

Transit Law

State of the Practice

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After decades of decline, public mass transit has experienced significant growth in patronage throughout the country in the latter part of the 20th century. To a large extent, the growth is due to massive capital investments in infrastructure and equipment by transit agencies supported by a substantial and growing federal financial commitment. Using locally generated resources and federal grants, transit operators have modernized their fleets and maintenance facilities and, in many instances, have constructed or expanded a variety of rail systems to meet increased travel demand. New technologies and innovative applications of existing technologies have been advanced to facilitate better and more cost-effective service delivery.

Because virtually all mass transit operations are conducted by or on behalf of public entities, principally local municipal governments or regional special-purpose agencies, and are funded with a variety of local, state, and federal tax revenues, complex statutory and regulatory provisions apply to transit operations.

Lawyers dealing with mass transit at the turn of the century are faced with a myriad of issues, ranging from compliance with numerous regulatory requirements to implications of new technology applications. The purpose of this paper is to highlight the most significant of those issues and identify directions, challenges, and contributing factors as transit law enters the 21st century.

TRANSIT FUNDING AND FINANCING

The Transportation Equity Act for the 21st Century (TEA-21) reauthorizes the federal transit program through 2003. The structure of the program remains essentially intact, with several new programs added and program modifications incorporated. TEA-21 provides \$41 billion over six years for transit programs, with \$36 billion of this amount guaranteed. Of the total \$41 billion, \$29.34 billion is to come from the Mass Transit Account of the Highway Trust Fund, while \$11.65 billion is authorized from the General Fund. Of the amount from the General Fund, \$5 billion is not included in the guaranteed funding level.

Significant changes to the federal grant programs include the elimination of operating assistance under the urbanized area formula grant program for urbanized areas with populations of 200,000 or more. Whereas operating assistance is no longer an eligible expense, the definition of capital has been revised to include preventive maintenance. The new rail fixed guideway (new starts) program also came in for change. TEA-21 directs the

U.S. Department of Transportation (DOT) to issue regulations for the evaluation and rating of new start projects.

TEA-21 continues to encourage the use of innovative financing techniques. One new program established by TEA-21 is the Transportation Infrastructure Finance and Innovation Act, through which DOT can provide credit assistance on flexible terms directly to public-private sponsors of major surface transportation projects to assist them in gaining access to the capital markets.

With the funding guarantee of TEA-21, the short-term funding challenge through 2003 will be to secure appropriations at the guaranteed authorized levels. This may include convincing the U.S. Congress to waive discretionary spending caps or to devote a portion of current and future budget surpluses to increase longer-term funding. The challenge will be to defend the guaranteed funding structure and increase the authorizations for transportation programs. At the individual transit agency level, leverage of federal resources and the ability to get and retain local sources of funding, particularly dedicated sources of funding, will continue to be of vital importance.

Transit lawyers will play key roles in addressing these issues.

TRANSPORTATION PLANNING AND ENVIRONMENTAL ISSUES

Metropolitan and Statewide Planning

The basic metropolitan and statewide transportation planning process requirements, emphasizing the role of state and local officials and community members in state and local transportation decision making, remain intact under TEA-21. The most significant change made by TEA-21 is the consolidation of 16 metropolitan and 23 statewide planning factors into seven broad areas to be considered in the planning process, at both the metropolitan and the statewide level. Other changes are intended to further ensure the involvement of local officials; strengthen the financial aspects of the planning process; and improve coordination, cooperation, and public involvement. The requirement for a stand-alone major investment study has been eliminated, although alternative analyses must still be done. The Federal Transit Administration (FTA) and the Federal Highway Administration anticipate that, in addition to the statutory changes, the revised program regulations will address environmental justice and social equity; the linkages between air quality, planning, and land use issues; and the role of Intelligent Transportation Systems (ITS) technologies.

Conformity

On March 2, 1999, the U.S. Court of Appeals for the District of Columbia Circuit struck down certain provisions of the Environmental Protection Agency's (EPA's) conformity regulations [*Environmental Defense Fund v. EPA* (No. 97-1637, DC Cir. 3/2/99)]. Specifically, the court held that the grandfather provisions were unlawful. Under those provisions, a transportation project could receive local approval and federal funding as long as it appeared in a conforming plan, even if the plan and program no longer conform at the time of approval or funding violates the requirements of the Clean Air Act. Because of this ruling, certain projects previously covered by the grandfather provisions will likely be unable to receive funding or approvals to move forward.

