

Institutional Requirements for Competition: Labor Issues

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This paper identifies the labor requirements applicable when transportation organizations want to increase competition through subcontracting or service contracting and suggests methods for meeting those labor requirements. The paper defines subcontracting and service contracting, identifies the major sources of labor requirements and the organizational types that are affected by each source, discusses the labor requirements in detail, and suggests ways of effectively dealing with the requirements. Although the paper specifically addresses those labor requirements that must be met in order to increase competition through subcontracting and service contracting, the discussion is also relevant to other organizational modifications that change the number or identification of transit service providers.

In order to increase competition in urban mass transportation, it is necessary to deal effectively with the institutional requirements that envelop the industry (1). One type of institutional requirement that almost always must be addressed involves the labor issues (2,3). Frequently, labor requirements are seen as the major obstacle to increased competition. Indeed, they often place restraints on the type and extent of competition that can take place in the short run. Over time, however, there often are ways in which the desired competition can be introduced while meeting labor requirements.

The purpose of this paper is to identify the labor requirements involved when transportation organizations want to increase competition through subcontracting or service contracting and to suggest methods for meeting those requirements. The paper first defines subcontracting and service contracting. Next it identifies the major sources of labor requirements and the organizational types affected by each source. Then it discusses the labor requirements in detail and suggests ways of effectively dealing with them.

TYPES OF COMPETITIVE ARRANGEMENTS

Efforts to increase competition in transit have primarily included the use of two basic approaches. They are (a) subcontracting by operating agencies and (b) contracting for service by nonoperating agencies (2). Under subcontracting, a transit system contracts out part of its operations to other public- and private-sector organizations. The subcontracted work could involve transit service, maintenance, or any other activity. Subcon-

tracting's central characteristic is that an operating agency contracts out activities that it does or could perform itself. The subcontracting approach is the easiest to implement and is the most common.

Service contracting, or contracting for service, is also sometimes called fully competitive bidding. Under service contracting a nonoperating agency, such as a funding or planning body, contracts with private and public transit suppliers for the provision of transit service on various routes or geographic areas within its jurisdiction. Service contracting's central characteristic is that a nonoperating agency contracts out activities that it would never perform itself because they involve various aspects of operating transit service.

Privatization of transit service often uses the same techniques as competitive arrangements, although privatization itself does not require competition and only allows private-sector firms to participate. This discussion of labor requirements, however, is equally applicable to the use of subcontracting and service contracting under both privatization and competitive initiatives.

Both the subcontracting and service contracting approaches could be used in the same geographic jurisdiction, of course. But, subcontracting would be used only by operating agencies, and contracting for service would be used only by nonoperating bodies. And, as discussed next, subcontracting requires the consideration of both collective bargaining and 13(c) requirements, whereas service contracting usually invokes only 13(c) provisions.

SOURCES OF LABOR REQUIREMENTS AND ORGANIZATIONS COVERED BY EACH

The most common labor requirements come from two main sources. One of these sources is an agency's collective bargaining agreement, as governed by state public employee collective bargaining laws, the National Labor Relations Act as amended, and other legislation. The other source is an agency's 13(c) agreements, as required by Section 13(c) of the Urban Mass Transportation Act of 1964 as amended, referred to herein as the UMT Act (4-6).

The requirements that a particular agency is subject to depend on the agency's institutional and financial situation. The key institutional factor is whether an agency operates a transit system or whether it is a nonoperating organization such as a funding or planning agency. Nonoperating agencies do not employ transit workers; thus they sign no collective bargaining

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agreements, and state and federal laws concerning collective bargaining are not applicable to them. Operating organizations do employ transit workers; thus state and federal collective bargaining laws are applicable to them, as are existing collective bargaining agreements for those that employ unionized workers.

The key financial factor is whether federal aid is received for the project. This is because 13(c) requirements only apply when federal assistance is directly or indirectly used by an agency.

Thus, if no federal aid is received for the projects in question, a nonoperating agency generally is not covered by either collective bargaining or 13(c) requirements, and a unionized operating agency generally is subject to only collective bargaining agreements. If federal aid is received, a nonoperating agency generally is covered only by 13(c) requirements, but a unionized operating agency generally is covered by both collective bargaining agreements and 13(c) requirements. That is, when federal aid is received, subcontracting could potentially invoke both collective bargaining and 13(c) requirements, whereas service contracting would normally involve only 13(c) requirements.

