could lead to disagreement is that of determining more exactly how market research fits into the transportation planning process. The critical issue now is how to advance current planning practice by incorporating the market research techniques suggested in Morgan’s paper. It was very encouraging to see such a large con-
sensus at the session, which may serve as an historic bench mark in this regard. The direction in which short-range transportation planning methodology should move is clearly stated and, for the most part, agreed on. But, how long will it take us?”

Labor, Paratransit, and Section 13c

Durwood Zaelke, Environmental Law Institute, Washington, D.C.

There are many legal and institutional strategies that transit labor can use to protect itself from unwanted innovation; this paper examines the specific protection given by section 13c of the Urban Mass Transportation Act of 1964. The paper begins with a description of the mass transportation system to which section 13c applies and then describes the use of competitive brokerage for the selection of new mass transportation services. It next discusses the historical context of section 13c and the application of this section to the acquisition of private mass transit companies by using Urban Mass Transportation Administration funds. Finally, the paper describes various applications of section 13c that affect paratransit innovation, including competitive brokerage, and recommends measures for ameliorating any adverse effects such applications may cause.

When trying to understand section 13c of the Urban Mass Transportation Act of 1964, one is tempted to search for some lawyerlike logic behind the statute’s rather peculiar concept of giving mass transportation labor almost total job protection similar to the kind enjoyed by the railroad unions. But such a search provides more than the usual number of confusing detours, for section 13c is neither conceptually neat nor particularly logical. It is simply organized labor exerting pressure—first to have the provision included in the act and then to persuade the Secretary of Labor to interpret the provision in a broad and increasingly unwieldy way.

On the other hand, that section 13c lacks conceptual neatness and clear logic will not deter the courts from imposing some order when they are called on to interpret it. And there are several reasons that suggest why section 13c will soon be in the courts: (a) the constraints on the amount of state and local revenue available to run public transportation, (b) the growing competition among various transit and paratransit modes for limited Urban Mass Transportation Administration (UMTA) funds, and (c) the refusal by the U.S. Department of Labor to issue regulations imposing some reasonable limits on the scope of section 13c.

The intent of this paper is not to hasten the approaching lawsuits, but merely to suggest some equitable and logical bases for the courts to use in limiting the effects of section 13c. The paper begins by describing a systems view of transportation and the use of competitive brokerage to select new mass transportation services.

SYSTEMS VIEW OF TRANSPORTATION

Broadly speaking, a transportation system can be described as (a) a family of types and levels of transportation services, (b) allocated through some matching mechanism, (c) to serve distinct service markets. Innovation and improved system efficiency can come not only from improved hardware, but also from better techniques for identifying distinct consumer markets, better mecha-
the public if it cannot be reserved for the private and exclusive use of an individual passenger. This definition specifically excludes exclusive-ride taxi services and for-hire limousines. (In the discussion below, the term paratransit will be used to denote nontransit mass transportation services only.)

PARATRANSIT AND COMPETITIVE BROKERAGE

By forcing the consideration of paratransit, a system viewpoint of transportation will facilitate its expansion. In just this way, the expansion of paratransit is being fostered by the systems perspective advocated in the joint planning regulations.

Under these regulations, the MPO is given the responsibility for coordinating the planning and decision making for the entire transportation system of an urban area. Because this role provides the MPO with a unique opportunity to influence the matching of services with markets, it is similar to the function of a broker (1). However, the function of the MPO falls far short of true brokerage because the MPO rarely has authority to implement services and must rely on transit districts, state departments of transportation, or other such agencies to operate services.

The joint regulations specifically mandate the MPOs to consider existing private mass transportation services, including jitneys and other flexible paratransit services. Only paratransit services that are included in official MPO plans can receive UMTA funds (and thus require a section 13c agreement).

In addition, UMTA's proposed policy statement on paratransit indicates that the annual review of the official MPO plans will verify that adequate consideration has been given to paratransit. The policy statement also indicates that, consistent with the Urban Mass Transportation (UMT) Act of 1964, the MPOs are to "encourage the maximum feasible participation of private enterprise" in preparing their official plans and in providing subsequent paratransit services.

The requirement for "maximum feasible participation of private enterprise" is satisfied, according to the proposed policy, when new paratransit services are selected by using a competitive brokerage process that offers taxi operators and other private transportation providers full opportunity to bid for the new service.

