The original documents are located in Box 22, folder "Mass Transit - Labor Protective Agreements: Meeting with the President, Secretary Coleman and Secretary Usery, August 2, 1976 (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

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MEETING WITH THE PRESIDENT &
SECRETARIES COLEMAN & USERY

re: 13(c)

Monday, August 2, 1976
11:00
Oval Office

Where is John
McCollister's letter?

[July 1976]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Return to Cannon

MEMORANDUM FOR JIM CANNON

FROM : Daniel P. Kearney

SUBJECT: Report and Recommendation of Secretaries Usery and Coleman regarding UMTA Section 13(c) Procedures

We compliment you in moving this very difficult issue forward. Each little step is a major breakthrough in a problem which has been with us for a long time without being resolved.

In response to your request, OMB recommendations on the proposed options are:

Option 1. Negative declaration. We recommend 1c (compromise position). We understand from your staff that they believe this option will be acceptable to both departments. If this is true, it will be a significant step in reducing the cumbersome, time-consuming 13(c) process.

Option 2. Set time limits. We recommend that the two departments continue to seek a solution between their positions, but if that is not possible we recommend the DOT position.

Option 3. Multi-year certification. This option is closely tied to the decision on Option 1 and therefore we recommend the DOT position.

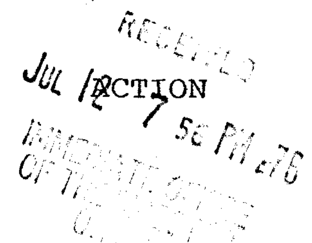
Option 4. Single certification for single grant. We recommend "agree."

Option 5. Promulgate and publish request. It does not appear the two departments are in agreement from the 6-25-76 memo. We would recommend that the regulations be put into effect no later than 60 days from now. Labor/DOT should use the consultative process before the regulations are final.

Log # 172, #529

THE WHITE HOUSE

WASHINGTON



July 9, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHIL BUCHEN
MAX FREIDERSDORF
ALAN GREENSPAN
ROBERT T. HARTMANN
✓JIM LYNN
JACK MARSH
BILL SEIDMAN

FROM: JIM CANNON

SUBJECT: Report and Recommendations of Secretaries Usery and Coleman regarding UMTA Section 13(c) Procedures

I attach for your consideration a Presidential decision memorandum on simplification of labor protective procedures under § 13(c) of the Urban Mass Transit Act of 1964 (as amended). This section requires that, if a grant of Federal moneys for transit purposes "adversely affects" local employees or unions, the Department of Labor must certify that "fair and equitable" arrangements have been made to protect such employees. The 13(c) process has grown cumbersome, time-consuming and inordinately expensive over the last decade.

On June 3, 1976, therefore, the President directed Secretaries Usery and Coleman to comment on 5 specific proposals for simplification of this process. Their joint memorandum is attached at Tab A. It shows agreement on 2 proposals, and disagreement on three. They have requested an opportunity to meet jointly with the President to discuss these issues.

Before this meeting takes place, could you review and comment on the options which they have posed so that the President may have the benefit of your views?

I would appreciate receiving your comments by c.o.b. Tuesday, July 13.

Thanks.

GERALD R. FORD LIBRARY

THE WHITE HOUSE

WASHINGTON

DECISION

July 9, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES CANNON

SUBJECT: Report and Recommendations of Secretaries Usery and Coleman for Improving Procedures Under Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended

BACKGROUND:

As you know section 13(c) of the 1964 UMTA Act (Amended) requires that before any Federal assistance for Mass Transit is granted, the Secretary of Labor must certify that "fair and equitable" arrangements have been made for transit employees "adversely affected" by the grant.

Although the intent of this provision of the law was sound, many believe the procedures have been manipulated so that, even where there is no "adverse" effect on workers, the process is used to win higher wages and increased fringe benefits: if transit operators do not agree to these terms, the unions will not approve the certification, DOL will not certify under 13(c), and UMTA funds will not flow. Transit operators, city and county officials, and UMTA heads have consistently expressed dissatisfaction with Section 13(c), and complaints from localities, documented as far back as 1967, have become more vehement in recent months.

On June 2, 1976, you reviewed a May 28, 1976, memorandum (attached at Tab B) describing the history of the 13(c) problem and directed Bill Coleman and Bill Usery to try to reach agreement on specific proposals for improving the 13(c) process.

SUMMARY OF RECENT DEVELOPMENTS:

After extensive discussions and lengthy exchanges of written as well as oral views, DOL and DOT reached agreement on two of the five proposals you made: (1) granting a single certification for a single Federal grant, and (2) publication of regulations or guidelines. There was disagreement on three proposals: (1) Establishing that certain catagories of grants have no adverse impact, and giving a "negative declaration" that, since no such impact is likely to occur, the 13(c) certification process is unnecessary; (2) setting time limits for the DOL decision process; and (3) granting a single multi-year certification for projects which result from a single, UMTA grant decision. Their joint paper is attached at Tab A.

Secretaries Usery and Coleman have requested a meeting with you to discuss this question. We have shared with some of your senior advisers the respective positions of the two Departments; their views are noted below.

I recommend that you approve a meeting with the two Secretaries at your earliest convenience.

APPROVE MEETING__________ DISAPPROVE MEETING__________

ISSUES:

1. NEGATIVE DECLARATION WITH CHANGED BURDEN OF PROOF.

Pursuant to your decision on June 3d, you proposed that DOT and DOL could establish categories of capital and operating assistance grants that historically have had minimal, if any, adverse impact on transit employees. Such categories would include bus and rail car purchases which result in no reduction in fleet size. In such cases, there could be a simple departmental declaration that no adverse impact is likely to occur, and that no specific 13(c) arrangement need be negotiated.

This would shift the present burden of proof from local transit operators (to prove that the Federal dollars will not harm employees) to the unions (to prove that there is an adverse impact.)

A review procedure could also be provided whereby an employee or union could also ask for special protective arrangements in connection with any grant based upon a showing of a substantial prospect of "adverse impact."

OPTIONS:

(a) Department of Labor Position.

The Department of Labor questions the legality of this "negative declaration," and objects to it from a national policy standpoint as well. They argue that the recommended national model agreement for 13(c) certification, negotiated a year ago, would be abrogated by such a procedure. Further, shifting the present burden of proof from the operators (to prove there is no adverse impact) to unions and employees (to prove there is such adverse impact) would be unfair, and might increase the delays already present in DOL 13(c) certifications.

(b) Department of Transportation Position.

While DOT urges that 13(c) requires certification only where employees are actually "adversely affected," Bill Coleman offers a compromise: limit the certification procedures to standard operating or revenue sharing type grants. DOT could require that any such operating assistance funding include a warranty by the transit district that no "adverse impact" will result, together with a promise to redress any such grievance if it shows up later.

(c) Compromise Position.

The DOL-DOT dispute may be a matter of semantics. Rather than calling this procedure a "negative declaration," a category could be established called "standardized approvals." In recurring grants, the Secretary of Labor on his own initiative, could require that certain Labor protections be guaranteed in the granting contract,

without the need for the collective bargaining process. DOL did just this on a recent demonstration project grant for the lower east side of Manhattan, approval dated June 4.

On this issue, your advisors recommend ____________________.

(a) DOL position____________________.

(b) DOT position____________________.

(c) Compromise position_____________.

2. SET TIME LIMITS

You urged the two Departments to cut the red tape in the 13(c) process by setting time limits for the negotiation of agreements.

OPTIONS

(a) Department of Labor Position

The Department of Labor argues that the 13(c) process has usually worked well without time limits but agrees that a limited category of reasonable time frames should be established.

(b) Department of Transportation Position

DOT disagrees that the 13(c) process has worked basically well without time limits. DOT urges that time limits be set on a case by case basis in all cases where DOT indicates that there is a significant possibility of funding.

On this issue, your advisors recommend ____________________.

(a) DOL position___________________.

(b) DOT position___________________.

3. MULTI-YEAR CERTIFICATIONS

You asked the two Departments to consider granting multi-year certifications for projects which result from a single UMTA grant decision.

OPTIONS:

(a) Department of Labor Position

DOL agrees that multi-year certifications would be useful so long as the parties agree to their use. They would limit such certifications to particular projects involving multi-year funding unless, through collective bargaining, the parties agree to broader protections.

(b) Department of Transportation Position

DOT urges that the proposed procedure is merely a piggy-back or recertification procedure based on existing agreements already collectively bargained between the parties. It should apply to three categories of repetitive grants:

(1) Grants for normal equipment replacement;

(2) Grants for maintenance carried out over a period of years, such as repairs on rights-of-way;

(3) Grants for specified multi-year programs on identifiable projects.

DOT urges that labor protections, once certified by DOL, should continue to apply to subsequent capital grants that have basically the same impact.

On this issue, your advisors recommend ____________________.

(a) DOL position____________________.

(b) DOT position____________________.

4. SINGLE CERTIFICATIONS FOR SINGLE GRANT

DOL and DOT agree that this should be done, so long as there is no change in the scope of the project.

