Urban Mass Transit Labor Relations: The Legal Environment

James L. Stern
Richard U. Miller
Stephen A. Rubenfeld
Craig A. Olson
Brian P. Heshizer†

This study examines statutory, administrative and judicial attempts to preserve the bargaining rights of employees in transit systems which have been taken over, directly or indirectly, by public entities. The authors first review the "Memphis Formula" which contributed to Congress's formulation of the Urban Mass Transportation Act of 1964. In addition to this formula, which relied on the creation of private management companies, the authors describe state legislation which established public transportation authorities. The authors then analyze the NLRB's reluctance to accept jurisdiction over labor disputes in this and related areas and recommend several ways of more aggressively protecting transit employees' rights on the federal level.

I
INTRODUCTION

Collective bargaining in the transit industry has been conducted under several legal frameworks. The choice of the framework in each case depends upon such factors as (1) the private or public ownership of the transit system, (2) the structure of management in a publicly owned system, (3) the idiosyncrasies of the local government which acquires the system, (5) the views of the union involved, and (6) the

† James L. Stern and Richard U. Miller are, respectively, Professor of Economics and Industrial Relations, and Professor of Business and Industrial Relations, at the University of Wisconsin - Madison; Stephen A. Rubenfeld is Assistant Professor of Management, Texas Tech University; Craig A. Olson is Assistant Professor, Krannert School of Business, Purdue University; Brian P. Heshizer is Assistant Professor, School of Business, Florida State University. This research was supported by a grant from the U.S. Department of Transportation, Urban Mass Transportation Administration (Grant Project No. WI-11-0004) to the Industrial Relations Research Institute of the University of Wisconsin - Madison. This paper is part of a report entitled The Legal Framework for Collective Bargaining in the Urban Transit Industry available from the Industrial Relations Research Institute, University of Wisconsin - Madison.
administrative and judicial determinations that a specific framework suits the situation.

Historically, many large transit systems were privately owned and their employees' collective bargaining rights were thought to be protected by the national labor legislation which governed the private sector, the Labor Management Relations Act of 1947, as amended in 1959 and 1974 (LMRA).\(^1\) During the past decade, most of these large systems have been acquired by the cities they serve or by metropolitan transit authorities; and they are often subject to state laws which restrict labor relations in public employment. Some states prohibit bargaining; others make employees' bargaining rights substantially inferior to those of employees covered by the LMRA. Congress recognized that the transition from private to public ownership could impair the bargaining rights of employees and provided specific protection against this possibility in the Urban Mass Transportation Act of 1964 as amended (UMTA).\(^2\) Section 13(c) of the UMTA\(^3\) makes the granting of federal funds for the public takeover of a transit system, for capital equipment, or for operating expenses contingent upon the Secretary of Labor's certification that arrangements have been made to protect the interests of employees who may be affected. Since abolishing bargaining rights would have injured employees, public bodies that wished to receive federal funds had to devise formulas which, in the Secretary of Labor's view, guaranteed bargaining rights would be preserved.

The procedure mentioned favorably in the legislative history of the UMTA is the "Memphis Formula," originated by the City of Memphis when it took over the private transit system. If the employees in Memphis had been subjected to Tennessee's legal bargaining framework for public employees, they would have lost their rights to bargain collectively and to negotiate a labor agreement to protect their wages, hours and working conditions. The City hired a private company to operate the transit system and to serve as legal employer for the purpose of collective bargaining. Under these arrangements, the union involved continued to bargain as it had when the system was privately owned. The Memphis Formula has been adopted by several dozen cities in the past fifteen years and, as far as the Department of Labor is concerned, meets the requirements of section 13(c). In some instances, however, requests for representation elections, the filing of unfair labor practice charges, or the issuance of injunctions by state courts and removal to federal district courts have led the National Labor Relations Board, its General Counsel, and state and federal courts to question whether this formula actually preserves bargaining rights under the LMRA.

To assert its jurisdiction in this area, the NLRB has had to decide whether management companies hired to run publicly owned systems are

---

\(^3\) 49 U.S.C. § 1609 (1976). In the original act, section 13(c) was numbered 10(c).
“employers” under the LMRA, which exempts public entities from its coverage. In answering this question, the NLRB and the courts have asked how much independent control these companies have over working conditions and how intimately connected their operations are with the city’s central functions.

Many of the decisions on these points have been issued in recent years and the matter has not been conclusively resolved either by the Supreme Court or the Congress. If, in the future, management companies are determined to be joint employers with the municipalities that hire them, they will be excluded from coverage under the LMRA. In that case the rights supposedly maintained by the Memphis Formula will no longer be legally enforceable and will no longer support section 13(c) certifications that employees have not been adversely affected by the takeover.

It is also possible that further review of the situation may lead the NLRB and its General Counsel to conclude that these operators are employers under the LMRA because they have sufficient independent control over labor relations and provide services which are not intimately connected with basic municipal functions. At present, this is not the majority view. Such a new policy might well specify what powers the private management must have in order to qualify as a separate employer. Also, the NLRB will have to decide whether or not, under its test of “intimately connected,” a transit system is a proprietary function outside a city’s central functions.

As of 1976, the prevailing NLRB and court decisions run contrary to the opinion of the Department of Labor and unions and management in the transit industry. It should be noted, however, that in most situations the need for federal funding to maintain nearly bankrupt private systems under public ownership leads both unions and management to maintain that their arrangements meet section 13(c) requirements. Only if there are employee-generated disputes between the union and management (or disputes within or between unions), and the parties seek relief from the NLRB or the courts, does the question of whether the parties are covered by the LMRA arise. These situations are few in number compared to those in which the legal question has not arisen; and absent legal determinations by the NLRB and courts, management and unions act as if they are covered by the LMRA.

In any event, the somewhat murky legal situation has led to this study of the legal framework for bargaining in the transit industry. The article is organized into five sections, including this introduction. In the following section, the origin and evolution of the Memphis Formula and its relationship to section 13(c) of UMTA are explored. The third section describes the development of transit authority legislation in several states. It includes an analysis of changes in transit authority legislation and assesses the impact of section 13(c) on transit authority enabling acts. The fourth section describes

the role of the NLRB in local transit. It examines four tests which the NLRB and the courts have developed to establish the Board's jurisdiction under the LMRA: (1) the standards of size which determine whether a privately owned system "affects commerce"; (2) the exemption of public entities; (3) the degree of "independent control" over labor relations by private companies hired as employers by public bodies; and (4) the "intimate connection" between the operations of a private management company and the exempted functions of cities and counties. The fifth section deals primarily with recommendations for resolving the problems discussed in this article.

II
THE MEMPHIS FORMULA AND SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964

The Urban Mass Transportation Act established a federal program to help cities maintain their transit systems. During Senate hearings on the Act, organized labor expressed concern that the transition from private to public ownership might endanger existing collective bargaining rights. This fear led sponsors of the bill in the Senate to include employee protection clauses in the Act as passed in 1964. Section 3 of the Act states that no financial assistance will be provided to any "State, local or public body or agency thereof" under the provisions of the UMTA "unless the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of the Act." Section 13(c) in the amended Act provides the following assurances of employee protection:

It shall be a condition of any assistance under [Section 3] of this [Act] that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and benefits (including . . . pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of re-employment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsen-

ing of their position with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(2)(f) [of the Interstate Commerce Act]. The contract for granting of any such assistance shall specify the terms and conditions of the protective arrangements.

This reference to the Interstate Commerce Act (ICA) in section 13(c) gave transit employees in systems receiving federal capital grants under the UMTA, as a minimum, the standards set forth in section 5(2)(f) of the ICA regarding employee protection. Section 5(2)(f) gave the Interstate Commerce Commission (ICC) power to protect employees of an affected railroad from a deterioration of their employment status. The employees' protections extended over a four-year period, beginning with the date on which the Commission’s approval of a railroad merger or consolidation became effective. Under this model, not only did the city or its agents agree to protect the employment position of employees of affected transit systems, they also agreed to continue the collective bargaining rights of employees who had previously bargained with the private management.

