arbitrator's authority in rendering a decision.⁸⁴ It is because of these and other problems at the local level, that even today ATU headquarters makes national union representatives available to ATU locals to assist them in contract negotiations. In many cases, the national union representative is even the chief union negotiator.

The ATU's strong preference for interest arbitration is in sharp contrast to that of its competitor union, the Transportation Workers Union (TWU), which has traditionally had a stronghold in the New York City and Philadelphia areas. The TWU has always had an ideological orientation completely opposite of the ATU. It was originally a leftist organization. Its fiery president Mike Quill, from the union's early beginning until his death in 1967, was skillful at creating crises and turning them to his union's favor. He managed to get

⁸⁴Barnum (1977), pp. 50-54.

favorable settlements by strikes or threats of strikes. He was both feared and respected for his political power in parts of the country in which his union had a stronghold. His political influence enabled him to get favorable settlements for his union even in New York City, a city that until 1954 had consistently refused to bargain with or sign a binding contract with any union. Still we must not overestimate the TWU's influence on voluntary interest arbitration, even in those days, on the country as a whole. It is safe to say that the ATU's philosophy toward interest arbitration has been, and still is far more influential, if for no other reason than that the ATU has unionized far more transit properties than the TWU.

The ATU must not be given too much credit for the popularity of voluntary interest arbitration in transit either, at least not in the public sector. Some credit has to be given to the inherent political qualities of interest arbitration. It must be remembered that managers of publicly owned transit properties tend to be political appointees. They are under pressure to keep transit fares and service up. They are also under pressure from transit workers and their unions to grant substantial wage increases. Interest arbitration may give them an easy way out of this dilemma. If the arbitrator decides in favor of a large wage increase, they can blame it on the arbitrator rather than appearing soft on the unions. Similarly, if the union gets only a very modest wage increase in interest arbitration, they also can save face with their constituency by blaming it on the arbitrator.⁸⁵

POST-NEGOTIATION RITUALS

When negotiations are concluded, it is time to engage in certain rituals: shaking hands, saying "you're tough," congratulating each other for having reached a settlement, emphasizing that the other side bargained tough but fair, celebrating and signing with special give-away pens at a peace treaty, making joint statements to the press, and so on. Wise negotiators look ahead and try to protect the relationship with the other party, otherwise they may not get them back to the negotiating table the next time, and more radical conflict ensues. Wise negotiators do not overkill. They do not celebrate victories, just settlements. They know that there is no such thing as a "good loser." They know that the more the other side lost, the greater the need to help bind the wounds, to heal damaged egos, to humanize inevitable conflict.

⁸⁵ Barnum (1977), p. 98.

USING INTEREST-BASED OR WIN-WIN NEGOTIATING TECHNIQUES TO TURN CONFLICT INTO COOPERATION

Positional bargaining easily leads to a "lose-lose" outcome. Even if it turns out to be a "win-lose" situation, the chances are that neither side wins it all; both parties lose at least something. Even if one side appears to have won considerably more than the other side, it cannot be sure whether only a battle has been won, but a war is about to be lost. There is no such thing as a "good loser." Losing hurts. Losing causes resentment. Resentment ruins the relationship. It is for these reasons that the newer approaches to collective bargaining in transit call for a completely different attitude and a completely different approach. It involves a new way of thinking about organizational culture, competition, and negotiations. It involves a determined willingness to turn union-management conflict and competition into team spirit and mutual problem solving -- "I help you with your problems, you help me with mine. I help you meet your needs and interests, you help me achieve mine." The technique for doing this is "win-win" or "interest-based" or "principled" negotiation. It works! It feels strange at first, like all change to new habits does; but it works, provided both sides make an effort and permanently commit to them.

THE FOUR PRINCIPLES OF WIN-WIN OR INTEREST-BASED NEGOTIATIONS

Four extremely important principles are the foundation of "win-win," or "interest-based," negotiations to be used for turning conflict into cooperation and toward mutual problem solving. They are the proven strategies for reaching agreements toward mutual gains. These principles, which have been popularized by Fisher and Ury in their famous book *Getting to Yes*,⁸⁶ are:

- Separate the people from the problem (or issue)
- Focus on interests, not positions
- Invent options for mutual gain
- Insist on objective criteria

The Principles Explained and Practiced

Separate the people from the problem. Attack the problem, not the people across the table -- don't get personal. If the other side attacks you personally, ignore it, pretend you didn't hear it, keep talking about the issue or problem at hand, the substance or topic of the negotiations. Stick to business. Know when

⁸⁶ Roger Fisher and William Ury, *Getting to Yes*, 2nd ed., Penguin Books, 1991.

you want to focus on the personal relationship and when to deal with the issue or problem at hand. For example, if the other side becomes defensive, you might point out some of the positive things they have said to preserve a good personal relationship during negotiations. Note: This principle does not suggest that people are not important. It merely says that people issues should be kept separate from the others.

Focus on interests, not positions. What problems, real interests does the other side have that will lead to tradeoffs? What are each side's real interests? Are they the same? How might one side be able to satisfy the others needs or interests without giving up too much? Differences in interests very often have greater potential for reaching agreement than identical interests. A good example is the parable of the two sisters. A mother overhears her two daughters quarreling over who gets the only orange left in the house. They cannot agree and keep on quarreling. Finally the mother has had enough of it and intervenes, asking the first daughter why she wanted the orange. She answers, "What a silly question, mother. Of course I want it to eat it." The mother asks the second daughter what she wants it for, and she answers, "I want to bake a cake, mother. I want to grind up the peel and put it into the cake." End of story, end of quarrel. It was a feud that could have been avoided had the two daughters not rushed immediately into defending positions rather than exploring each other's interests in the issue. It is crucial, but easier said than done, to distinguish sharply between the other side's position and their true interests. Asking why, and asking it more than once, is a good way to probe for interests, wants, and needs. Probing the other side for their "real" needs and interests, and analyzing ours, is an indispensable step before we can move on to the next one: we can invent options for mutual gain.

Invent Options for Mutual Gain. Their problem is our problem too. Generate a variety of possible solutions or trade-offs that solve both sides' interests and needs. Generating creative alternatives is the opposite of fixed pie assumption, "zero sum game," or "win-lose." Both sides can perceive a win -- but win with different things and to solve different problems. What can one side give to the other that they need that costs us less than it is worth to them?

An example of win-win negotiations is as follows: A landlord needs cash immediately to pay bills, but the prospective renter of the apartment cannot move until the first of the month and has the old apartment rent paid up until the end of month, but has enough money in his checking account and agrees to pay the first and last month's rent on the spot. The landlord agrees to "hold" the apartment for the renter and to count rent from the first of the following month.

The number and kinds of alternatives that can be generated is limited only by

an individual's or group's imagination and creativity. Remember, the most important source of negotiating power is to have (or create) something the other side wants or needs. In group situations, a frequently used technique to generate creative options is brainstorming.

Insist on using objective criteria (standards) for evaluating options. Ask questions such as: "How did you arrive at that figure?" "Can you give me a breakdown on the quote you gave me?"

For example, the seller and buyer of a car may agree to the base price negotiations on the Kelley Bluebook value of car, or the seller and buyer of a house may negotiate a price on the basis of what similar homes in the neighborhood with same square footage have sold for during past months (usually on the computer of real estate firms), or ask for an appraisal by an outside appraiser. A labor negotiator could insist that a wage increase be based on industry average or an increase based upon comparison of another company in the same area or industry. Previously agreed upon standards serve as an objective measuring stick in evaluating the just generated options in the next step. Sometimes it may be appropriate to agree on standards for evaluating options early in the negotiations, particularly where there may be a temptation to manipulate the standards to fit one's favorite option that has just been generated. Remember that the standards or criteria for evaluating options have to be a direct reflection of the needs and interests previously identified.

SUMMARY

These deceptively simple principles are the core of all interest-based negotiations. The words are simple -- putting them into practice is not. Participants in interest-based bargaining rarely do well unless they have been trained by a professional. The process requires great interpersonal skills and, most of all, a high degree of trust between the parties. And, as most practitioners soon find out, trust is a very fragile thing. All it takes is a single action that is perceived by the other side as deliberate deception, and the whole relationship may be ruined. More about this in the following chapters.

A WILD GOOSE STORY

When you see wild geese heading south for the winter, flying in V formation, you might consider what science has discovered as to why they fly the way they do.

By flying in the V formation, the whole flock adds at least 70 percent greater flying range than if each bird flew alone. As each bird flaps its wings, it creates an uplift for the bird immediately behind it.

People who share a common direction and sense of cooperation can get where they are going more quickly and easily because they are traveling on the thrust of one another.

When a wild goose falls out of formation, it suddenly feels the drag and resistance of trying to go it alone, and quickly gets back into formation to take advantage of the lifting power of the bird in front of it.

If we had as much sense as a wild goose, we would stay in formation with those who are heading in the same direction we are.

When the head goose gets tired, it rotates back into the flock, and another goose flies point.

It makes sense to take turns doing demanding jobs with people or wild geese.

Geese honk from behind to encourage those up front to keep up their speed. What do we say when we honk from behind?

Finally, when a wild goose gets sick or is wounded by gunshot, and falls out of formation, two other geese fall out and follow it down to lend help and protection. They stay with the fallen goose until it is able to fly again or until it dies, and only then do they launch out on their own or with another formation of geese to catch up with their group.

Why can't we have more goose sense around here?

LONG-TERM LABOR-MANAGEMENT PARTNERSHIPS

HISTORY

Contrary to popular opinion, union-management partnerships are not a new phenomenon in the United States. One of the authors of this research project wrote a term paper in the 1950s as an undergraduate student in which he investigated the early history of union-management cooperation in the United States.⁸⁷ He found examples of union-management mutual problem solving programs in the American clothing industry as early as 1910. In a revolutionary break with traditional practice, the Amalgamated Ladies Garment Workers Union assisted several clothing manufacturers in simplifying the design of new garments that were more appealing to customers and cheaper to produce, without sacrificing quality. This author found other noteworthy examples of unions in the 1920s assisting large railroad and small steel companies in becoming economically viable enterprises again. However, the author also found that in all of these instances the union-management cooperative efforts were born out of the need to survive. All of the companies were on the verge of economic collapse, and the unions were threatened with loss of jobs for its members, and with it, loss of union members. The employers' economic dilemma was a threat to the survival of both union and company. When the threat to survival was gone, the parties returned to their previous adversarial relationship. It is an observation that still lingers in this author's mind in assessing the long-term prospects on interest-based negotiations and joint labor-management committees in this country.

These examples, however, were isolated incidents of union-management partnerships. Hard, adversarial collective bargaining was still the prevailing labor relations approach in American industry and it continued that way for many decades. Long laundry lists of proposals, inflated demands to camouflage the real priorities, threats of strikes or lockouts, bluffing, and withholding information continued to be a tradition in American union-management negotiations.

⁸⁷ Herbert H. Oestreich, "Union-Management Cooperation," unpublished term paper, Kent State University, June 3, 1953. The author's position that union-management cooperative programs are nothing new has been confirmed by a series of articles published in the early 1990's by Kathleen B. Sterbenz. See her consecutive article series "The Historical Roots of Participative Management," Parts I through IV, in *Update* (published by the Northeast Ohio Center for Labor/Management Cooperation), consecutive issues of Spring 1991 through Spring 1992.