On this issue your advisors recommend ____________________.

AGREE ______________ DISAGREE ______________

5. PROMULGATE AND PUBLISH REGULATIONS

The two Departments basically agree that guidelines for the 13(c) process, not formal regulations, should be published. Although clear rules are needed formal regulations would be complex and might serve only to institutionalize the defects in the 13(c) process which are already thorns in the sides of local officials.

(a) Department of Labor Position

DOL recommends the deferral of formal rule making until the two Departments can consult with those affected by 13(c).

(b) Department of Transportation Position

DOT urges that simple guidelines, rather than lengthy regulations, be published, and that this be done quickly. DOT questions the need for further delays or consultations, since all affected parties have been making their views known for over 8 years. (Simple guidelines could be published in 60 days.)

On this issue your advisors recommend ____________________.

AGREE ______________ DISAGREE ______________

THE WHITE HOUSE

WASHINGTON

ACTION

July 9, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHIL BUCHEN
MAX FRIEDERSDORF
ALAN GREENSPAN
ROBERT T. HARTMANN
JIM LYNN
JACK MARSH
BILL SEIDMAN

FROM: JIM CANNON

SUBJECT: Report and Recommendations of Secretaries Usery and Coleman regarding UMTA Section 13(c) Procedures

I attach for your consideration a Presidential decision memorandum on simplification of labor protective procedures under § 13(c) of the Urban Mass Transit Act of 1964 (as amended). This section requires that, if a grant of Federal moneys for transit purposes "adversely affects" local employees or unions, the Department of Labor must certify that "fair and equitable" arrangements have been made to protect such employees. The 13(c) process has grown cumbersome, time-consuming and inordinately expensive over the last decade.

On June 3, 1976, therefore, the President directed Secretaries Usery and Coleman to comment on 5 specific proposals for simplification of this process. Their joint memorandum is attached at Tab A. It shows agreement on 2 proposals, and disagreement on three. They have requested an opportunity to meet jointly with the President to discuss these issues.

Before this meeting takes place, could you review and comment on the options which they have posed so that the President may have the benefit of your views?

I would appreciate receiving your comments by c.o.b. Tuesday, July 13.

Thanks.

THE WHITE HOUSE

WASHINGTON

July 9, 1976

MEMORANDUM FOR: JIM CANNON

FROM: JUDITH RICHARDS HOPE

SUBJECT: UMTA § 13(c)

I attach a revised Presidential decision memorandum on UMTA § 13(c) incorporating David Lissy's revisions and suggestions. The meeting with the President requested by Usery and Coleman should occur as soon as possible particularly in light of a GAO study of this problem which is due to be released soon. Also, Bill Ronan and the head of American Public Transit Association, Bill Stokes, are meeting with Usery next Wednesday afternoon to voice loud complaints on DOL's 13(c) process. Bill Nicholson advises that 30-60 minutes of Presidential time would probably be available Wednesday morning, July 14, to meet on the issue. I think this would be a good time.

cc: Jim Cavanaugh
Art Quern
David Lissy

THE WHITE HOUSE

WASHINGTON

DECISION

July 9, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES CANNON

SUBJECT: Report and Recommendations of Secretaries Usery and Coleman for Improving Procedures Under Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended

BACKGROUND:

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Although the intent of this provision of the law was sound, many believe the procedures have been manipulated so that, even where there is no "adverse" effect on workers, the process is used to win higher wages and increased fringe benefits: if transit operators do not agree to these terms, the unions will not approve the certification, DOL will not certify under 13(c), and UMTA funds will not flow. Transit operators, city and county officials, and UMTA heads have consistently expressed dissatisfaction with Section 13(c), and complaints from localities, documented as far back as 1967, have become more vehement in recent months.

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This would shift the present burden of proof from local transit operators (to prove that the Federal dollars will not harm employees) to the unions (to prove that there is an adverse impact.)

A review procedure could also be provided whereby an employee or union could also ask for special protective arrangements in connection with any grant based upon a showing of a substantial prospect of "adverse impact."

OPTIONS:

(a) Department of Labor Position.

The Department of Labor questions the legality of this "negative declaration," and objects to it from a national policy standpoint as well. They argue that the recommended national model agreement for 13(c) certification, negotiated a year ago, would be abrogated by such a procedure. Further, shifting the present burden of proof from the operators (to prove there is no adverse impact) to unions and employees (to prove there is such adverse impact) would be unfair, and might increase the delays already present in DOL 13(c) certifications.

(b) Department of Transportation Position.

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On this issue, your advisors recommend ____________________.

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DOT urges that labor protections, once certified by DOL, should continue to apply to subsequent capital grants that have basically the same impact.

On this issue, your advisors recommend ____________________.

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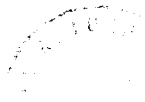

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DOL and DOT agree that this should be done, so long as there is no change in the scope of the project.

On this issue your advisors recommend ____________________.

AGREE _______________ DISAGREE _______________

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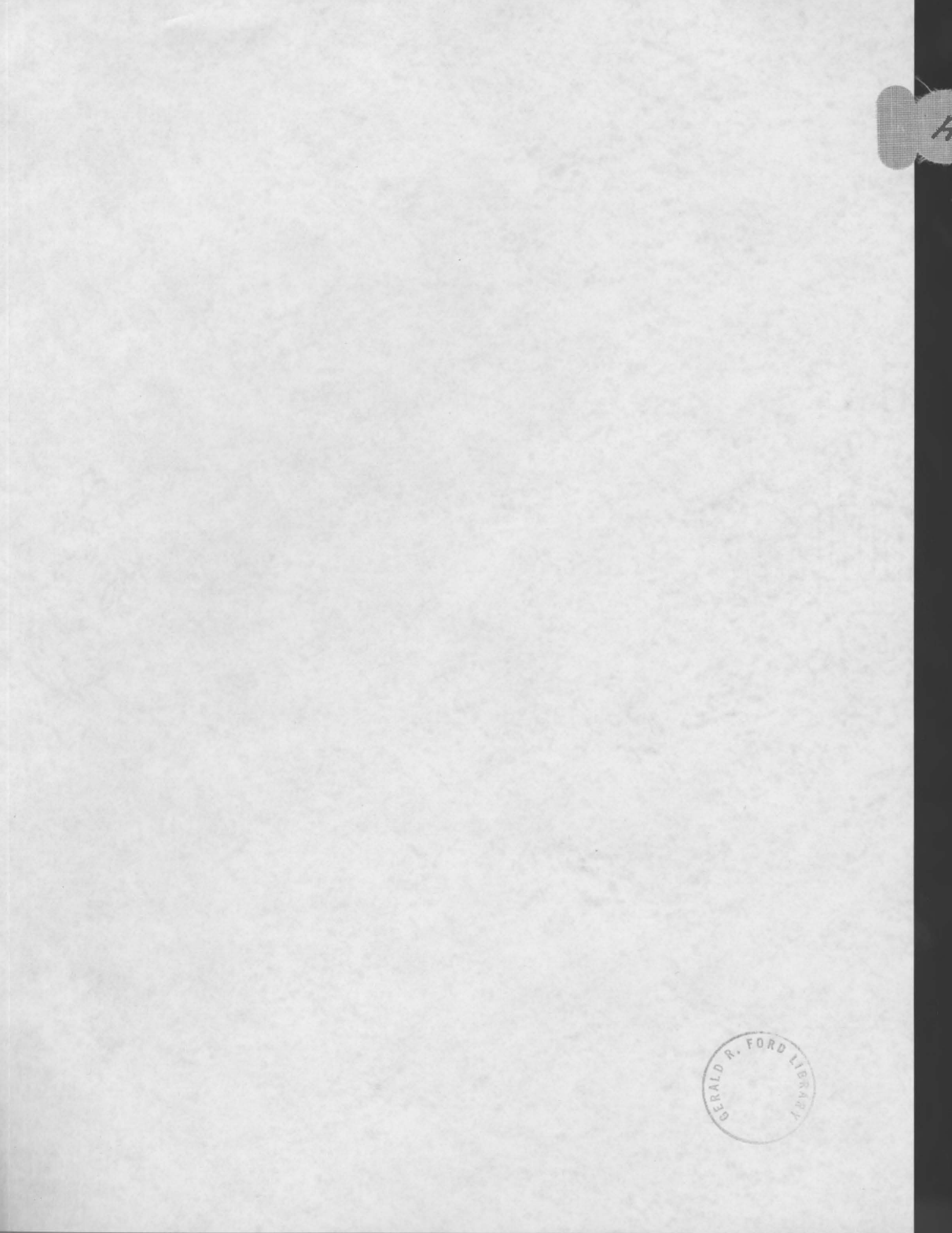
DOL recommends the deferral of formal rule making until the two Departments can consult with those affected by 13(c).

(b) Department of Transportation Position

DOT urges that simple guidelines, rather than lengthy regulations, be published, and that this be done quickly. DOT questions the need for further delays or consultations, since all affected parties have been making their views known for over 8 years. (Simple guidelines could be published in 60 days.)