Meeting section 13(c) provisions presented a problem to municipalities in states that had prohibited public sector collective bargaining. In order to receive funds under the UMTA, the acquiring body had to maintain its bargaining relationship with the union, but bargaining rights could not be maintained where state law forbade a city to bargain with its employees. Opponents of the Act brought this point out during debate in Congress. Senator Wayne Morse, sponsor of the section 13(c) amendment, admitted


As a condition of its approval, under this paragraph (2) . . . , of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. . . . Notwithstanding any other provisions of this chapter . . . , an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

that the provision of section 13(c) requiring the continuation of collective bargaining would present problems in some states, but he contended that it would not preclude cities in such states from receiving federal assistance. They could receive federal capital grants, Senator Morse maintained, by using the "Memphis Formula." Under this formula, a city arranges with a private management company to operate the transit system. The employees of the system remain private employees and continue to bargain collectively with their employer, the management company. The Memphis Formula allows the public owners to conform to the national labor policy and receive federal funds under UMTA without violating state laws or policies that prohibit a public agency from directly bargaining with employees.

Subsequent events have shown that Morse correctly predicted the utility of the Memphis Formula as a means of circumventing state laws that prohibit public bodies from bargaining collectively with its employees. At least twenty-seven cities have used the Memphis Formula to acquire federal capital grants after passage of the UMTA. Management companies in these cities serve as employers for the purpose of conducting labor management relations and, theoretically at least, the city or public agency is not involved in bargaining. However, because of the possibility that a city may change its management company, the Department of Labor normally requires the government unit applying for the federal assistance to be a party to or to recognize officially the section 13(c) agreement binding the management company and any successor.

The requirement that the public body co-sign or pledge to abide by the section 13(c) agreement has a potentially significant impact on labor relations in the transit industry. It raises the question of whether the management company is a joint employer with the public body and is therefore excluded from coverage under the Labor Management Relations Act. In any event, the Memphis Formula has become a common form of transit management and warrants examination because of what it purports to do to the legal framework of transit labor relations.

The Transition to Public Ownership

The Memphis Street Railway Company, a private corporation, had been providing bus service in Memphis since 1896. Since the mid-1940's, 

10. Larry Yud, Special Assistant for the Urban Mass Transportation Administration, U.S. Department of Labor, estimates that the actual number of transit systems operated under a Memphis Formula arrangement may be 50 or more. Interview by telephone (Oct. 20, 1975).
13. See text accompanying notes 70-118 infra.
the company faced financial problems because of the decline in ridership and revenues. In 1960, concerned about the long term decline in transit revenues, stockholders of the two major investment companies owning the private company began pressuring the firms to sell the bus company.15

With these developments in the forefront, the company president suggested in August, 1960, that the City and the company should discuss whether it would be better to continue private operation with a franchise extension and higher fares or to have the City take over and operate the transit system.16 On December 27, 1960, the City purchased the transit system and then negotiated a contract to provide for continued operation of the transit system by the management of the private company which had formerly run it.17

A review of the take-over process suggests that the owners of the private company initiated the sale of the company to the City for several reasons. Revenues had been declining since 1945 and the projected trend gave every indication of a continuing decline.18 Second, the company felt that the City Commission’s persistent refusal to grant fare increases directly contributed to the system’s poor financial situation. Third, the City was reluctant to commit itself to renewing the company’s franchise, which would expire in 1965. The deteriorating financial state of the company convinced most stockholders that it would be in their best interests to sell.

The City saw several advantages in acquiring the bus system. The Commission became convinced that it or some agent could operate the transit system at a profit since public operation would give the company tax advantages from the federal and state government.19 The City also realized that the company could not finance the necessary improvements to the system. A report on the transit system indicated that only with public ownership could the desired improvements be made.20 Finally, public oper-

15. Interview with E.P. McCallum, Jr., former president Memphis Street Railway Company, by telephone (Oct. 27, 1975), and MTSM, supra note 14, at 9.
16. MTSM, supra note 14, at 10.
17. In negotiating this transaction, the City relied on state legislation which gave it authority to acquire and operate a public transportation system. See 1943 Tenn. Pr. Acts ch. 26 (amended, 1961 Tenn. Pr. Acts ch. 319), summarized in text accompanying notes 28-33 infra.
18. The degree to which the projected losses induced the company’s stockholders to sell is indicated by their agreement to a purchase price of more than one million dollars less than the appraised value of the bus company. MTSM, supra note 14, at 13.
19. Letter of Frank Ragsdale, member of Board of Street Transportation Commissioners, to the City Commission, reprinted in MTSM, supra note 14, at 34-37; interview with Edmund Orgill, mayor of Memphis (1956-59) and first chairman of the Memphis Transit Authority (1956), by telephone (Oct. 27, 1975).
20. Id. at 26, 34-35.
ation offered the only way in which low fares could be maintained without subsidizing the private company. Thus, the City became increasingly confident of its ability to run the system at a profit and with service superior to that provided by the private company.

The Rationale for the Management Services Contract

The City Commission believed that the hiring of a private management company would permit the City Commission to insulate itself from the problems associated with the day-to-day operation of the system. With a management company, complaints about service, fares, and routes would go to the company, not the Commission. The Board of Street Transportation Commissioners (subsequently renamed the Memphis Transit Authority) which drafted the arrangements, wanted to keep the operation of the company away from the Commission, where it might become a pawn in city politics.

A management company would also enable the employees of the old private company to continue their bargaining relationship under public ownership. The Tennessee Supreme Court had ruled in 1958 that a city or public agency violated state's right-to-work laws if it bargained with its employees. Ray Wallace, the former financial secretary of the Amalgamated Transit Union local representing the employees, recalled that the union had impressed upon the mayor, the company and the Commission the employees' interest in maintaining the union and their bargaining rights. E.P. McCallum, the president of the private company and management company, said that the company had a good relationship with the union and wanted to maintain it under the management company. He also pointed out that the City wanted to keep the company's pension plan separate from the City's plan, because the company plan provided higher benefits to a work force that was older than the City's work force and would be collecting pensions sooner. The management company, however, could continue to bargain with the union and maintain the existing pension and insurance plan because the employees would be employees of the management company rather than the City.

The City felt that a management company could do a better job of running the system than could the City. The Memphis Transit Authority in particular believed that officers of the private company were competent

22. Id.; McCallum, supra note 15; MTSM, supra note 14, at 34-35.
managers whom the City knew and could trust. The Chairman of the Authority remarked that through past association with the company members of the Authority, he had reached the conclusion that the management personnel would run the system efficiently once unencumbered by restrictions placed on them by former owners of the bus company.\(^{27}\)

In summary, it appears that the use of a private management company offered more advantages and fewer problems to all of the concerned parties. It enabled the City to avoid labor relations problems and kept the Commission clear of aggravating daily problems arising from the operation of the bus system. The union retained its contract, the stockholders got as much of their investment out of the bus system as possible, and the former managers of the private company kept their positions in the new company. These factors made the transition to public ownership a smooth and efficient operation.

**Control of Labor Relations**

One other area, the management company's relationship with the City, needs to be considered. The central question is, to what degree, if any, did the City influence or control the labor relations, finances, and policy of the management company?

Three sources, the Tennessee statute empowering the City to operate its transit system, the Management Agreement between Memphis Transit Authority and the Memphis Transit Management Company, and interviews with people intimately involved with the Authority and company at its inception, show the nature of the relationship among the City, the Transit Authority, and the Management Company.