Although this paratransit policy has not yet been finalized, competitive brokerage is already being used to select new paratransit services in several urban areas (e.g., the Orange County, California, system). In competitive brokerage, the broker can be either the MPO, a local government agency such as the transit authority, or a joint venture of the MPO and a government agency. The functions of the broker should include:

1. Identifying the travel market,
2. Specifying the desired level of service (travel time, wait time, fare, and comfort),
3. Specifying the criteria that will be used to evaluate proposals or bids for serving the market,
4. Requesting a statement of qualifications from potential service providers,
5. Requesting proposals for providing the service,
6. Evaluating proposals against the specified criteria,
7. Contracting with the organization submitting the best proposal, and
8. Monitoring the service.

The service providers prepare competitive proposals in response to the broker's request, and the successful organization provides the new service.

Competitive brokerage offers the opportunity for selecting new services not only on the basis of direct costs, but also on the basis of indirect costs such as the social cost of environmental damage. Indirect costs can be considered by carefully selecting and weighing the criteria for evaluating proposals. Although considering social costs makes brokerage more complex, paratransit advocates (and environmentalists) should insist that it be done—because it will demonstrate more fully the inherent advantages of paratransit for many new markets.

It will also make brokerage more compatible with the selection of transportation control strategies under the Clean Air Act Amendments of 1977.

The process for evaluating the service proposals is similar to that used by the federal government to evaluate research and development contract proposals. The criteria for evaluating research and development proposals are divided into two categories: technical and cost. The technical criteria for transportation brokerage might include the following:

<table>
<thead>
<tr>
<th>Possible Criterion</th>
<th>Possible Weight (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ability to provide requested level of service (understanding of market; understanding of requested service; reasonableness of management plan; type, number, and condition of vehicles and other equipment and facilities; quality of maintenance program)</td>
<td>40</td>
</tr>
<tr>
<td>Effect of proposed service on energy use; air, noise, water, and visual pollution; congestion; land use (including residential and commercial displacement); and employment</td>
<td>30</td>
</tr>
<tr>
<td>Qualifications of provider (experience and financial responsibility)</td>
<td>20</td>
</tr>
<tr>
<td>Implementation schedule</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
</tr>
</tbody>
</table>

After the bids are evaluated against the technical criteria, all those within an acceptable range should be evaluated against cost criteria. Cost proposals should be submitted separately and include detailed information on cost per vehicle service hour and any start-up cost such as training. Generally, the technical bid that offers the lowest cost should be selected; however, the broker should be able to choose a higher cost bid if it offers a significant technical advantage.

The success of the brokerage approach for a particular application depends on many considerations. These include how accurately the broker can identify the specific markets that are to be served and, especially in the early applications of the approach, how many service providers can be induced to bid for the market and how capably they prepare their bids.

Brokers can minimize these difficulties by providing early notice of the competition, requesting preliminary statements of qualifications from all likely providers, and drafting clear and precise requests for proposals. Brokers might also hold preproposal conferences to inform potential bidders about the mechanics of preparing proposals, the criteria that will be used to evaluate the proposals, and the general level of service desired. Such conferences would allow the broker to answer questions, which is more difficult to do after a request for proposal has been issued.

Brokers should learn as accurately as possible what the requested service should cost so that the bids can be evaluated against an objective standard as well as against each other. This is especially important when brokerage is first being tried, and few bidders are responding.

If we assume that the new markets are precisely identified and the brokerage approach (or other matching mechanism) functions efficiently, the result should be a significant increase in the use of paratransit. The reason
is simple: For many new markets, some form of paratransit will offer the most efficient service at the lowest cost.

However, because labor costs are such a significant part of transit and paratransit operating costs, the increase in labor cost that accompanies the use of organized transit labor can cancel most of the advantage of paratransit. For this reason, the posture of labor, especially organized labor, toward paratransit is often the key to successful paratransit innovation.

SECTION 13c: HISTORICAL SETTING

Before the enactment of the Urban Mass Transportation (UMT) Act of 1964, almost all urban transit systems were owned privately. As private systems, labor-management relations were controlled by the National Labor Relations Act (NLRA) of 1935, and employees were guaranteed the right to organize, seek recognition, and bargain collectively (2, 3).

Suburbanization and the dramatic increase in automobile use caused transit ridership to decrease by more than 70 percent between 1945 and 1970. The loss of revenue passengers caused service reductions that, in turn, caused total union membership in the transit industry to decrease by more than 40 percent. Nevertheless, during this difficult period, transit unions succeeded both in maintaining the earning position of their members relative to that of other workers and in winning increasingly favorable (and inflexible) work rules.