On this issue your advisors recommend ____________________.

AGREE _______________ DISAGREE _______________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U. S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

JUN 25 1976

MEMORANDUM FOR: THE HONORABLE JAMES CANNON
Assistant to the President
for Domestic Affairs

FROM: W.J. USERY, JR.
Secretary of Labor

WILLIAM T. COLEMAN, JR.
Secretary of Transportation

This is in response to your memorandum of June 3 transmitting the President's direction that we address five specific proposals relating to the administration of Section 13(c) of the Urban Mass Transportation Act of 1964. The positions of the two Departments on each of these five proposals are set forth in the attachment. We have also attached some tabular background material.

In view of the potentially controversial nature of some of these recommendations, we request an opportunity to meet jointly with the President to discuss these issues prior to his making any decisions.

Attachment

6/25/76

MEMORANDUM ON SECTION 13(c)

1. NEGATIVE DECLARATION WITH CHANGED BURDEN OF PROOF

Proposal from June 3 Memorandum:

"Establish categories of capital grants that historically have had minimal, if any, adverse impact on transit employees. Such categories might include bus and rail car purchases which result in no reduction in fleet size. In such cases, there could be a simple departmental declaration that no adverse impact is likely to occur, and that no specific 13(c) arrangement need be negotiated.

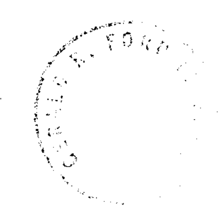
This procedure would shift the present burden of proof of adverse impact from local transit operators to the unions or the employees.

Provide a review procedure whereby an employee or union could ask for special protective arrangements in connection with any grant based upon a showing of a substantial prospect of 'adverse impact.'"

Department of Labor Position:

The Department of Labor questions the legality of establishing categories of UMTA assistance where prior certification under 13(c) would no longer be required. The statute states that each "...contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements." The Solicitor of Labor has advised that implementation of a negative declaration procedure would be inconsistent with the statute and legislative history. His opinion letter is attached at Tab A.

The Department of Labor also objects from a policy standpoint to the proposed negative declaration procedure. Establishing categories of projects where individual certifications would not be required would abrogate the national model agreement which was negotiated only this past July to be effective through September, 1977. This agreement, negotiated among representatives of the American Public Transit Association and of the national transportation unions, set forth a recommended model set of protective conditions for application in individual 13(c) agreements relating to operating assistance. A separate memorandum from Lewis M. Gill (Tab B), who mediated this agreement, sets forth the understanding of the parties that, while use of this agreement was to be encouraged, existing Labor Department case-handling procedures



including individual project notice and sign-off were to continue. Existing case-handling procedures were to stay in effect for capital, operating or demonstration projects not covered by the agreement. This agreement has served as the basis for approximately 85 percent of Labor Department certifications for covered operating assistance projects during 1976. Any unilateral change in procedures by the Labor Department would contravene the agreement of the parties.

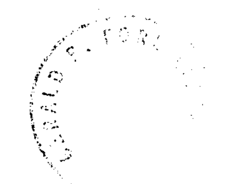
Secondly, the proposed negative declaration procedure would shift to individual employees or their unions the burden of establishing adverse impact resulting from Federal assistance. This would be a radical change from current procedure, since the common practice under existing agreements is to place the burden of proof upon the employer. It would be very difficult, if not impossible, for employees to meet this burden, since proof of causality requires familiarity with information peculiarly within the knowledge of the applicant. This shifted burden would detract substantially from the current level of employee protections, and would in our view be inconsistent with the purposes of the statute.

Given a major administrative change of this type, we would anticipate that unions and individual employees would frequently file claims of adverse impact. This would trigger a formal review procedure, possibly including public hearings requiring DOL inquiry into the specifics of individual employee's cases. This process could substantially delay the DOL certifications and require a major increase in DOL staff to handle the workload. It would also create a burdensome two-step process for the parties: an administrative hearing on adverse impact, then possible grievance proceedings to determine remedies. Further, as the DOL made determinations regarding adverse impact, a body of case law would develop which could affect labor and management's own decisions under grievance procedures in existing collective bargaining arrangements. The end result would be to create yet another area where a Federal agency would be issuing decisions with a potentially substantial impact on public and private sector activity.

Department of Transportation Position:

The Department of Transportation considers this a viable, desirable procedure, and believes that it is allowable within the law.

As a matter of law, Section 13(c) does not require protective arrangements in each and every contract for assistance, but rather only in situations where employees would be adversely "affected by such assistance." There are classes of projects which do not



adversely affect employees, and the Secretary of Labor has ample administrative authority to so hold. This was, in fact, the way the provision was administered in 1965. Opinion of counsel is attached at Tab C.

While we support the application of the negative declaration approach to a range of projects as the June 3 memorandum suggests (and we have been assured that the omission of operating assistance from that proposal in your memorandum was an oversight), we could accept limiting its use to a single category of operating assistance projects. These would be grants where funds are provided in the nature of general purpose operating assistance or revenue sharing, and where the term "project" has no particular identity but is identified as a certain proportion of the total sum of money needed to operate an entire system. In such cases, adverse impacts seem inconceivable and the Secretary of Transportation should be able to make grants without a 13(c) certification. Further, the Secretary of Transportation should require that there be included in UMTA operating assistance funding contracts a warranty by the grantee of no adverse impact, together with a commitment by such grantee to provide redress under Section 13(c) upon any subsequent showing of actual adverse impact.

As to the burden of proof problem, while it is difficult for either party to show that an alleged harm does or does not relate to the presence of Federal funds which are comingled in the operator's budget, it certainly seems more equitable for the party who is charging he has been harmed to have to make that showing. A shift in the burden of proof to labor should not increase the filing of claims, but should rather cut down on any filing of frivolous charges. Once a claim is filed, the Labor Department will have to make a finding no matter which party has the burden of proof, so there is no basis for arguing that this proposal will cause administrative problems.

The presence of a negotiated national model agreement does not alter the desirability of moving to a negative declaration approach. That agreement expires in 1977 and was, at best, only a guideline; the American Public Transit Association (APTA) was not negotiating as the bargaining representative of transit authorities and never pretended to be binding them. Moreover, the national model agreement is itself causing substantial problems and perpetuates an unnecessary collective bargaining procedure in a situation where that is unnecessary. APTA has now proposed a very different 13(c) procedure affecting operating assistance, so the Department of Labor would not be abrogating the agreement on its own motion. There is an increasing number of requests for changes in 13(c) administration from every level of government; see, for example, communications from the Governor of Massachusetts and the National Association of Counties (NACO) at Tab D.

2. SET TIME LIMITS

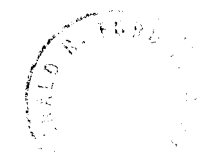
Proposal from June 3 Memorandum:

"DOL could set time limits for the negotiation of agreements, after which the Secretary of Labor could make his own determination of what arrangements constituted 'fair and equitable' protection. DOL could provide conditional certifications so that UMTA funds could flow before critical deadlines were reached (end of the fiscal year, or exhaustion of local operating funds)."

Department of Labor Position:

The Department of Labor recognizes the advantages of establishing reasonable time frames for negotiations regarding protective arrangements in certain project situations. The Department objects, however, to standardized time limits that would apply automatically to all projects within a given category. The circumstances of individual grants and the protective arrangements that may be required vary considerably, even within a particular category of grant. The length of time required for both parties acting in good faith to negotiate an agreement on protective terms varies accordingly. Unless used selectively, time limits could thus cut short the bargaining process before agreement has been reached, even in cases where lack of certification is not delaying grant approval. In addition, in many cases such time limits will provide an incentive for one or both parties not to bargain in good faith, given the prospect that a particular level of protections would be imposed by the Department of Labor at a certain point. Rigid time limits would therefore operate, in our view, to undercut the philosophy of the statute to encourage local collective bargaining. This philosophy is quite clearly stated in the legislative history. The House Committee Report on the Urban Mass Transportation Act of 1964 explicitly stated that "specific conditions for worker protection will normally be the product of local bargaining and negotiation."

There are cases where time limits are advisable, and the Department of Labor will apply them on a flexible basis. We will ask the Department of Transportation to identify those high-priority projects where timely resolution of 13(c) issues is crucial to the administration of the mass transportation assistance program. These projects will be given expedited processing by the Department of Labor, including the setting of time limits on negotiations where we consider appropriate. We anticipate that such time limits will be infrequently imposed, since the 13(c) process has usually worked well without such limits in the past. In the great majority



of cases, certification occurs before UMTA is ready to approve the grant. Further, as labor, management and the Department of Labor have gained more experience under the program, the average processing time for 13(c) certifications has decreased substantially. Despite a tripling in case load since Fiscal Year 1974, average case processing time has been reduced from 3.5 months to 2.5 months.