Some agencies occasionally may be faced with additional labor requirements. Although not examined in this document, these can come from local, state, and federal government sources (7).

COLLECTIVE BARGAINING AGREEMENTS

The labor requirements that can have the most impact on an operating agency's workers are found in the collective bargaining agreement between the agency and its employees (8). Collective bargaining agreements mainly restrict attempts of transit operating agencies to subcontract, with service contracting by nonoperators being inapplicable.

In the following discussion of the impact of labor agreements on subcontracting, four subjects are covered: (a) agreements with specific language on subcontracting, (b) agreements without specific language on subcontracting, (c) notification of the union of intent to subcontract and duty to bargain over it, and (d) potential for modifying agreements. The following four subsections address each of these subjects in turn and suggest ways for dealing with their requirements.

The discussion is illustrated with the outcomes of applicable transit arbitrations that have occurred since 1977. A classification of the arbitration cases is presented in Table 1. Of the 15 cases, 2 considered 13(c) agreements only, 2 concerned both 13(c) agreements and collective bargaining agreements without subcontracting language, 5 involved only collective bargaining agreements without subcontracting language, and the final 6 examined only collective bargaining agreements with applicable subcontracting language. The detailed criteria used by arbitrators when collective bargaining agreements contain no subcontracting language are presented in a later section, and the 13(c) issues are presented in the sections covering 13(c) protections. Of the 15 cases, management won 8 and the union won 6, so there has been no clear victor. Also, it is interesting to note that 6 of the 15 cases, or over one-third, have occurred in the last 2 years.

Collective Bargaining Agreements with Specific Language on Subcontracting

In some cases, the collective bargaining agreement may specifically cover the subject of subcontracting. Provisions related to subcontracting often are found in a management rights clause or a subcontracting clause. Following are three examples of language seeking to ensure certain rights for management (9):

- The agency has the right to subcontract any work.
- The agency has the right to subcontract any work unless it would result in the layoff, transfer, or demotion of any bargaining unit employee.
- The agency has the right to subcontract any work if the subcontracting would result in lower costs or more efficient operations.

More commonly, the agreement contains subcontracting language designed to prevent or limit subcontracting and sometimes succeeds in doing so (10,11). However, clear contract language is applied strictly by arbitrators, so the mere existence of language limiting subcontracting does not necessarily prevent it. An example of such language, which seems to restrict management but, in fact, permitted substantial subcontracting, is provided by a 1987 arbitration involving the Fort Wayne Public Transportation Corporation (PTC) (12). Management had subcontracted service that included some regular fixed-route lines that had previously been operated by its own employees. The union grieved, citing the following subcontracting clause: "The Company shall not contract out or subcontract out or hire part-time employees to perform any work normally performed by the employees within the bargaining unit which would result in lay off, transfer or demotion of these employees." Since no employees were laid off, transferred, or demoted, the arbitrator ruled that the subcontracting was permissible.

The Fort Wayne case illustrates another point as well. As is explained in the next subsection, employees and management each have well-established rights when the contract is silent on subcontracting. However, if subcontracting is specifically covered in the agreement, this language is applicable to any subcontracting activities. Thus, for management as well as for labor, the presence of subcontracting language will change their rights. However, the specific changes that occur are not necessarily obvious without careful examination (13).

In sum, when an agreement includes clear, specific language about subcontracting, all parties are bound by the provisions during the agreement's life. However, new provisions may be negotiated in the next agreement. Thus, if management wants to subcontract in the future, and the current agreement contains language that does not permit the type of subcontracting desired, management should plan ahead and attempt to negotiate the necessary rights into its next agreement.

Collective Bargaining Agreements Without Specific Language on Subcontracting

Most transit collective bargaining agreements do not specifically address the topic of subcontracting in any part of the

TABLE 1 CRITERIA USED IN 15 TRANSIT ARBITRATIONS INVOLVING SUBCONTRACTING, 1977-1988

CRITERIA	CASES	
	#	%
13(c) Agreement Language	4	27
Subcontracting Language in Collective Bargaining Agreement	6	40
Collective Bargaining Agreements Without Subcontracting Language:	7	47
Justification for the Subcontracting	7	47
Effect on Union, Bargaining Unit and Labor Agreement	7	47
Effect on Bargaining Unit Employees	7	47
Type of Work Involved	7	47
Past Practice	3	20
Duration of the Subcontracted Work	3	20
History of Negotiations on Subcontracting	1	7
Availability of Properly Qualified Employees	1	7
Availability of Equipment and Facilities	1	7
Regularity of Subcontracting	1	7
Atypical Circumstances Involved	1	7

Notes: Percentages are the number of cases in the category divided by 15.