Streamlining

TEA-21 calls for the establishment of a coordinated environmental review process for major highway and transit projects. The streamlined process is to use concurrent, rather than sequential, reviews by the responsible federal agencies and will allow states to include their environmental reviews in the process.

Congestion Mitigation and Air Quality Improvement

TEA-21 reauthorized the Congestion Mitigation and Air Quality Improvement program, which provides a flexible funding source to state and local governments for transportation projects and programs to help meet the requirements of the Clean Air Act. Eligible projects include transit improvements, travel demand management strategies, traffic flow improvements, and public fleet conversions to cleaner fuels. Under the new law, funding is available for projects in former nonattainment areas that are now in compliance (maintenance areas) as well as areas that do not meet the National Ambient Air Quality Standards (nonattainment areas).

AMERICANS WITH DISABILITIES ACT COMPLIANCE

Perhaps no law fostered as much change for transit systems in the last decade as the Americans with Disabilities Act of 1990 (ADA). The ADA's requirements for the accessibility of public services and accommodations, including public transportation, to persons with disabilities have presented extraordinary challenges and opportunities to transit systems and communities across the country. Whereas it appears that transit systems are, for the most part, in compliance with the ADA or making enough progress toward compliance to avoid major litigation, a variety of legal and policy challenges still await transit systems striving for full accessibility in the next century.

Persons with Mental and Sociological (Behavioral) Disabilities

The ADA recognizes that the rights of a person with a disability are not absolute. It allows an individual with a disability to be excluded from employment, public services, and facilities when that individual is not a qualified individual with a disability or the person is a direct threat to him- or herself or to others. Some persons with mental or behavioral disabilities may pose such threats or otherwise not be qualified to use public transit safely. Transit operators may then be in the position of making the decision to bar certain individuals from paratransit or public transit altogether. The circumstances under which such action would be appropriate and the nature of the process due before an agency could take such an action are not specified in current regulations or guidance but appear likely to be the subject of future action.

Tort Liability

Transit operators—with the help of their legal counsel will continue to be concerned about containing losses and about protecting themselves from any liability that might result from transporting persons with disabilities.

Paratransit Compliance

With an aging population, currently strained paratransit systems will face additional demand pressures. This will cause transit agencies to continue to wrestle with questions of eligibility, capacity constraints, and trip denials.

Enforcement

The disability community has expressed concern that the Department of Justice and other federal agencies are not doing enough to enforce the ADA. Rather than seeking settlement agreements that do not set nationally binding precedents, many in the disability community would prefer that the government more aggressively file lawsuits and prosecute violators.

LABOR AND EMPLOYMENT

Privately owned public transit operations traditionally were conducted by organized workforces. When public ownership of these entities supported by federal capital and operating subsidies became the norm, collective bargaining and other attributes of an organized workforce were retained by virtue of a specific requirement included in the original federal transit act and retained in each subsequent reauthorization act. The requirement is commonly known as the 13(c) requirement, after the section in the original transit act. [The provision appears in the current act, TEA-21, at 49 U.S.C. §5333(b).] Under 13(c), a prerequisite for a federal grant award is certification by the U.S. Department of Labor of a satisfactory 13(c) agreement between the transit agency and the relevant unions. This requirement has given unions considerable leverage with transit agencies and has been the source of numerous administrative and judicial proceedings. One common characteristic of transit labor agreements is a wage scale greater than the equivalent private-sector wage scale. Some commentators have attributed this disparity to the workforce's bargaining power facilitated by 13(c). In an effort to control costs, a number of transit agencies have sought to contract out, or privatize, some of their services to take advantage of lower private-sector wages. These efforts usually result in vigorous and protracted disputes with the transit agency's unions, either within the framework of the collective bargaining agreement or as part of negotiating a 13(c) agreement. Despite efforts by some members of Congress to remove 13(c) each time the transit act comes up for reauthorization, there appears to be no significant prospect that the provision will be modified or eliminated in the foreseeable future. Transit counsel will be required to continue to negotiate agreements as favorable as possible within 13(c) constraints in the next century.

Whereas 13(c) is a transit-specific labor issue, transit operators also must deal with the wide range of employment-related legislation enacted over the last half of the 20th century, including the employment portion of the ADA, the Family and Medical Leave Act, the employment discrimination portions of the Civil Rights Act, and the various federal and state wage and hour acts. Employment discrimination, particularly sexual harassment, is an increasingly active area of employment litigation, and transit operators are continuing to face their fair share of claims and suits in this area. This trend shows no indication of abating as we enter the 21st century.