Department of Transportation Position:

The position of the Department of Labor is not adequately responsive to the problem or to the White House proposal. It would make time limits the exception rather than the rule. The Department of Transportation agrees that time limits can reasonably vary with the type of grant involved, and if necessary with local conditions. But time limits should be set, on a case by case basis, in all cases where we indicate that there is a significant possibility of funding. In addition, we support the concept of an expedited processing track for those projects which DOT indicates to DOL have a high priority.

We cannot agree that the 13(c) process has worked well without time limits in the past. Average processing time is deceptive as a measure, since it lumps the difficult situations in with routine grants. In fact, the unconstrained procedures currently followed by DOL have resulted in the documented feeling by grantees that they are in an uneven bargaining position, and a perception that unions have a veto over transit grants.

Nor would the introduction of time limits defy the legislative history. That legislative history makes clear that the Secretary of Labor is not expected to be guided solely by a devotion to collective bargaining. For example, the 1963 Report of the Senate Committee on Banking and Currency on S.6 states:

> "The Committee expects that the Secretary of Labor in addition to providing the Administrator with technical assistance will assume responsibility for developing criteria as to the types of provisions that may be considered as necessary to insure that workers' interests are adequately protected against the kinds of adverse effects that may reasonably be anticipated in different types of situations."

Further, 12 years of experience in the program have resulted in rather standard arrangements, making the risk of injustice owing to a time constraint minimal.

Some procedural hedge against the possibility of failure to bargain in good faith seems appropriate. That can easily be accomplished by providing that any party seeking a direct certification by the Labor Department after expiration of the time period should have to make a showing that it has sought to bargain in good faith.

3. MULTI-YEAR CERTIFICATIONS

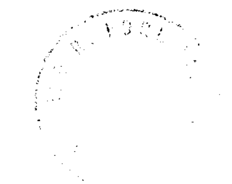
Proposal from June 3 Memorandum:

"Instead of having each grant of Federal dollars give rise to a new 13(c) agreement, DOL could establish a policy of granting multi-year certifications which would be good for all grants made within a specific period of time subject to review based upon the union or an employee showing 'adverse impact.'"

Department of Labor Position:

The proposal calls for a certification for a particular authority for a specified period, presumably to cover all forms of operating, capital or demonstration assistance from UMTA. The Department of Labor believes that where the parties agree to their use, multi-year certifications can be a useful mechanism for improved administration of Section 13(c), particularly for the operating assistance grant program. In fact, the model agreement, which covers a period of three fiscal years, was a positive step in this direction. Multi-year, and multi-project, arrangements are also frequently negotiated between the parties under the capital grant program. Increased utilization of such agreements can and will be encouraged by the Department of Labor.

The Department of Labor would limit such certifications, however, to particular identifiable projects involving multi-year funding unless the applicant and employee representatives were to agree to a broader protective arrangement. For the government to impose protective arrangements negotiated in one set of circumstances in a different set of circumstances runs counter to the basic premise of the statute that employee protections in individual cases be determined by collective bargaining. Project circumstances inevitably differ as a result of routine and recurring technological, operational and organizational changes. It is difficult, if not impossible, to predict what type of protections might be appropriate in the context of a particular operating, capital or demonstration project.



Any such change in the Secretary of Labor's current certification practices would be inconsistent with the procedures agreed to and jointly recommended to him by the parties to the model agreement. Furthermore, since the proposed procedure contemplates an administrative mechanism for review of union or employee claims of adverse impact, a cumbersome administrative procedure could arise, presenting the same problems discussed under Issue No. 1.

Department of Transportation Position:

The procedure the Department proposes would be better described as "recertifications based on existing agreements." In the case of certain categories of grants which are routine and/or repetitive in nature, the Secretary of Labor should provide automatic certification based upon the application to that grant of any pre-existing Section 13(c) agreement previously agreed to by the parties for a grant of that type. Such certification should be routinely made unless the grantee or any affected employee shows cause within a reasonable period of time as to why some new protective arrangements need to be considered.

This procedure should apply to at least the following categories of grants:

(a) capital grants for purchase or renovation of vehicles (including buses, railcars, or other vehicles) based on a normal equipment replacement or maintenance cycle, not resulting in a contraction of service levels;

(b) capital grants for refurbishing of rights-of-way, building, or other real property where the maintenance activity is closely similar to that carried out over a period of years;

(c) grants pursuant to specified multi-year programs of identifiable projects.

The model agreement is irrelevant in the context of this DOT proposal since that proposal deals only with capital grants while the model agreement dealt only with operating assistance.

More in point, it can be argued that even though a grant might have the same content and impact from year to year, the circumstances within which the parties might bargain on protective arrangements can change over time so that annual collective bargaining cannot be precluded. However, the Department of

Transportation does not feel that the law intended to permit or require an upward ratcheting of protective arrangements year after year even though the content or impact of the grant assistance does not vary. Once adequate protections have been certified, they should continue to apply to subsequent grants that have basically the same impact.

4. SINGLE CERTIFICATION FOR SINGLE GRANT

Proposal from June 3 Memorandum:

"Only a single certification should be required for a given project, even if such a project is funded through several successive grants or grant amendments."

Department of Labor Position:

The Department of Labor agrees that a single certification is feasible for a given project which may be funded through several successive grants or grant amendments as long as there is no change in the scope of the project. Such a practice is in fact utilized at present.

The Department of Labor will develop appropriate procedures as outlined in our position on Issue No. 5.

Department of Transportation Position:

Concur.

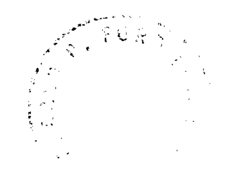
5. PROMULGATE AND PUBLISH REGULATIONS

Proposal from June 3 Memorandum:

"To assist all parties in participating in the 13(c) process, simple published regulations should be available."

Department of Labor Position:

The Department of Labor will prepare and publish appropriate guidance for interested parties with respect to the orderly and timely administration of Section 13(c). While the Department is of the view that published regulations are appropriate, it may be advisable to defer initiating the formal rulemaking process until the Department has had further opportunity to confer with the Department of Transportation and with management and labor regarding



their current differences over the administration of the 13(c) program. The Department of Labor plans to convene the standing committee contemplated in paragraph 9 of the Gill memorandum to assist in this consultative process.

Department of Transportation Position:

The Department of Transportation concurs but would urge that simple guidelines, rather than lengthy regulations issued through a formal rulemaking, would be a better way to proceed.

TAB A

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

22 JUN 1976

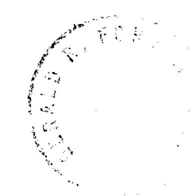
MEMORANDUM FOR THE SECRETARY

Subject: White House Paper on Section 13(c) of UMTA; Legal Question concerning Negative Certifications of Employee Protections

Attached is a paper dealing with the legal question of whether this Department can issue negative certifications with respect to the employee protective provisions under Section 13(c) of UMTA. As you know, this was one of the suggestions in the recent White House memorandum to this Department and the Department of Transportation. The paper concludes that such negative certifications cannot be legally justified.

William J. Kilberg
Solicitor of Labor

Attachment



U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

MEMORANDUM OF LAW

SUBJECT: Department of Transportation's Proposal that the Secretary of Labor provide a "Negative Declaration" in lieu of existing certification procedures for certain project categories.
SOL: 76-22-(UMT)

The Department of Transportation has proposed that the Secretary of Labor, in processing grant applications involving certain categories of projects under sections 3, 5 and 6 of the Act, which have in the past resulted in minimal if any adverse impact on mass transit employees, need not require that specific terms and conditions of a protective arrangement be worked out to certify that fair and equitable arrangements have been made to protect the interests of employees.

It is the position of the Department of Labor that the Department of Transportation's proposal concerning negative declarations, would prohibit the Secretary of Labor from performing his role as mandated by Congress.

Section 13(c) of the Act provides that "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. . . . The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements." (Emphasis added.)

Congress in passing the Urban Mass Transportation Act was aware that the future of the mass transit industry was in jeopardy without federal assistance. Further, in contemplating the impact of the Urban Mass Transportation Act Congress believed that the bill would serve to preserve the jobs of many workers then engaged in the mass transit industry, and more importantly Congress envisioned that this bill would in the long range generate new jobs through the extension of existing systems and the creation of new systems. While recognizing the vast potential for improvement in employment

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prospects as a result of this bill, Congress was also aware of the potential adverse effects on employees as a result of this bill.

> Although the problem of worker protection may arise in only a limited number of cases, the committee nevertheless believes that the overall impact of the bill should not be permitted to obscure the fact that in certain communities individual workers or groups of workers may be adversely affected as a result of the introduction of new equipment or the reorganization of existing transit operation. (2 U.S. Cong. & Adm. News, 1964, H. Rep. 204, p. 2584.)

Because of this concern, Congress sought to ensure that individual workers adversely affected should be fully protected in a fair and equitable manner and that federal funds would not be used in a manner that is directly or indirectly detrimental to the legitimate interests and rights of workers. Congress intended the means for providing these protections would be worked out through the local bargaining process.