Of the 15 cases in total: 2 involved only 13(c) agreements; 2 involved both 13(c) agreements, and collective bargaining agreements without subcontracting language; 5 involved only collective bargaining agreements without subcontracting language; and 6 involved only collective bargaining agreements with subcontracting language.

contract. The fact that the agreement is silent, however, does not give management the unilateral right to subcontract whatever and whenever it chooses. That is, the very fact that there is an agreement establishes certain employee rights concerning subcontracting. On the other hand, management does retain significant rights to subcontract under a silent agreement (14).

Arbitrators have developed a number of standards that identify the circumstances under which subcontracting can occur when the labor agreement is silent on the subject (14). The most common of these, with examples from recent transit arbitrations, are covered next. The first four standards are key. They have been present in all of the arbitration cases involving transit subcontracting under collective bargaining agreements silent on the subject, and they are likely to be present in most future cases. Each of the remaining seven standards has been a factor in one or more recent transit subcontracting cases. Although these standards are less likely than the first four to be relevant to a particular case, it is certain that they will be used when applicable.

1. *Justification for the subcontracting.* It is always necessary to have well-documented reasons for subcontracting, such as lower costs, efficiency, or other sound business reasons.

In one case, for example, the arbitrator asked (15), "Had the employer made a reasonable 'efficiency and cost' decision when it was determined by COTA [Central Ohio Transit Authority] to subcontract this special project? This is, clearly, a most important question." After looking at the evidence, the arbitrator determined that management had done so, even though the union made a "very lengthy presentation" trying to show that the cost differences were slight.

Likewise, after noting that the decision must be justified and examining the evidence, a variety of arbitrators ruled as follows. The Transit Authority of River City (TARC) (16) had made a reasonable efficiency and cost decision; TARC (17) had acted in good faith because there were major savings and it was a practical impossibility for the company to schedule the work efficiently; the Chattanooga Area Regional Transportation Authority (CARTA) (18) had established

legitimate reasons for subcontracting in the record; the Chicago Transit Authority (CTA) (19) subcontracting could be justified on the basis of all relevant evidence as a normal and reasonable management action, because of a consulting study and other cost analyses. In the Transit Authority of Lexington-Fayette County (LexTran) (20), the arbitrator noted the well-documented financial difficulties and the presence of UMTA regulations requiring privatization. Significantly, the arbitrator stated that UMTA pressure alone would not justify subcontracting.

2. *Effect on the union, bargaining unit, and labor agreement.* Subcontracting may not be used as a method of discriminating against the union. It should not hurt the status or integrity of the bargaining unit; that is, it should not have the effect of seriously weakening the bargaining unit or important parts of it. It should not result in subversion of the labor agreement.

For example, in the 1987 TARC case (16), the arbitrator noted that he had found no evidence that the subcontracting was motivated by antiunion animus. At COTA (15), the arbitrator addressed the question of whether the subcontracting undermined the bargaining unit or the security of the union as an institution. He found no evidence that this was intended by management, nor any evidence that this would be the unintended result. The size of the unit had been growing and was expected to grow even more. Significantly, the arbitrator noted that, "This . . . small project, involving approximately 10 operators and 2 mechanics, is very small compared to the work force of over 400 employees in the COTA bargaining unit."

However, in their decisions, many arbitrators noted that the effects of subcontracting on the bargaining unit had been minimal. They cautioned that the level of subcontracting could not be increased without the possibility of a change in their decisions. For example in the June 1987 LexTran case (20), the arbitrator noted that the integrity of the bargaining unit had not been injured by the contracting out of three fixed-route bus routes, which had only been in existence for a short time and were little used. However, he cautioned that if the authority contracted out additional routes, the bargaining unit's integrity might be seriously jeopardized, and the current decision would not prejudice a future union claim following any additional subcontracting.

In a few cases, injury to the integrity of the bargaining unit has been a key factor in arbitrator decisions preventing subcontracting. In an arbitration involving the Portland, Maine, Metro (21), in which management planned to use private providers to operate handicapped services, the arbitrator ruled against management. A prime reason was that the subcontracting would undermine the bargaining unit. And, in ruling against subcontracting at the South Bend, Indiana, PTC (22) in a case involving only one part-time maintenance employee at a remote substation, the arbitrator held that, "it was not shown to be the parties' intent to freeze the size of the bargaining unit by allowing the permanent subcontracting in of new work which could be done cheaper by outsiders."