1. The government responded to the decreasing service and growing threat of bankruptcy to many private firms with the most salutary of all government responses: money—first to help the private systems continue what was recognized as an essential public service and then to acquire the systems under outright public ownership. Most of the government money was provided by the UMT Act. It might be thought that the transit unions would have accepted the money gladly and without question, coming as it did when union membership was decreasing rapidly and when many private systems were facing bankruptcy. But such was not the case.

2. On the contrary, the unions felt threatened by two aspects of the UMT Act. First, they feared that UMTA research and development funds might lead to automation and loss of jobs. Second, they feared that public acquisitions using UMTA money would result in the loss of the right to bargain collectively, a right that the unions enjoyed under private ownership.

3. While the fear of automation seems exaggerated even today, the fear of losing the right to bargain collectively was well-grounded. The labor protection afforded by the NLRA was lost when a private system became public. Before 1964, this loss meant that transit employees were then controlled by state laws governing public-employee labor relations, many of which prohibited collective bargaining. Some states provided some labor protection, but substantially less than the NLRA.

4. To protect the collective bargaining rights won when transit was privately owned, the unions made it clear that they would support the UMT Act only if labor was adequately protected. Private transit management had long accepted collective bargaining and saw no reason to object to its continuation. Nor did city managers, who were assured by organized labor that no real burden would be placed on any local community by protecting labor and yet to try managing their transit system.

SECTION 13c: STATUTE AND PROCEDURES FOR CERTIFICATION

Section 13c addressed labor's fears by requiring the recipient of a grant under the UMT Act of 1964 to negotiate an agreement with the relevant transit union to protect any employees affected by the grant. The protective agreement mandated by the statute is required to be fair and equitable and to:

1. Continue the right to bargain collectively,
2. Preserve rights under existing collective bargaining agreements,
3. Assure employment to employees of acquired systems and priority of reemployment to terminated employees,
4. Provide for paid retraining programs, and
5. Indemnify individual employees against a worsening of their employment condition.

Under section 13c, the Secretary of Labor, rather than the Secretary of Transportation, is given the authority to determine whether a protective agreement (the so-called section 13c agreement) includes the requisite protection and is fair and equitable. The procedures for making this determination, or certification, are described in guidelines issued by the U.S. Department of Labor (DOL) [42 Federal Regulation 3319, to be codified in 29 CFR section 215 (January 18, 1977)]. Briefly stated, the guidelines request that applicants for UMTA funds (a) estimate the effects the funds will have on existing mass transportation employees, (b) identify any labor unions representing these employees, and (c) describe any steps already taken to develop the section 13c agreement. Typically, the only effects listed on applications are beneficial; the applicants do not want to alert affected employees about potential claims.

When a completed application is received by UMTA, a copy is forwarded to DOL, which, in turn, forwards a copy to any relevant union. At this point the union and the applicant are expected to negotiate the specific protective terms to be contained in the section 13c agreement. The negotiations are to be in good faith and a time limit can be set to offset the advantage a union may gain by delay.

When the agreement has been negotiated, DOL then reviews it to ensure that it satisfies the statute. If it does, it is certified by the Secretary of Labor and returned to UMTA. If it does not, the Secretary either returns it to the parties for further negotiations or sets forth the protective terms himself or herself. Similarly, if the parties are unable to agree on the terms, the Secretary will impose whatever terms he or she finds to be fair and equitable. Finally, if the affected employees are not represented by a union, the Secretary unilaterally imposes the protective terms.

SECTION 13c: APPLICATION

Applying section 13c to the UMTA funding program is becoming increasingly complex, and the worst is apparently yet to come.

Some initial complexity can be avoided by grouping together the provisions of the statute that seem legitimately to apply only to the case where UMTA funds are being used to acquire a private mass transit system. These include the provisions to:

1. Continue the right to bargain collectively,
2. Preserve rights under existing collective bargaining agreements,
3. Assure employment to employees of acquired sys-
tems and priority of reemployment to terminated employees, and
4. Provide for paid retraining.

The first three of these provisions concern rights that were held by existing private transit unions before the acquisition; these rights are merely continued by section 13c. The fourth right (paid retraining) appears to be only to enforce the third (assurance of employment for employees of acquired systems). Because these four provisions should apply only to the case of an acquired private system, they should not directly concern paratransit or other new services. However, when a new paratransit service is to be managed by the same management that is operating the existing transit service, the section 13c agreement for the new service must be considered in the context of the existing labor-management relations, including any existing section 13c agreement.