> The committee wishes to point out that subject to the basic standards set forth in the bill, specific conditions for worker protection will normally be the product of local bargaining and negotiating. (2 U.S. Cong. & Adm. News, 1964, H. Rep. 204, p. 25864.)

Further, the committee went on to stress the role of the Secretary of Labor in assuring that the intent of Congress be carried out.

> The committee also expects the Secretary of Labor, in addition to providing the administrator with technical assistance, will assume responsibility for developing criteria as to the types of provisions that may be considered necessary to ensure that worker interests are adequately protected in the different types of situations that may arise. (2 U.S. Cong. & Adm. News, p. 2584-2585.)

It is evident that Congress wished the Secretary of Labor to assume responsibility for determining that employees are provided fair and equitable protection.

In 1966, when the Act was first amended, Congress again reiterated its commitment to providing employee protections. Both the Senate and House Committee reports specifically stated:

> Before Federal assistance may be provided, the Secretary must determine that all contracts contain the usual provisions relating to * * * labor * * * under criteria specified in the Act * * *. (See Cong. Rec., October 20, 1966, p. 28345, 89th Cong., 2d Sess.)

Further, in a memorandum, inserted into the Congressional Record, explaining the technical changes made by the Urban Mass Transportation Act amendments of 1966 it was stated:

> The labor protective provisions contained in the original Urban Mass Transportation Act continue to apply in the case of any project which can conceivably affect the rights and interests of employees. (supra, at p. 28345.)

The Act was amended again in 1974 to authorize grants for operating subsidies to states and local public bodies and their agencies. There was no discussion by Congress to amend or eliminate the need for 13(c) protections for loans under section 3. In addition, a new section 5 was added to the Mass Transportation Act which now provides for the apportionment of funds on a formula basis. Congress specifically provided in section 5: "(n)(1) that the provisions of section 13(c) and section 3(e)(4) shall apply in carrying out mass transportation projects under this section."

Therefore, it is perfectly clear from its passage and through the amendments of 1973, Congress was committed to providing mass transit employees the protections of section 13(c). If the Secretary of Labor were to adopt the proposal put forth by the Department of Transportation the burden of proof would shift to the individual employee to rebut the Secretary's "Negative Declaration" of adverse impact in order to qualify for the statutory protections. This was obviously not what Congress intended in establishing protections

for those employees who were adversely affected as a result of the federal grant.

Moreover, section 13(c) specifically provides that protective arrangements under the Urban Mass Transportation Act shall provide benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act (29 U.S.C. 5(2)(f)). The United States Supreme Court, in Norfolk and Western Railway Co. v. Nemitz, et al. (92 S.Ct. 185 (1971)) a decision concerning the application of section 5(2)(f) stated as follows:

> We reviewed the history of §5(2)(f) in Railway Executives Assn. v. United States, 339 U.S. 142, and said that 'one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations.' Id., at 148. That 'mandatory protection' can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commision so provides. (supra, at p. 188.)

The Supreme Court clearly interpreted section 5(2)(f) as requiring the development of the terms and conditions of arrangements intended for employee protection. Section 13(c) requires that employees be afforded no less.

Further, as a practical matter, the proposal as suggested by the Department of Transportation, creates more problems than it cures. The proposal appears to envision a procedure by which certain types of projects would be categorized as presumed to result in minimal, if any, adverse impact on mass transportation employees. Accordingly, when a grant application in one of these specified categories, is presented to the Department of Labor the Secretary would simply make a departmental declaration that no adverse impact is likely to occur and therefore no specific 13(c) arrangement need be negotiated.

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However, the Department of Transportation has not specified how these categories are to be established. Proposed projects under section 5 are of such a broad nature and involve such large sums of money that it would appear to be impossible, absent a crystal ball, for the Secretary of Labor to say these projects could not conceivably have an adverse impact on transit employees.

It would appear that the Department of Transportation is proposing that the Secretary of Labor rely solely on an applicant's assurance that the envisioned project would not impact adversely upon mass transit employees in the area. Such a proposal flies directly in the face of the congressional intent that the Secretary of Labor use his expertise and the auspices of his office to ensure employee protections.

If the proposal, as suggested, were adopted the Secretary of Labor would have no way of confirming or refuting the applicants' assurances based on information supplied by the applicant. Such decisions, made in a one-sided vacuum, do not begin to fulfill the responsibility placed on the Secretary of Labor by Congress. Therefore, new procedures would necessarily have to be devised by which the Secretary could obtain sufficient information about a particular project before considering the question of who may be adversely affected by the project.

Under existing procedures the employee has the burden of showing that his position has been adversely affected. The burden of proof then shifts to the applicant to show that the adverse impact was not a result of the federal grant.

The DOT proposal would shift the total burden onto the employee although the applicant would be in a far better position to trace the use of the federal funds. Therefore the employee would be faced with the virtually impossible task of rebutting the Secretary's Negative Declaration.

Accordingly, the proposal as suggested by the Department of Transportation neither fulfills the statutory mandate of the Act, to provide fair and equitable protections for mass transit employees, nor would it simplify procedures as intended.

William J. Kilberg
Solicitor of Labor

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TAB B

MEMORANDUM TO THE SECRETARY OF LABOR

The parties have agreed on the following proposals as to administrative use of the national agreement in processing applications for operating assistance under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended:

1. Immediately upon execution of the agreement by the national officers, they and the Secretary should urge the local parties to sign the agreement as promptly as possible.

2. Local parties who nevertheless elect not to sign the agreement will not be legally bound by it; in processing any cases involving such non-signatory parties, it will be discretionary with the Secretary as to how he will utilize the standards set forth in the national agreement as guidelines. The failure of local parties to sign the agreement may be a factor to be considered by the Secretary in determining whether there are special circumstances under paragraph 5 below. Similarly, the existence of any legal disabilities preventing a recipient from complying with portions of the agreement, or other special questions of application of Section 13(c), may be factors to be considered under paragraph 5.

3. The protective arrangements set forth in the national agreement shall be available to all affected employees and binding on all such employees covered by the agreement.

4. Individual project notices, full documentation, and individual project sign-off procedures, under current practices and policies of the Department of Labor, should continue.

5. Individual project review by the Secretary of Labor shall be given at the request of any interested party, to determine whether special

circumstances are presented by the project which require changes in the master agreement or supplemental arrangements, as applied to the particular project.

6. In the event it is determined by the Secretary that changes or supplemental arrangements are required, there should be an opportunity to negotiate such arrangements and changes in accordance with existing case-handling procedures prior to any Secretarial determination of the disputed issues.

7. The scope of the master agreement shall not include federal operating assistance for dial-a-ride, taxi, jitney, van pooling, car pooling, subscription service, or other forms of paratransit services. The master agreement shall similarly not cover or be applied to special operating assistance for projects for the elderly and handicapped.

8. In regard to any other non-covered capital, operating, or demonstration project, the interested parties shall retain their right to individual negotiation of fair and equitable employee protective arrangements for the particular project under existing case-handling procedures wherein the interested parties will determine for themselves whether and to what extent the master agreement shall be made applicable to such project; if no agreement is reached by the parties, the Secretary's regular case-handling procedures shall be utilized.

9. The parties will set up an appropriate standing committee to consult with and assist the Secretary and his staff on problems which arise in the administrative use of the national agreement.

Lewis M. Gill
Special Mediator

July 13, 1975

TAB C

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

June 28, 1976

MEMORANDUM FOR: THE HONORABLE JAMES CANNON
Assistant to the President
for Domestic Affairs

SUBJECT : Section 13(c)

Attached is the legal opinion of the UMTA Chief Counsel on the question of negative declarations under Section 13(c), to complete the June 25 response from the Departments of Labor and Transportation. The opinion should appear at Tab C in the submission.

R H McManus
Robert H. McManus
Associate Administrator for
Transportation Management
and Demonstrations

Attachment

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

June 25, 1976

MEMORANDUM

TO : Administrator
UOA-1

FROM : Acting Chief Counsel
UCC-1

SUBJECT: Legal Opinion: Authority of the Secretary of Labor to determine that certain categories of projects funded under the Urban Mass Transportation Act of 1964, as amended (the Act), are not required to have protective arrangements negotiated and certified prior to extending financial assistance for such projects.

Section 13(c) of the Act provides as follows:

> "(c) It shall be a condition of any assistance under section 3 1/ 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 continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of

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1/ Section 2(b)(2) of Public Law 89-562 amended section 13(c) by substituting the words "under section 3 of this Act" for the words "under this Act." Subsequently, Chairmen of the Committees on Banking and Currency of the House and of the Senate inserted in the Congressional Record statements indicating that there was no intent to exclude the urban mass transportation demonstration program under section 6(a) from the labor-protective requirements of section 13(c). See Congressional Record, October 20, 1966, p. 28344, and October 22, 1966, p. 28826 (89th Congress, 2d Session).