The prevailing position, however, is that subcontracting will be allowed under this standard if the effects on the bargaining unit and the collective agreement are "small" and if there is no trace of antiunionism involved.

3. *Effect on bargaining unit employees.* An argument for

allowing subcontracting is that members of the bargaining unit have not been discriminated against, displaced, deprived of jobs previously available to them, or laid off as a result of the subcontracting. Unless the agreement contains an overtime guarantee, loss of overtime earnings is not an important consideration.

The fact that no bargaining unit employees had been laid off was given as a reason for allowing subcontracting by the arbitrators in every transit arbitration examined where the contract was silent on subcontracting and the arbitrator did permit subcontracting. No transit employees have been laid off in any of the arbitration cases to date, so it is not known how much weight the presence of layoffs would receive. However, its frequency of mention indicates that it would be a major factor in any decision.

In the COTA case (15), as well as in some but not all of the others, the arbitrator went even further. At COTA, the arbitrator considered not only whether any employees had been laid off but also whether jobs that were traditionally performed by bargaining unit employees would be denied them.

A similar issue is that of bargaining unit positions vacated by attrition being shifted to a subcontractor, thereby decreasing the unit size without layoffs. Because this has not occurred in any arbitrated case to date, it has not been considered by transit arbitrators. However, significant declines in the size of the bargaining unit, even if accomplished by attrition rather than layoffs, would probably be a factor in the union's favor (12).

In sum, when an arbitrator has allowed traditional work to be subcontracted, the decision often has been conditioned upon the fact that only a small amount of work was involved and the integrity of the bargaining unit had not been injured. This leads to the fourth key criterion—the type of work involved.

4. *Type of work involved.* If the work subcontracted is of the type normally performed by bargaining unit employees, this is an argument against subcontracting. But, if the work is frequently subcontracted in the industry, or is of a marginal or incidental nature, this argues in favor of allowing it.

Arbitrators have made clear references to the centrality of the type of work in justifying their decisions. For example, in the 1982 CTA arbitration (23), which involved subcontracting of security work, in ruling for management the arbitrator acknowledged that security was a support function. He stated that he might have ruled for the union if the central functions of the bargaining unit, such as vehicle operation, were involved. At CARTA (18), the arbitrator considered whether the work was "adjunct type services, like office cleaning," and implied that "door-to-door service with small, specially equipped vans to accommodate a limited number of handicapped or semiambulatory passengers" is an adjunct type service.

Whether demand-responsive service, service using vans, service limited to certain groups, or some combination of these factors is considered to be the type of work "normally performed" by bargaining unit members will depend on the case at hand. New demand-responsive van service for special groups was found not to be dissimilar from traditional service at the MBTA (10). Although the MBTA argued that the dial-a-ride operation was new and uniquely different from the service that the authority had traditionally provided, and

therefore was not "bargaining unit work," the arbitrator found that, "Just as the size of the vehicle is not decisive of whether it is bargaining unit work, neither fixed routes nor regular schedules control that question." But, such work has been found to be dissimilar in some cases. At COTA for example (15), the arbitrator found that the newly instituted demand-responsive service for special groups did differ from "the work of driving the large coaches traditionally done by members of the bargaining unit, to transport the general public." In sum, a decision as to whether demand-responsive service, service using vans, service to special groups, or any combination is significantly different from traditional fixed-route service with large coaches will depend on the particular set of circumstances involved. However, it would seem that if an agency has offered only fixed route/time service using large buses in the past and decides to subcontract demand-responsive service for special groups using vans, this work usually would be considered different.

To summarize the first four standards—arbitrators always require that the subcontracting be justified; then they often apply the remaining three standards as a set, with the net effect that all three are the relevant factor. The next seven standards are also important but have not been applicable as often as the preceding four.

5. *Past practice.* If the parties have exhibited a clear pattern of behavior concerning subcontracting in the past, that practice is evidence for what is permissible under the current agreement.

For example, when LexTran (20) contracted out three lightly used fixed routes, the arbitrator noted that subcontracting had been used to replace uneconomic fixed-route service in the past, albeit with demand-responsive vehicles. In the 1987 TARC case (16), the arbitrator noted that past practice and bargaining history tended to favor the right of subcontracting, because some contracting out had occurred since 1980, and the union had never brought it up in negotiations.