During the early 1970s, efforts were made in American industry to expand employee participation in managerial decision making in order to combat the perceived or real alienation of workers from their repetitive jobs. So-called **Quality of Work Life (QWL)** programs, many of them promoted by the federal government, sprang up and received a good deal of publicity in the press. Most of the early efforts to expand the popularity of QWL failed. They ran into strong opposition from organized labor, who viewed these efforts, often rightfully so, as union avoidance tactics. They frequently also ran into internal opposition from company managers who viewed QWL as the brain child of outsiders who knew little or nothing of the “real world” inside the company. The QWL program experienced a renewal during the 1980s when threats to their economic survival led both management and union leaders to explore ways to improve productivity, the quality of products and services, and to reduce operating costs in the firms.

One example of these relatively narrow QWL efforts was the so-called **Quality Circles (QCs)**, which for a number of years gained great popularity. Quality circles are teams of workers appointed by management who typically meet for a few hours a week with their supervisor to identify and solve specific problems in production operations or customer service. Some companies experienced dramatic cost savings through the ingenuity of workers at relatively low levels in the organization in identifying ways to improve production processes, eliminate wastes, and enhance customer service. As time went by, however, QCs became less popular. One reason is that in many organizations, all too often suggestions by QC members were rejected by management. In addition, most QC programs were relatively narrow in nature, keeping them completely separate from collective bargaining. Changes in work rules, and other matters subject to collective bargaining, were off limits to the management dominated quality circles.⁸⁸ As a result, unions did not really participate very heavily in the QC movement. As a matter of fact, in the case of non-union firms, organized labor often suspected that QCs and other quality of work life programs were designed to keep the unions out.

Today, all that has changed. Where labor-management cooperation has been successful, the unions are truly equal partners with management in these efforts. In many labor-management committees today, the successors of the old QCs, it is impossible to tell which members are management appointed and which are union appointed.

⁸⁸ Katz and Kochan (2000), pp. 299-303

FROM INTEREST-BASED NEGOTIATIONS TO JOINT LABOR-MANAGEMENT COMMITTEES

Today, long-term labor-management partnerships, which emphasize mutual problem solving rather than traditional adversarial confrontation patterns, basically take two forms. Often the parties first try **interest-based negotiation** (IBN), then add one or more **labor-management committees** (LMCs) if IBN was successful. In other cases, the parties first try a modest cooperative program by forming one or more labor-management committees, which are basically problem-solving teams, and they may add interest-based negotiations later. In still other cases they launch the two simultaneously. Both IBN and LMCs require a high level of trust between union and management representatives, a change in organizational culture in both the employer and union organization, open communication, and a high degree of information sharing. As we shall see later, those are giant steps for both union and management to undertake.

INTEREST-BASED NEGOTIATIONS

Interest-based negotiations (IBN), already discussed in the chapter entitled “Some Negotiating Basics,” is basically the same as what is popularly called “win-win” negotiations or bargaining. It is also called “principled negotiations” because the techniques follow these principles:

- Attack the issue, not the people
- Focus on interests, not positions
- Invent options for mutual gain
- Evaluate options by agreed-upon criteria

The authors also believe that union and management negotiators should agree beforehand that any attempt at interest-based bargaining should be regarded as an experiment that either side may abandon at any time and return to the previous bargaining relationship without adverse consequences.

JOINT LABOR-MANAGEMENT COMMITTEES

LMCs are basically union-management problem solving teams. They are similar in some ways to the old QCs, but differ in the degree of union participation in the establishment and control of these teams, as well as the scope of tasks they are allowed to tackle. They either deal with one specific problem only, or they may be continuous improvement teams. It is essential that they are created and maintained with equal union participation. There are risks to making those teams merely an arm of management at the exclusion of the union. If the union does not exercise equal control of these teams, surely

the union membership is going to rebel against union leaders for going soft on management.

It is also essential that LMCs not be allowed deal with issues that are subject to collective bargaining, unless specifically authorized by the union-management contract negotiating team to do so. Otherwise, it would not only undermine the contract negotiating team, it would also create the legal risk of the union losing its right to exclusive representation and losing the protections of the National Labor Relations Act.

TRANSIT-SPECIFIC EXAMPLES OF LABOR-MANAGEMENT PARTNERSHIPS

A few years ago, former Secretary of Labor Robert Reich appointed a task force to examine labor-management collaboration in state and local governments. The task force studied in-depth nearly 50 different locations across the U.S. Some of the sites included transit operations controlled by local transit authorities. A 1996 publication of a report of this task force contains these findings about labor-management cooperation in the public sector:⁸⁹

- State and local government must transform service and the way the public workplace is managed. Traditional methods of delivery service, administration of personnel, styles of supervision communication, and approaches to collective bargaining are no longer sufficient.
- There is a need to lower the confrontational rhetoric by elected officials, managers, and union leaders and to have everybody focus on common tasks and goals.
- Focusing on service to the public with increased employee participation can reduce confrontation in collective bargaining relationships that have a history of conflict.

The potential for labor-management cooperation in public service is greater than commonly recognized, perhaps even greater than in the private sector.

Below are some transit-specific examples of successful labor-management partnerships.

City of Peoria, Illinois

Steadily rising health plan costs are familiar budget busters in both private and public sector organizations. It is a collective bargaining issue that has defied

⁸⁹ US Department of Labor, *Working Together for Public Service*, Report of the US Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation. Washington, DC: US Department of Labor, May 1996, pp. 3-4.

solution by the most imaginative and experienced negotiators. The city of Peoria, Illinois was no exception. The city's employee health plan cost for a wide variety of employee groups, including transit employees, was increasing between 9 to 14 percent every year while the city's revenues were going down. There seemed to be no end to the dilemma. Nobody cherished the idea of reducing employees' health care benefits, asking employees to accept higher deductibles, or share the increased premium cost. In 1993, with the approval of its unions, Peoria took the health care issue off the bargaining table, and formed a complex Labor-Management Committee with representatives of its eight unions, including the transit union, and eight representatives of its administration. It was a wise move. It is generally not recommended that unions and management who want to try interest-based bargaining start with such a difficult and usually hard-fought issue at the bargaining table.

The city of Peoria by-passed that issue at the negotiating table, and instead submitted it to a Joint Labor-Management Committee (JLMC) that had more flexibility and no agreement deadline to meet. The committee went to work and designed a more competitive health plan bidding procedure with the help of some outside consultants, improved the provider selection process, took a close look at what kind of health care employees really needed and wanted, and finally came up with a tailor-made health care package. That year the city's employee health plan was expected to cost about \$6 million. The joint-labor management committee came up with a plan that cost only \$4.8 million, saving the city \$1.2 million and resulting in greater employee satisfaction with the health plan than before. In previous years, the parties always deadlocked over the health plan issue at the bargaining table and had to settle the impasse in arbitration. That year, in 1994, they settled the issue without arbitration, and have not gone to arbitration since. They continue their efforts to improve and economize their health care package.⁹⁰

Metra Regional Commuter Railroad Corporation

One of the most impressive successes in maintaining long-term union-management collaboration, and the lessons to be learned from it, can be found in the example of the Metra Regional Commuter Railroad Corporation in the Chicago metropolitan area. The corporation is one of the divisions of the Regional Transportation Authority (RTA), which serves the transit need of the greater Chicago metropolitan area. The RTA was created by the State of Illinois in 1982. Its Metra division is responsible for all commuter rail service in the six-county metropolitan Chicago area. After its formation, Metra acquired several private carriers that were no longer financially solvent. Over

⁹⁰ *Working Together for Public Service* (1996), pp. 16-17

time, however, some of Metra's passenger services have been subcontracted again to private carriers, which employ approximately 2,000 workers engaged in commuter rail services. There are roughly 2,300 additional employees in the transit services directly operated by Metra itself. Metra directly negotiates with 15 different unions, and has 19 different collective bargaining agreements.⁹¹

Relatively early in its union-management history, Metra proposed the formation of a Joint Labor Management Committee (JLMC) to end the traditional, adversarial union-management relationship of its predecessors and to create a new labor-management partnership. The Metra history of union-management collaboration once again supports our firm conclusion that more often than not, interest-based bargaining and subsequent mutual problem solving efforts are born out of a need for survival by one or both of the parties. In the case of Metra, employees were grateful to have a job following the bankruptcies of their previous employers. Metra's successful history of union-management collaboration demonstrates another frequently observed success factor when an organization with a hostile relationship with its unions fails and is acquired by another organization and a new management, there is an absence of historic baggage in the relationship of the old unions and the new management. The unions, which represent the same employees as before, are more willing to take a fresh look at their collective bargaining relationship with the new management. In the case of Metra, the management of the new organization almost immediately committed itself to giving its unions and union employees a voice in its decision-making processes. It created in 1983 what is believed to be the first Labor-Management Committee in the commuter rail industry in this country.⁹²

What is interesting to note is that Metra started interest-based bargaining and the formation of a Labor-Management Committee (problem-solving team) all at about the same time. The success of both underscores our point that there is no rule of thumb as to which ought to come first, and there is no reason to believe they cannot be started at about the same time. Metra, however, was very careful to remain neutral when it came to selecting union representatives to serve on the Labor-Management Committee. It left that job to the Railway Labor Executives Association (RLEA), an association of the heads of the various railroad unions in the area. Another precaution was that the Labor-Management Committee could not deal with any issues that were subject to collective bargaining. Furthermore, the committee first started to work on

⁹¹ Mercer Management Consulting (1997), p. A4-3.

⁹² Mercer Management Consulting (1997), p. A4-4.

relatively small problems, on issues that were relatively non-controversial, like employee safety, employee assistance programs, prevention of drug and alcohol abuse, and technical skills training. Later on, Metra and its union leaders created an additional steering committee, which was placed in charge of coordinating and guiding the many individual task forces or problem solving teams that were formed. During all of this, Metra emphasized training and workforce education for all those who worked on problem solving teams or the negotiating committee. In addition, Metra and its unions hired independent outside consultants to help guide their efforts in gradually forming a permanent labor-management partnership. It is interesting to note that Metra had no particular design for its labor-management partnership. Instead it chose to let the new cooperative union-management relationship evolve naturally and gradually. Nor did Metra try to measure productivity improvements as a result of this new partnership because it did not want its unions to become defensive over these measurements. The overall effect of all this was a decentralization of decision making at Metra, a flattening of the organization chart, and a solid continued labor-management partnership for many years. Both union leaders and management at Metra believe their success has been due to the following factors:⁹³

- Careful selection of the original union representatives of the first Labor-Management Committee. All were high-ranking union officers with an excellent understanding of union objectives and decisions to be made to translate goals into action. They also knew how to interact well with senior level managers.
- Keen interest and participation of top management in the activities of the Labor-Management Committee. That interest was clearly communicated to all management personnel.
- Clear and unqualified support from the Metra Board of Directors throughout the program.
- Buy-in from all the unions at the highest level.
- Started small and moved slowly to build trust. Started with projects that had a high probability of success.
- Included a customer service perspective in all of their projects.
- Included middle management in the program. Empowered middle managers to implement agreed-upon improvements.

⁹³ Mercer Management Consulting (1997), pp. A4-6.

- Open and honest sharing of information with union representatives
- Constant communication with all the parties involved.
- Mutual respect.
- Long-term perspective.
- Quickly dealt with early warning signs of potential conflict.

In our opinion, this list should have included recognition of the contributions of the outside consultants to the success of this partnership, particularly in the early stages. Our observations lead us to conclude that training by outside consultants in the early stages of such a program to make the participants understand the process and techniques involved are absolutely crucial ingredients for success.