Chapter 26 of the Tennessee Private Acts empowers the City of Memphis to create the Memphis Transit Authority and delineates its powers.\(^{28}\) Section 1 gave Memphis the right to purchase the transit system which would be "under the jurisdiction, control and management of the Memphis Transit Authority..." The Authority could, according to the statute, "contract with... [a] corporation to manage... the transit system, and to employ the necessary personnel," directed and supervised by the Authority, in all phases of its operations.\(^{29}\) Though the Authority could delegate management responsibility of the system to a private group, it still retained power under the statute to set rates, fares, and routes.\(^{30}\) The statute also listed the purposes and order in which transit revenues were to be spent.\(^{31}\) This section of the statute also stipulated that a three percent tax on gross receipts be paid to the City in lieu of all taxes. The statute required the

---

\(^{27}\) Interview with Edmund Orgill, by telephone (Oct. 27, 1975).
\(^{29}\) Id. § 12.
\(^{30}\) Id. § 4.
\(^{31}\) Id. § 14.
Authority to meet weekly, and the City Commission had to designate one of its members as its representative to these meetings so that the City Commission would be apprised of Authority actions.\textsuperscript{32}

As we shall demonstrate in Part IV, many of these statutory provisions would now lead the NLRB to decline jurisdiction over a transit system's labor disputes. Countervailing factors appear in the minutes of the City Commission's meeting of January 6, 1961, which described the relationship of the Management Company and the Authority to the City. The minutes show that the Commission had decided that the Transit Authority should have complete supervision and direction of the transit system, and that, after providing funds for the purchase of the private company and new buses, the Commission desired "to be relieved from the responsibilities [for the transit system as soon] as reasonably possible."\textsuperscript{33} The Commission then stated other conditions called for under the Tennessee statute relating to appointment and compensation of Authority members, use of transit revenues, and general requirements, including a monthly report on transit operations to the City.

These principles were reduced to contractual form in the Management Agreement between the Authority and the Memphis Transit Management Company, which described the duties and obligations of the two parties.\textsuperscript{34} The agreement stated that the Authority had acquired and owned all assets needed for the operation of a public passenger transportation system which the Management Company would operate and manage. Fares and routes would remain the same initially as those of the private company, but would thereafter be subject to the Authority's approval.

The Management Company would "prepare operating budgets for the transportation system for approval by the Board [Authority] and . . . make recommendations to the Board [Authority]" regarding fare changes. The Management Company would furnish the executive officers and technical and operating personnel to run the system "within rate-of-pay ranges approved by the Board [Authority]." The pension and group insurance plan of the private company would continue under the same trustee. The City would not hold the Management Company responsible for ruptures in service caused by strikes. The president and general counsel of the Company would "handle all legal matters except prosecution and defense of claims," for which the Company would retain attorneys approved by the Authority.

The Agreement also specified arrangements for revenues collected. All revenues received from the operation of the transit system, including rents, fares, and investments, would be the property of the City and would be deposited in a special account called the "Transit Revenue Account." The Authority would use these revenues to reimburse the Management Company

\textsuperscript{32} Id. § 8.

\textsuperscript{33} Memphis City Commission Minute Book (Jan. 6, 1961).

\textsuperscript{34} All quotations are taken from the management agreement and are not footnoted unless derived from another source.
for operating expenses, including salaries of "all employees of the Company except the president, operating vice-president, and the financial vice-president, social security, pension and group insurance coverage, claims resulting from civil suits for damages against the company, and general expenses necessary to operate and maintain the public transit system." Corporate expenses for the Management Company, that is, salaries of corporation officers, equipment, office supplies, would not be reimbursed, but would be provided by compensating the Company by an amount equal to .98 percent of gross revenues.

The Agreement noted that the three corporate officers solely owned the stock of the Management Company which could be transferred only by approval of the Authority and the other executive officers.

The statute and management contracts provide information about two facets of the Management Company’s relationship with the City. First, the statute describes the Memphis Transit Authority’s duties and powers over the transit system and shows that the Authority could exert considerable influence over the transit system if it wished. The Authority also had the duty of keeping the City Commission apprised of conditions in the public transportation system, and in this role, it acted as a buffer between the Commission and the Management Company. Second, the Management Agreement specified the relationship between the Authority and the Management Company. The Agreement, however, concentrated on financial arrangements between the Company and the City. Little is actually said about labor relations or the Authority’s control over the Company’s management of the system. We can infer from that document that the Company exercised control over both since the Authority did not make direct reference to them.

It is difficult to ascertain the extent of the Management Company’s independence from the Authority. An apparent contradiction exists between the views of individuals involved in the Authority and Management Company at that time and the evidence given in the Management Agreement and statute. Those people interviewed without exception expressed the view that the Management Company was independent from City and Authority control.35 For example, the Management Company bargained and signed contracts with the employee’s union, hired and fired its own employees, and made capital purchases, such as buses, without City or Authority approval. The Management Company and the City Commission had, in fact, no direct

35. Those interviewed included: R.E. Brake, vice-president of finances for the private company and the management company until his retirement; E.P. McCallum, president of the private company and management company until 1965; Edmund Orgill, mayor of Memphis (1956-1959) and first chairman of the Memphis Transit Authority; Dorothy Isradker, assistant comptroller and now assistant city attorney for Memphis; Ray Wallace, financial secretary of the Amalgamated Transit Union local at that time, representing the employees of the bus company; and Walter Armstrong, as attorney, who helped negotiate the sale of the company to the city.
contact at all. As pointed out earlier, the Commission did not want direct involvement in the operation of the bus system because of the problems it would cause. The Memphis Transit Authority and the executive officers of the Management Company met weekly, but, according to McCallum, the Authority was interested in the overall efficiency of the Company and did not become involved in labor relations matters. However, the Company had to get the Authority’s approval for its budget or an increase in it resulting from a prospective wage agreement with the union. The Authority did not do the bargaining, though McCallum did note that at one time the union requested and talked with the Authority about wages.

We can conclude that the Management Company did substantially direct its labor relations, but that the Authority had to approve the operating budgets of the system which included, of course, wages negotiated with the union. The Authority had the potential to exert more control over the Company’s labor relations through its budgetary powers, but available evidence indicates that it avoided, as much as possible, involvement with bargaining. The members clearly preferred to leave this responsibility to the Management Company.

Both the Authority and the Management Company considered the Company to be the employer of the system’s employees. Neither state nor federal courts nor the NLRB, however, had the opportunity to rule on that question. Thus, whether the NLRB would have taken jurisdiction of a labor dispute involving the Memphis Formula in its original setting remains a matter of speculation.

A Postscript

The Management Company’s arrangement in Memphis lasted until 1973. In that year, the Authority terminated the contract with the Company and assumed complete control and operation of the system. The relationship between the Authority and the Management Company had changed with personnel changes, and, over the years, the Company’s freedom of operation had been progressively limited. The Management Company’s freedom of operation in those first years may have resulted from the good relationship between the Authority and the Company. When those people who helped fashion the Memphis Formula retired or took new positions outside of transit, their successors could not maintain the original Authority-Management Company relationship.

III
PUBLIC TRANSIT AUTHORITIES CREATED BY STATE LAW

In Section II we discussed the evolution of the Memphis Formula and

36. This is stipulated in the Management Agreement between the Board and the Management Company.
37. Interview with E.P. McCallum, by telephone (Nov. 11, 1975).
38. On the impact of these changes, see text accompanying note 53 infra.
URBAN MASS TRANSIT

its apparent impact on the legal framework of labor relations in the transit industry. Another significant form of transit management that has developed during the transition from private to public ownership is the public transit authority. State legislation, which has been responsible for the emergence of the public transit authority, has taken two forms: enabling acts which empower a specific city or county to set up a transit authority and general statutes which allow any city, metropolitan area, or county to create a transit authority to operate public transportation within the area. By mid-1976, forty states had enacted such legislation. It is important to note from the standpoint of collective bargaining that many states which forbid or limit bargaining by public employees and are considered generally hostile to labor unionism have enacted transit authority enabling legislation. Thus, given that the public authority has become a common method of transit operation and management, its provisions for collective bargaining deserve closer analysis.

Early State Legislation on Transit Authorities

City charters, state civil service regulations, and state public utility statutes, the earliest form of state public transportation legislation, usually did not extend collective bargaining rights to unions. Those laws were generally intended to regulate fares and routes and, if anything, forbade union membership and collective bargaining.