The remaining provision of section 13c is the right of individual employees to be indemnified against a worsening of their employment condition. This indemnification right did not exist under previous collective bargaining agreements; to the extent it exists at all, it was created by section 13c. The right to indemnification has been applied to acquisitions, as have the other provisions, as well as to the receipt of UMTA Operating money (Figure 1). In addition, it is the 13c right that most often arises in the context of paratransit or other new services.

Indemnification has two aspects: the right to new jobs and the protection of existing jobs.

Jobs

Whether a new paratransit service is managed by transit management or by other management, section 13c does not give the transit union any right to the new jobs. On the other hand, in both management situations, the fact that a section 13c agreement must still be negotiated with the transit union means that the union may have the opportunity to win the new jobs during the negotiations. Management may be able to foreclose this opportunity, however, by determining in advance of the negotiations such conditions as who is to get the new jobs and at what wages. This could be done by selecting the service provider through competitive brokerage before conducting the negotiations with the union.

When a new paratransit service is to be managed by an existing transit management, the existing labor-management relations may provide the union with other opportunities to assert jurisdiction over the new jobs (Figure 2). For example, the existing collective bargaining agreement or other section 13c agreement (e.g., paragraph 23 of National Section 13c Agreement for UMTA Operating Assistance) may contain a provision granting the transit union exclusive jurisdiction over all new jobs. Where such a right does exist, job classification, wage rate, and such generally will be determined by collective bargaining.

Having a new paratransit service managed by an organization that is separate from the transit organization is the easiest way for the new service to take advantage of nonunion labor and the accompanying lower costs and greater flexibility (Figure 3). A similar type of operation is used successfully in the construction industry to take advantage of nonunion labor. The construction unions have (unsuccessfully) challenged this practice, claiming that the management of the nonunion operation was controlled by the management of the union operation and should be required to abide by the existing collective bargaining agreement that gave the union the exclusive

right to all jobs. Similar objections can be expected from the transit unions. Tests developed under the Memphis formula may be helpful in resolving the issue.

If the new paratransit jobs are union and the conditions (job classifications, wage rates, and work rules) are the same as those of transit, the cost advantage of using paratransit to serve the new market may be largely lost. However, in at least one case (Cleveland), where an earlier paratransit service had been awarded to a taxi operator after competitive bidding, the transit union agreed to a new job classification for service to the elderly and handicapped. This resulted in wages that were one-third lower than transit wages and in more flexible work rules.

When transit management manages a new paratransit service, the new job classifications, lower initial wages, and more flexible work rules such as were obtained in Cleveland probably represent the most favorable labor conditions that management can expect. A possible danger in this approach, however, is that the union may demand in subsequent collective bargaining sessions that the wages of the paratransit employees be equalized with transit wages. What the Cleveland union does will be instructive. This problem might be solved by limiting the term of the initial contract to 3 to 5 years and then using competitive brokerage before renewing (or not renewing) it (giving due consideration to the acquired experience of the existing provider).

The example of Cleveland illustrates another significant factor: the effect of potential competition. The question is this: How important to the outcome in Cleveland was the union's fear that unless it relaxed its work rules and lowered its wage rates, the new service and jobs would go to a competitor such as the local taxi operators?

In public-sector wage determinations, the absence of the budget ceiling imposed by competition is often accused of inflating union wages and benefits and contributing to the fiscal crises of many states. However, in most public services, wage increases are at least constrained by the aversion politicians have toward increasing taxes to expand the municipal budget. To the extent that UMTA (and state) funds are available to subsidize wage increases for transit employees, even this control is absent. The use of competitive brokerage, however, offers the opportunity to change this.

Indemnification

The complex issue of indemnification is closely related to the issue of jobs. Indeed, the basic right (if it exists) is to be protected under certain circumstances from losing one's job or from being forced to accept a lower paying job. Accordingly, if the transit union is successful in asserting jurisdiction over the new jobs and obtaining equal wages and working conditions, the transit employees are completely indemnified. Even if the new paratransit service is so successful that it drives the existing transit service out of business, the corresponding expansion of the new service will absorb all displaced employees (given a similar ratio of riders to operators).

This is total indemnification for transit employees. But what of other mass transportation employees who lose their jobs because of competition from the new paratransit service? Must they be indemnified also? Thus, we come to the question, Who must be indemnified by whom and from what harm?