6. *Duration of the subcontracted work.* It is more likely that the subcontracting will be allowed if the work is subcontracted for a temporary or limited period and less likely it will be allowed if it is subcontracted for a permanent or indefinite period.

The fact that the work would be temporary was an important factor in several transit cases. For example, at COTA (15) the arbitrator noted that subcontracting of the service "may not be permanent, since COTA stressed the experimental nature of the service to be contracted for only a year." More strongly, the CARTA (18) arbitrator stated "Finally, and perhaps most important of all, this is only an interim service which is scheduled to lapse as soon as the larger buses equipped to handle handicapped passengers are ready for operation." And in the 1987 TARC arbitration (16), the arbitrator cautioned that "If this route becomes permanent . . . some of the fundamental assumptions underlying this decision would cease to be present. If this occurred, the decision herein should be reexamined."

7. *History of negotiations on subcontracting.* If either party has attempted to gain certain subcontracting rights during new contract negotiations and failed, this is considered as evidence that such rights are not part of the agreement.

An example is provided by the 1985 Chicago CTA arbitration (19). The arbitrator noted that "the fact that the Union

proposed contract language prohibiting subcontracting suggests the Union recognized the fact that the collective bargaining agreement does not specifically prohibit subcontracting."

8. *Availability of properly qualified employees.* Are bargaining unit members with appropriate skills available to do the work? If they are, this would be an argument against allowing subcontracting; if they are not, this would be a strong argument in its favor.

For example, in the Boston MBTA case (10), management argued that their ordinary drivers did not have the training and skills needed for their demand-responsive handicapped service. In this case, the arbitrator rejected the argument, saying that drivers hired for the demand-responsive service had often obtained the training and skills after being hired.

9. *Availability of equipment and facilities.* An argument for allowing subcontracting is that necessary equipment and facilities are not available and cannot be economically purchased.

For example, in the 1980 TARC arbitration (17), the arbitrator noted that, "The evidence showed that the cleaning is more sophisticated than that performed by the Company's janitorial staff and requires equipment that the Company does not have."

10. *Regularity of subcontracting.* Arguments favoring subcontracting would be that this was the first time the job had been necessary or the work is so intermittent and irregular as to make it infeasible to hire permanent employees to perform it.

The 1980 TARC arbitration (17) provides an example of the use of this criterion. In ruling that the subcontracting was permissible, the arbitrator said that:

In the case at hand, we are dealing with an unusual situation in that janitorial service is required on a short time basis in the early hours of the morning The working hours vary from 2 to 5 hours and the complement (of workers needed) fluctuates from two to four or more depending on the type of cleaning required The fluctuating nature of the work performed by the subcontractor makes it a practical impossibility for the Company to schedule the work efficiently.

The eleventh and final standard, involving unusual situations, is discussed next.

11. *Atypical circumstances involved.* Subcontracting may be justified when it is necessitated by an emergency, some urgent need, a deadline, or other circumstances not usually present.

For example, in 1986, because of a large number of car door openings on trains in motion, the New York City Transit Authority (NYCTA) (24) farmed out the work of examining and repairing the doors. There were several arbitration decisions over a period of time on the matter, and there was some applicable contract language. However, the following statement by the arbitrator well illustrates the criterion being examined:

I have viewed this situation from the inception of the arbitration as a severely troubling, if not an emergency, matter. In fact, had it not been for my concern for the safety of the public, I likely would have found that the contract required the immediate and complete removal of the Vapor (subcontractor) employees from the 207th Street shop.

To summarize the discussion of all eleven standards—in the

absence of collective bargaining agreement language specifically dealing with subcontracting, the particular situation at hand should be considered in determining if subcontracting will be allowed. If the weight of the evidence from the criteria will convince an arbitrator that the subcontracting is reasonable and undertaken in good faith, then it will be allowed. As should be clear from the transit cases cited, arbitrators often have ruled for management. So, if reasonableness and good faith truly are present, it usually is possible to convince an arbitrator that this is so.

Although arbitral decisions become part of the existing collective agreement between the parties for the duration of the contract, they are open to renegotiation and change in future contracts. That is, if an agreement is silent on subcontracting and management has lost or feels it would lose before an arbitrator, it still can obtain its end by negotiating appropriate language when bargaining the next contract with the union.