Beginning in the 1940's, several major cities began operating their own mass transportation systems under public authorities. These systems arose first in metropolitan areas because private companies could not provide the level of services needed to meet the demands of a burgeoning urban population during and after the Second World War. The public transportation authority legislation enacted during the 1940's and 1950's took the form of enabling legislation for an individual city. These acts expressed a different collective bargaining policy than general state legislation mentioned previously. The 1945 act establishing the Chicago Transit Authority, for example, empowered the CTA to enter into written collective bargaining agreements with employee representatives over wages, hours and working conditions. This act also gave the Authority the right to arbitrate disputes arising out of the contract or over contract negotiations if so desired by it and the parties. Section 329 of the act further required that the Authority transfer all operating and maintenance employees of an acquired system to the Authority. A second illustration is that of the act establishing Massachusetts Bay Transportation Authority, which contained a provision similar to Chicago's authorizing the Authority to bargain and requiring it to arbitrate disputes.

40. Id.
The act governing the Southeastern Pennsylvania Transportation Authority (Philadelphia) also permits collective bargaining and agreements with labor organizations. Under it, the Philadelphia Authority is required to recognize and abide by existing labor contracts of acquired systems.\textsuperscript{42}

A noticeable exception to the granting of bargaining rights in early transit authority legislation was the act authorizing the New York City Transit Authority.\textsuperscript{43} This act, passed in 1953, does not include a guarantee to continue collective bargaining, an omission that may be attributed in part to the city's reluctance to bargain with the Transport Workers Union led by Mike Quill. The stormy history of labor relations in the transit system militated against New York City's agreeing to bargain and enter into agreements with the TWU. The city in fact refused to sign a labor contract with any union until 1953.\textsuperscript{44} The bargaining rights New York Transit employees have received have come, therefore, not from the enabling legislation but from union pressure on the city to grant such rights. Such rights, however, were inferior to those granted private workers under federal legislation.\textsuperscript{45} For example, even though unions had bargaining rights after 1954, the New York City Authority had the right to cancel any labor agreement at will. Similarly, the transit unions were never able to obtain a union shop agreement covering the Authority.\textsuperscript{46}

Several observations can be made about pre-1964 state transit authority legislation. Most of it was enacted by eastern and midwestern states, the exception being California.\textsuperscript{47} Usually the laws provided for an authority in certain cities, most frequently large metropolitan areas with strong labor unions.\textsuperscript{48} Moreover, those cities were in states where labor was well organized and could put pressure on the state legislature to protect union interests. However, even in states and cities with highly organized labor unions, employees had far fewer collective bargaining rights under the public authority than under private ownership. None of the statutes mentioned here, for example, compelled the authority to continue collective bargaining or even to bargain collectively with its employees. In each case, the statute \textit{allowed} the authority to bargain collectively with employees on its own volition. As noted above, the New York City enabling act did not even mention bargaining with employees.

\textsuperscript{44} In 1956, a local union attempted to obtain a court order to bargain; however, the judge held that the authority under its present charter need not bargain with its employees. New York Transit Auth. v. Loos, 2 Misc.2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956).
\textsuperscript{45} On the New York experience generally, see D. Barnum, Collective Bargaining and Manpower in Urban Mass Transit Systems 116-20, 130 (1972) (Transportation Studies Center, Univ. of Penn.).
\textsuperscript{46} \textit{Id.} at 120.
\textsuperscript{47} \textit{Id.} at 215.
\textsuperscript{48} These cities include Boston, Chicago, Erie, New York, Philadelphia, Pittsburgh, and St. Louis.
In short, the early public authority statutes were improvements over civil service and public utilities acts but did not give "iron-clad" guarantees for the continuation of collective bargaining. Despite this situation, labor apparently felt that the shift from private to public ownership and operation would not affect its bargaining rights. However, when transit employees lost their bargaining rights in Dade County, Florida, after the system went public in 1962, both the ATU and the AFL-CIO urged that the proposed federal mass transportation bill include a guarantee of continued employee bargaining rights. Senator Morse, convinced of the need to protect employee bargaining rights by organized labor, had section 13(c) amended to that end. Not only does section 13(c) affect the collective bargaining rights of employees when a system applies for federal funds, but it has also influenced state public transit authority legislation enacted following passage of UMTA in 1964.

**Public Transit Authority Legislation After 1964**

Two trends have developed in transit authority legislation enacted after the UMTA. First, transit authority enabling legislation is no longer geographically confined to the East, Midwest, and California. States in the Deep South, the Plains, and the Southwest have enacted such legislation. These are "right-to-work" states, many of which have not granted collective bargaining rights to other public employees. Second, many of these states have been forced to include labor provisions like section 13(c) in their transit authority legislation in order to satisfy the federal Urban Mass Transportation Act. Section 13(c) of UMTA prompted many states, which previously had given limited or no bargaining rights to public employees to require that public transit authorities continue existing collective bargaining relationships with employees.

Alabama, for example, offers no bargaining rights to public employees unless the state legislature authorizes it. Yet, the state passed a law in 1971 which gave the City of Birmingham the power to create a public transit authority which could enter into collective bargaining agreements with its employees and their unions. The statute also stipulates that employees of the authority will have all the rights under section 13(c) and repeats those provisions verbatim.

Another southern state that forbids public employee bargaining but has

---


50. Interview with Walter Bierwagon, Vice President and Director of Public Affairs of the Amalgamated Transit Union, in Washington, D.C. (June 10, 1976). See also 109 Cong. Rec. 5670 (1963) and text accompanying note 9 supra.


52. Id. § 21.
made an exception for transit is Tennessee. Recall that Memphis originally contracted with a private management company to enable transit employees to maintain their bargaining rights. In 1971, the state passed an act that allowed public transit authorities to bargain collectively with their employees and further required them to arbitrate their labor disputes.\(^{53}\) This act also contains the employee protection provisions of section 13(c).\(^{54}\) A final example of a southern state which has granted special bargaining rights to transit employees is Virginia.\(^{55}\) Though it granted limited bargaining rights to public employees, it imposed no obligation on public employers to negotiate. However, in 1974, the Virginia legislature enacted a statute that requires each city’s or county’s public transportation authority to extend to employees the protection afforded under section 13(c). Under this statute, the authority also must honor existing collective bargaining agreements and continue to bargain collectively with employees of acquired systems.\(^{56}\)

Ohio, a state which has not granted bargaining rights to other public employees, by statute compels transit authorities to continue bargaining relationships and to honor signed labor agreements.\(^{57}\) In a similar vein, New Mexico recently passed a public employee relations law limited to transit employees. It allows any municipality desiring to qualify for federal funds under UMTA to bargain collectively with employees and to meet the employee-protection requirements of section 13(c).\(^{58}\) The New Mexico statute states explicitly that its purpose is “to bring existing New Mexico laws in accord with the provisions of the Urban Mass Transportation Act of 1964 and to enable a municipality to qualify for a grant under such law . . . .”\(^{59}\) Other public employees in the state do not have such extensive bargaining rights.

The federal law has affected public transit authority legislation passed before 1964 when such legislation has been amended subsequent to 1964. For example, Illinois enacted in 1973 the Regional Transportation Authority Act which integrated the operations of the pre-1964 Chicago Metropolitan Authority into a regional body.\(^{60}\) The new legislation, however, contained a specific provision to meet the section 13(c) requirements for federal funds. This section states that the authority will give employees protection at least equal to that contained in section 13(c) of UMTA,\(^ {61}\) and that if agreement on any contract term cannot be reached by collective bargaining the authority or employee representative may submit the dispute to arbitration.\(^{62}\)

\(^{53}\) Transportation Systems Act, TENN. CODE ANN. §§ 6-3801 to 3809 (Supp. 1976).

\(^{54}\) Id. § 6-3802.


\(^{56}\) Id. § 15.1-1357.2 (Supp. 1977).


\(^{59}\) Id. § 14-53-14.

\(^{60}\) ILL. ANN. STAT. ch. 111 2/3, §§ 701.01-705.05 (Smith-Hurd Supp. 1977).

\(^{61}\) Id. §§ 702.15, 702.16.

\(^{62}\) Id. § 702.19.
The federal law has also influenced public transit authority acts in California. Prior to the passage of UMTA, three transit districts were established according to provisions in the State Public Utilities Code. Those three acts provided assurances that the authority would bargain in good faith with a union chosen by the employees. But these acts did not protect all existing employee benefits or recognize any concerted action beyond the right to choose a bargaining representative. The public transportation authority legislation enacted after 1963 included more comprehensive provisions to protect existing labor contracts. For instance, the Southern California Rapid Transit District legislation states that the district must honor all agreements when it acquires existing systems and bargain with employee representatives over changes that could affect the employment status, wages, hours, or working conditions of the district's employees. The act also recognizes the employees' right to self-organization, collective bargaining and other concerted activities. Most transit district acts passed after the Southern California act have included similar provisions.