In addition we would like to note that the success factors at Metra closely matches those found in the studies of other organizations, as well our own information obtained in personal interviews with a large variety of labor relations practitioners in the transit industry.

The Jennings Survey

In the early 1980s, Kenneth Jennings, Jay Smith, and Earle Traynham did a landmark study of union-management cooperation in the transit industry.⁹⁴ They surveyed in depth seven different transit properties. They conducted 67 on-site interviews of transit practitioners: general managers, managers of personnel/labor relations, transportation managers, maintenance managers, assistants to these managers, line supervisors, union representatives and third-party neutrals.

Based on this survey and a review of the literature, the authors concluded that in mass transit, these conditions contribute heavily toward success or failure of union-management cooperative programs:⁹⁵

- Thorough training of participants in the program.
- Early successes are important. Therefore, it is important to take on easy problems or issues first, leave the tough ones for later on.
- At the beginning, go for tangible, visible results on clearly defined issues.
- Union leaders must be secure with their membership in participating in

⁹⁴ Kenneth M. Jennings, and others, *Labor-Management Cooperation in a Public Service Industry*. New York: Praeger, 1986.

⁹⁵ Jennings (1986), pp. 124-126.

cooperative efforts.

- Take into account demographic differences between different localities and employee groups who participate in these efforts. For example, older employees may be more willing to sacrifice income for job security.

Regarding the measurement of productivity gains from labor-management partnerships, the authors observed that there is frequently a reluctance or outright objection to using statistical measures to assess the success or failure of such programs. The authors point out that some years ago a survey of 99 labor-management situations in the private and 30 in the public sector found that precise numbers were used in only about 10 percent of the situations (25 out of 245). The authors believe that there are at least four good reasons for this reluctance to quantify productivity improvements:⁹⁶

- Success or failure of labor-management partnership efforts may be due to external factors beyond the control of the participants employees, such as scarcity of spare parts, raw material, supplies, machines and equipment. Too many variables determine the outcome of change. For example, increased output may be little more than the tendency of employees to work harder when under the spotlight of attention (Hawthorne effect). Similarly a threat of a plant closing can do wonders for productivity. Cause and effect may be difficult to establish. For example, reduced employee turnover may be due more to poor economic conditions than LMC efforts.
- Facts and figures necessary to measure improvements accurately may not be available. Employees may not be accustomed to supplying those figures at the bargaining table or in an LMC meeting.
- The quantitative results of a labor-management partnership may be interpreted by some people in a negative light. For example, a reduction of grievances may be interpreted as supervisors becoming lax in enforcing discipline.
- There is a danger of overemphasis on short-term results -- to look good on the balance sheet, when the outlook in any labor-management partnership should be long-range. There are many valuable but vaguely defined benefits of union-management cooperative efforts that cannot be accurately measured, such as improvement in quality of worklife, employee morale, customer satisfaction, etc.

⁹⁶ Jennings (1986), pp. 107-110. See also Barnum (1977), pp. 158-160, who discusses in detail the flaws in measuring *driver* productivity.

SUMMARY AND CONCLUSIONS

LESSONS LEARNED FROM HISTORY

We believe we have learned, or should have learned, some important lessons from two big strikes by the Amalgamated Transit Union against Greyhound Bus Lines. Even though Greyhound is not a “transit” company by our definition, the Greyhound strikes had a far-reaching impact on labor relations in the entire transit industry. A seven-week strike occurred in 1983, and another ensued in 1990, which ended more than three years later. Both made history; both had devastating consequences to both the union and the company. We have found that the Greyhound strikes directly contributed to the realization of some practitioners in the transit industry that strikes of this magnitude can ruin both union and transit company. As a result they have shown a greater willingness to engage in interest-based bargaining, and greater union-management cooperation in mutual problem solving.

Transit managers have learned that poor union-management relations negatively affect marketing and profits of transit organizations, whether private or public. They are lessons learned not only from the Greyhound strikes, but strikes in the airline industry as well, particularly those experienced by Eastern Airlines.

The combined experience of the Greyhound, Eastern Airline, and other major strikes, we believe, hold the following specific lessons for the transit industry:

- Destructive labor relations adversely affect a transit organization’s financial and marketing position, which can only be reversed by the parties themselves, not by government intervention.
- Management must be proactive in its dealings with union officials if it wants to reverse hostile labor relations. It cannot wait for the union to make the first move toward a more conciliatory approach.
- A striker replacement policy creates horrendous legal problems, and legal problems have a habit of dragging on and on.
- A weak and fragmented union typically offers more disadvantages than advantages for management. A weak union cannot facilitate the collective bargaining process for two reasons. First, union officers, when faced with this situation, typically spend most of their time and energies quelling political rivals and appeasing the various factions within the union. Secondly, while negotiating, management cannot be sure that union negotiators really speak for the union membership. Agreements reached

with union leaders at the bargaining table will easily unravel when a competing faction within the union convinces the membership that the proposals are not in their best interests.

POLITICAL FUNCTIONS OF STRIKES AND STRIKE THREATS

Employees in privately owned transit organizations have the same legal right to strike as other private-sector employees. Employees of publicly owned transit organizations, with few exceptions, do not have a legal right to strike, because of state legislation banning the strike for state and local government employees. In practice, they occasionally strike anyhow.

A strike, or threat of strike, plays a strong political role in the transit environment, much more so than in most other industries. We have explored the less obvious role which a strike, or threat of a strike, plays in the collective bargaining process in the transit industry.

INTEREST ARBITRATION

Interest arbitration differs from grievance or rights arbitration in that it deals with disputes over the making of a new contract. Grievance or rights arbitration, on the other hand, has to do with disputes over the interpretation, application, or alleged violation of an already existing contract. In new contract negotiations, when union and management reach an impasse, they submit the dispute to a neutral party for a final, binding decision, and call it *interest arbitration*.

Although not very common in other industries, interest arbitration is widely used in the transit industry, both in the public and private sector. We have explained the reasons for the widespread acceptance of interest arbitration in transit, and how it specifically impacts the collective bargaining process.

SUCCESS FACTORS IN LONG-TERM LABOR-MANAGEMENT PARTNERSHIPS

Threat to Survival

The authors have come to the firm conclusion that union-management cooperative efforts are most likely to succeed when both parties' survival is at stake, particularly in the early stages of their labor-management partnership. The threat to survival may be economic, or it may be political.

When the transit employer is on the verge of economic collapse, its unions are also threatened with loss of jobs for its members. In this situation, both union and management have a powerful motive for cooperating with each other to get the transit organization back on its financial feet again and to remove that common economic threat.

But the threat to survival may also be political. A publicly owned transit organization may be threatened with privatization. Managers are threatened with loss of jobs, and union leaders are threatened with the loss union recognition by the new private enterprise, or at least a less favorable bargaining position with the new enterprise. In this case, both union and management may decide to cooperate with each other in trying to influence political bodies or political appointees to abandon their thoughts of privatization. There have been examples of political threats to survival on a much more individual level, and general managers of transit organizations have come under close scrutiny and criticism by influential members of a transit board for their approach to labor relations. The result was that the general manager decided to try an interest-based bargaining approach that succeeded.

In our study we found the threat to survival to be such a pervasive motivator for transit unions and transit management to begin a new, more cooperative collective bargaining relationship, that we feel its importance as a success factor in forming the new relationship cannot be overstated.

Visionaries and Role Models at the Top

Effective long-term union-management collaboration always requires visionaries and role models at the top of their organizations. Those who have studied successful large-scale innovation in organizations have found that vision and visionary leadership at the top of the organization are more important than decision making skills.⁹⁷ In the transit industry, in our opinion, the most important visionary and role model is the general manager. In our interviews for this publication, investigators found numerous examples of interest-based bargaining or other forms of union-management collaboration failed because the general manager just did not “walk the talk.” In some cases, he or she simply delegated the task of establishing an interest-based bargaining relationship or a Joint Labor-Management Committee (JLMC) to someone else in the organization and lost credibility. Here is an example of one middle manager’s reaction when asked about the general manager’s attitude toward interest-based bargaining:

You know, Herb, general managers come and go. They all talk a big line when they first come here. Most of us just sit back and wait and see, see whether they really mean it. The one we have now doesn’t. It’s just talk. And the union knows it too. They don’t take him seriously either.

⁹⁷Claudia Bird Schoonhoven and Mariann Jelinek, “The Innovation Marathon: Living in Turbulent Times,” *Northern California Executive Review*, Vol. 4, No. 2, Fall 1990, p. 21.

The Paradox of Initiating Bottom-Up Changes from the Top Down

Few labor relations scholars and practitioners will disagree with the claim that top management must be the strong visionaries and innovators in transforming union-management relations from an adversarial to a cooperative relationship. Although easier said than done, the notion seems obvious. What seems less obvious, perhaps even paradoxical, is our claim that the very same people who created a change of thinking at the top of the organization must also initiate a change of thinking among the lower levels of the organization. Effective mutual problem solving between union and management requires problem solvers and change agents among the rank and file of the organization, the people who are closest to the jobs. Rather than imposing such changes from the top, the highest echelons of management must find ways of inspiring and empowering the lower echelons of the organization to *initiate* these changes.⁹⁸ It is the people whose jobs are closest to problems that are in the best position to find the most creative and sensible solutions. When they are successful in doing so, the visionaries at the top of the organization, both management and union, have succeeded in deliberately turning a “top-down organization” into a “bottom-up organization,” a requirement for a successful long-term labor-management partnership. It is also this kind of organization in which teamwork through employee empowerment flourishes. But we must not forget to involve the middle management levels in these efforts either. Middle managers also must be trained and encouraged to become facilitators rather than bosses. Chances are that much of the initial resistance, in overtly or disguised form, comes from the middle management levels of the organization. They often feel that their loss of personal control is too big a price to pay for the chance that a risky experiment might pay off. And unless management involves its unions as completely equal partners in these participative programs, they are bound to suffer the same fate as quality circles did some years ago.

The Role of Outside Consultants and Trainers

In our opinion, outside consultants and trainers are an indispensable ingredient for success. We believe it would be unwise to try interest-based bargaining or start joint labor-management committees without first having direct participants involved in the process receive training from an outside consultant or government mediator.⁹⁹ Those involved in either interest-based bargaining or joint labor-management committees need training in interest-based bargaining philosophy and techniques. It is usually during these initial training

⁹⁸ Anne T. Lawrence and David A. Weckler, “Turning Frogs into Princes: Transforming Other Companies into NUMMI’s Image,” *Northern California Executive Review*, Vol. 4, No. 2, Fall 1990, pp. 2-3.

sessions that skillful consultants manage to establish trust in the process and in each other. Labor-management committee members need additional training on problem solving and decision-making skills, cost-benefit analysis, and team building.

“Looping Out”

Successful interest-based bargaining requires steady trust, not only between the negotiators at the bargaining table, but also on the part of the constituencies the negotiators represent. In order to preserve the trust of their constituencies in the interest-based bargaining process, the negotiators must periodically “loop out.” They have to take time out from across-the-table negotiations, go back to their constituencies, inform them of what is going on, and renew their trust in what they, the negotiators, are doing. If they fail to do so, they run the risk of losing the support of their constituencies.

