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THE WHITE HOUSE

WASHINGTON

June 2, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: JAMES CANNON

FROM: JAMES CONNOR JEC

SUBJECT: Policy Options for Improving Procedures Under Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended

The President reviewed your memorandum of May 28 on the above subject and approved the following:

> Instruct Secretaries Usery and Coleman to address the specific proposals as outlined in the above memorandum and, within one week, submit final, joint recommendations to me for decision.

Please follow-up with appropriate action.

cc: Dick Cheney

THE WHITE HOUSE

WASHINGTON

June 2, 1976

MR PRESIDENT:

Policy Options for Improving Procedures Under Section 13(c) of the Urban Mass Transportation Act of 1964, As Amended

The attached memorandum was staffed to Messrs. Friedersdorf, Seidman, Lynn and Buchen.

They all concur in the recommendation made by Jim Cannon that you instruct Secretaries Usery and Coleman to address the specific proposals.

OMB made some specific comments about the situation and they are attached at TAB C.

Jim Connor

THE PRESIDENT HAS SEEN.....

THE WHITE HOUSE DECISION

WASHINGTON

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.

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.

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.)

-- NEGATIVE DECLARATIONS WITH CHANGED BURDEN OF PROOF

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 not 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 _____

THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

APR 8 1976

MEMORANDUM FOR: THE PRESIDENT

SUBJECT: Labor Protective Arrangements Under Section 13(c) of the Urban Mass Transportation Act

This memorandum is in response to your request for a report addressing the major problems posed by the implementation of Section 13(c) of the Urban Mass Transportation Act. You have asked that the Secretary of Labor and I jointly analyze the problems, indicate what actions this Administration might take, and propose a timetable for action.

## I. Background

Section 13(c) has been a provision of the Urban Mass Transportation Act since 1964. That provision states:

> "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 continuation of 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 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."

This language was inspired by a specific anti-labor action taken in Dade County, Florida, in anticipation of an UMTA grant. The provision was designed to protect employees of private transit companies which in 1964 were just beginning to receive Federal subsidies; at that time, the rush to conversion to public ownership had not yet begun. The statutory reference to the 1887 Act (as amended in 1940) incorporates the standards regarding worsening of employees' positions developed by the Interstate Commerce Commission in the context of mergers and/or consolidations of rail companies.

The legislative history of Section 13(c) clearly indicates that Congress contemplated collective bargaining as a method of arriving at the labor protective arrangements to be followed in the transit industry, although the statute calls for "arrangements" not "agreements". The Secretary of Labor, in reliance on this legislative history, has followed a procedure under which DOL staff forwards applications for UMTA assistance to national transit union representatives who then forward them to local unions. The unions and transit operators then engage in collective bargaining to arrive at the protective arrangements which the Secretary of Labor certifies as fair and equitable within the meaning of the law. The national union typically plays a more dominant role in this bargaining than the local, such that local desires to settle are sometimes subverted. UMTA does not make a grant until the DOL certification is obtained.

While the 1964 Act covered principally capital grants under Section 3, the 1974 Act extended Section 13(c) to capital and operating assistance formula grants under Section 5. Having seen 13(c) operate from the local level, when I became Secretary of Transportation in March of 1975, I raised the issue with Domestic Council staff and with Secretary of Labor Dunlop. The Secretary of Labor responded affirmatively and used his good offices in the Spring of 1975 to develop a model agreement which could apply to the formula grants, including those for operating assistance. This National Agreement was negotiated by transit union representatives and representatives of the American Public Transit Association, and was signed in July of 1975. The National Agreement is a useful step toward simplification of Section 13(c) administration, but its provisions are now raising problems of their own.