Assessment of Post-UMTA Public Transit Authority Legislation

The most apparent difference between state laws which created transit authorities before and after UMTA is the broader protection offered employees by post-1964 legislation. Many post-1964 state statutes specifically guarantee the organizational and bargaining rights of transit employees. As we have seen, this differs from the pre-UMTA pattern. The earlier legislation, while less hostile to collective procedures than merit systems and public utility laws, did not provide the level of employee protection found in later state transit authority legislation. Transit employees working for public transit authorities prior to 1964 had distinctly inferior collective bargaining rights compared with the rights they had when they were private sector employees. State authority statutes passed since UMTA have reversed this situation; thus, in many instances the collective bargaining rights of public authority transit employees approximate their prior private sector rights.

The influence of section 13(c) on transit authority legislation also has been noted. Several states have used language closely paralleling section 13(c) to ensure that the state act will meet the federal requirements. To illustrate, the Utah transit authority act states that the "rights, benefits and other employee protective conditions and remedies of section 13(c) . . .

63. Cal. Pub. Util. Code §§ 15701-15797 (West 1965 & Supp. 1977). Authority was given to create districts in Alameda or Contra Costa County (Id. § 24561 [1955]), the San Francisco Bay Area (Id. § 28600 [1957]), and the Stockton Metropolitan Area (Id. § 50020 [1963]) (West 1973).
64. Id. §§ 25051-25052, 25057; 28850, 28851; 50120, 50121, 50126. The acts gave supervisory personnel and pensioners some protection. E.g., §§ 25053, 25054.
65. Id. §§ 30753, 30755, 30750(b).
shall apply to the establishment and operation by the district of any public transit service or system. . . ." 67 The statute creating the Baltimore Metropolitan Transit Authority similarly gives employees the protection of section 13(c). 68

Under the impact of federal legislation, states have revised their transit authority legislation to meet federal standards. In some cases, states have granted the employees of public transit authorities greater collective bargaining rights than other public employees in that state. Transit authority legislation protected employees' rights in order to comply with federal labor policy even though that policy may be inconsistent with the state's general view toward collective bargaining by public employees. These states, therefore, have made transit employees an exception to their public sector labor policy to enable public transit systems within their jurisdiction to qualify for federal funds.

Conclusion

The Memphis Formula is not the only way that a city can attempt to meet required federal labor protection standards without violating its state laws. Transit authority legislation provides another route to achieve the same end. Inclusion of section 13(c) language in transit authority legislation meets the UMTA requirements. A majority of the forty states that have enacted statutes for the establishment of transit authorities have included labor protection provisions. 69 Consequently, the transit authority mechanism provides municipalities with another way to meet section 13(c)'s requirement that employee collective bargaining rights be preserved.

IV

THE NLRB AND LOCAL TRANSIT

An NLRB decision to take jurisdiction over labor relations problems of

68. MD. TRANSP. CODE ANN. § 7-605 (Supp. 1977).
69. Twenty-eight states, including the District of Columbia, of the forty states that have passed transit authority legislation include labor protection provisions in those acts. As mentioned, the extent of the employee protection varies within these statutes. The states that have employee protection clauses in their transit authority legislation are: Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. Twelve other states have passed transit authority enabling legislation but without labor protection provisions: Arizona, Florida, Georgia, Iowa, Kansas, Mississippi, Missouri, Nevada, New Hampshire, New York, South Carolina, and Texas. Typically, these statutes enable a city, county or both to set up an authority to operate a public mass transportation system. These laws, while containing no labor provisions, vary in complexity. The New York act goes into considerable detail on composition of the authority, indebtedness, and system expansion. At the other extreme are states such as Mississippi and Georgia whose acts consist of one section allowing an authority to be created. For further detailed information about state transit authority legislation, see J. Stern, R. Miller, S. Rubenfeld, C. Olson & B. Heshizer, The Legal Framework for Collective Bargaining in the Urban Transit Industry 53-181 (1976).
local transit systems depends upon several factors. First, the Board asks whether the transit system is large enough to have a substantial effect upon commerce. If so, the Board decides whether the transit system is exempt from its jurisdiction because it is owned and operated by a governmental subdivision. The governmental exemption question is further complicated in the transit industry by the existence of the Memphis Formula under which a private contractor operates the system on behalf of a governmental body.

In Memphis Formula situations, the NLRB may be called upon to determine whether the private management company is subject to the LMRA or whether it shares the government's exemption under section 2(2) because it lacks sufficient control to qualify as an independent employer. Even if the management company meets the independent control test, its services may be so intimately connected to the government's function that it is exempt from coverage under the LMRA. The following subdivisions of this section of the paper consider each of these questions in turn.

**Substantial Effect Upon Commerce**

The commerce clause is the constitutional basis for the enactment of the LMRA and its predecessor, the National Labor Relations Act. The NLRB has jurisdiction over labor disputes affecting commerce: it can determine questions of representation affecting commerce under section 9, and it can prevent unfair labor practices affecting commerce under section 10.70 In 1950, the NLRB began to use revenue standards as one of its guidelines for determining whether to take jurisdiction in those cases that affected commerce. Under the 1950 revenue standards for transit systems, the NLRB assumed jurisdiction in cases involving interstate commerce and having more than a de minimis effect. The Board established a $3,000,000 revenue standard for local transit systems in 1954. The last revision of the revenue standards in 1958 extended the Board's jurisdiction to include local (intrastate) transit systems "which do a gross volume of business of at least $250,000 per annum."71

The NLRB expanded its jurisdiction over local transit systems in order to restrict the "no-man's land" that had existed whenever the NLRB refused to hear a particular case and the state was pre-empted from doing so by comprehensive federal legislation.72 Section 10(a) of the LMRA enabled the Board to cede to a state agency jurisdiction over "any cases in any industry . . . even though such cases may involve labor disputes affecting commerce,"73 but only if the state law and its interpretation were consistent

---

with the LMRA. This agreement to cede was "the exclusive means whereby States . . . [were] . . . enabled to act concerning matters which Congress . . . entrusted to the National Labor Relations Board." 74 In the absence of an agreement to cede whenever the NLRB did not assume jurisdiction, parties involved in a labor dispute affecting commerce would not have access to a forum in which to seek relief.

The 1959 amendments of the LMRA legitimized the Board's practice of declining jurisdiction whenever the revenue standards were not met or "the effect of such disputes on commerce was not sufficiently substantial to warrant the exercise of jurisdiction." 75 However, the proviso to this section does not allow the Board to decline jurisdiction over a dispute which would have been granted jurisdiction under the prevailing 1959 revenue standards. Therefore, the Board cannot decline jurisdiction over local transit systems doing the requisite $250,000 gross volume of business. In addition, section 14(c)(2) allows a state court or agency to assert jurisdiction over a labor dispute if the NLRB has decided that its effect upon commerce is not "sufficiently substantial." 76 The major transit companies in most of the 279 urban areas large enough to be eligible for operating assistance funds under the UMTA have sufficient operating revenue business to meet the $250,000 revenue standard. 77

Governmental Subdivision Exemption

A transit system's compliance with the revenue standards does not guarantee that the NLRB will automatically assert jurisdiction. If the employer of the transit system is considered to be a governmental subdivision, it is exempt from the application of the LMRA under section 2(2). 78 In NLRB v. Natural Gas Utility District 79 the Supreme Court sanctioned the Board's practice of declining jurisdiction under this political-subdivision exemption whenever an entity is "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

In deciding that this gas utility district was a political subdivision, the Supreme Court considered the following factors: the appointment of its commissioners by an elected judge and the power to remove them in the