WORDS OF CAUTION

Conflict over Differences of Interests Remain

Union-management cooperation and successful interest-based bargaining does not mean an end to conflict between union and management. There will always be differences in interest to be ironed out and to be compromised. Emotions may run high when neither side wants to give up its own interests. Conflicts are inevitable. They are normal, and do not necessarily mean the end of interest-based bargaining. As Dr. Stephen Van Beek said at a conference sponsored by the Mineta Transportation Institute at San José State University:¹⁰⁰

When we talk about cooperation, I think it's always important to keep in mind that there are some differences that can be split and there are some compromises that can be made, but there's always going to be a degree of conflict between labor, management, and other organizations. Nobody is going to go to the table and give everything up in order to have cooperation. There are distinct interests and those distinct interests are going to make themselves known. It's unrealistic to expect that cooperation will mean no

⁹⁹ The Feral Mediation and Conciliation Service (FMCS) has developed excellent training programs for these purposes and has experienced facilitators on its staff to train and advise union and management organizations on these matters. More information can be obtained from any regional office of the FMCS or by contacting FMC headquarters in Washington, DC, at (202) 606-5445.

¹⁰⁰ Stephen Van Beek, *Toward a Cooperative Future?* Symposium. Norman Mineta International Institute for Surface Transportation Policy Studies, IISTPS Report 97-2, May 1997, pp. 9-10.

argument or no conflict. We are therefore not talking about ending all conflict. But what we are talking about is getting people at the same who then can, where they can. To articulate the need for transportation spending and not get into some kind of silly arguments between labor and management that weakens everybody's position before legislatures and regulators.

Conflicts over differences of interests are bound to become more intense in the latter stages of interest-based bargaining, when the parties tackle the economic issues. The parties may actually return to the "fixed pie" mentality and adversarial bargaining over how to split the financial gains which mutual problem solving efforts have brought the employer. The best case scenario is that this change in attitude and bargaining style is only temporary. The worst case scenario is that the trust is gone, and one or both sides decide to return permanently to the old adversarial style of collective bargaining.

Expect Failures

Ira Lobel is a mediator of the Federal Mediation and Conciliation Service, with a wealth of experience in helping union and management negotiating committees overcome apparently irreconcilable conflicts in interest-based negotiations. He has done his best to debunk the romantic notion that an interest-based bargaining is a panacea for all union-management problems.¹⁰¹ We basically agree, but we have also noted instances in which the parties abandoned interest-based bargaining and mutual problem solving because of unresolved differences in interests and a resurgence of distrust, only to get back to the partnership when the time seemed right again. The most spectacular example in this respect took place with the Utah Transit Authority. While the labor-management partnership there achieved some remarkable successes, there came a time when the union-management relationship deteriorated so much that the labor-management partnership was all but abandoned. On the management side, there emerged the feeling that partnering was too focused on the union, and a one-way street. They felt that the union was only interested in itself and could care less about management's problems. As one voice on the management side put it: "How can you partner with someone who's only looking out for themselves? As partnering goes up, quality goes down."

¹⁰¹ Ira B. Lobel, "Is Interest-Base Bargaining Really New?" *Dispute Resolution Journal*, Vol. 55, No 1, February 2000, pp. 8-17.

On the union side there were many people who felt that managers were obstructing the partnering efforts and would never change. This is one quote from the union's point of view: "It used to be that they at least acted like they wanted to work with us; now that kind of effort is gone. It's back to the 'I'm the boss and don't forget it.'"¹⁰²

The first contract negotiated by union and management in the interest-based bargaining environment was voted down by 70 percent of the local union membership. The local union leadership came close to being voted out of office. An important lesson the management side learned from this was that it had not adequately considered the perceptions and expectations of the union leaders' constituency. It worked more closely with the union on communicating the second contract package that was negotiated in interest-based bargaining, and it was accepted by the union membership.

Times of increased conflict and periodic breakdowns in the relationship do not mean that a long-term labor-management partnership is not possible. Ups and downs are normal, even though they may be difficult to take. One transit labor relations director said, "I wonder why sometimes interest-based bargaining looks and feels so great, and at other times it's utter frustration."

Measuring Productivity Improvements

Trying to assess the success or failure of labor-management partnerships by using statistical measures of increases or decreases of employee productivity is a risky business. There are often too many factors beyond the control of the participants in the transit system that cause productivity to rise or fall. For example, in trying to measure the productivity of vehicle maintenance employees, such external factors as scarcity of spare parts or raw materials and availability of modern machines and equipment may distort the figures. For drivers, such measures as number of passengers moved or passenger miles driven per employee suffer from the fact that they are more influenced by the riders than the drivers, by peak and off-peak ridership, by traffic congestion, and other factors. There is a justified mistrust of the numbers by the unions representing these employees in the organization, and that mistrust may negatively affect other aspects of the trust between unions and management that is so badly needed in a successful labor-management partnership.

There are also socio-psychological factors justifying that mistrust of the numbers. For example, increased output may be little more than the tendency

¹⁰² From an interview with Jerry Benson, Human Resource Director, Utah Transit Authority, March 27, 2000, and a presentation by Jerry Benson, Lorin Simpson, and Kim Ulibarri at the National Transit Institute Transit Trainers' Workshop, Portland, Oregon, March 27, 2000.

of employees working harder when under the spotlight of attention (“Hawthorne Effect”). The state of the economy may be a factor also. A threat of elimination of certain transit services for economic reasons can increase productivity. Reduced employee turnover may be due more to poor economic conditions than union-management partnership efforts. In using productivity measures, there is also a danger of overemphasis on short-term results in order to look good on the balance sheet, when the outlook in any labor-management partnership ought to be very long-range.

There are many valuable but vaguely defined benefits of union-management cooperative efforts that cannot be accurately measured, such as improvement of quality of worklife, employee morale, customer satisfaction, employee loyalty, employee sense of ownership of their jobs, and many others. It is no wonder that labor unions are often defensive about productivity measurements being used to assess the success or failure of union-management cooperative efforts, particularly in the early phases of their new relationship. Their cooperation may be at risk.

Expecting Too Much Too Soon

A labor-management partnership that lasts requires profound changes in organizational culture in both the management and union organization. Such change comes slowly. It requires a patience that the practitioners or their constituencies often do not have. As a result, the confidence in the process and the trust in each other are not given a chance to evolve slowly and naturally. Trying to address the big issues and the big problems early in the relationship usually means trouble. With few exceptions, those who report success in their labor-management partnership also report that they started small. They started with the easy, less controversial issues in interest-based contract negotiations and with the easier problems in joint labor management committee meetings, and left the tougher ones for a later day. They allowed success to breed success.

The Spirit is More Important than the Procedures

It is our observation that many a good start toward interest-based bargaining, joint labor-management committees, and programs of positive discipline in the transit industry has been ruined by a preoccupation with written rules and procedures. Bureaucratic procedures often ruin a good thing by drawing up rules and regulations that are created to make a good thing better, by trying to make sure that a few isolated individuals don’t take advantage of a good thing. So pages and pages of bureaucratic procedures are created that are completely opposite of the spirit of goodwill that interest-based bargaining embraces.

The reader may recall the opposite example of the Metra Regional Commuter

Railroad Company (Metra), mentioned previously. Metra had no particular design or written procedures for its labor-management partnership. Instead, Metra let the new cooperative union-management relationship “evolve” naturally and gradually, becoming an eminently successful relationship. The spirit of trust and openness in union-management cooperative efforts are more important than the procedures.

GRIEVANCE DISPUTES

What affect does a long-term labor-management partnership have on grievance disputes? In our opinion, the evidence is inconclusive, even though interviewees and conference speakers often claim that interest-based bargaining and joint labor-management committees have dramatically reduced the number of grievances filed in their transit organizations. Our opinion is supported by a landmark study in the early 1980s of seven selected transit properties with experience in long-term labor-management partnerships.¹⁰³ In this study, Kenneth Jennings and his research colleagues point out that the reduction of the number of grievances may be due to many factors that have nothing to do with the success of a labor-management partnership. For example, in the new organizational culture of a labor-management partnership, there may be strong pressures on supervisors to be more lenient in disciplining employees than before. Our own interviews suggest that two gradual changes in the handling of grievances tend to take place in the evolution of a long-term labor-management partnership. First, in the long-term-labor-management partnership there tends to be a natural drift toward a “discipline without punishment” approach, which would drastically reduce or even eliminate grievances filed by employees.¹⁰⁴ Secondly, we found that in many cases, joint-labor management committees, in their problem-solving efforts, address employee concerns before they become formal grievances.

OTHER SUMMARY POINTS

Additional summary points can be found in Appendix A through C. In Appendix A, there are checklist type of reminders and recommendations for those readers who plan to become involved in interest-based bargaining. In Appendix B there is a summary of hints for those who plan to be involved with joint labor-management problem solving committees. Appendix C contains a summary of government regulation of drug and alcohol testing in the transit industry.

¹⁰³ Jennings (1986), p. 109.

¹⁰⁴ In the "Discipline Without Punishment Approach," often called "Positive Discipline," emphasis on counseling and an employee's voluntary commitment to help solve the performance or behavior problem. In the first step of this discipline procedure, there usually is only casual and completely non-threatening counseling by the immediate supervisor. The supervisor seeks to explore the reasons for the employee's problem, make him or her realize that rules and standards are merely "business necessities," and nothing personal. Without threat, the supervisor seeks voluntary commitment from the employee to help correct the problem. No official record of the first step of this procedure is placed in the employee's personnel file. If the employee's unacceptable performance or behavior continues, in the second step of this disciplinary procedure, more serious counseling takes place and the employee is given a written reminder to the employee that he/she promised to correct the problem. In the counseling session of this step, without threat of discipline, A specific action plan agreed upon, to be regarded as a "psychological contract." A written summary of the agreed upon action plan is placed in the employee's official personnel file. If the employee's problem still continues, in the third step, the employee is placed on a one-day paid "decision making leave" (DML) to "think it over" -- whether he/she wants to keep the job or resign. If the employee, upon return for the leave, decides to stay, In the fourth step specific goals, specific actions, specific timetables are agreed upon and put in writing. The employee agrees in writing that discharge is automatic if the problem continues or occurs again. There is a 22-minute video available which demonstrates this process: It is called "Discipline Without Punishment," and is published by CRM Films, telephone 800-421-0833.