## II. Problems

The problems with the operation of Section 13(c) might be categorized as follows:

1. Applicability. As a general matter, there is a substantial question as to whether protective arrangements developed in the context of public subsidies to privately owned transit companies and of railroad mergers and consolidations are appropriately applied to what is now a publicly owned transit industry. We now know, through twelve years of experience with the UMTA program, that the characteristic result of UMTA grants has been to expand, not contract, the labor force involved in mass transportation. The potential for employee displacement and disadvantage as a result of most UMTA grants is slight, as demonstrated by the small number of claims for benefits under the protective arrangements which have been negotiated. Therefore, Section 13(c) is probably producing very little in terms of necessary protection, while its operation is causing significant frustration, red tape, and intrusion on labor-management relationships as summarized below.

2. Labor union veto. A major problem with the operation of 13(c) has been the fact that it gives labor unions an effective veto power over UMTA grants, and thereby upsets the balance of power between labor and management.

This arises, in part, because Secretaries of Labor have been unwilling to determine, on their own motion, what arrangements are "fair and equitable" and have instead left the matter to collective bargaining between the parties. However, DOL sets no time constraints on the collective bargaining process and has issued no regulations to guide the operation of the law. From the transit authorities' point of view, collective bargaining under such conditions is unrealistic since, while the unions can bargain indefinitely, management has to get the UMTA capital grant before the end of the fiscal year (or UMTA will reallocate the funds elsewhere to prevent their lapse) or before shut-downs of service occur in the case of operating assistance grants. The problem is complicated by the fact that the bargaining is really done by the national unions, which have no real stake in the specific community's receipt of the UMTA funds.

Some transit operators have further alleged that labor's effective veto over UMTA grants gives labor an important hostage in collective bargaining on issues unrelated to labor protection--e.g., wages, working conditions, etc. While such abuses have not been documented by transit operators, such a prospect certainly exists.

3. Impression of clumsy management. The operation of Section 13(c) also creates a strong public impression of Federal intervention in local affairs and of clumsily managed Federal programs. From the point of view of good program management, UMTA cannot reliably plan which capital projects will receive funding in any given year because

of the uncertainties of Section 13(c) negotiations, especially toward the close of the fiscal year.

4. Burden of proof. Another problem arises out of the fact that DOL has followed Interstate Commerce Commission practice in requiring the transit authority to sustain the burden of proof that an UMTA grant will not have an adverse effect on labor, rather than placing that burden on labor to demonstrate some potential harm. In the context of operating assistance funding, where the UMTA subsidy funds have a pervasive effect in support of the entire program of the transit authority, it is completely impossible to disprove any relationship between a specific management action and the general UMTA subsidy. Thus, practically any employee who receives less pay--for instance, due to an adjustment in service--could make a claim for displacement benefits, and the operator would have an extremely difficult burden of proof to carry in rebuttal.

5. National Agreement. A number of specific problems are cited by transit authorities as a result of the operation of the National Agreement associated with operating assistance grants. They argue that, at the very most, it should only serve as a guide and that no such agreement should be made rigidly applicable nationwide; they allege that the Department of Labor has been unwilling to accommodate specific geographic differences. They further argue that the National Agreement contains a great number of specific provisions that overly constrain management decisions--for example, a requirement that a 60-day notice plus 80-day appeals/arbitration period be given to local unions before any schedule or route modification can be implemented.

6. Stifling innovation. A final problem has to do with the impact of 13(c) in terms of limiting development of service mechanisms in transit which do not involve the use of salaried union drivers. For example, there is much interest in exploring the use of "paratransit"--shared ride taxis, vanpools, jitneys, subscription buses, etc.,--as an adjunct to normal transit service. But any use of UMTA funds to support such services, even if the funds pass through the transit operator by subcontract, can be vetoed by the national and local unions which may view paratransit as a threat to maintenance and expansion of the transit authority labor force. Not only can this have a seriously inhibiting effect on innovation in the transit industry, but it perils the continued survival of the private taxi industry which would likely benefit from paratransit development. Taxi operators see some of their business undercut by

government subsidized public and private non-profit organizations, and yet cannot themselves gain access to the public funds in appropriate cases.