77. Over 90% of the systems whose operating statistics are reported in the American Public Transit Association's Transit Operating Report, 1974, had revenues sufficient to meet the Board's standard.
79. 402 U.S. 600, 604-05 (1971). The NLRB, however, had asserted jurisdiction, deeming the district a private entity on the basis of its autonomy in conducting daily operations. Id. at 609 (Stewart, J., dissenting).
same fashion as public officials; the delegation to the district of the power of eminent domain; its exemption from state, county, and municipal taxes; the status of the district’s records as public documents open for inspection; the investigatory power and nominal compensation of the commissioners; the provision of social security benefits to district employees on a voluntary basis; the "automatic" public hearing and written "decision" available to all users who protested rates; and the broad statutory grant to the district of "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created." 80

On the basis of this political-subdivision test, the General Counsel of the NLRB dismissed an unfair labor practice charge against an agency operating a transit system which had been filed by a union representing the system’s bus drivers. 81 The General Counsel considered the agency to be a political subdivision because it was created by two states, was given some powers of eminent domain, was exempted from state and federal taxes and was administered by a board of commissioners selected by the governor and approved by the state senate of each state. The General Counsel declared that these facts "established that the agency was created directly by two states and is administered by individuals responsible to public officials," 82 thus echoing the Board’s line of reasoning as reflected in *Natural Gas.*

An exception to the general pattern of exempting governmental bodies arose in connection with a strike of the San Diego transit system and a subsequent representation petition. This deviation was caused by the NLRB’s reliance upon a federal district court’s finding that the San Diego Transit Corporation was a private employer. 83

In this dispute, an employer sought an injunction against a strike in state court and the union removed the proceeding to federal district court. The district court found that the San Diego Transit Corporation had been formed by private citizens; that its Board of Directors, composed of five citizens appointed by the city council, selected a manager responsible for the daily operation of the system; that the manager was not directly responsible to the city and that no city administrators were acting as ex officio members of the board; that the corporation’s house counsel was not part of the city legal staff; that the corporation’s labor relations policy was not controlled by the city and that the terms and conditions of employment of the transit employees were different from the city employees; that the transit employees were not eligible for city pension plans; and that there was no interchange of city and transit employees and no utilization by the latter of the city’s civil service system. The court also found that the corporation had

80. *Id.* at 608.
82. *Id.*
83. San Diego Transit Corp., No. 70-103-S (S.D. Cal., filed April 17, 1970) (findings of fact and conclusions of law).
claimed to be an employer under the LMRA while appearing before the NLRB.84

The district court made its findings of fact on April 17, 1970. Shortly thereafter, the Board accepted jurisdiction over the representation petition filed on behalf of employees of the San Diego Transit Corporation. Although this case initially appears to be an anomaly since the Board did not take jurisdiction in other cases involving federally funded transit systems, jurisdiction was granted in this instance because the Board considered the corporation which provided the transit services to be a private company rather than a governmental subdivision. In its opinion of May 14, 1970, following closely on the Court’s decision, the Board cited the corporation’s nonstock, nonprofit, tax-exempt status; the appointment of citizens to the governing board; and the lack of interchange between the city’s and the transit corporation’s employees as bases for claiming jurisdiction.85 To support its view that asserting jurisdiction effectuated the policies of the LMRA, the Board cited San Diego Civic Facilities Corporation86 in a footnote. That case involved a nonprofit, nonstock, tax-exempt corporation which was established, funded and operated by a group of private citizens. The Board found that the city leased land and buildings to the corporation, had the right to approve the corporation’s annual management program and to object to the hiring or removing of the chief manager. On the other hand, it found that the board or private citizens directed operations, policed the performance of the contract, and controlled labor relations.

In both San Diego Transit Corporation and Civic Facilities, the NLRB assumed jurisdiction on the basis of the specific facts of the arrangement between the municipality and the corporation providing services. In accordance with the Natural Gas test,87 the nonprofit, nonstock, tax-exempt corporation was not a political subdivision because it was not created by the city and was not directly responsible to city officials. In general, however, governmental bodies that operate transit systems appear to be exempt from NLRB jurisdiction under present Board rulings.88

*The Degree-of-Independent-Control Test*

Although governmental subdivisions are exempt under section 2(2) of the LMRA, private employers engaged by the governmental subdivision to operate a transit system may or may not share this exemption, depending in

84. *Id.*
87. 402 U.S. at 604.
88. *Cf.* Crilly v. Transp. Auth., 529 F.2d 1355 (3d Cir. 1976), involving an agency expressly created to carry out a public function and responsible to a board appointed by public officials. Citing Natural Gas, 402 U.S. at 604-05, the court held that the agency’s status exempted it from the employee protections of the NLRA and LMRA, although it was engaged in business affecting commerce, connected with a labor organization, and charged with a violation of LMRA § 301, 29 U.S.C. § 185 (1970).
part upon the degree of independent control that the employer exercises over labor relations and working conditions. Sometimes this degree-of-control test is framed in terms of whether the parties are joint employers when the governmental entity has substantial control over labor relations. In other cases, the Board asks whether the private employer is an independent contractor when the political subdivision appears to have no control over the labor relations. The test basically requires the NLRB to determine whether the exempt entity's control over the labor relations prevents the private employer from effectively bargaining with its employees. When the public entity possesses such control, the private employer shares its exemption from NLRB jurisdiction. As noted in the cases cited below, the NLRB accepts jurisdiction only if the private employer, rather than the governmental subdivision, exerts substantial control over the employment relationship.

The NLRB has asserted jurisdiction over a nonprofit health care institution which contracted with a county for the provision of services, because the institution "exercised sufficient control over the wages, hours, and other conditions of employment of its employees to enable it to bargain effectively with the Union." The Board found that the county had "ultimate control" over the employer's activities, with the power to set overall guidelines and standards. On the other hand, the Board concluded that the employer had the "ultimate responsibility" of overseeing daily operations without supervision or control, and could establish job descriptions and starting salaries, as well as hire, discipline, and fire its workers. In another case, despite an employer's compliance with military regulations on an army base to which it provided scientific and engineering support, the NLRB took jurisdiction over the employer because it had "sole control" of labor relations and could bargain with its employees. The Board pointed to specific language in the contract which described the employer as an independent contractor and discounted the Army's right to evaluate performance or to require an organizational structure exactly parallel to its own.

On another occasion, although the NLRB deemed the World Bank an exempt governmental subdivision, it considered a private company which provided building maintenance services to the Bank to be an employer subject to the NLRB because of its "effective control over working conditions and its competence to bargain with the union." The Board accepted the D.C. Circuit's view that the parties were joint employers, but found that

91. ARA Servs., Inc., 221 N.L.R.B. 64 (1975).
the company had assumed a dominant role in labor relations. The Board noted that the contract specified that the company would act as an independent contractor and failed to reserve rights to the World Bank to set working conditions. The Board treated the World Bank’s authority as the power to demand general standards of efficiency, safety, and sound business judgment; and it described the company’s acquiescence in the World Bank’s participation in hiring, firing, and assignment as the predictable efforts of a service company to please its client. In another case, a federal court approved the NLRB’s assertion of jurisdiction over the operator of a turnpike restaurant who contracted with the New Jersey Turnpike Authority to provide services, because the private employer hired, paid, and fired its employees and because the Authority’s contractual restrictions upon the employer’s operations were standard conditions of agreement with an independent contractor for efficient, orderly provision of services and did not amount to an attempt by the exempt Authority to control the employment relationship.

The NLRB declined jurisdiction over a company which contracted to maintain a county’s automotive fleet, because the county exercised “substantial and extensive control” over the company’s labor relations, “rendering it impossible for the Employer to bargain effectively with any union concerning wages, hours, and other conditions of employment.” The Board found that the county’s broad control was clear in the contract, which imposed specific hours, employee classifications, wage rates, insurance requirements, record-keeping, and other duties on the employer. The Board also relied on the county’s direct supervision of the employer’s operations.

The NLRB has refused to assert jurisdiction over a private, nonprofit, visiting nurse association which provided services for an exempt municipality, because it was a joint employer and shared the municipality’s exemption. The Board found that the city controlled the joint operations of the two entities, that the nursing association failed in practice to distinguish its operations from the city’s, that supervisors in one system freely directed nurses in both, and that nurses in each system had the same salaries, benefits, and discipline procedures and could shuttle between the systems.