GLOSSARY OF ABBREVIATIONS, ACRONYMS AND TERMS

Term	Definition
13(c)	Section 13(c), the labor protection provisions of the Urban Mass Transit Act of 1964, as amended
AAA	American Arbitration Association
AC Transit	Alameda-Contra Costa Counties Transit, California
ADR	Alternative Dispute Resolution (Alternative to resolution by the courts, such as mediation and arbitration)
AFL-CIO	American Federation of Labor – Congress of Industrial Organizations
AFSCME	American Federation of State, County and Municipal Employees, AFL-CIO
APTA	American Public Transportation Association (formerly American Public Transit Association)
ATU	Amalgamated Transit Union, AFL-CIO
BART	Bay Area Rapid Transit System (San Francisco Bay Area)
BNA	Bureau of National Affairs, Inc. (Publisher of labor relations reference work)
Caltrans	California Department of Transportation
CPUC	California Public Utility Commission
CTC	California Transportation Commission
CTP	California Transportation Plan
CWA	Communications Workers of America, AFL-CIO
DOL	U.S. Department of Labor

Term	Definition
DOT	U.S. Department of Transportation
FHWA	Federal Highway Administration
FMC	Federal Mediation and Conciliation Service
FTA	Federal Transit Administration. May also stand for Federal Transit Act of 1991, as amended
IAM & AW	International Association of Machinists and Aerospace Workers, AFL-CIO
IBB	Interest-Based Bargaining (same as IBN)
IBEW	International Brotherhood of Electrical Workers, AFL-CIO
IBN	Interest-Based Negotiations (same as IBB)
IBT	International Brotherhood of Teamsters, AFL-CIO
IBU	Ferryboatmen's Union
IISTPS	International Institute for Surface Transportation Policy Studies (now called the Mineta Transportation Institute)
ILWU	International Longshore and Warehouse Union, AFL-CIO
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
IUE	International Union of Electronic, Electrical Workers, AFL-CIO
JLMC	Joint Labor-Management Committee (same as LMC)
LMC	Labor-Management Committee (same as JLMC)
LMPC	Labor-Management Partnership Committee (same as LMC or JLMC)
LMRA	Labor Management Relations Act of 1947 (also called Taft-Hartley Act)

Term	Definition
Med-Arb	Mediation-Arbitration (If mediation fails, it must be followed by final and binding arbitration by a third-party neutral)
NCEC	Non-Contract Employee Committee (a union of professional, administrative employees in the Sacramento Regional Transit Authority)
NIRA	National Industrial Recovery Act of 1933 (declared unconstitutional, replaced by the NLRA)
NLRA	National Labor Relations Act of 1935, as amended
NLRB	National Labor Relations Board
NTI	National Transit Institute
RTA	Regional Transit Authority
SEIU	Service Employees International Union, AFL-CIO
SIU	Seafarers' International Union
TCRP	Transit Cooperative Research Program (of the Transportation Research Board)
TCU	Transportation Communications International Union, AFL-CIO
TRB	Transportation Research Board
TWU	Transportation Workers Union, AFL-CIO
UMTA	Urban Mass Transit Act of 1964, as amended. Redesignated as the Federal Transit Act in 1991. (Note: "UMTA" can also stand for the former "Urban Mass Transit Administration")
UTU	United Transportation Workers Union, AFL-CIO
VTA	Valley Transportation Authority of Santa Clara Valley, California

ENDNOTES

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13. *A History of the Amalgamated Transit Union*. Washington, DC: Amalgamated Transit Union, 1992, pp. 146-147.
14. Peters (1996), p. 6.
15. *A History of the Amalgamated Transit Union*, (1992), pp. 147-148.
16. *A History of the Amalgamated Transit Union*, pp. 148-149. See also Janice Castro, "Labor Draws An Empty Gun," *TIME*, March 26, 1990, pp. 56-59.
17. "Business Briefs," *Wall Street Journal*, May 10, 1993, p. B3.
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19. Michael H.Cimini, Susan L. Behrmann, and Eric M. Johnson, "Labor-Management Bargaining in 1992," *Monthly Labor Review*, January 1993, pp. 19, 29-30.
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24. Institute for Urban Transportation at Indiana University, *Mass Transit Management: A Handbook for Small Cities*, 3rd edition revised February 1988, Part 1: Goals, Support, and Finance. Washington, DC: Urban Mass Transportation Agency, U.S. Department of Transportation, 1988, p. 59.
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26. Thomas E. Lisco," The Problems of Transit Systems," in Diana Reische (ed), *Problems of Mass Transportation*, New York: H. W. Wilson Co., 1970, pp.47-57.

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27. American Public Transit Association (1999), pp. 20-24.
 28. Institute for Urban Transportation at Indiana University, 1988, Part 3: Operations, p. 198-199.
 29. Kenneth M. Chomitz, *Fiscal and Organizational Impact of Part-Time Labor in Public Transit*, Washington, DC: Urban Mass Transit Administration and U.S. Department of Commerce, 1985, p. xi.
 30. *Agreement Between San Diego AFL-CIO Bus Drivers Local 1309 of the Amalgamated Transit Union and San Diego Transit*, Section 21.
 31. Chomitz (1985), p. xv.
 32. E-mail communication with Frank Shipman, Vice President of Human Resources & Employee Relations, San Diego Transit Corporation, February 24, 2000.
 33. For a rigorous discussion of the various forms of outsourcing in the transit industry see Darold T. Barnum, "Institutional Requirements for Competition: Labor Issues." *Transit Administration and Planning Research*. Transportation Research Record 1209. Washington, DC: Transportation Research Board, National Research Council, 1989, pp.40-48.
 34. U.S. Department of Labor, *Working Together for Public Service*, Report of the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation. Washington, DC: U.S. Department of Labor, May 1996, pp.47-49. (Note: In their discussion on privatization, the authors do not always distinguish between "privatization" of the entire transit facility and "subcontracting" only a few jobs or services within the facility).
 35. Barnum (1983), p. 14.
 36. Source: Internet web pages of the respective unions, accessed between June and November 1999. Also, C.D. Gifford, editor, *Directory of U.S. Labor Organizations*, 1999 edition. Washington, DC: Bureau of National Affairs, 1999. Also, Darold T Barnum (1983), chapter 2.
 37. One such exception is California, where the state's enabling legislation that created transit districts and transit authorities specifically allows the strike. Note, however, that the Amalgamated Transit Union is philosophically opposed to the strike, and favors contractually required interest arbitration in case of an impasses in contract negotiations.

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39. Arthur A. Sloane and Fred Witney, *Labor Relations*, 9th ed. Upper Saddle River, N. J.: Prentice Hall, 1997, pp. 133-135.
40. William H. Holley, Jr., and Kenneth M. Jennings, *The Labor Relations Process*, 6th edition. New York: The Dryden Press, 1997, p. 277-282.
41. "Clinton Order Discouraging Striker Replacement Is Voided," *New York Times*, February 3, 1996, Section 1, p. 9.
42. Barnum (1983), p. 92.
43. For a more extensive discussion of the political functions of the strike or threat of strike in the transit industry, see Barnum (1983), pp. 92-95.
44. Telephone interview with a staff member of the American Public Transit Association, January 14, 2000.
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48. Readers who are interested in these programs may contact: National Transit Institute Rutgers University, 120 Albany Street, Suite 705, New Brunswick, NJ 08901-2163, Tel 732-932-1700, Fax 732-932-1707.
49. Darold T. Barnum (1983), p. 9.
50. Bob Blymer, "Transit in California: A Chronological History," *Transit California*, November 1996, pp. 18-26.
51. Gordon F. Fielding, *Managing Public Transit Strategically*, San Francisco: Jossey-Bass Publishers, 1987. Also, Charles A. Lave, "Is Part-time Transit a Cure for Transit Deficits?" *Traffic Quarterly*, Vol. 34 (1980), pp. 61-62.

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52. For the originators of this model, which contrasts *distributive* and *integrative* bargaining, see Richard E. Walton and Robert McKersie, *A Behavioral Theory of Labor Negotiations*. New York: McGraw-Hill, 1965.
 53. This approach is often called *win-win* negotiations. Professional trainers generally avoid that term because they want to keep the concept of “winning” out of that process, and more toward “problem solving.”
 54. Harry C. Katz and Thomas A. Kochan, *An Introduction to Collective Bargaining and Industrial Relations*, 2nd ed. Boston: Irwin-McGraw-Hill, 2000, pp. 191-192.
 55. John Calhoun Wells, *Conflictive Partnership: A Strategy for Real-World Labor-Management Cooperation*. Presentation at the Tenth National Labor-Management Conference, Chicago, Illinois, April 26, 2000. The paper also appeared in the *1996 IRRA Spring Meeting Proceedings*, as well as in the August 1996 issue of the *Labor Law Journal*.
 56. Railroads and Airlines are covered by a different law
 57. Contrary to popular misconception, the NLRB generally does not get involved in contract administration, such as grievance handling and grievance arbitration. Disputes over the application or interpretation of the collective bargaining agreement between the parties are usually handled through private arbitration procedures. Federal or state government agencies may aid the parties in finding qualified private arbitrators but generally do not do arbitration themselves.
 58. The *union shop* means that a clause in the collective bargaining contract has been negotiated between management and the union which requires employees in the bargaining unit to join the union within a certain number of days after hire, usually 30 days.
 59. Richard C. Kearney, *Labor Relations in the Public Sector*, 3rd edition. New York: Marcel Decker, Inc., 2001, chapter 3.
 60. The original City Commission in Memphis was much different from what it became later. The original commission had direct budget control over the Memphis Street Railway Company and thereby great control over its labor relations. All that changed in 1960 when the commission turned these controls over to the Memphis Transit Authority and its governing board.

61. Under the previous private ownership system, the revenues of the Memphis Street Railway Company were subject to 52 percent federal income tax alone, in addition to state and local taxes.
62. James L. Stern, Richard U. Miller, Stephen A. Rubinfeld, Craig A. Olson, and Brian P. Heshizer, "Urban Mass Transit Labor Relations: The Legal Environment," *Industrial Relations Law Journal* (now *Berkeley Journal of Employment and Labor Law*), Vol. 2, No. 3 (Fall 1977), pp. 389-420. For a more detailed report by the same authors, see "The Legal Framework for Collective Bargaining in the Urban Mass Transit Industry," Report No. 76 Urban Mass Transportation Administration, University of Wisconsin, Industrial Relations Research Institute, November 1976.
63. 1943 Tennessee Private Acts, Ch. 26, as amended in 1961 by Ch. 319.
64. James L. Stern (1977), p. 399.
65. James L. Stern (1977), pp. 401-402.
66. James L. Stern (1977), p. 394.
67. State of California Public Utilities Code, Section 10300.
68. State of California Public Utilities Code, Section 10350.
69. Mathew M. Bodah, "Twenty-Five Years of Collective Bargaining under the Urban Mass Transit Act of 1964," *Labor Studies Journal*, Vol. 15, No. 3 (Fall 1990), p. 45.
70. Interest arbitration differs from grievance or rights arbitration in that it deals with disputes over the making of a new contract. Grievance or rights arbitration, on the other hand, has to do with disputes over the interpretation, application, or alleged violation of an already existing contract. In any form of arbitration, when union and management reach an impasse, they submit the dispute to a neutral party for a final and binding decision.
71. A more comprehensive guide to the labor protection provisions in this act than we have provided here can be found in the following Transportation Research Board publication: G. Kent Woodman, Jane Sutter Starke, and Leslie D. Schwartz, *Transit Labor Protection-A Guide to Section 13(c) Federal Transit Act*. Washington, DC: Transportation Research Board, Legal Research Digest No. 4, June 1995.

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72. Michael I. Luger and Harvey A. Goldstein, "Federal Labor Protections and the Privatization of Public Transit," *Journal of Policy Analysis and Management*, Vol. 8, No. 2, Spring 1989, pp. 229-250.
 73. "Feds to Abandon Privatization," *TWU Express*, December 31, 1993, p. 3.
 74. Richard C. Kearney (2001), chapter 3.
 75. Roger G. Brown and Terrel L. Rhodes, "Public Employee Bargaining Under Prohibitive Legislation: Some Unanticipated Consequences," *Journal of Collective Negotiations in the Public Sector*, Vol. 20, No. 1 (1991), pp.23-30.
 76. Ed Wytkind, in *Toward a Cooperative Future?* Symposium, Norman Mineta International Institute for Surface Transportation Policy Studies, IISTPS Report 97-2, May 1997, p.68.
 77. U.S. Department of Transportation Web Index, National Transportation Library, "Drug and Alcohol Testing: An Overview," http://www.fhwa.dot.gov/omc/drug_alc/html, June 1996.
 78. Roger Fisher and William Ury, *Getting to Yes*, 2nd ed., Penguin Books, 1991. A sequel to this excellent book is the equally readable paperback by William Ury, *Getting Past No*, rev. ed., Bantam Books, 1993. See also Harry C. Katz and Thomas A. Cochan, *An Introduction to Collective Bargaining & Industrial Relations*, 2nd ed., Boston: Irwin-McGraw-Hill, 2000, p. 191-193.
 79. In "interest-based" bargaining, a more recently advocated approach that is strongly supported by the U.S. Department of Labor, bluffing and posturing is to be avoided. Instead, the parties emphasize mutual trust and mutual problem solving.
 80. Roger Fisher and Scott Brown, *Getting Together: Building Relationships As We Negotiate*, Penguin Books, 1988. Another book containing many helpful suggestions on how to negotiate with difficult people is the very readable paperback by William Ury, *Getting Past No*, rev. ed., Bantam Books, 1993.
 81. Perhaps the best book on this subject is the paperback by Thomas R. Colosi, *On and Off the Record: Colosi on Negotiation*, American Arbitration Association, Kendall/Hunt Publishing Company, 1993.
 82. If you don't like the word "power," call it "leverage" or "influence."