## III. Proposed Remedies

A number of options for administrative action are available which might alleviate the problems cited.

As an initial matter, however, it is clear that Section 13(c) is being misapplied in connection with Section 5 grants for operating assistance, as opposed to capital grants under that Section. It is self-evident that making Federal funds available for operating subsidies to deficit-ridden public transit authorities can only help, not hurt, the employment status of transit employees. In fact, it is the availability of the Federal money which itself is forestalling curtailments of service and job terminations in a great many cases.

Therefore, I believe that the Secretary of Labor should provide an immediate "negative declaration" to cover UMTA Section 5 operating assistance grants. Under such a procedure, borrowing the practice used in connection with environmental clearances, the Federal official determines in advance that there is no significant likelihood of adverse impact as a result of the Federal grant, and a lot of needless red tape is by-passed.

This is wholly consistent with the statute, since Section 5 funds are available at local option for either capital or operating assistance. Congress had to apply 13(c) to Section 5 in order to cover the capital grant aspect.

What follows, then, is a set of options in generally ascending order of departure from current practice to rectify the problems of 13(c) as they apply to all categories of UMTA capital grants.

1. Multi-year certifications, with stronger DOL role. DOL could provide that its certification would be good for all grants made within a specific period of time, say, three years, subject to review based upon an employee showing that a specific grant raised a substantial prospect of adverse impact that could not reasonably have been foreseen at the time the Section 13(c) agreement was negotiated. In addition, DOL would set time limits for the negotiation of agreements, after which the Secretary of Labor would make his own determination of what arrangements constituted

fair and equitable protection. Further, DOL would provide conditional certifications, based perhaps upon an extension of the existing 13(c) agreement then in force with that transit property, so that UMTA funds could flow before critical deadlines were reached (end of the fiscal year, or exhaustion of local operating funds). During the period of the conditional certification, collective bargaining could continue or the Secretary of Labor could review the facts and make his own determination.

Further, only a single certification should be required of 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.

2. Negative declarations with changed burden of proof. Alternatively, 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, the Secretary of Labor would make a blanket negative declaration--as suggested above for operating assistance grants--that no adverse impact is likely to occur, and that no specific 13(c) arrangement need be negotiated. A review procedure would 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. As an additional protection, the standard UMTA capital grant contract could require a certification by the transit authority that no adverse employee impact would result from the grant. This certification could be specific as to lack of adverse impact--i.e., no loss of pension rights, protection of collective bargaining rights, etc.

For categories of capital grants for which such negative declarations were not appropriate, the streamlined approach described under option 1., above, would pertain--i.e., three-year certifications, time limits on negotiations, and conditional certifications as funding deadlines approach.

3. Federal definition of fair and reasonable arrangements. As an alternative to the above options, DOL and DOT could collaborate to identify labor protective arrangements for capital grants which would be enforced through the UMTA grant contract. This would observe

the strict requirement of the law, which does not in fact speak to "agreements" at the local level but only "arrangements" certified by the Secretary of Labor. Previous collective bargaining experience provides ample basis for identifying a set of reasonable protections; a limited appeal procedure might be made available to handle particular local conditions.

Such federally determined protective arrangements would be carefully drawn to ensure that productivity improvements remained possible, subject to whatever constraints on them were forthcoming from normal collective bargaining. I strongly believe that it is inappropriate for the Federal Government to enforce the Section 13(c) provision in a way that limits public transit authority management prerogatives to make productivity improvements. I find no basis for believing that the Congress intended otherwise. In fact, for us to take any other position would run counter to the recent collectively bargained contract settlement in New York City where cost-of-living increases are to be financed by productivity improvements. Federal requirements can hardly be more restrictive in this regard than such a labor management settlement.

4. Limitation of Section 13(c) to public takeovers. A further alternative might be to limit the operation of Section 13(c) to the protection of employee rights during the period of public takeover from private transit companies. This approach finds a basis in the origin of the legislative language in the history of railroad merger and consolidation practice. Accordingly, any UMTA capital grant made, say, three years after the time of public acquisition would be deemed to require no further protective arrangements.