What Harm

There appear to be at least three types of harm contemplated in the UMT Act of 1964. The first is the possi-
bility that collective bargaining rights and jobs may be destroyed either from the direct acquisition of a private system or by automation. The second is the possibility that a new public service will compete so directly with the existing private service that state or local law will find an inverse condemnation and require just compensation. (This is contained in section 3e of the UMT Act and is separate from section 13c.) The third (if indeed it was contemplated at all) is the indirect harm caused by UMTA-funded competition.

Funding new paratransit with UMTA money generally presents the issue of indemnification against indirect competition. For example, UMTA-funded paratransit may attract riders from existing mass transportation services in such numbers that the existing service is forced to reduce its work force in advance of natural attrition. Presumably, if the existing mass transportation service is privately owned, section 3e will require compensation in those cases where the competition is so severe that state or local law finds an inverse condemnation. However, without a specific buy-out statute, considerable diminution in the value of the private service will be allowed before an inverse condemnation will be found under a state constitution.

While compensation paid to a private service will probably not benefit the employees, it is not at all clear that section 13c indemnification was intended to protect employees in this situation. The employees are, after all, free to demand such protection from private management in the event of a future buy out. Similarly, when

---

**Figure 1. UMTA money for public acquisition of private transit system; effect on union employees.**

- **UTMA money to acquire private transit system**
- **existing transit service**
- **existing transit jobs**
  - existing transit union rights:
    1. to bargain collectively
    2. under existing collective bargaining agreement
    3. current employment
- **existing transit service continued**
- **new 13c protection created:**
  1. retraining
  2. indemnification

---

**Figure 2. UMTA money for transit and paratransit with same management; effect on union employees.**

- **UTMA MONEY**
- **UNIFIED MANAGEMENT**
- **existing transit service**
- **existing transit jobs**
  - existing transit union rights:
    1. to bargain collectively
    2. under existing collective bargaining agreement
    3. current employment
- **new paratransit service**
- **new paratransit jobs**
  - possible existing union rights continued:
    1. under existing agreement
    2. under existing collective bargaining agreement
    3. current employment
- **new 13c protection created:**
  1. retraining
  2. indemnification

---

**Figure 3. UMTA money for new paratransit not managed by transit management; effect on union employees.**

- **UTMA money**
- **new paratransit service**
- **new paratransit jobs**
  - possible new transit jobs created:
    1. under existing agreement
    2. under existing collective bargaining agreement
    3. current employment
- **13c protection created:**
  1. retraining
  2. indemnification

---
UMTA-funded competition with an existing private service is not so severe as to require compensation under section 3e it is not clear that section 13c indemnification applies. It may be that the only protection against competition is limited to private systems (and their employees) is section 3e. Possibly, the need for this compensation could be reduced by giving the existing private service the right to bid for the new service with which it might otherwise be forced to compete.

Because section 3e is expressly limited to private systems, protection for existing public mass transportation service must come, if at all, from the indemnification provided by section 13c. But even to suggest that public transportation services indemnify one another seems absurd.

Obviously, competitive harm will not occur so long as new services grow by inducing new travel or by attracting riders from services that do not have paid drivers (especially private automobiles). Indemnification would not be necessary if automobile restrictions were imposed and their drivers forced into mass transportation.

Nor will competitive harm occur if the services agree to avoid competition. Accordingly, many section 13c negotiations have addressed indemnification by agreeing in advance to avoid competition. This is done in several ways. One is to keep the new market geographically separate from the existing market. Another is to separate the market in terms of time of service—such service might be limited to off-peak hours. Finally, markets can be kept separate by limiting the type of service in terms of fare and level of service. High-fare, high-service-level (door-to-door) paratransit does not compete with line-haul transit. Nor does service to the elderly and handicapped. By requiring the careful and precise selection of markets for new services, the use of competitive brokerage can limit competition.

The dilemma that arises from limiting competition by indemnifying existing mass transportation employees from competitive harm is that it seems desirable for a new service to attract riders not only from automobiles, but also from any existing service that is less efficient or that imposes greater external social costs (such as environmental damage or congestion). However, to the extent that only some services are eligible for UMTA funds or other subsidy, it may be inequitable to rely exclusively on the market (the consumer) to determine which service is most efficient. For example, one service may capture a larger market share and appear more efficient only because it receives a larger UMTA (or other government) subsidy. In addition, the market is not an effective judge of external social costs.