83. For the source of the discussion which follows, see: Herbert Oestreich, "Compulsory Interest Arbitration for Police and Firefighters." *California Labor and Employment Law Quarterly*, Vol. 3, No. 2, Spring 1984, pp. 11-13.
84. Barnum (1977), pp. 50-54.
85. Barnum (1977), p. 98
86. Roger Fisher and William Ury, *Getting to Yes*, 2nd ed., Penguin Books, 1991.
87. Herbert H. Oestreich, "Union-Management Cooperation," unpublished term paper, Kent State University, June 3, 1953. The author's position that union-management cooperative programs are nothing new has been confirmed by a series of articles published in the early 1990's by Kathleen B. Sterbenz. See her consecutive article series "The Historical Roots of Participative Management," Parts I through IV, in *Update* (published by the Northeast Ohio Center for Labor/Management Cooperation), consecutive issues of Spring 1991 through Spring 1992.
88. Katz and Kochan (2000), pp. 299-303.
89. U.S. Department of Labor, *Working Together for Public Service*, Report of the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation. Washington, DC: U.S. Department of Labor, May 1996, pp. 3-4.
90. *Working Together for Public Service* (1996), pp. 16-17.
91. Mercer Management Consulting (1997), p. A4-3.
92. Mercer Management Consulting (1997), p. A4-4.
93. Mercer Management Consulting (1997), pp. A4-6
94. Kenneth M. Jennings and others, *Labor-Management Cooperation in a Public Service Industry*. New York: Praeger, 1986.
95. Jennings (1986), pp. 124-126.
96. Jennings (1986), pp. 107-110. See also Barnum (1977), pp. 158-160, who discusses in detail the flaws in measuring driver productivity.
97. Claudia Bird Schoonhoven and Mariann Jelinek, "The Innovation Marathon: Living in Turbulent Times," *Northern California Executive Review*, Vol. 4, No. 2, Fall 1990, p. 21.

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98. Anne T. Lawrence and David A. Weckler, "Turning Frogs into Princes: Transforming Other Companies into NUMMI's Image," *Northern California Executive Review*, Vol. 4, No. 2, Fall 1990, pp. 2-3.
 99. The Federal Mediation and Conciliation Service (FMCS) has developed excellent training programs for these purposes and has experienced facilitators on its staff to train and advise union and management organizations on these matters. More information can be obtained from any regional office of the FMCS or by contacting FMC headquarters in Washington, D.C., at (202) 606-5445.
 100. Stephen Van Beek, *Toward a Cooperative Future?* Symposium. Norman Mineta International Institute for Surface Transportation Policy Studies, IISTPS Report 97-2, May 1997, pp. 9-10.
 101. Ira B. Lobel, "Is Interest-Base Bargaining Really New?" *Dispute Resolution Journal*, Vol. 55, No 1, February 2000, pp. 8-17.
 102. From an interview with Jerry Benson, Human Resource Director, Utah Transit Authority, March 27, 2000, and a presentation by Jerry Benson, Lorin Simpson, and Kim Ulibarri at the National Transit Institute Transit Trainers' Workshop, Portland, Oregon, March 27, 2000.
 103. Jennings (1986), p. 109.
 104. 104. In the "Discipline Without Punishment Approach," often called "Positive Discipline," emphasis is on counseling and an employee's voluntary commitment to help solve the performance or behavior problem. In the first step of this discipline procedure, there usually is only casual and completely non-threatening counseling by the immediate supervisor. The supervisor seeks to explore the reasons for the employee's problem, make him or her realize that rules and standards are merely "business," Jennings (1986), pp. 107-110. See also Barnum (1977), pp. 158-160, who discusses in detail the flaws in measuring driver productivity "necessities," and "nothing personal." Without threat, the supervisor seeks voluntary commitment from the employee to help correct the problem. No official record of the first step of this procedure is placed in the employee's personnel file. If the employee's unacceptable performance or behavior continues, in the second step of this disciplinary procedure, more serious counseling takes place and the employee is given a written reminder to the employee that he/she promised to correct the problem. In the counseling session of this step, without threat of discipline, a specific action plan agreed upon, to be regarded as a "psychological contract."

A written summary of the agreed upon action plan is placed in the employee's official personnel file. If the employee's problem still continues, in the third step the employee is placed on a one-day paid "decision making leave" (DML) to "think it over" as to whether he/she wants to keep the job or resign. If the employee, upon return from leave, decides to stay, specific goals, specific actions, specific timetables are agreed upon and put in writing. The employee agrees in writing that discharge is automatic if the problem continues or occurs again. There is a 22-minute video available which demonstrates this process called *Discipline Without Punishment*, and is published by CRM Films, telephone 800-421-0833.

105. Ed Wytkind, in *Toward a Cooperative Future?* Symposium. Norman Mineta International Institute for Surface Transportation Policy Studies, IISTPS Report 97-2, May 1997, p.68.
106. Department of Transportation Web Index, National Transportation Library, "Drug and Alcohol Testing: An Overview," http://www.fhwa.dot.gov/omc/drug_alc/html, June 1996.
107. American Arbitration Association, *Labor Arbitration in Government*, Vol. 29, No. 7, July 1999, Case #5547.

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APPENDIX A

INTEREST-BASED BARGAINING GUIDELINES

(Note: Many of the items mentioned in Appendix A also apply to the guide for LMCs in Appendix B)

OTHER NAMES FOR INTEREST-BASED BARGAINING

- Interest-based Negotiations
- Win-win Negotiations (or bargaining)
- Principled Negotiations
- Integrated Bargaining
- Mutual Gains Bargaining
- Collaborative Bargaining

WHAT IS IT?

- It is a relationship, more than a technique
- It is a relationship built on mutual trust
- It focuses on mutual problem solving, rather than “winning”
- A negotiating technique that requires firm commitment to four principles.
- It is the opposite of adversarial or positional bargaining

THE FOUR PRINCIPLES

1. Attack the issue, not the people
2. Focus on interests, not positions
3. Invent options for mutual gain
4. Evaluate options by agreed-upon criteria

ASSUMPTIONS

- The parties value a long-term relationship more than short-term gains.
- The parties can learn to trust each other.
- The parties are willing and able to help each other in solving problems and satisfy each other’s needs and interests.
- Principles and standards can replace power in the bargaining process.

STEPS TO FOLLOW

- To sell interest-based bargaining to the other side and your own constituency, union and management agree that either side may pull out of the experiment without adverse consequences during the first three to five negotiating sessions and return to the previous relationship.
- Communicate to your own constituencies your intentions to engage in interest-based labor negotiations. Point out that this is only an experiment - - that either party may pull out of the program without adverse consequences if it does not work out.
- Gain support from all levels in your organization. During negotiations, take time out periodically to communicate with your constituency to keep them informed and maintain their trust in what you are doing.
- Both union and management carefully select representatives to serve on its negotiating team.
- Jointly train members of the union and management negotiating teams in the philosophy and techniques of interest-based bargaining, preferably by an outside consultant.
- Prepare for negotiations. Really do your homework.
- If possible, let the consultant who trained the negotiating teams facilitate the first two or three negotiating sessions.
- Both union and management negotiating teams prepare an opening statement for the first negotiating session.
- At the first negotiating session discuss and agree on ground rules to follow during sessions. One such ground rule should be the “Rule of One,” meaning only one person is allowed to talk at any one time. Side conversations and interruptions of the person who has the floor are not allowed.
- Identify the issues that each side is concerned with.
- Reach agreement on the sequence of issues to be discussed.
- For each issue, openly discuss each side’s interests (real issues) behind the issue.
- For each issue, develop options for mutual gain (preferably through brainstorming techniques).
- For each issue, develop standards or criteria for evaluating the options that have been generated.

- Evaluate the options, sticking closely to the standards or criteria agreed upon.
- Reach agreement.
- Write up the agreement.

DO'S AND DON'TS

DO'S

- Make sure you have the full support and participation of the top leadership of both the union and management organization before you consider interest-based bargaining.
- Use an outside consultant to get started.
- Make sure the union and management negotiating teams are properly trained before you venture into interest-based bargaining.
- Start interest-based negotiations with the easy issues first and leave the tough ones until later. Success in reaching agreement on the easy issues builds confidence in the process and trust in each other.
- Just in case, have a “walk-away” alternative on the issues that are a matter of survival.
- Listen -- really listen.
- Manage your perceptions. Don't jump to conclusions.
- Remain unconditionally constructive, no matter what.
- Remember that you have to be trustworthy before you can expect to be trusted.
- Commit yourself to the process of interest-based bargaining. You will need that commitment when the going gets rough.
- Do realize that people's real interests in an issue are not always obvious, not even to themselves. You may have to ask “why?” several times.
- Search for overlapping interests which both union and management share.
- Do expect serious differences of interest and serious controversy on the tougher issues.
- Do expect failures, but they need not ruin the relationship.
- Treat everybody at the bargaining table as an equal.
- Realize that the negotiators at the bargaining table negotiate on behalf of constituencies, usually multiple constituencies. You must help the other

negotiators in their efforts to keep their own constituencies satisfied.

- Remember that consensus means that you feel you can live with a given option. It need not be your favorite one.
- Walk the Talk. People judge you more by your actions than your words.
- Recognize that it is in management's own interest to help strengthen union security. Recognize that there are always competing factions within the union that may try to undermine the union leadership's efforts to cooperate with management. Remember, union leaders are elected, not appointed.
- If necessary, form subcommittees to study issues that take a long time to resolve or require special expertise. Have the subcommittee report back to the main negotiating committee with its findings and recommendations. Make sure the subcommittee is staffed with an equal number of union and management representatives.
- When the other side behaves objectionably, take time out to negotiate or re-negotiate the ground rules.
- Maintain accurate minutes on subject matters discussed at the previous meeting -- those that have been completed or resolved, as well as those still open. Remember that the average person forgets within 48 hours about 75 percent of what he or she has heard.
- Prepare and distribute an agenda before each meeting, so that the parties can prepare themselves and do their homework.
- Seek the help of a federal, state, or private mediator when it looks like you are going to reach an impasse during negotiations.

Don'ts

- Don't expect too much too soon. Organizational cultures change slowly.
- Don't expect to be trusted unless you are trustworthy yourself.
- Don't have union representatives sit at one side of the table with management people at the opposite side. Use mixed seating arrangements. Use round tables, if possible.
- When you feel personally attacked, don't counter-attack. It only escalates the conflict, detracts from the issue, and does not solve problems. Remain unconditionally constructive at all times.
- Don't try interest-based bargaining until everybody involved has been trained in the process.
- Don't tackle the tough issues first. Start with the easy ones.