5. Legislative approaches. As an alternative to the above options which might be pursued by administrative action, we might elect to seek legislation which would constrain the impact of Section 13(c) in capital grant situations. Such legislation might, for example, limit the impact of the provision to public takeover situations as suggested in option 4. Outright repeal of 13(c) is deemed very unlikely.

## IV. Next Steps and Timetable

This memorandum has outlined the major issues and suggested actions which I have wanted to present, and I have welcomed the opportunity to do so. However, there remains the task of bringing about some

effective resolution of the positions of the Departments of Transportation and Labor.

I suggest that this can best occur by your designating someone to oversee a thorough interaction between representatives of the two Departments, and to stick with it until something is accomplished. Past efforts have not been particularly effective. I believe the missing ingredient may have been a persistent White House convenor or mediator to ensure results.

It would seem to me that a month to negotiate would be enough to identify both common ground and sharp differences. I consider all of my suggested remedies except the fifth (legislative approaches) do-able within three months, if agreed to during the first month.

William T. Coleman, Jr.

MEMORANDUM FOR THE PRESIDENT
ATTENTION: James E. Connor
Secretary to the Cabinet

Subject : Section 13(c) of the Urban Mass Transportation Act, Labor Protective Arrangements

This is in reply to Bill Usery's April 21, 1976 memorandum which commented on the review of problems and proposed actions in my April 8, 1976 memorandum.

The DOL reply followed the organization of our initial memorandum. We will adhere to that format in this commentary, for ease in tracking the written dialogue.

The DOL memorandum made two initial comprehensive observations before commenting on individual problems and proposed remedies. The first was that there is on the part of public bodies and transit systems a widespread lack of understanding of the employee protection requirements and the procedures utilized by the Department of Labor in processing grant applications for certification purposes, as well as some opposition to the specific letter of the law or its intent. It is said that as a result many of the DOT proposals are contrary to the law, and that "DOT's position on these matters cannot be accomplished through administrative action, but instead would require amendment to the existing legislative requirements."

All that merely begs the question as to what the law intends or requires. We suggest there is considerably more administrative license than DOL indicates. As far as lack of understanding is concerned, we believe the Department of Labor can help minimize this problem by taking certain steps recommended by consultants to DOL and by others as will be cited later--steps to issue guidelines and criteria or boundary conditions to assist the collective bargaining process.

The second initial observation emphasizes that since the passage of the Act DOL has made over 1350 certifications, and was unable to do so in only a handful of cases. A comment by a consultant to DOL that the Department's performance had been "uniformly excellent" was mentioned. We do not wish to or intend to detract from the Department's record, measured statistically. However, the same consultant who commended the Department also noted that "the statistical record does not tell the whole story", and made recommendations based on their conclusion to "surface the problems inherent in the present administrative practices with a view to strengthening them." The problems cited by the consultant (Jefferson Associates, January, 1972) were:

"-- The delay in reaching agreements as required by 13(c) of the Urban Mass Transportation Act, which critically affects other aspects of the grant process.

"--Poor initial understanding of the requirements of 13(c) on the part of grant applicants.

"--Poor communication between the Department of Labor and the Department of Transportation in coordinating the needs of grant applicants.

"--Reluctance of the Secretary of Labor or his designated representatives to assume affirmative responsibility for developing criteria with respect to the types of provisions that may be necessary to insure that workers' interests are adequately protected in the different types of situations that may arise. This may be caused by the Secretary's historic reluctance to pin down relevant criteria for fear of limiting the bargaining process, or it may be simply a failure to properly disseminate developed criteria for the guidance of the parties. In either case, the result is the same.

"--The unwillingness of the Department of Labor to limit by practice the amount of time given to the parties for voluntarily reaching agreement and relating that time frame to the overall objectives of the grant program. Although it is understandable that the Secretary would not normally wish to intervene in the informal process if it is working well, in cases where the parties clearly are at impasse, he should move more forthrightly and expeditiously.