SAFETY

DOT Secretary Rodney Slater has identified safety as the department's top priority in the coming years. The departmentwide approach is being followed up at FTA with the adoption

of a zero tolerance policy aimed at preventing transit operations-related injuries and fatalities to transit employees and customers.

Drug and Alcohol Testing

Responding to particular customer needs (such as paratransit and welfare-to-work efforts), taxicabs are being used for more and more public transit services. Increasingly, it is the transit agency that is choosing the taxi service used (either directly or through a transportation broker). FTA's position has been that when the transit patron randomly chooses from a variety of cabs, the FTA's drug and alcohol rules are generally not applicable to that cab company. If, however, the transit agency has an exclusive contract with one or two cab companies, those companies are subject to the rules. FTA is currently considering the applicability of the rules in cases where the transit agency does not have an exclusive contract but itself randomly chooses a cab from a wide variety of potential service providers.

FTA's long-standing position has been that the drug and alcohol rules are applicable to federal grantees as a condition of acceptance of the operating assistance funds provided by FTA. However, TEA-21 eliminated operating assistance for grantees serving populations greater than 200,000, raising a question about the continued applicability of the rules. In response to a grantee question about this issue, FTA stated that the rules remain applicable as a condition of the grantee's acceptance of capital grants. However, the obligation to adhere to the rules for the duration of the useful life of the material purchased with the capital assistance, once the useful life of the material is over and the federal interest lapses, is doubtful. FTA anticipates that, ultimately, some grantees may no longer be subject to the rules.

With respect to postshift testing, FTA's policy has been that when a test has properly begun, an employee who has been randomly selected may not simply walk away from the test because the employee's shift is over. Whereas this has not caused problems at most agencies, at least one transit agency has raised the issue because both the agency management and the labor unions at the agency oppose any testing occurring after a worker's shift ends. The practical effect of the agency's position is that no employee can be selected for random testing later than 3 hours before the end of his or her shift (otherwise the employee could be made to remain for testing after the end of the shift). FTA, however, feels strongly that such a policy violates the rules, since if employees know that they will not be subject to testing after a certain point during their shift, the element of surprise associated with random testing will be impeded.

Rail Safety

Communities across the country are interested in developing new or expanding existing rail transit systems, in many instances making use of existing rail infrastructure to do so in a cost-effective manner. However, the increasing frequency of passenger rail systems sharing track and right-of-way with freight railroads is raising a variety of safety issues with different implications for commuter rail systems traditionally regulated by the Federal Railroad Administration (FRA) and for light rail systems, traditionally outside of FRA's purview.

FRA is in the midst of a rulemaking to implement passenger car safety standards for the first time, in addition to revising many of its existing rulemakings through the Rail Safety

Advisory Committee process. The commuter rail operators have been much more involved in this process in the past few years than they have in the past, and FRA is more sensitive to the operational needs and restraints unique to commuter rail operators. This process will no doubt continue in the next century.

The issue is less clear for light rail transit operators using or connecting to freight track. Open questions exist relating to the scope of FRA's jurisdiction over these operations and the relative responsibilities of FRA and FTA in safety oversight of these types of operations. FRA and FTA are working on a joint memorandum of understanding that is supposed to address these issues, although it is not clear when the new policy will be issued. Light rail operations involve using non-FRA-compliant equipment and often have different operating conditions not well suited to many of FRA's regulations. At the same time, FRA has been more assertive over these operations in recent times, prompting several transit systems to seek waivers from FRA to run non-FRA-compliant light rail vehicles. FRA has indicated a willingness to entertain waivers for such operations when the freight and transit systems will operate on a time-separated basis (i.e., transit during the day and freight traffic in the overnight period). At least one system is seeking permission to run operations on a nontemporally separated basis, but there has as yet been no decision from FRA on this matter.

Bus Safety

Transit bus operations have not been subject to the same overall federal safety oversight as rail transportation modes. Rather, regulation in the transit bus industry has come from a variety of unrelated sources: the manufacture of transit buses is governed by the National Highway Traffic Safety Administration's Federal Motor Vehicle Safety Standards, transit bus operators are required to meet the Federal Highway Administration's Commercial Driver's License Standards, and safety-sensitive transit bus system workers are subject to the FTA drug and alcohol rules. Most transit bus systems are also subject to state safety regulation. Whereas transit bus operations have an excellent safety record, the lack of an overall regulatory regime, along with a few well-publicized incidents, has raised some concern. This issue is likely to gain more attention over the next few years, although it is not clear what direction the issue will take.