- Don't use power plays or intimidation to get what you want.
- Don't undermine union security.
- Don't allow meetings to become gripe sessions.

RULES FOR BRAINSTORMING

- In the first step, the goal is quantity, not quality, of ideas. The more ideas the better.
- In the first step, any kind of evaluation or criticism of any idea or option is strictly forbidden. Respect all ideas, no matter what.
- Use a free-wheeling imagination. Don't get boxed in by conformity or fear of disapproval. Pretend for the moment there are no limits on cost, time, personnel, equipment, materials or other resources. (That comes later).
- Avoid "killer phrases," like, "That's ridiculous," "We already tried that," or "Whoever heard of that?"
- Listen, really listen, to the ideas others come up with. Build on them (piggyback) and come up with a fresh idea of your own; perhaps combine ideas.
- Record each idea, preferably on a flip chart. It helps people piggyback and affords equal recognition for everyone's idea.
- Encourage participation by everybody in the room.
- When everybody has been working hard and no more new ideas are being generated, agree on standards or criteria by which the ideas on the flip chart are to be evaluated. Keep in mind the issue or problem to be solved.
- Next, quickly eliminate (strike out) those ideas that do not meet the agreed-upon criteria for evaluation.
- Write down on a separate sheet of flip chart paper those ideas that survived.
- Have participants agree on a rank order of the remaining ideas in terms of how well each meets the evaluation criteria.
- Reach consensus as to which idea best satisfies all of the evaluation criteria.
- Consensus means you feel you can "live with" a certain decision. It doesn't have to be your ideal.
- Vote only as a last resort.

POST-NEGOTIATION RITUALS

- Shake hands with everybody in the room.
- Congratulate each other for having reached an agreement peacefully.
- Remember -- in interest-based bargaining we do not celebrate victories -- but rather success in mutual problem solving.
- Emphasize that the other side bargained tough but fair. No negotiator likes the image of as a pushover.
- Make only joint statements to the press about the success of the negotiations.
- Make sure every member of the union and management negotiation team gets his or her signature on the printed collective bargaining agreement.
- Make sure that the members of the negotiating team are the first to get a copy of the printed collective bargaining agreement.
- The top leadership of the union and management organization should publicly recognize the achievements of the negotiating committee.
- Remember that all of these rituals set the stage for the next contract negotiation.

APPENDIX B

LABOR-MANAGEMENT COMMITTEE GUIDELINES

(Note: Many of the items mentioned in Appendix A also apply to the guide for LMCs in this Appendix)

OTHER NAMES FOR LABOR-MANAGEMENT COMMITTEE

- Join-Labor-Management Committee (JLMC)
- Labor-Management Partnership Committee (LMPC)
- Labor-Management Problem-solving Team
- Quality Circle (if it includes union representatives)
- Total Quality Management or TQM (if it includes union representatives)

WHAT IS IT?

- A team of employees, selected by both union and management, who are empowered to study and solve organizational problems.
- The degree of employee empowerment varies from organization to organization and from team to team, all the way from being closely directed to completely self-directed problem solving teams.
- All of the principles of team building, teamwork, employee participation and employee empowerment apply to LMCs.
- LMCs usually exist separately from collective bargaining teams, but may tackle problems referred to them by the union-management negotiating team.
- LMCs may be formed before, after, or concurrently with interest based bargaining.

ASSUMPTIONS

- Employees at all levels of the organization, if properly trained and empowered, are capable of solving problems in a way that benefits both the organization and other employees.
- Employees who are closest to the job are best qualified to solve job-related problems.
- If the union is afforded full participation and equal control of LMCs, it can and will become a process of effective mutual problem solving.
- The whole is greater than the sum of its parts. A successful system of

Labor-Management Committees renders far greater outcomes than finding solutions to a finite number of problems. It changes the whole organizational culture for the better, in both employer and union organization.

GETTING STARTED

- Make sure you have the support of all levels of the union and management organization.
- Both union and management each carefully select representatives to serve on the LMC(s).
- Jointly train union and management members on the LMC in the philosophy of LMC, communication, team building, and problem solving skills, plus any technical skills they may need. Do so before they actually work as a problem solving team.
- The size of an LMC differs from organization to organization, depending on the size and structure of the organization. It is essential, however, that there be an equal number of union and management representatives on each team.
- At the first LMC meeting, discuss and agree on ground rules to be observed in each meeting. One such ground rule should be the “Rule of One,” meaning only one person is allowed to talk at any one time. Side conversations and interruptions of the person who has the floor are not allowed.
- Clarify at the first meeting what the mission and objectives of this particular LMC are.
- Reach agreement on the sequence of issues or problems to be discussed.

RULES FOR BRAINSTORMING

- In the initial stages of brainstorming, the goal is quantity not quality, of ideas. The more ideas the better.
- In the first step, any kind of evaluation or criticism of any idea or option is strictly forbidden. Respect all ideas, no matter what.
- Use a free-wheeling imagination. Don’t get boxed in by conformity or fear of disapproval. Pretend for the moment that there are no limits on cost, time, personnel, equipment, materials or other resources. (That comes later.)
- Avoid “killer phrases” like, “That’s ridiculous,” “We already tried that,” or

“Whoever heard of that?”

- Listen, really listen, to the ideas that others come up with. Build on them (piggyback) and come up with a fresh idea of your own. Perhaps combine ideas.
- Record each idea, preferably on a flip chart. It helps people piggyback and affords equal recognition for each individual idea.
- Encourage participation by everybody in the room.
- When everybody has been heard and no more new ideas are being generated, agree on standards or criteria by which the ideas on the flip chart are to be evaluated. Keep in mind the issue or problem to be solved.
- Next, quickly eliminate (strike out) those ideas that do not meet the agreed-upon criteria for evaluation.
- Write down on a separate sheet of flip chart paper those ideas that survived.
- Have participants agree on a rank order of the remaining ideas in terms of how well each meets the evaluation criteria.
- Reach consensus as to which idea best satisfies all of the evaluation criteria.
- Consensus means you feel you can live with a certain decision. It doesn't have to be your ideal.
- Vote only as a last resort.

DOS AND DON'TS

Dos

- Make sure you have the full support and participation of the top leadership of both the union and management organization before you consider interest-based bargaining.
- Use an outside consultant to get started.
- Make sure the teams are properly trained before they venture into actual problem solving.
- Start with the easy issues first, and leave the tough ones until later. Success in reaching agreement on the easy issues builds confidence in the process and trust in each other.
- Everyone on the LMC is completely equal to everyone else, in the most literal sense of the word.

- Rotate the chairperson at every meeting. Everybody gets to be chairperson in that rotation.
- The chairperson acts as a facilitator not as a leader.
- All issues and problems are to be resolved by consensus.
- Remember that consensus means that you feel you can live with a given option. It need not be your favorite one.
- Make sure that no employee loses his or her job as a result of any LMC activity.
- Make sure that each problem is precisely identified as to what, where, when, how, and how much, before anyone is allowed to suggest a solution.
- Remain unconditionally constructive, no matter what.
- Remember that you have to be trustworthy before you can expect to be trusted.
- Do expect serious differences of opinion and serious controversy on the tougher issues.
- Do expect failures, but they need not ruin the LMC.
- When the other side behaves objectionably, take time out to negotiate or re-negotiate the ground rules.
- Maintain accurate minutes on subject matters discussed at the previous meeting, those that have been completed or resolved as well as those still open. Remember that the average person forgets within 48 hours about 75 percent what he or she has heard.
- Prepare and distribute an agenda before each meeting, so that members can prepare themselves and do their homework.
- At the first meeting, discuss and agree on ground rules to follow during sessions. One such ground rule should be the “Rule of One,” meaning only one person is allowed to talk at any one time. Side conversations and interruptions of the person who has the floor are not allowed.
- Make sure that all of the LMC members participate in each meeting.
- Establish how often the LMC shall meet, and what the maximum duration of any one meeting shall be.
- Stick to the agenda.
- Let bygones be bygones.

- Speak for yourself at all times. Avoid “Your” language as much as possible. For example:
 - “This is what I heard you say.”
 - “This is how I see it.”
 - “Here is how I feel about it.”
 - “Here is what I would like to see us do.”
- Form temporary subcommittees when the workload gets too heavy, a task is too time consuming, or a problem requires special expertise. Consider forming more LMCs.
- Consider hiring a third-party facilitator or external consultant when the LMC gets stuck.

Don’ts

- Don’t have union representatives sit at one side of the table and management representatives at the opposite side. Use mixed seating arrangements. Use round tables, if possible.
- Don’t work on issues that are subject to collective bargaining, unless the union and management negotiating teams have specifically delegated this task to your committee.
- Don’t work on issues that are pending grievances. Allow the formal grievance steps to run their course.
- Don’t expect too much too soon. Organizational cultures change slowly.
- Don’t start problem solving meetings until everybody has been trained in the process.
- Don’t tackle the tough issues first. Start with the easy ones.
- Don’t jump to conclusions about the cause of a problem or what the solution should be. Don’t fail to inform yourself first about what exactly the problem is, where it is, when it is, how it manifests itself, and what the extent of it is.
- Don’t attack the people, attack the problem. Don’t criticize the person, criticize the idea. Make it an “it,” not a “you.”
- Don’t talk when you should be listening.
- Don’t mumble under your breath or to a neighbor. Say it out loud.
- Don’t interrupt the person who is speaking. Raise your hand to be

recognized by the facilitator.

- No conspiracies or “coalitions” outside the meeting.
- Don’t undermine team decisions when talking to others in the organization. Defend them to others in the organization.
- When you feel personally attacked, don’t counter-attack. It only escalates the conflict, detracts from the issue, and does not solve problems. Remain unconditionally constructive at all times.
- Don’t use power plays or intimidation to get what you want.
- Don’t undermine union security.
- Don’t undermine the collective bargaining agreement. Do not make any decisions or recommendations that go against any provision in the collective bargaining agreement
- Don’t allow meetings to become gripe sessions.

SUGGESTED MEETING EVALUATION FORM

Directions: Please reflect on the last LMC meeting you attended. After each statement below, write in the number that best reflects your viewpoint on each statement.

1=Strongly Disagree

2=Disagree

3=Undecided

4=Agree

5=Strongly Agree

Statement	Rating
I knew why we were having the meeting before I arrived.	
I knew what results we should accomplish at the meeting before I arrived	
Everyone who should have been at the meeting had been told it was being held.	
I received the agenda for the meeting beforehand	

Before I came to the meeting, I knew how it would be conducted	
There was enough time to discuss the agenda items	
Everybody in the room participated	
Everybody treated everybody else with respect	
I felt everybody was listening when I spoke	
We stuck to the agenda	
We accomplished what we set out to accomplish	

COMMENTS: _____

APPENDIX C

DRUG AND ALCOHOL TESTING PROCEDURES

DRUG AND ALCOHOL TESTING

One of the most severe constraints upon transit facilities is legally mandated drug and alcohol testing of employees in safety-sensitive positions. These constraints have far reaching effects on labor relations in transit. They are a headache for both union and management. Ed Wytkind, Executive Director of the Transportation Trades Department of the AFL-CIO said:

Drug and alcohol testing is another concern. The Teamsters and the ATU and the TWU and others know all too well that there's not a day in a week when one of their members isn't subjected to some form of drug testing. Post-accident, pre-employment, return to service, random—I don't care what is. For the transit industry, it was an unfunded mandate because it cost a lot of money and the federal government didn't finance it, so the public transit systems have to pay for it.¹⁰⁵

For union officers, supervisors and managers in the transit industry who deal with employees in safety sensitive positions it is important to be familiar with the government's requirements of drug and alcohol testing.