"--The failure of the Department of Transportation properly inform grant applicants of their full responsibilities under 13(c) in a complete, accurate and timely fashion, as the application proceeds through DOT and other departments.

These are quite similar to the types of problems we have cited, and to which our proposed remedies are addressed.

PROBLEMS

This discussion will follow the six problems cited in our initial memorandum, and DOL's April 21 reply.

1. Applicability

DOL's counterpoint, that the lack of large numbers of employee claims is no indication that Section 13(c) is producing little in terms of

necessary protection, is probably right. At least it's not an unqualified indication. We would concede that the development of specific protective arrangements for particular project situations can resolve many issues that would otherwise lead to claims, that claims are in effect resolved by the parties in advance.

We strongly disagree with DOL's statement that it is "simply not true" that 13(c) has caused "significant frustration, red tape and intrusion on labor management relationships." Reports of interviews by third parties (e.g., GAO and Jefferson Associates), correspondence, newspaper editorials, and a recent NACO resolution (attached) attest to these problems. Some of this is cited further on. DOL suggests that any problems arise out of "the labor management and collective bargaining relationships which are allowed to operate and not from any Federal instrusion on these relationships." This avoids the basic criticism that DOL has essentially abdicated its responsibility to the unions, permitting the collective bargaining process to run altogether too long and without sufficient guidance.

With reference to the quote from the report prepared by UMTA staff following a November 20, 1975 Conference and Symposium on Transit Industry Labor-Management Research, it must be said that this was merely a staff summary

of a meeting attended heavily by academic researchers, and does not represent an UMTA position. Furthermore, in a February 9, 1976 letter to UMTA in behalf of the American Public Transit Association, David E. Fox, Staff Attorney , stated that "the conclusions . . . regarding the attendees' agreement relative to the effect and importance of 13(c) is inaccurate. The APTA representatives were not panelists and did not comment on this point. To construe this silence as agreement would be incorrect." Fox asked that his letter be made part of the official UMTA files relative to the November 20, 1975 seminar.

Nevertheless, we by no means allege that 13(c) is the main cause of the magnitude and general composition of the problems and issues facing the industry in the area of labor relations. Our principal focus is the effect of the provision, and its implementation, on effective management of the UMTA grant-in-aid programs.

2. Labor union veto

The DOL memorandum, in reenforcing the point (with which we agree) that Congress contemplated collective bargaining as a method of arriving at the protective arrangements to be followed, quoted from 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 workers' interests are adequately protected against the kinds of adverse effects that may reasonably be anticipated in different types of situations."

The DOL memorandum cites the five cases (Denver, Delaware, Chicago, Detroit, Boston) in which determinations of protective arrangements were made by the Secretary over union objections. It is said that "this fact tends to discredit the'union veto power' charge." Frankly, when one realizes that this is less than one-half of one percent of the total certification actions considered by DOL, it may be thought that the fact reenforces the assertion that the Department is essentially a conduit of applications to appropriate unions, and lets the process continue unduly unconstrained. Further, in these five cases, which were extreme, the intervention by DOL was not self-generated; it was urged by UMTA.

With reference to regulations to guide the operation of the law, the DOL memorandum states that "with cooperation and involvement by representatives from UMTA, regulations in the form of guidelines were drafted during calendar years 1974 and 1975"; further that the proposed regulations had the internal approval of DOL officials, but "when final UMTA concurrence and/or comment was sought, none could be obtained and the proposed regulations were never finalized." The implication seems to be that

negotiations were doing well up to the point of obtaining a final DOT clearance or comment, which never came.