95. Enforcing the Board’s bargaining order, the D.C. Circuit accepted the propriety of deciding that one “joint employer” has the “dominant role” and stated this was a question of fact on which the NLRB’s findings would normally be conclusive. 424 F.2d at 772-79.

96. NLRB v. Howard Johnson Co., 317 F.2d 1 (3d Cir.), cert. denied, 375 U.S. 920 (1963). The Court declared the degree of control over business operations less important to its decision than the degree of control over employment relations.

97. ARA Servs., Inc., 221 N.L.R.B. 64 (1975).

98. Id. at 64-65.


100. In Current Constr. Corp., 209 N.L.R.B. 718 (1974), the Board refused to take jurisdiction over a joint venturer who provided pruning and related services to city parks, because the city parks department by contract and in practice retained a “pervasive degree of
The Degree-of-Control Test in Transit Cases

Under its degree-of-control test, the NLRB has refused jurisdiction over transit systems in cities which have received funds from the UMTA and have utilized Memphis Formula management company arrangements.

On December 22, 1972, the Group Supervisor for Subregion 38 of the NLRB dismissed a representation petition from the Amalgamated Transit Union, which had requested certification as the bargaining representative for the employees of the American Transit Corporation in Decatur, Illinois, because of the city’s "control over substantial areas of employees' wages, hours and working conditions" and the city’s status as a political subdivision. In making his decision, the Group Supervisor relied upon language of the management contract between the city and the private company:

American Transit Corporation was awarded a contract to operate the bus system; the terms of the contract require American Transit to employ and furnish drivers and to direct and supervise labor relations. The contract also provided, however, that American Transit must obtain prior approval of the City before entering into any collective bargaining agreement. The City also retained contractual control over certain other aspects of the employment relationship and personnel policy making, including approval of hours of operation, approval of the hiring of new employees, and approval of payrolls for City reimbursement to American Transit for payment of wages to employees. The evidence indicates that the City has retained control over all matters affecting operating costs, including individual salary increases, general wage scales and other employee benefits.

The Department of Labor found that Decatur's version of the Memphis Formula met its standards for approval under section 13(c) and thereby made Decatur eligible for federal funding under UMTA. However, the decision had no effect on labor relations because the NLRB refused to take jurisdiction on the grounds that the city retained control over the employees' and the company's labor relations. Consequently, the city's exempt status was extended to the private employer.

The Decatur case raises two points in regard to utilization of the Memphis Formula and grants of federal funds. The Department of Labor

---

102. Id.
103. Id.
requires a city to sign the section 13(c) agreement along with the management company and to guarantee to continue the agreement with successor employers. 104 On the other hand, the NLRB Group Supervisor indicated in the Decatur case that the city's signature on the section 13(c) agreement demonstrates the exempt employer's degree of control over operations and labor relations and therefore may extend the governmental subdivision exemption to the management company. 105

Another example of the Board's implementation of the degree-of-control test to federally funded transit systems arose in a Santa Cruz, California, case in which the NLRB Region 20 Director dismissed a representation petition filed by employees of the management company. 106 The management contract between the Santa Cruz Metropolitan Transit District and the management employer provided that employees would be given raises in the same years in which city employees were given raises. It also provided that the Metropolitan Transit District, a governmental subdivision, would determine the hours worked by employees, the scheduled routes, the amount of payments to the employer to cover required wage increases, and the system which established priority hiring rights among the employees. This "pervasive degree of control over the Employer and its operations" was the basis for the dismissal of the petition and the refusal of the NLRB to overrule the Regional Director on appeal. 107

The Intimate-Connection Test

Even if the application of the Memphis Formula meets the Board's governmental subdivision and degree-of-control tests, it still has to meet the intimate-connection test, as the Board has indicated that these tests are separate and each may be sufficient to revoke its jurisdiction. 108 In Herbert Harvey, Inc., the NLRB asserted jurisdiction over an employer providing building maintenance services to the exempt World Bank, both on the basis that the employer controlled labor relations and that there was no intimate connection between its "housekeeping" services and the investment functions of the bank. 109 The Board defined the intimate-connection test and contended that its decision was consistent with prior cases:

[T]he assertion of jurisdiction over a contractor providing services for an institution exempted from the process of the Act is dependent

104. Yud, supra note 12, at 211.
107. Id.
108. See text accompanying notes 109-18 infra.
upon the relationship of the services performed to the exempted functions of the institution. Where the services are intimately connected with the exempted operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities.\textsuperscript{110}

In another recent case, the Board declined to assume jurisdiction on the basis of the intimate-connection test and clarified the degree-of-control test. In this instance a private company had contracted with the City of Scottsdale, Arizona, for the provision of fire protection and related services.

The degree of control exercised by the exempt institution over the operations of the nonexempt employer who provides services may, of course, be a determinative factor in certain situations. Thus, where the exempt employer exercises substantial control over the services and labor relations of the nonexempt contractor, so that the latter is left without sufficient autonomy over working conditions to enable it to bargain efficaciously with the union, that in itself is reason enough for declining jurisdiction, for the contractor is not required "to do the impossible" or to engage in a mere "exercise in futility," since the purpose of collective bargaining is to produce an agreement covering working conditions. In such a situation, of course, while the Board may do so, there is no need to invoke Harvey's "intimate connection" test, there being sufficient other reason for declining jurisdiction.

Where the control exercised over the nonexempt employer is not substantial, so that the employer is capable of bargaining with the union over wages, hours, and other conditions of employment, the focus of necessity is on the nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer and not, as the dissent claims, on the mere absence of control by the one over the other.\textsuperscript{111}

The Board found that the city owned the firefighters' facilities and had imposed various obligations on the employer. Nonetheless, the employer retained power to hire, discharge, and supervise its employees, who did not share in the city's fringe benefits. Since the city's control over labor conditions was not "substantial," the Board relied on the intimate-connection test, declaring that the firefighting service was not simply intimately related to the city's purposes but was also "in itself an essential municipal function which Scottsdale, instead of performing directly with its own employees, delegated to the Employer to perform on its behalf, making available its facilities and equipment for that purpose."\textsuperscript{112} Dissenting,

\textsuperscript{110} Id. at 240.
\textsuperscript{112} Id. at 586.
Member Fanning stated that the Board should focus on the degree-of-control before even considering the intimate-connection test.\textsuperscript{113}

In a recent decision involving a transit company in St. Cloud, Minnesota, the NLRB refused to assert jurisdiction over a transit management company that provided services which were intimately connected with the exempted operations of the governmental entity.\textsuperscript{114} The private employer, Transit Systems, contended that the Metropolitan Transit Commission was a political subdivision and that there was an intimate connection between the employer and the Commission. It also argued that the jurisdictional revenue standards were not met, a point that was not treated by the Board. The Board found that Transit Systems had "complete responsibility for the daily operations of the bus service, including the hiring and firing of employees, equipment and building maintenance, labor relations, equipment purchasing, and accounting."\textsuperscript{115} Although the company thus presumably met degree-of-control test, the Board dismissed the bus drivers' representation petition under its intimate-connection test, saying that, "[w]here the services are intimately connected with the exempted operations of the government entity, the Board has found that the independent contractor shares the exemption."\textsuperscript{116} It distinguished \textit{BDM Services Company},\textsuperscript{117} because the employer there had not performed the exempt functions of the U.S. Army (national defense), but had merely provided scientific and engineering advice.\textsuperscript{118}

\textit{Conclusion: The NLRB and Section 13(c) Rights}

Under the governmental-subdivision exemption and the degree-of-
control or intimate-connection tests, the likelihood that the NLRB will assert jurisdiction over federally funded transit systems is minimal. It may be possible to structure the Memphis Formula to gain jurisdiction despite the governmental or the degree-of-control tests, but the intimate-connection test appears to be a more substantial obstacle.