Notice of Intent and Duty to Bargain Collectively

The previous sections have examined the labor requirements concerned with what work may be subcontracted during the term of the collective bargaining agreement. This section examines labor requirements concerned with the *process* of making subcontracting decisions. There are two main process requirements to be considered. The requirements are, first, the notification of the union of intent to subcontract and, second, the duty to bargain with the union about subcontracting.

If management plans to engage in subcontracting of a different type or to a significantly greater degree than it has done in the past, it must carefully follow any notification or bargaining requirements specifically included in its current agreement. Even if the agreement says nothing about notification, management usually is required to notify the union about an intent to subcontract, whether the intent develops during new contract negotiations or during the term of an agreement (25,26).

Likewise, during new contract negotiations, or under a silent agreement during its term, usually management is required to bargain with the union over subcontracting if the union specifically asks to do so. However, good faith bargaining does not require management to alter its initial position, unless the union has truly convinced it that it should do so. At the end of such bargaining, if the parties have reached an impasse, then management has the right to implement its final position. Note, however, that under some public employee collective bargaining laws, it may be necessary to use certain impasse resolution procedures such as mediation or fact finding before implementing the subcontracting (25,26).

If an impasse is reached under an agreement silent on subcontracting, and management implements its final position, the union has the options of doing nothing, filing a grievance, which could lead to arbitration, or going to a state public employee relations board or court. If the union does nothing, obviously management will be able to continue the subcontracting. If the union files a grievance and pursues it to arbitration, the arbitrator will rule based on the standards applicable to a silent contract. If the union takes the case to a board or court, which is likely to occur only if the state has

a comprehensive collective bargaining law, that body will determine whether management bargained in good faith with the union on the topic. If the board or court determines that management did bargain in good faith, even if management did not change its initial position, it will support management's implementation of its final offer.

Regardless of the scenario, during either new contract negotiations or during the term of an existing agreement, management should not forgo its option to act for fear of union reaction. However, management should obey all applicable agreement provisions. If the agreement is silent on subcontracting, management should notify the union of its intent to subcontract well in advance of signing a subcontracting contract and, if the union specifically requests to do so, should bargain in good faith about the subcontracting with the union, following procedures mandated in applicable collective bargaining laws. If agreement cannot be reached, management should proceed to subcontract as specified in its final position. In short, management should take decisive, but not impetuous, action to attain its ends.

New Collective Bargaining Agreement Negotiations

The final factor that can affect subcontracting decisions is the potential for modifying the agreement during new agreement negotiations. If management feels that it cannot subcontract in the way that it wants under its current agreement, it can attempt to obtain the needed language in its next labor agreement. Restrictions imposed by a silent agreement, specific agreement language, arbitration decisions, and binding past practices can be removed if appropriate language is inserted in the next agreement.

Changes in agreement language are not normally possible except when the contract is being renegotiated. Thus, if decision makers are considering the possibility of subcontracting in the future, they should remember this when planning for contract negotiations. In short, if the current agreement does not provide sufficient rights, then it is important to plan ahead and negotiate for them, so the necessary rights will be present to allow subcontracting thereafter.

In some cases, a union may be willing to give up substantial economic benefits in return for obtaining a favorable subcontracting clause or may require substantial economic benefits for removing one from the agreement. This may have a significant impact on the cost advantages of subcontracting. For example, the union may agree to lower wages for certain occupations or be willing to bid for certain work, thus affecting the relative cost differences between doing the work in house and contracting it out. That is, the threat of subcontracting can be used as a very potent argument for obtaining cost savings. Indeed, the concessions obtained from agreeing not to subcontract might be equal to or greater than the hoped-for savings from subcontracting.

In sum, decision makers should expect subcontracting issues to flow over into regular contract negotiations whether or not there is specific language in the current agreement. They must determine whether the benefits of obtaining, or giving up, subcontracting rights are worth the costs. They should consider the advantages and disadvantages of subcontracting in terms of the effects on (a) costs and revenues, (b) the desired

labor-management relationship, and (c) other key elements of the system's strategy.

The second major source of labor requirements is Section 13(c) of the UMT Act and the resulting 13(c) agreements (13). The next two sections discuss the effects of 13(c) requirements on attempts to increase competition through subcontracting or service contracting and how to deal with the situations.