It is important that the circumstances of that interaction be made more clear. The negotiations were undertaken as a result of a meeting between former UMTA Administrator Frank Herringer and DOL Under Secretary Schubert. An informal task force was established in 1974 to look into 13(c) procedures and recommendations. After much time and discussion, UMTA staff eventually took the initiative and drafted a suggested regulation in November of 1974 providing much discretion to the Secretary of Labor with respect to particular projects while providing a definite procedure, with time limits, for the certification of all projects. The regulation also sought to open the question of classification of projects. It would have allowed UMTA to forecast approvals, as well as give timely assurance to applicants that their funding needs could be met.

DOL did not critique the UMTA draft, but submitted its own proposed regulation, which was quite similar to one it proposed in 1971-72 following an OMB report (May 20, 1971) on 13(c) issues. It called for a more burdensome formal procedure than now exists, was without meaningful time limits, and made no distinction between the various types of projects administered by UMTA. In effect, the negotiations were seen by UMTA staff to be at an impasse, and guidance was sought on a course to take. It is conceded that there was no formal response, though the impasse condition was communicated and understood at the staff level.

The issues are the same we are reviewing at the present time. Hopefully, the involvement of a third party convenor will help us see the issues through to some conclusions.

Finally, with respect to the "union veto" issue, though the documentation on labor's holding the 13(c) agreement hostage to issues unrelated to labor protection is sketchy, there is a more definite record on the extent to which an unequal bargaining relationship may exist between the unions and grantees in negotiating employee protection agreements. This situation is discussed pointedly in a May 20, 1971 report of Vincent Puritano, Program Coordination Division, OMB, to Associate Director Arnold R. Weber. Referring to interviews with city officials in five cities, Puritano reported: "They claim, unanimously,that the city not only was forced in each case to either agree to the union's interpretation of 13(c) requirements or lose the grant but that DOL officials provided minimum help and guidance and backed the union position in no uncertain terms and always over that of the cities."

A GAO Report being made at the request of Senator John Tower, and still in draft, will report on the results of interviews with 12 grantees on this issue, among others. The draft reports that in eight of the 12 places, the grantees felt in an uneven bargaining position because of the procedures being followed. None of 26 unions contacted felt they were in an uneven relationship.

3. Impression of clumsy management

The point we are interacting on under this heading essentially is that of unconstrained time for collective bargaining, and the difficulty this presents in program management with respect to planning which capital projects will receive funding, especially toward the close of the fiscal year. The DOL memorandum suggests there always will be fiscal year-end crises, and that avoidance of them "seems to be most within the control of applicants and UMTA." Some such crises are within UMTA's control; this set of problems is controlable by DOL.

We think that the concluding statement in Chapter V, Recommendations, of the Jefferson Associates Report is constructive on this point. It reads:

> "The Department of Labor should make it clear to grant applicants and to the unions in its information bulletins and in its education program that the Secretary will exercise his power to certify 13(c) agreements in cases where the parties are unable to reach an agreement by themselves or with the help of third parties. The parties should be reminded that the bargaining process cannot be endless, that time limits are important and that these time limits are tied closely to the timing of the total grant application process. It is the duty of the Secretary to affirmatively develop the conduct of the bargaining to complement the total needs of the grant applicant without endangering the rights of individual employees as guaranteed by the provisions of 13(c). All participants should always keep in mind that the purpose of the Urban Mass Transportation Act of 1964 was and is to encourage the development and growth of mass transit systems across the country. Participants have a responsibility to make this legislation work. There are problems to be solved. If the systems are not improved, and they will not be improved without Federal assistance, employee protection agreements

> will be meaningless. If pressing for legislative rights ignores realities and frustrates change, little will be gained. If local bargaining, which the Congress chose to rely on, is to have any meaning the parties themselves must give it meaning. The Department of Labor can be a catalyst, a resource and even a broker in certain situations. But if one or the other party chooses to press the most it can out of the legislation and to ignore real problems, the employees and the public will be the losers."

4. Burden of proof

Though we thought we were only making one point (the second, below) under this heading, the DOL sees us attempting to make two points: first, that the DOL requires development of protective arrangements even if there is little likelihood of adverse impact on employees; and second, the impossibility of grantees carrying the burden of proof in operating assistance cases that the commingled Federal funds were not the "cause" of some specific employee grievance.