> 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 reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

Under current practice, all applications for assistance under sections 3 and 5, and those applications involving operations under section 6, are submitted to the Department of Labor (DOL) for certification that fair and equitable arrangements exist to protect the interests of employees affected by such assistance. The DOL then has the parties negotiate by collective bargaining the terms and conditions of such arrangements. The usual parties in interest are the affected unions and the recipient of grant funds.

In order to provide for the more orderly and efficient management of the programs of the Urban Mass Transportation Administration (UMTA), the Department of Transportation (DOT) has proposed a procedure pursuant to which the Secretary of Labor would determine that there are classes of projects which do not adversely affect employees. It is proposed that DOT would limit this negative declaration procedure to general purpose operating assistance projects under section 5 of the Act, a category under which adverse impact is unlikely. Section 5 2/ funds are provided to urbanized areas on the basis of a statutory formula; so long as the relevant statutory and administrative requirements are met, decisions as to the disbursement of section 5 funds are vested in State and local processes. Once these local decisions are made and the statutory and administrative requirements are met, Federal operating assistance is applied to a certain proportion of the eligible operating expenses needed to operate a transit system. Thus, the Federal "project" can be identified only

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2/ Section 5 funds may also be used for capital projects; any such projects would not be subject to this proposal.

as a payment for a portion of undifferentiated transit operating expenses. In such cases, the Secretary of Transportation should be able to make grants without a 13(c) certification. However, the Secretary of Labor should have the ability to concur in or contest an UMTA determination that certain proposed projects fall under such a category. Further, the Secretary of Transportation would require that there be included in UMTA operating assistance grant contracts a warranty by the grantee of no adverse impact, together with a commitment by such grantee to provide redress under section 13(c) upon any subsequent showing of actual adverse impact.3/

DOT has identified other classifications of projects--certain types of capital grants--which would also lend themselves to this procedure, but for purposes of this opinion the Department is limiting the discussion to the general operating assistance category.

3/ Warranty - The Public Body (Grantee) warrants that the Project will not adversely affect the employment and working conditions of any mass transportation employees within the project area. The Public Body (Grantee) agrees that in the event any such employees are so affected, UMTA may suspend assistance under this contract pending correction of the adverse affect, the Public Body (Grantee) and the representative of the affected employee(s) may be requested by the Secretary of the Department of Labor to negotiate an agreement which the Secretary will certify as meeting the requirements of 13(c) of the Act, and the Secretary of Labor may on his own motion set such protective arrangements as he deems appropriate to protect the interest of adversely affected employees. The Public Body (Grantee) agrees to make redress to adversely affected employees pursuant to the conditions of such protective arrangements as may be negotiated by the parties or set by the Secretary of Labor.

CONCLUSION

Upon review of the language of section 13(c) of the Act, the legislative intent of section 13(c) and the discretionary powers of the Secretary of Labor, I am of the opinion that there is no mandatory requirement that "fair and equitable arrangements" be negotiated by the collective bargaining process in advance of grants or any category of grants where there is no evidence and little possibility that such grant assistance would adversely affect mass transportation employees.

RATIONALE

The Act -- 13(c) only applies where there are adverse effects.

The language of section 13(c) cited above is clear. The operative language is the first sentence which reads:

> "It should be a condition of any assistance under section 3 4/ 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."

The clear intent of this sentence is that transportation employees affected adversely by UMTA assistance be protected. The DOL does not appear to dispute this. (See Solicitor, DOL, Memorandum of Law, dated June 22, 1976, at pp. 2 and 4.) The relevant reports of Congress are replete with the reference to 13(c) providing protection for employees who may be adversely affected by a project. For example:

> "Although the problem of worker protection may arise in only a limited number of cases, the committee nevertheless believes that the overall impact of the bill should not be permitted to obscure the fact that in certain communities individual workers or groups of workers may be adversely affected as a result of the introduction of new equipment or the reorganization of existing transit operation." (2 U.S. Cong. & Adm. News, 1964, H. Rep. 204, p. 2584.) (Emphasis supplied)

4/ See Footnote 1/.

To construe the sentence otherwise would be in error. To date, to my knowledge, no collectively bargained agreements have been designed to come into play when an employee is not affected or when he is beneficially affected. It is not consistent to agree there is little or no chance of adverse effects and then require the parties to negotiate an agreement that provides protections against such effects. The DOL has argued that the last sentence of 13(c) is operative and requires all contracts to specify the protective arrangements. This sentence reads:

> "The contract for the granting of any <u>such</u> assistance shall specify the terms and conditions of the protective arrangements." (Emphasis supplied)

The word "such" relates back to assistance which adversely affects employees, so that this final sentence is consistent with the DOT proposal. In any case, the DOT proposal would include in all contracts of assistance the warranty referred to above. It is not a case of leaving an adversely affected employee without redress or remedy. Even if it should be found that the Secretary of Labor cannot proceed in any project situation without advance assurance that protective provisions are in place, the proposed grantee warranty provides such protective provisions and advance assurance.

<u>13(c) contains no mandatory requirement for collectively bargained agreements</u>.

The DOL cites "Legislative History" as requiring collectively bargained agreements in each and every case and indicating that the DOL Secretary's hands are tied. The first sentence of 13(c) cited above is operative and puts the burden of determining fair and equitable arrangements in the hands of the Secretary and not in the hands of legislative history.

Legislative history favoring collective bargaining to determine "fair and equitable arrangements" where there is likelihood of adverse effects does not remove the Secretary's threshhold authority to determine that there is no such reasonable likelihood. Further, the legislative history on collective bargaining can be read both ways.

The DOL has in the past referred to the March 28, 1963 Report of the Senate Committee on Banking and Currency to the effect that "it is expected that specific conditions normally will be the product of local bargaining and negotiations, subject to the basic standard of fair and equitable treatment." However, the Committee also indicated that the Secretary of Labor was expected to develop criteria for the administration of the law. In the very next sentence of the Report quoted this is said: "The Committee expects that the Secretary of Labor, in addition to providing the Administrator with technical assistance, will assume responsibility for developing criteria as to the types of provisions that may be considered as necessary to insure that worker interests are adequately protected against the kinds of adverse effects that may reasonably be anticipated in different types of situations." (Emphasis supplied).

There is precedent for negative declaration procedures although not expressly authorized by statute. An example supporting the DOT approach may be found under Section 102(C) of the National Environmental Policy Act of 1969 (NEPA) (P.L. 91-190, 81 Stat. 852, 42 U.S.C.A. 4321) which provides, in part, that Federal agencies must prepare detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. The guidelines prepared pursuant to NEPA by the Council on Environmental Quality (CEQ) provide, *inter alia*, for an agency determination that under certain circumstances an environmental statement is *not* necessary for a proposed action. (See § 1500.6, 40 *CFR*). In such cases, the agency must prepare an environmental assessment and a publicly-available record briefly setting forth the reasons for its "negative" determination. While NEPA does not provide for such "negative" agency determinations, the CEQ guidelines establish procedures which interpret NEPA to permit such determinations so long as they are adequately documented and made in conformance with those procedures. It is my opinion that the Secretary of Labor may exercise similar discretion and judgment under section 13(c) of the Act.

The suggested procedure would allow UMTA projects to be classified by category and those falling within a "no impact" category would not be subject to the normal 13(c) process but would be subject to the warranty. The Department of Labor would, of course, review and concur in each grant determined by UMTA to fall within the "no impact" category or any other category. While 13(c) of the Act does not expressly provide for this approach, I believe that, similar to the NEPA example discussed above, it can be accomplished without violating the spirit of the Act by development, with the Department of Labor, of a sufficiently detailed set of regulations or guidelines.

A mandatory collective bargaining requirement could have widespread policy implications.

Many other pieces of social legislation now contain labor protective provisions and the administrative practices implementing them are evolving. As a matter of policy, requiring collective bargaining in each and every case, regardless of the likelihood of adverse impact would result and has resulted in delay, constant upward ratcheting of protections, and the extension of protections to employees who are not directly affected by the assistance. For example, the Juvenile Justice and Delinquency Prevention Act of 1974 (P.L. 93-415) and the Special Health Revenue Sharing Act of 1975 (P.L. 94-63) contain requirements that fair and equitable arrangements be made to protect employees affected by the new programs. The Developmentally Disabled Assistance and Bill of Rights Act of 1975 (P.L. 94-103) has a Davis-Bacon type provision. In 1974, the National Labor Relations Act was amended to extend coverage under that act to employees of nonprofit hospitals and nursing homes (P.L. 93-360).

Such recent railroad legislation as the Rail Passenger Service Act of 1970 (P.L. 91-518) and the Regional Rail Reorganization Conservation Act of 1973 (P.L. 93-236) contain extensive employee protection provisions and require that such arrangements be made prior to entering into certain activities under the act. However, we are unaware of any requirement under these laws that continual or periodic renegotiations of these agreements must be undertaken through the collective bargaining process.