The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing not only in transit but other transportation industries as well. The U.S. Department of Transportation (DOT) has published detailed rules that require employers in the transportation industry to have certain programs in place that control drug and alcohol abuse. These rules include required procedures for urine drug testing and breath alcohol testing.

GRIEVANCES INVOLVING DRUG AND ALCOHOL TESTING

Transit employees in safety-sensitive positions frequently file grievances over disciplinary action taken against them because they allegedly refused to take a drug or alcohol test, allegedly failed one of these tests, or other reasons. According to the U.S. Department of Transportation's regulations, if an employee tampers with his urine sample during a drug test, he is automatically considered to have "refused to submit to testing." The price he or she pays is

¹⁰⁵ Ed Wytkind, in *Toward a Cooperative Future?* Symposium. Norman Mineta International Institute for Surface Transportation Policy Studies, IISTPS Report 97-2, May 1997, p.68

often termination. Frequently, however, the evidence is not quite so clear as to whether the employee “really” refused to submit to the test, and the employer runs the risk of having the discipline reversed by an arbitrator.

In the city of Yonkers, New York, for example, a driver was asked in the wake of a vehicular accident to submit to a drug test. He did. But the drug-testing laboratory reported to the employer that he had tampered with his urine sample and failed the post-accident drug test. The employer concluded that the driver had refused to submit to a post-accident drug test and terminated him. An arbitrator ruled that the employee was not disciplined for just cause and a greatly embarrassed employer had to reinstate the employee with back wages. During the arbitration hearing it was revealed that when the employee went to the drug testing facility, he simply did not produce a large enough urine sample to satisfy the laboratory. The technician who administered the test threw that sample away and asked the employee to produce another sample. It was inadequate in volume as well. By the time he was asked to give a third sample, he was so nervous that he could not urinate at all. The lab reported that he refused to submit to a drug test and therefore failed the test.¹⁰⁶

The Yonkers case and numerous other arbitration cases suggest that it is extremely important for a transit employer to choose a competent and reputable drug and alcohol testing service. Even then, the employer must conduct a full and fair investigation that goes beyond a slip of paper from the drug testing service that says the employee failed a test, refused to take it, or tampered with the test sample. Conducting a full and fair investigation of drug and alcohol related offenses requires a knowledge of the legal requirements of drug and alcohol testing in the transit environment. The same is true for union officers who want to successfully defend a transit employee in a drug or alcohol-related disciplinary action.

ALCOHOL TESTING

Since alcohol is a legal substance, certain rules had to be created which limit the use of alcohol for employees in safety-sensitive positions. Safety-sensitive employees may not refuse to submit to an alcohol test. If such an employee was involved in a traffic accident, he or she may not consume alcohol within eight hours after an accident—whether at home, on the job, or elsewhere.

Alcohol testing for transit employees in safety-sensitive positions may take place at four different occasions:

¹⁰⁶ American Arbitration Association, *Labor Arbitration in Government*, Vol. 29, No. 7, July 1999, Case#5547.

Post-accident testing

Reasonable suspicion testing

Random testing

Return to duty and follow-up testing

Post-accident alcohol testing is required for drivers whose performance could have contributed to an accident (as determined by a citation for a moving traffic violation). Alcohol testing is required in all accidents where there was a fatality, even if the driver was not cited for a moving traffic violation.

There also has to be an alcohol breath test where there is **reasonable suspicion** that a transit employee may be under the influence of alcohol during work hours. When a trained supervisor or company official observes behavior or appearance that is characteristic of alcohol misuse, an alcohol test is to be conducted.

There also has to be **random testing** of transit employees in safety-sensitive positions. That is to say, employees to be tested must be randomly selected, the test must be unannounced, and must be conducted just before, during, or just after performance of safety-sensitive functions. The testing dates and times are unannounced and are conducted with unpredictable frequency throughout the year. Each year the number of random tests conducted by the employer must equal at least 25 percent of all the safety-sensitive drivers.

Return-to-duty and follow-up testing must take place when an individual who has violated the prohibited alcohol conduct standards returns to performing safety-sensitive duties. Follow-up tests are also unannounced, and at least six tests must be conducted in the first 12 months after a driver returns to duty. Follow-up testing may be extended for up to 60 months following return to duty.

What are the consequences of alcohol misuse? Drivers who engage in prohibited alcohol consumption must be immediately removed from safety-sensitive functions. Drivers who have engaged in alcohol misuse cannot return to safety-sensitive duties until they have been evaluated by a substance abuse professional and complied with any treatment recommendations to assist them with an alcohol problem. To further safeguard the public, drivers who have an alcohol concentration of 0.02 or greater when tested just before, during, or just after performing safety-sensitive functions must also be removed from performing such duties for 24 hours. If a driver's behavior or appearance suggests alcohol misuse, a reasonable suspicion alcohol test must be conducted. If a breath test cannot be administered, the driver must be removed

from performing safety-sensitive duties for at least 24 hours.

Are employees with alcohol problems entitled to rehabilitation? Drivers who violate the alcohol misuse rules will be referred to a substance abuse professional for evaluation. Any treatment or rehabilitation would be provided in accordance with the employer's policy or collective bargaining agreements. Employers are not required to provide rehabilitation themselves, pay for treatment, or reinstate the driver in his or her safety-sensitive position. Any employer who does decide to return a driver to safety-sensitive duties must ensure that the driver has been evaluated by a substance abuse professional; has complied with any recommended treatment; has taken a return-to-duty alcohol test (with a result of less than 0.02 concentration); and is subject to unannounced follow-up alcohol tests.

Are driver-alcohol testing records confidential? Yes. Test results and other confidential information may be released only to the employer and the substance abuse professional. Any other release of this information is only with the driver's written consent. If a driver initiates a grievance, hearing, lawsuit, or other action as a result of a violation of these rules, the employer may release relevant information to the appropriate decision maker.

DRUG TESTING

Government drug testing rules are similar to alcohol testing rules, with a few additional requirements. The drug testing rules cover the same drivers as the alcohol testing rules. As far as timing and occasions are concerned, there is one more type: **Pre-employment drug testing**. The five types of government required drug tests are:

- Pre-employment drug tests
- Post-accident testing
- Reasonable suspicion testing
- Random testing
- Return to duty and follow-up testing

The pre-employment drug test category, which covers **applicants** for safety-sensitive positions, is self-explanatory. The other categories have already been explained in our discussion on alcohol testing.

How is drug testing done? It is conducted by analyzing a driver's urine specimen. The analysis has to be performed at a laboratory certified and monitored by the Department of Health and Human Services (DHHS). There are about 90 DHHS certified drug-testing laboratories located throughout the

United States. The driver provides a urine specimen in a location that affords privacy. A so-called "collector" picks up, seals and labels the specimen, and completes a chain of custody document. The collector then takes the specimen and accompanying paperwork ready for shipment to a certified drug-testing laboratory. The specimen collection procedures and chain of custody document preparation ensure that the specimen's security, proper identification, and integrity are not compromised. The law requires that drug-testing procedures for commercial motor vehicle drivers include *split specimen* procedures. Each urine specimen is subdivided into two bottles labeled as a "primary" and a "split" specimen. Both bottles are sent to a laboratory. Only the primary specimen is opened and used for the urinalysis. The split specimen bottle remains sealed and is stored at the laboratory. If the analysis of the primary specimen confirms the presence of illegal, controlled substances, the driver has 72 hours to request the split specimen be sent to another DHHS-certified laboratory for analysis. This split specimen procedure essentially provides the driver with an opportunity for a "second opinion."

What drugs are transit employees or applicants tested for? All urine specimens are analyzed for the following:

Marijuana (THC metabolite)

Cocaine

Amphetamines

Opiates (including heroin)

Phencyclidine (PCP)

Drug testing is done in two stages. First, a regular drug test is performed. If the result is positive for one or more of the drugs listed above, then a **confirmation test** is performed for each identified drug, using state-of-the-art gas chromatography/mass spectrometry (GC/MS) analysis. GC/MS confirmation ensures that over-the-counter medications or preparations are not reported as positive results.

Who reviews and interprets the laboratory results? All drug test results are reviewed and interpreted by a physician called a Medical Review Officer (MRO) before the results are reported to the employer. If the laboratory reports a positive result to the MRO, the MRO contacts the driver (in person or by telephone) and conducts an interview to determine if there is an alternative medical explanation for the drugs found in the driver's urine specimen. For all the drugs except PCP, there are some special, legitimate medical uses that may explain the positive test result. If the driver provides appropriate

documentation, and the MRO determines that it is legitimate medical use of the prohibited drug, the drug test result is reported to the employer as negative.

What are the consequences of a *positive (failed)* drug test? A driver must be removed from safety-sensitive duty if he or she has a positive drug test result. The removal cannot take place until the MRO has interviewed the driver and determined that the positive drug test resulted from the unauthorized use of a controlled substance. A driver cannot be returned to safety-sensitive duties until he or she has been evaluated by a substance abuse professional or MRO, has complied with recommended rehabilitation, and has a negative result on a return-to-duty drug test. Follow-up testing to monitor the driver's continued abstinence from drug use may be required.

How does **random drug testing** work? The prescribed procedure is similar to the requirements of random alcohol tests, as described above, except that the total number of random drug tests conducted each year must equal at least 50 percent of the safety-sensitive drivers. Random testing for drugs does not have to be conducted in immediate time proximity to performing safety-sensitive functions. Once notified of the selection for testing, however, a driver must proceed to a collection site to undergo the urine specimen test.

What about employee drug education and training? Employers must provide information on drug use and treatment resources to safety-sensitive drivers. All supervisors and managers of safety-sensitive drivers must attend at least one hour of training on the signs and symptoms of drug abuse. This training is regarded to be necessary to determine when reasonable suspicion exists.

Are driver drug testing records confidential? Yes! Driver drug testing results and records are to be kept strictly confidential by the employer, by the drug testing laboratory, and by the medical review officer. They cannot be released to others without the written consent of the driver. As in alcohol testing, exceptions to these confidentiality provisions are limited to a decision maker in arbitration, litigation or administrative proceedings arising from a positive drug test result. Statistical records and reports are maintained by employers and drug-testing laboratories. These data are used mainly to monitor compliance with the rules and to assess the effectiveness of drug education programs.

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He has over 25 years experience as a professional labor arbitrator, mediator and fact finder. He has served on the panel of neutrals of the American Arbitration Association, Federal Mediation and Conciliation Service, State of California Mediation and Conciliation Service, State of California Public Employment Relations Board (PERB) and has formerly been an ad hoc hearing officer of the State of California Agricultural Labor Relations Board. He has published over 30 full-length arbitration decisions in professional reference works (Bureau of National Affairs, Inc. and Commerce Clearing House, Inc.). In addition, he has published articles, pamphlets, training materials, and presented papers on a large variety of human resource, labor relations, and management topics. In the past he has served as editorial consultant to the State Bar of California, Labor and Employment Law Section, in the preparation of a major reference work: *California Public Sector Labor Relations*, published by Matthew Bender & Co., 1989.

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