Who Is Indemnified and by Whom

Originally, section 13c indemnification appears to have been concerned exclusively with protecting unionized mass transit employees. UMTA funds threatened private mass transit employees most directly, especially when used for mass transportation services. This quickly becomes unmanageable. Consider whether a new paratransit service that attract riders from the existing UMTA-funded service deserves to be indemnified; reciprocity would seem to require it. Clearly, reciprocity is not an adequate basis for determining who is to be indemnified by whom. If all UMTA-funded services owe indemnification to each other, there will be an exchange of indemnification. One can almost imagine a market for transferable indemnification rights that are freely traded by management and employees. As more and more services that are eligible for UMTA funds (i.e., shared-ride taxi services and other mass transportation services) begin to receive them, such an exchange may become possible, although no less absurd.

But if indemnity is not owed to all services eligible for acquisition, and the transit unions themselves proposed section 13c as a remedy. It seems fairly clear that little thought was given to any other transportation employees. Similarly, originally, only transit management could have been expected to provide section 13c protection, including indemnification, because only transit management was in a position to harm employees.

However, now that paratransit is receiving UMTA funds, new issues have arisen. These include (a) whether new mass transportation services (limited here to paratransit) must give indemnification to existing mass transportation employees, (b) whether indemnification is owed to the new service by existing services that have received UMTA funds, and (c) the way in which indemnification, if it is not owed to all existing services by all new services, is to be limited?

The effective limit on who will be indemnified is, of course, who loses a job because of competition funded with UMTA money. But it must be kept in mind that indemnification (and all section 13c protections) has two fairly distinct aspects. The first is the agreement itself, which is intended to be prophylactic; it is an a priori determination of which employees will be protected and what protection they will be afforded. The second is the actual adjudication of claims under the agreement. Because the burden of proving harm under a section 13c agreement is so heavily weighted in favor of the employee, it is especially important to limit the number of eligible employees. Similarly, limiting the number of eligible employees is necessary because the indemnification must provide at a minimum the protection specified under a provision borrowed from the railroad public mass transportation services. Another is to separate the markets by time of day; thus, new paratransit service in terms of fare and level of service. High-fare, high-service-level (door-to-door) paratransit does not compete with line-haul transit. Nor does service to the elderly and handicapped. By requiring the careful and precise selection of markets for new services, the use of competitive brokerage can limit competition.

The dilemma that arises from limiting competition by indemnifying existing mass transportation employees from competitive harm is that it seems desirable for a new service to attract riders not only from automobiles, but also from any existing service that is less efficient or that imposes greater external social costs (such as environmental damage or congestion). However, to the extent that only some services are eligible for UMTA funds or other subsidy, it may be inequitable to rely exclusively on the market (the consumer) to determine which service is most efficient. For example, one service may capture a larger market share and appear more efficient only because it receives a larger UMTA (or other government) subsidy. In addition, the market is not an effective judge of external social costs.

Who Is Indemnified and by Whom

Originally, section 13c indemnification appears to have been concerned exclusively with protecting unionized mass transit employees. UMTA funds threatened private mass transit employees most directly, especially when used for mass transportation services. This quickly becomes unmanageable. Consider whether a new paratransit service that fails because of competition from the existing UMTA-funded service is competing in the mass transportation market and thus should be extended indemnification against competition from other services that are receiving UMTA funds.

The reciprocity has an attractive symmetry. For example, if UMTA money can be used to subsidize a new paratransit service that competes with an existing shared-ride taxi service and destroy taxi jobs, the taxi employees may need indemnification. In this case, however, are the taxi employees also owed indemnification from competition caused by other UMTA-subsidized services that are not as similar to taxi service and that compete less directly? [An example that has been used is a new, UMTA-funded subway that competes indirectly with the private taxi service (5). If reciprocity is again followed, the taxi service will have to be indemnified from competition caused by any service that is receiving UMTA money.]

Similarly, reciprocity would seem to require that the newly funded paratransit service would also have to provide indemnification to all other services that are eligible for UMTA funds (i.e., shared-ride taxi services and other mass transportation services). This quickly becomes unmanageable. Consider whether a new paratransit service that fails because of competition from the existing UMTA-funded service is to be indemnified; reciprocity would seem to require it. Clearly, reciprocity is not an adequate basis for determining who is to be indemnified by whom. If all UMTA-funded services owe indemnification to each other, there will be an exchange of indemnification. One can almost imagine a market for transferable indemnification rights that are freely traded by management and employees. As more and more services that are eligible for UMTA funds (i.e., mass transportation services) begin to receive them, such an exchange may become possible, although no less absurd.