13(c) AGREEMENTS

Section 13(c) of the UMT Act, as interpreted by its legislative history, requires that "13(c) agreements" be signed by recipients of federal aid (4-6). If employees represented by unions may be directly or indirectly affected by a project, the 13(c) agreement is negotiated by the recipient and the involved unions. The 13(c) agreements detail the exact nature of the protections. Certain minimum protections are set by the law, although the law itself notes that these minimums will not necessarily be sufficient or standard. The specific conditions applicable to a given case are negotiated and agreed to by the parties directly involved, with impasses being resolved by the Secretary of Labor, whose decisions are reviewable by the federal courts.

Although 13(c) agreements are tailored to fit the circumstances of each case, most tend to be similar. For example, most of the agreements for operating aid are patterned after the National Employee Protective Agreement of 1975, often referred to as the model agreement or the national agreement (4). Indeed, the model agreement is frequently adopted verbatim by the parties.

There are a number of provisions in the model agreement that can affect subcontracting, including those involving advance notice requirements for operational changes (Paragraph 5), compensation due to adversely affected workers (Paragraph 6 and others), priority of employment for dismissed employees (Paragraph 18), successor provision (Paragraph 19), and, most important, the sole provider requirements (Paragraph 23). Only the sole provider requirement is discussed here.

Paragraph 23 of the model agreement contains the requirement that the federal aid recipient shall be the

sole provider of mass transportation services to the Project and such services shall be provided exclusively by employees of the Recipient covered by this agreement, in accordance with this agreement and any applicable collective bargaining agreement.

However, subcontracting that predates the 13(c) agreement may continue. In its most restrictive interpretation, this paragraph prevents federal aid recipients from subcontracting work that has not been historically subcontracted. Most arbitrators and transit labor relations authorities who have taken public positions on the matter have stated that the language supports the restrictive view, although not everyone agrees.

However, if an operator's collective bargaining agreement does permit subcontracting while its 13(c) agreement does not, which will prevail? In three of the four arbitration awards that have been issued on the question through mid-1988, the arbitrators have said that the sole provider language in Paragraph 23 of the model agreement will be binding *only* if it

does not conflict with the collective bargaining agreement (16,18,27). The three applicable collective bargaining agreements were silent on subcontracting, but the arbitrators held that the desired subcontracting was permitted under them. Hence, because the collective bargaining agreements permitted the subcontracting, and the collective bargaining agreements were ruled to prevail, the subcontracting was permitted.

In the fourth case (28), the arbitrator ruled that the 13(c) agreement's subcontracting prohibitions should prevail over a collective bargaining agreement silent on the subject and prohibited the subcontracting. This ruling directly conflicts with the other decisions.

There undoubtedly will be more arbitrations on the problem, so a definitive answer may not be available for some time, if ever. Moreover, in all cases to date, the collective bargaining agreement was silent concerning subcontracting, so the arbitrators were considering management rights under silent collective bargaining agreements versus management rights under a 13(c) agreement with specific subcontracting language. It would appear that the collective bargaining agreement would be increasingly likely to prevail if it contained specific language permitting subcontracting, if its language was negotiated after the 13(c) agreement was signed and if its language specifically provided that it would prevail over all other agreements.

In sum, in most cases to date, management rights under a collective bargaining agreement have prevailed over subcontracting restrictions in the 13(c) agreement for operating aid. But, the outcome of a particular case will partly depend on the specifics concerning the case in question and the arbitrator involved.

It is important to note that some capital, demonstration, and other 13(c) agreements have unique provisions regarding subcontracting. Often these are much less restrictive than those found in the model agreement for operating aid. For example, some 13(c) agreements provide that subcontracting can occur as long as the project service does not compete with, displace, or substitute for existing fixed-route service already provided by the employees of the recipient system. Moreover, some unions have been willing to agree to modifications allowing subcontracting in appropriate circumstances, so decision makers should consider bargaining for such provisions even if their current 13(c) agreements do not allow it.

DEALING WITH 13(c) ISSUES

In the initial planning stages for a subcontracting or service contracting project, decision makers should early determine if an existing 13(c) agreement covers the situation. A decision to begin subcontracting or contracting for service in the normal course of operations would often be covered by the current operating agreement, assuming federal operating aid is being used by the system on an ongoing basis. Situations in which current agreements usually would not be applicable would be those in which a new demonstration project is being contemplated or a new capital purchase is involved.