These acts are all administered somewhat differently but as a whole they give selected groups of local employees protections against adverse effects of Federal assistance. If it is determined that the only way to assure protections, even where there is no adverse effect, is by collective bargaining without exercise of Federal discretion these programs could all become subject to the will of organized labor. Organized labor would certainly press for all of its employees to have like protections and benefits. Those public employees not covered by an agreement in one program will either obtain it through another or will assert their right to it by their presence as part of a public work force that is not being given the same rights as the rest of the work force.

Theodore A. Munter

Theodore A. Munter

TAB D

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national association of counties
1735 new york avenue, n.w., washington, d.c. 20006 (202) 785-9577

April 8, 1976

Dear Friend:

County governments have been involved in public transportation for years. Since passage of the landmark $11.8 billion National Mass Transportation Assistance Act of 1974, county governments have become even more involved.

In many areas, county elected officials make vital decisions affecting financial support for existing and new systems, allocation of Section 5 formula funds among transit operators in urbanized areas, appointment of transit board members, and other major policy issues.

One matter which seriously concerns them is the manner in which the labor-protective requirements of Section 13(c) of the 1964 Urban Mass Transportation Act are administered. We enclose, for your information, a resolution adopted by the National Association of Counties' Board of Directors on March 30, 1976.

This resolution was recommended to the Board by unanimous vote of the NACo Urban Affairs Committee and our Transportation and Labor-Management Steering Committees.

We would welcome your comments and/or support for our position. If you write to the President, the Secretaries of Transportation or Labor, the Urban Mass Transportation Administrator, or Congressional leaders, we would be interested in receiving a copy of your comments.

Sincerely,

Sandy Spence

Sandra Spence
Legislative Representative
Transportation

national association of counties
1735 new york avenue, n.w., washington, d.c. 20006 (202) 785-9577

NACo POLICY RESOLUTION

TRANSPORTATION LABOR PROTECTIVE AGREEMENTS SECTION 13(c)

Adopted by NACo Board of Directors

March 30, 1976

WHEREAS, Section 13(c) of the Urban Mass Transportation Act of 1964 requires as a precondition to UMTA assistance, "fair and equitable" arrangements to protect the interests of employees by such assistance; and

WHEREAS, the determination of what is "fair and equitable" is made only by the Secretary of Labor without benefit of written regulations; and

WHEREAS, before making this determination, the Secretary of Labor submits proposed labor protective agreements to unions representing affected employees; and

WHEREAS, the Secretary of Labor typically submits such proposals to many labor organizations, even where there is only a very minimal potential interest involved; and

WHEREAS, the Secretary of Labor sets no limit on the length of time such organizations may take to review the proposed agreemnt and such review often results in unreasonable and unnecessary delays in funding; and

WHEREAS, the effect of this practice is to allow labor organizations to hold hostage needed UMTA grants; and

WHEREAS, the pressure on transit officials to sign these agreements in order to assure continuity of public transportation service cannot realistically be ignored; and

WHEREAS, these pressures make management of transit operations in an orderly, efficient and cost-effective manner impossible;

NACo URGES THAT

the Congress and the Department of Transportation and the Department of Labor conduct a thorough review, study and reconsideration of the administrative procedures currently utilized in achieving compliance with Section

13(c) of the Urban Mass Transportation Act of 1964. Particular attention should be given to the effect of the general provisions and administrative procedures of 13(c) as they impact on the provision of public transportation services

the study should also include but not be restricted to considerations such as:

° The relevance and effectiveness of 13(c) in assuring agreements which are fair and equitable to public transportation users and taxpayers at the federal, state and local levels.

° A limitation of 13(c) review provisions to these unions having a direct interest in them.

° A limitation of the amount of time affected unions may be permitted in their review of labor protective agreements.

° The need for written regulations to guide the Department of Labor in its administration of 13(c).

° The need for a review of the appropriateness and relevance of the provisions and use of the so-called "model agreement" negotiated and signed by the American Public Transit Association (representing management) and the Amalgamated Transit Union and Transport Workers Union of America.

° The need to separate application of agreement provisions appropriate for rail transit employees which are based upon 19th century rail provisions from those appropriate for modern transit system employees.

° The need to ensure that state collective bargaining laws will apply to local transit public employee labor relations and shall not be prempted by the Secretary of Labor.

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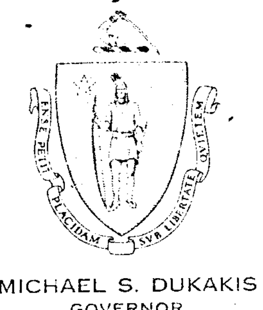

MICHAEL S. DUKAKIS
GOVERNOR

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

June 11, 1976

The Honorable William T. Coleman, Jr.
Secretary of Transportation
U.S. Department of Transportation
Washington, D.C. 20590

Dear Secretary Coleman:

It is my understanding that you and Secretary of Labor W. J. Usery, Jr. are currently working to mitigate the adverse effects of the administration of Section 13(c), the so-called labor protection clause, of the Urban Mass Transportation Act of 1964 as amended. I am writing to you today to express my deep concern over the negative impact which Section 13(c) has been having on transit operations in the Commonwealth of Massachusetts. Even more severe than any actual cost experience is the hesitancy of many communities to become involved in public transportation because of their fears of open-ended liabilities which the provisions of Section 13(c) as currently implemented seem to involve. I understand also that Massachusetts is not unique in this regard. Therefore, I urge you to continue your efforts to deal with the "13(c) problem" on behalf of public mass transportation in this nation.

I am enclosing a copy of a letter from my Secretary of Transportation, Frederick Salvucci, to you referring to a proposed UMTA Section 5 operating assistance 13(c) agreement submitted by the Pioneer Valley Regional Transit Authority (Springfield, Massachusetts area). The latter proposed agreement is also enclosed. Secretary Salvucci's letter states fairly my views on the subject. The potential liability to the taxpayer of signing federally required 13(c) agreement must be better defined. Accepting federal money for continuing and improving local transit services, including routine transit vehicle and other equipment replacement must not be accompanied by fantastically complicated agreements whose potential costs to the taxpayer cannot even be explained by the lawyers drafting the agreements much less understood by the public officials who must sign them.

I, therefore, urge you to continue your work with Secretary Usery to arrive at a new method of administering Section 13(c) of the UMTA Act —

which is fair and equitable for all parties involved in using, operating, and paying for the excellent public mass transportation system which this nation needs and deserves.

Sincerely,

Michael S. Dukakis

MSD:sjs

cc: Mr. Robert E. Patricelli, Administrator, UMTA
Mr. Stephen G. McConahey, Asst. to the President for Intergovernmental Relations
Lt. Governor Thomas P. O'Neill, III
Secretary Frederick P. Salvucci

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The Commonwealth of Massachusetts

Executive Office of Transportation & Construction

One Ashburton Place

Boston, Massachusetts 02108

FREDERICK P. SALVUCCI
SECRETARY

March 8, 1976

Secretary William T. Coleman, Jr.
U.S. Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

Re: 13(c)/Section 5 - Springfield

Dear Secretary Coleman:

I am writing to ask for your support of the attached UMTA Section 5 operating assistance 13(c) statement submitted to Mr. Patricelli, Urban Mass Transportation Administrator, by the Lower Pioneer Valley Regional Transit Authority (Springfield, Massachusetts area). In my view the proposed statement clearly shows that there can be no adverse effect on employees of the Regional Transit Authority's private carriers as a result of the receipt of federal Section 5 operating subsidies for a portion of the RTA's transit deficit.

A key fact underlying our effort in this regard is that we are attempting to expand the capability of our transit authorities to provide public transportation services. We are encountering, however, resistance on the part of many communities which might otherwise join in the transit authorities' program. Their resistance is grounded in their fear that federal transportation aid programs -- which they see as essential to providing expanded services -- will bring with them a host of undefined labor protective requirements which have unforeseen yet ever growing financial costs to the taxpayers of their communities. A clarification from the federal government that no such undefined and costly requirements exist in the Section 5 operating subsidy program as a result of the interpretation of Section 13(c) would be a tremendous aid in our effort.

I therefore hope that you will find the proposed 13(c) statement entirely satisfactory and I ask that you strongly represent the interests of the transit organization involved in this before the Secretary of Labor. Your involvement and the vigorous support of the DOT and UMTA are essential to the success of this approach to the 13(c)--Section 5 operating aid question.

Yours sincerely,

Frederick P. Salvucci

Frederick P. Salvucci

CC: Mr. Robert E. Patricelli
Urban Mass Transportation Administrator

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CHICOPEE LONGMEADOW WESTFIELD
EASTHAMPTON LUDLOW W SPRINGFIELD
E. LONGMEADOW NORTHAMPTON WILBRAHAM
PIONEER VALLEY TRANSIT AUTHORITY

February 18, 1976

RECEIVED
FEB 20 1976
OFFICE OF THE SECRETARY OF
TRANS. & CONST.