But if indemnity is not owed to all services eligible for acquisition, and the transit unions themselves proposed section 13c as a remedy. It seems fairly clear that little thought was given to any other transportation employees. Similarly, originally, only transit management could have been expected to provide section 13c protection, including indemnification, because only transit management was in a position to harm employees.

However, now that paratransit is receiving UMTA funds, new issues have arisen. These include (a) whether new mass transportation services (limited here to paratransit) must give indemnification to existing mass transportation employees, (b) whether indemnification is owed to the new service by existing services that have received UMTA funds, and (c) the way in which indemnification, if it is not owed to all existing services by all new services, is to be limited?
SUGGESTIONS FOR LIMITING THE APPLICATION TO PARATRANSPORT OF SECTION 13c

The first suggestion for limiting the application to new paratransit of section 13c is to eliminate it entirely. Although the history of the administration of the section is, of course, to the contrary and the unions will protest, there are many reasons to think that section 13c was not intended to cover paratransit.

The first reason is that section 13c seems to have been intended only to provide protection against direct harm to collective bargaining rights. It is against public policy to indemnify existing services against indirect competitive harm. Even if indemnification had been appropriate when UMTA subsidies were available only to some mass transportation services, this is no longer the case; UMTA subsidies are available to all mass transportation services. To the extent that a service is eligible for UMTA funds it should be estopped from receiving indemnification from competition that also receives UMTA funds. The protections available to the private taxi company that may be losing jobs to UMTA-subsidized competition are to request compensation under section 3e or its own UMTA subsidy (e.g., by bidding successfully for the new paratransit service).

The opportunity to bid for the new service that uses UMTA funds may be all the protection that is needed; if the existing service cannot provide the new service most efficiently, perhaps it should not provide it at all.

The second reason why section 13c indemnification should not apply to paratransit is that, when the new service is managed by an organization that is separate from the transit management, the new management does not have direct control over the harm to the threatened employees of the existing competitor. This differs from the situation in which UMTA funds are used to acquire an existing private service or to automate a service and the new management has direct control over any harm to its employees. It is both more difficult to control indirect competitive harm and more difficult to prove the cause of the harm. More important, there is no compelling reason for management to limit competition by providing indemnification. Indeed, there may be greater benefits from encouraging such competition. Again, this differs from the case of acquisition, where section 13c may have been necessary to prevent the new management from directly destroying existing collective bargaining rights.

Finally, indemnification from indirect competitive harm is not a right that existed before section 13c; it did not exist under prevailing collective bargaining agreements (nor could it have). If the overriding intent of section 13c is to ensure that the employee will be as well off in his or her relationship with management under public ownership as he or she was under private ownership, section 13c should apply to such employee from the time he or she is hired by UMTA-funded paratransit, not by an UMTA-funded service.

In addition to the optimistic position of withdrawing the application of section 13c to paratransit, there may be other ways to limit the operation of indemnification. These include the following: (Of course, only mass transportation services that are receiving UMTA funds must provide indemnification.)

1. Indemnification should be provided only to mass transportation services that are not receiving UMTA funds; this is the group most in need. Either indemnification or UMTA funds should be given, but not both.

2. If indemnification is to be provided to mass transportation that is receiving UMTA funds, a waiting period should be established before a new, UMTA-funded service becomes eligible for indemnification (although the new service might be required to indemnify other services immediately).

3. Indemnification should not be required for any private mass transportation service; private service is entitled to compensation under section 3e and to maximum feasible participation in providing new services and has no control over other mass transportation employees.

4. Indemnification should be provided only to employees of conventional fixed-route mass transit services. The legislative history supports this view. Labor itself argued that it needed railroad-type protection because transit was so similar to the railroads, and an early version of section 13c submitted by labor would have protected future employees. By omitting this language in the final version, Congress indicated an intent to protect only employees then existing—i.e., fixed-route transit employees.

5. The only indemnity provided should be a guarantee to maintain the size of the relevant bargaining unit for a specified period of time, beginning with the receipt of UMTA funds.

6. Indemnification should be provided only to mass transportation that will be competed with directly. For example, the private taxi company should at most be indemnified by UMTA-funded paratransit, not by an UMTA-funded subway.