INTELLIGENT TRANSPORTATION SYSTEMS

One area of technological development that is likely to experience rapid implementation in the 21st century is associated with ITS, defined as the integration and application of current and emerging technologies in fields such as information processing, communications, and electronics to the solution of surface transportation problems. The transit components of ITS are identified as Advanced Public Transportation Systems (APTS). FTA is sponsoring a number of APTS projects for fleet management purposes in such areas as communications systems, geographic information systems, automatic vehicle location systems, automatic passenger counters, and transit operations software. APTS projects also include traveler information components such as pretrip transit information systems, in-terminal and wayside transit information, in-vehicle transit information, and multimodal traveler information. Advanced fare collection systems are also adopting ITS technology.

The legal challenges arising from ITS/APTS occur in a number of areas ranging from procurement (requiring contracting for technically sophisticated state-of-the-art equipment

and systems) to First Amendment issues (determining to what extent observation, measurement, and identification are an unconstitutional invasion of privacy). Significant tort liability concerns may also arise from adoption of highly automated systems.

Transit lawyers in the 21st century will need to become conversant with these issues at an early stage to keep up with the expected pace of ITS/APTS implementation.

PROCUREMENT

Most transit agencies are subject to local or state statutory procurement requirements that dictate the procurement process and procedures for various types of procurement activities including architectural and engineering services, construction, and vehicle and equipment purchases. In addition, above certain threshold amounts, the FTA's Third Party Contracting Guidelines are applicable. For the most part, these statutes and regulations dictate that procurement actions be undertaken in a manner that will promote full and fair competition, usually through the use of a competitive proposal or bid process. The genesis of most of these statutes and regulations was in the reformist period early in the 20th century in response to rampant cronyism and outright corruption evident in much public procurement activity. The objective of the statutes and regulations largely has been achieved. However, the process is often cumbersome and does not permit or severely limits procuring agencies from taking advantage of certain procurement techniques such as design-build and negotiated procurement.

FTA has recognized the need to encourage transit agencies to use the most effective and efficient forms of procurement. In recent years the FTA's Third Party Contracting Guidelines have been updated several times, with each update imposing fewer FTA constraints on local procuring agencies and providing greater flexibility in authorized procurement methods as long as the overall objective of promoting free and open competition is achieved. FTA has gone further than just liberalizing its policies by funding demonstration projects using such innovative approaches as turnkey procurement. When permitted by local statutes and regulations, this approach allows an agency to negotiate with respondents to perform, usually under a single contract, all of the tasks to design and construct a transit project such as a rail system.

To take advantage of creative financing alternatives, transit agencies are exploring the comprehensive turnkey approach to transit system development by negotiating design-build-own-maintain-transfer arrangements. Under such an arrangement, a prime contractor or consortium of contractors will develop a transit project, including design, construction, operation, and maintenance of the project for a defined period of time. At the conclusion of the operation and maintenance period the arrangement provides for transfer of the project to the transit agency. More often than not, the contractor will also finance a significant part of the project, thereby reducing or eliminating the transit agency's need for a large up-front capital investment or issuance of debt by the agency. Outside of the United States such arrangements are fairly common, but within the United States local or state-level statutory restrictions often preclude or limit their use. Amendment or repeal of these constraining statutes is a prime area for procurement reform in the next century. Because the arrangements are complex and involve significant financial, technical, and operational issues, substantial sophisticated legal analysis is essential to achieve a satisfactory result.

In addition to legal issues associated with new and emerging procurement methods, a significant number of statutory and regulatory requirements associated with most transit

procurement activities will continue to dictate that transit lawyers carefully scrutinize and monitor their agencies' procurement activities to ensure compliance. For example, federal law mandates that certain content and assembly activities meet "buy America" requirements. Another example of continuing legal involvement is in compliance with federal, state, and local statutes providing for participation in transit agency contracts by economically disadvantaged business enterprises. In recent years, these requirements have come under constitutional attack as violative of equal protection. This issue likely will remain to be resolved at the Supreme Court level after the turn of the century.

CONCLUSION

During the second half of the 20th century, legal issues associated with public transit activities have resulted in the development of a significant specialized bar. Further growth and increased sophistication of this specialized area of practice are likely in the early decades of the 21st century. Transit operators will face different issues in the next century, but they will be no less challenging.

At the millennium, the state of the practice is positive, with transit lawyers regularly providing counsel and representation to their clients. The support structure provided to transit law practitioners, both new and experienced, by the Transportation Research Board, the American Public Transit Association, and various regional transit industry associations is well organized and effective.