Mr. Robert E. Patricelli, Administrator
Urban Mass Transportation Administration
400 7th Street SW, Room 9324
Washington, D. C. 20590

Re: Lower Pioneer Valley Regional Transit Authority Application for Section 5 Operating Assistance for Fiscal Year 1976 Protecting the Interests of Employees

Dear Mr. Patricelli:

I have carefully examined Sections 3(e)(4), 5(n)(1) and 13(c) of the Urban Mass Transportation Act of 1964, as amended. In its application for operating assistance under Section 5 of said Act, for fiscal year 1976, this Authority is required to agree to protect the interests of employees affected by such assistance. The employees concerned are those of private carriers, which carriers have contracted, or which may in the future contract, with this Authority to supply the public mass transportation service which this Authority provides to the people of the Lower Pioneer Valley Region.

In this regard, I note that Section 5(d)(1) of said Act allows the Secretary of Transportation to approve, as an operating assistance project, "the payment of operating expenses to improve or continue such service." The Authority's application for Section 5 operating assistance will be made on this condition that the project will be for the payment of operating expenses to improve or continue the mass transportation service provided by this Authority under contract with private carriers.

In fulfillment of the above mentioned conditions of your Act regarding employee protections, I submit that our proposed operating assistance project cannot, as a project, result in conditions contrary to the requirements of said Act. In that respect, I certify that such project and the receipt of Federal operating assistance under it cannot result in any of the following: (1) the modification or termination of rights, privileges or benefits, including pension rights and benefits, under existing collective bargaining agreements or otherwise; (2) the modification or termination of collective bargaining rights; (3) a worsening of the positions of individual employees with respect to their employment; (4) a failure to provide assurances of employment to employees of acquired mass transportation systems and priority of

ROOM 422 31 ELM ST SPRINGFIELD, MASS. 01103 TELEPHONE: 413-732 6248

re-employment of employees terminated or laid off; or (5) the failure to provide training or retraining programs.

I should appreciate your early response with regard to such application. If you have any questions concerning the foregoing, I should be pleased to discuss them with you.

Very truly yours,

Terry E. Tornek

TERRY E. TORNEK, Administrator
Lower Pioneer Valley Regional
Transit Authority

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THE WHITE HOUSE

WASHINGTON

DECISION

May 28, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES CANNON

SUBJECT: POLICY OPTIONS FOR IMPROVING PROCEDURES UNDER SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, AS AMENDED

BACKGROUND:

Section 13(c) of the 1964 UMTA Act (Amended) requires that before any Federal assistance is granted, The Secretary of Labor must certify that "fair and equitable" arrangements have been made for transit employees "affected" by the grant. There are no published regulations governing 13(c). The presumption has developed that each and every grant of Federal dollars "affects" transit employees, and DOL has adopted a procedure whereby localities' applications for UMTA funds are forwarded directly to transit union representatives in the geographical area requesting funds. The unions and the transit operators then engage in collective bargaining to arrive at protective arrangements which the Secretary of Labor can certify as "fair and equitable." Union rules generally then require that the agreement be subject to the approval of the International Union. For this reason, DOL almost never certifies an agreement unless the International has approved it - but it can do so. UMTA may not make a grant until the DOL certification is obtained.

Transit operators, city and county officials, and UMTA heads have consistently expressed dissatisfaction with Section 13(c), and complaints from localities, documented as far back as 1967, have become more vehement in recent months. The principal complaint is that unions use the 13(c) requirement and management's need for the UMTA funds to indirectly raise bargaining issues unrelated to the UMTA grant. This feeling is not well documented, but then it is not the kind of matter which lends itself to documentation.

In 1974, an informal DOL-DOT task force was established to examine 13(c) procedures and make recommendations. At the staff level an impasse soon occurred and there was little result except for an increased tendency on the part of each Department to blame the other for any problems in the 13(c) process.

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Within recent weeks we have heard of Section 13(c) problems in such diverse locations as Omaha and Lincoln, Nebraska; Los Angeles, California; Albuquerque, New Mexico; Nassau County, New York; and Ocean County, New Jersey. In some instances we have been able to help expedite the process through Domestic Council inquiries.

On March 9, 1976, the Board of the Southern California Rapid Transit District "reluctantly" approved a 13(c) agreement citing "economic duress."

On March 30, 1976, the Board of the National Association of Counties passed a resolution requesting a thorough Federal review of 13(c) procedures which were found to "allow labor organizations to hold hostage needed UMTA grants;" and "make management of transit operations in an orderly, efficient and cost effective manner impossible."

A current draft GAO Report, being made at the request of Senator John Tower, will include the following results of interviews with 12 local grantees on 13(c) effects. Eight of the 12 feel DOL procedures put them in an uneven bargaining position with the unions; none of 26 unions contacted felt they were in an uneven relationship.

CURRENT ADMINISTRATION ACTIONS:

On March 24, 1976, Jim Connor requested DOL and DOT to prepare a joint memorandum outlining 13(c) problems and possible Administration solutions. The Departments, unable to agree, have submitted separate papers. (At Tab A: DOT's submissions of April 8, 1976, and May 28, 1976; at Tab B: DOL's submissions of April 7, 1976 and April 21, 1976.)

In mid-April the Domestic Council convened a meeting of the Administrator of UMTA and the Counselor to the Secretary of Labor in an effort to achieve some agreement on steps which could be taken. After an hour or more of discussion, it was apparent that representatives of the two Departments could not even agree on the issues to be discussed or the facts surrounding the implementation of 13(c). The meeting did lead to the second series of memoranda from the two Secretaries and at least some clarification of the issues.

Our discussions with all levels of the two Departments, including the two Secretaries, have been frequent and extensive but I do not believe Bill Coleman and Bill Usery have ever discussed the matter with each other.

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In early May the Domestic Council convened separate meetings with leading transit management representatives and with the local government groups (National Association of Counties, etc.) to get first hand descriptions of their perception of the problems with the implementation of 13(c).

Since last fall there have also been numerous contacts with interested local officals, such as Pete Schabarum who serves on the Board of the Southern California Rapid Transit District.

Transit management and local government officials have expressed considerable pleasure at our willingness to look into the 13(c) process but also some concern at the slow progress they perceive us to be making.

DISCUSSION:

Although some critics of Section 13(c) would like us to assault its philosophic underpinnings, legislative change is clearly unattainable and probably undesirable. The root of most of the problem, in any event, is not Section 13(c) but the way it has been implemented.

There is little dispute that workers who are adversely affected by the grant of Federal money should be recompensed. The grants themselves, however, should not be the vehicles for escalation of wages and benefits.

Because DOL and DOT have basically not worked together on this issue, we have been unable to define specific proposed Administration action. We have, however, identified several steps which we believe can and should be taken.

RECOMMENDATIONS:

I recommend that you instruct Secretaries Usery and Coleman to address the specific proposals which follow and, within one week, to submit final, joint recommendations to you for decision.

AGREE ____________________ DISAGREE ____________________

I recommend that the specific proposals to be addressed include:

1. Simplification of procedures under existing law. For example:

   -- SET TIME LIMITS

   DOL could set time limits for the negotiation of agreements, after which the Secretary of Labor could make his own determination of what arrangements constituted "fair and equitable" protection. DOL could provide conditional certifications so that UMTA funds could flow before critical deadlines were reached (end of the fiscal year, or exhaustion of local operating funds).

   -- MULTI-YEAR CERTIFICATIONS

   Instead of having each grant of Federal dollars give rise to a new 13(c) agreement (often more than one per year per city) DOL could establish a policy of granting multi-year certifications which would be good for all grants made within a specific period of time (three years) subject to review based upon the union or an employee showing "adverse impact."

   -- SINGLE CERTIFICATION FOR SINGLE GRANT

   Only a single certification should be required for a given capital project, even if such a project is funded through several successive grants or grant amendments. (This would be the case for a new rapid transit system, where UMTA makes a multi-year commitment of funds and liquidates that commitment over time with a series of annual grants. Under present practice each such annual grant requires a separate 13(c) agreement, collectively bargained and certified.)

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-- <u>NEGATIVE DECLARATIONS WITH CHANGED BURDEN OF PROOF</u>

DOT and DOL could establish categories of capital grants that historically have had minimal, if any, adverse impact on transit employees. Such categories would include bus and rail car purchases which result in no reduction in fleet size. In such cases, there could be a simple departmental declaration that no adverse impact is likely to occur, and that no specific 13(c) arrangement need be negotiated.

This would shift the present burden of proof from local transit operators (to prove that the Federal dollars will <u>not</u> harm employees) to the unions (to prove that there is an adverse impact.)

A review procedure could be provided whereby an employee or union could ask for special protective arrangements in connection with any grant based upon a showing of a substantial prospect of "adverse impact."

AGREE ______________ DISAGREE ______________

2. Promulgate and Publish Regulations

Regulations were drafted in 1974 and 1975 but never finalized. Such guidelines would assist all parties in participating in the 13(c) process.

AGREE ______________ DISAGREE ______________

3. I recommend that the Domestic Council be charged with co-ordinating this effort.

AGREE ______________ DISAGREE ______________