The NLRB's decision not to take jurisdiction casts doubts about the validity of section 13(c) agreements and the certification process under the Urban Mass Transportation Act. Currently, the Department of Labor, governmental subdivisions, management, and employees assume that the Memphis Formula and its derivations preserve private sector rights, including rights protected by the NLRB. In most instances, this assumption has not been questioned because the need for a representation election has not arisen or because neither of the parties has filed an unfair labor practice charge with the NLRB. When representation or unfair labor practice cases have arisen, however, the NLRB has not taken jurisdiction except in one instance.119

When the NLRB declines jurisdiction, what recourse is available to transit employees who are denied access to NLRB procedures? Possible avenues of redress include state public sector legislation, if there is such legislation, and the arbitration procedures of the Secretary of Labor provided for under the Urban Mass Transportation Act. Although the Secretary of Labor has not been asked to determine representation questions and unfair labor practices, unions may well ask the Secretary to do so in the future, particularly in states which have not enacted public sector labor relations statutes. In any event, the present situation is potentially unstable. It has not assumed major proportions, however, because of the long history of established and relatively sophisticated bargaining voluntarily pursued by unions and managements in the transit industry. But if bargaining relationships deteriorate and the need for the NLRB's services arises, it appears that they will not be forthcoming.

At present, the Department of Labor certifies that Memphis Formula arrangements prevent an employee from being adversely affected by the loss of bargaining rights, while the NLRB excludes such an employee from its jurisdiction and therefore denies him access to the administrative arrangements designed to protect such rights. The Secretary of Labor is charged with the administration of section 13(c) of the Urban Mass Transportation Act, while the National Labor Relations Board administers the Labor Management Relations Act. Both agencies are carrying out their responsibilities under separate legislation, but the result is that rights established under one act are not recognized under the other. Perhaps this question will be eventually resolved by Congress, or more immediately reviewed by the Secretary of Labor and the NLRB Chairman.

119. See text accompanying notes 83-88 supra.
When Congress enacted the UMTA in 1964 few Congressmen realized the Act’s eventual ramifications on labor management relations in the transit industry. Although the effect of section 13(c) requirements on states that forbade public employee bargaining was discussed during congressional debate, supporters of the bill saw this as a minor problem. Congress believed that the Act would help systems remain in private hands rather than shift to public ownership. In the rare case where public acquisition did occur, the Memphis Formula was cited as the mechanism which could be used to circumvent the state law and fulfill the employee protection requirements.

Since 1964 transit systems have gone public in increasing numbers and the Memphis Formula, instead of being an isolated form of transit management, is being used by several dozen cities. Also, a majority of the states have enacted special transit authority legislation that enables cities and counties to operate public transit systems. These events have led to a set of circumstances which Congress did not foresee.

Congress thought that Memphis Formula arrangements would provide for the continuation of private sector bargaining rights. The NLRB has determined, however, that employees of publicly owned transit systems are exempt from its jurisdiction because section 2(2) excludes any state or political subdivision thereof from its definition of an employer, the Memphis Formula notwithstanding. In this situation, federally mandated private sector rights which are allegedly preserved turn out to be non-existent when challenged.

Testimony before Congress by Secretary of Labor Willard Wirtz suggested that employee rights would be protected when public transit authorities were created. Secretary Wirtz stated that “new forms, such as transit authorities [and] port authorities . . .” have been developed that can meet the requirement that collective bargaining be continued. However, since these “new forms” have not included special provisions for the enforcement of section 13(c) rights, the rights appear to be unenforceable when challenged in states which do not provide such rights for public employees.

The problem of maintaining bargaining rights when a system goes public could be resolved in several ways by action of the Secretary of Labor, the President or Congress. Each of the procedures discussed below could be subject to court challenge, however, on the same constitutional grounds.

---

120. 109 CONG. REC. 5317 (1963).
relied upon by the Supreme Court in *National League of Cities v. Usery*.123 There, the Court found that the grounds for federal preemption were not strong enough to offset the states' right to establish certain conditions of employment for municipal employees, such as special hours for firefighters. Possibly, the same doctrine would be applied to the regulation of labor relations in public transit systems, although the Court did not extend the doctrine to other areas such as racial discrimination and the regulatory activities of the Office of Federal Contract Compliance.

One approach to transit labor relations problems might be the following: the Secretary of Labor could issue an interpretation of section 13(c) stating that his office would resolve disputes about employees' representation rights and unfair labor practices in those instances in which the NLRB declined jurisdiction and in which there was no state agency to handle the problem or in which the state agency also declined jurisdiction. The Secretary could then refer disputes to an existing branch of the Labor Department such as the division of the Labor Management Services Administration (LMSA) which presently has jurisdiction over employee protection under section 13(c), or to the LMSA division which presently handles unfair labor practice charges and other problems arising in connection with the administration of Executive Order 11491 (the order covering labor-management relations in the executive branch of the federal government).124

Whichever branch of the Labor Department is charged with this additional responsibility could then arrange for the matter to be heard by a Labor Department administrative law judge. Enforceability would be achieved in the same fashion as at present under section 13(c); that is, the Secretary of Labor would condition eligibility for further or continued receipt of UMTA funds upon compliance with the decision of the administrative law judge.

This first suggestion involves a minimum of change in existing procedures. In only a few instances have challenges to employees' rights arisen under circumstances where there was not an administrative agency to resolve the dispute. It should be kept in mind, however, that the small number of disputes is attributable to the fact that the unions and transit management are able to settle most problems without the need for third-party help. If this situation were to change, and questions about the preservation of bargaining rights arose in many of the cities in which transit systems have gone public in the past decade, the ad hoc arrangements suggested here might prove inadequate.

Instead of having the Department act as the agency of last resort after the NLRB had refused to take jurisdiction, a more comprehensive compliance procedure could be established by the Secretary of Labor for the initial handling of section 13(c) rights. Representation requests and unfair

labor practice charges would be lodged initially with a newly created branch of the Labor Department (alternatively, it could be housed within UMTA).

A third possibility is to assign these problems to the NLRB. The NLRB has the experience in this field; it handled such problems when the transit systems were private, and it has the staff to carry out this function. It has no authority at present, however, to assume jurisdiction under the LMRA since governmental authorities are specifically excluded from coverage in section 2(2) of the LMRA. Congress, could amend the LMRA to extend the NLRB jurisdiction to those publicly owned transit systems whose employees have been extended the rights guaranteed under section 13(c) of the UMTA; or Congress could amend the UMTA to give the NLRB jurisdiction over all transit industry labor relations just as it gave the NLRB jurisdiction over postal employees in the 1970 Postal Reorganization Act.125

Alternatively, the President could issue an executive order giving the NLRB the duty of implementing the representation and unfair labor practice rights to which employees are entitled under section 13(c) of the UMTA. Presumably, the President can add a new function to any existing agency and require it to carry out a congressional mandate even though this mandate is specified in different legislation and applies to employers not covered by the original legislation. Although this action, like any of the others mentioned previously, might be subject to legal challenge it represents the simplest administrative solution to the problem.126

An entirely different approach to the problem would be one under which the Secretary of Labor develops guidelines for use by state governments in carrying out the administrative responsibilities required to make section 13(c) rights enforceable if challenged. States which had no agencies to carry out this function would have to create them if they wished to remain eligible for UMTA grants. States which already maintain an agency for labor relations in either the public or private sector would have to make sure that the agency had the authority and capability of protecting section 13(c) rights.

Finally, it should be recognized that the local transit industry has a long history of collective bargaining and that both employees and managers are well represented by their respective unions and associations. It appears logical, therefore, for the Departments of Labor and Transportation to invite these representatives to work with the Departments in order to devise a new formula that will meet the needs of labor, management and the government.


126. An additional method of enforcing and interpreting section 13(c) rights is through federal court action, a procedure followed recently in Local Div. 519, ATU v. La Crosse Mun. Transit Util., No. 77-C-292 (W.D. Wis., Jan. 27, 1978). In this case, the city transit authority refused to arbitrate a dispute about the terms of a new agreement. The union then petitioned the federal court to force the city to arbitrate on the ground that the section 13(c) agreement provided for the resolution of disputes by arbitration—a right that the union had negotiated when the transit system was privately owned. The city argued that the federal court did not have jurisdiction, and that even if it had, it should not exercise it. The court, however, took jurisdiction and upheld the union claim.