When an existing 13(c) agreement is applicable, decision makers should carefully read it in its entirety early in the

planning stage for the competitive initiative. They should determine if their agreement restricts or prohibits their ability to take the desired actions and should carefully observe any notification and other requirements. They should understand that adversely affected workers must be compensated only for those effects caused by a federally aided project.

If the desired activities are restricted or prohibited by applicable 13(c) agreements, decision makers should consider changes in the competitive projects that would achieve their goals while meeting the labor requirements. However, it is important to remember that several arbitrators have ruled that subcontracting restrictions in 13(c) agreements based on the model agreement are not binding if they conflict with the agency's collective bargaining agreements. If 13(c) restrictions are binding, and acceptable changes in the projects cannot be made, it may be necessary to attempt to negotiate 13(c) agreement revisions or to negotiate changes in the collective bargaining agreement that would take precedent over the 13(c) restrictions. In some situations, it might be possible to fund the project with nonfederal revenues that have been appropriately segregated from federal subsidies; however, this is a complex matter and should be undertaken only with the assistance of counsel completely knowledgeable of 13(c) requirements, practices, and procedures.

If possible, projects should be designed to avoid adverse impacts on current transit workers. If there will be an adverse effect, and it is caused by federal aid, decision makers should determine the cost of compensating the involved workers. In those cases where the benefit of the project is greater than the cost, the project should proceed and the claims should be settled. That is, decision makers should not let the prospect of a union grievance or the possibility of adverse effect claims stop a project.

If applicable 13(c) agreements do not provide the needed rights or a new agreement is needed, then it is necessary to plan far ahead for the negotiations. Ideally, a new 13(c) agreement should be individually tailored to fit the situation at hand. Often it may be most practical to accept the terms commonly included in similar agreements, but each provision should be carefully examined to be sure that the desired competitive projects will be allowed under it. For example, if an agency plans to apply for a capital grant to buy buses that will be leased out to a subcontractor or the winner of a bid, it should make sure that its 13(c) capital agreement allows it.

Effective negotiations take time and effort. When a new or revised 13(c) agreement is needed for a competitive project, negotiations with the unions should be started early in the planning process. This is true, not only for new capital and demonstration agreements, but also for revised operating agreements. That is, even though an agency's operating agreement can be renegotiated every year, project timing or negotiating strategy can sometimes result in a long delay before the desired language can be reasonably obtained. In many respects, 13(c) negotiations resemble union-management bargaining over other topics, and use of similar knowledge, skills, strategy and tactics may help to attain a desirable agreement.

If agency decision makers have bargained in good faith with the unions but have reached a true impasse, they should approach the U.S. Department of Labor (DOL) and explain the situation fully. Sometimes the DOL may be able to suggest alternatives or procedures for resolving the impasse that are

acceptable to the parties. If this does not work and the Secretary of Labor is convinced by the parties that they have negotiated in good faith, he or she will issue a determination concerning the issues at impasse and will advise the parties of the protective terms and conditions upon which the 13(c) certification will be based.

In a number of cases, the involved union has agreed to 13(c) language that specifically permits subcontracting. For example, subcontracting frequently has been allowed with language such as the following: "Project services shall not compete with, displace, or substitute for existing fixed-route service provided by employees of the recipient system." This particular provision may not meet the needs of some agencies, but it does illustrate that often the unions are responsive to agencies' need to subcontract. And, by use of the give-and-take common to regular agreement negotiations, mutually acceptable terms often can be worked out.

CONCLUSIONS

Transit labor protection requirements imposed by law and union-management agreements are compromises between the legitimate desires of transit providers to improve performance and the legitimate desires of workers for job security. However, the necessity of public policy to address both needs gives little comfort to those who want to increase competition, especially when they face a bewildering array of seemingly insurmountable labor restrictions. And, although it might be desirable to decrease current labor restrictions on competition, this is very unlikely to happen.

However, as discussed at length in this paper, it is possible to attain substantial competition under current labor law and requirements. Although labor requirements do prevent the immediate implementation of unlimited changes, it is possible to implement significant amounts of subcontracting, contracting for service, and similar arrangements for increasing competition, within reasonable time periods.

Finally, it should be realized that attempts to attain more competition often are seen by transit workers as attacks on their job security and bargaining rights. If workers believe this to be true, they and their unions will bitterly oppose the initiatives. Thus, if the changes are not intended to harm job security or the union, this should be exhibited by word and deed. That is, if the competitive initiatives can be structured so everyone gains, or at least so no one loses, they will be more easily accepted.

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