As many persons have recommended, DOL should issue regulations that specify the precise circumstances under which section 13c applies (6). These regulations should also provide guidance on the specific terms to be contained in specific section 13c agreements. Leaving the terms solely to local negotiations has given the transit unions far more power than they had before public acquisition (and far more than seems fair and equitable). Similarly, the regulations should specify what terms will be imposed if the parties cannot agree. If DOL and UMTA cannot or will not agree to issue criteria, a petition for rule making would seem appropriate. Another alternative would be an executive order that would form the basis for UMTA and DOL to issue criteria.

Finally, UMTA should consider establishing a separate cost account for the administration of section 13c and any indemnification that is required. This would allow a more explicit accounting of the true cost of extending such elaborate protection to labor. It would also encourage new services to accept the consequences of indemnifying competing employees whom they drive out of business and would lessen the inhibitory effect section 13c has on innovation.

CONCLUSION

Many forces, including the systems viewpoint of urban transportation, are forcing a fuller consideration of paratransit. Although paratransit poses some threat to ex-
isting line-haul markets served by conventional mass transit (especially deficit ridden markets), its greatest threat is in capturing many new markets that otherwise would have gone to transit.

Not surprisingly, the possibility of missing out on these new markets and new jobs is causing transit unions considerable concern. But, aligned against the unions' interest in the new jobs is an impressive array of other factors, many of which are related to the need to reduce our dependency on the private automobile. Concern about air, noise, and visual pollution; energy use; congestion; and other unintentional social costs of automobile use have made it clear that public mass transportation must be expanded in a way that will attract private automobile users. Because paratransit is more flexible and offers a higher level of service, it has many inherent advantages over conventional mass transit for serving the automobile market.

At the same time that paratransit is being recognized as a possible alternative to the private automobile, the fiscal crises of many cities are causing general budgetary restraint and there is a growing understanding that UMTA capital and operating funds are also limited. The result of these fiscal constraints is that paratransit and conventional transit are competing not only for new jobs, but also for a limited and fixed amount of government subsidy.

A final factor favoring paratransit is the use of competitive brokerage to select new mass transportation services. By removing the institutional advantage existing transit would have for gaining new markets, competitive brokerage promises to reward the inherent advantages of paratransit, including its lower labor cost.

Against these factors is section 13c, which the transit unions are using both to block paratransit expansion and to gain control of any new jobs. While there is wide disagreement on the extent of the problem, section 13c clearly slows innovation.

But innovation will occur, and the unions have already shown, as in Cleveland, that they can be flexible enough to compete for many new markets. Flexible work rules should be a concession the unions continue to make to win new jobs. New job classifications should also be expected.

The central role of the MPO in promoting paratransit expansion makes it an ideal forum for resolving many of the debates about section 13c. In fact, many of the issues arising under section 13c are political in nature and belong more properly in the political forum provided by the MPO. It is, for example, a local political decision how to allocate UMTA money among different mass transportation services. It may also be advantageous to use the political forum to set wage rates for transportation services; a fixed budget ceiling should be the concern of all city managers. It is also a political decision to determine which transportation jobs are affected and how they are to be protected.

For these reasons, the MPO may have an increasing role in the section 13c process, from assisting management negotiate specific agreements to providing a specific account to pay claims. The MPO's political composition gives it needed authority and flexibility, as well as a concern for budgetary matters that is greater than many transit managers.

The MPO is also in a good position to encourage trade-offs between new jobs and security for existing jobs. Agreements that are collateral to section 13c could also be used to advantage by the MPO. These agreements might set forth existing transportation conditions other than UMTA funds that can affect employees, facilitate reemployment of terminated employees, provide for the sharing of liability for claims, and keep accurate cost accounts of all claims.

In conclusion, even with the possible protection of section 13c, transit unions are being forced to be flexible to accommodate innovation and continue to expand. However, removing the application of section 13c to paratransit would accelerate this process without any serious harm to the unions.

ACKNOWLEDGMENTS

The National Science Foundation and the Urban Mass Transportation Administration supported earlier research on section 13c; Christine S. Lipaj provided a great deal of valuable research. Of course, the views expressed are mine only.

REFERENCES


Requirements for Paratransit Vehicles


The current state of the art of paratransit vehicles—the sizes and types used, the operating constraints, guidelines for size selection, a vehicle-tender selection process, current trends, and forecasts of the evolution of vehicle design over the next 10 years—is discussed. Action is suggested to reduce uncertainty over individual vehicle performance and improve utilization and design. Vans and integrally designed small