With reference to the first point, the DOL memorandum cites the last sentence of 13(c) requiring the grant contract to "specify the terms and conditions of the protective arrangements", and interprets this to clearly contemplate the development of specific arrangements in each and every project situation. This is an obvious non sequitur. Our position is that case-specific collectively bargained arrangements are appropriate in each project situation in which it can be expected that employees will be affected as a result of a project; in other cases, negative declarations should be made or standard form protective arrangements can be included in the grant contract without need for a new round of clearances and collective bargaining.

With respect to the second point, the DOL memorandum quotes the definition of "project" as used in the National Agreement for Section 5 protective arrangements, and concludes that employees are not in fact provided protection against adverse effects unrelated to the Federal assistance. We cannot agree with DOL.

The definition of "project" in the National Agreement does not conform to the definition of "project" as used in the grant contract. In fact, the definition in the National Agreement specifically compounds the problem we are pointing to: The term "Project, . . . shall not be limited to the particular facility, service, or operation assisted . . . but shall include any changes . . . which are a result of the assistance provided." The very issue is--what is a "result" of the Federal operating assistance?

Under the Section 5 grant contract, when the funds are used only to financially assist operating costs, the term "project" has no particular identity. It is defined simply as a certain sum of money which is part of the total sum of money needed to operate an entire system. No particular services or parts of the operation are described as the project. The project is money, a proportion of total costs. Therefore, the "burden of proof" provision is simply not operational. It is impossible to administer, unless one concludes either that everything done by the system manager is a result of the "project" (money accepted) or that nothing is.

We believe that our April 8, 1976 memorandum recognizes this reality in describing a possible "negative declaration" procedure for Section 5 operating assistance grants, with a changed burden of proof leaving it to the employee to show how he was harmed as a result of the grant. Perhaps the negative declaration should be used for operating assistance grants unless a specific or discrete service or operation is described as being the subject of the grant. In the latter cases, protective arrangements would be specified.

5. National Agreement

Our basic point with reference to the National Agreement for Section 5 was that it is a useful step toward simplification of Section 13(c) administration, but its provisions are now raising problems of their own. DOL takes exception to our statement that grantees allege that the DOL has been unwilling to accommodate specific geographic differences, stating that the agreement has been applied in a number of instances, both with and without modification; and that arrangements other than the National Agreement have also been utilized.

The spirit of our comment is to encourage such flexibility. Notwithstanding the DOL's counterpoints, some large transit systems have been quite critical of the lack of DOL flexibility, and the less sophisticated smaller properties in particular need some guidance in the use of such an agreement.

With specific reference to the Los Angeles complaint about the provision in the Agreement requiring a 60-day notice plus 80-day appeals period before schedule or route modifications can be implemented, the DOL memorandum cites its letter of determination that the provision clearly was not intended to apply to normal schedule and route modifications. This is a reasonable and helpful ruling, but the broadness of the Agreement language is causing problems.

6. Stifling innovation

The DOL memorandum takes exception to our statement that 13(c) has a "seriously inhibiting effect on innovation in the transit industry", and that it "perils the continued survival of the private taxi industry which would likely benefit from paratransit development." It is said that DOT determines the projects which are eligible for Federal funds, and that certain taxi or taxi-related projects have already been funded.

The taxi/paratransit issue is a serious one. The National Agreement for Section 5, which was spawned by the 13(c) requirement, contains a provision which practically closes off the use of Section 5 funds to finance service contracts between transit systems and taxi and paratransit operators. It provides that the designated recipient of funds (i.e., commonly transit authorities) must use its own labor force in offering services financially assisted by Section 5 funds. Transit management thereby foregoes options for innovation in the nature of integrated fixed route bus service and shared-ride demand responsive taxi service.

And taxicab companies are foreclosed from assistance which could mean the critical difference in their survival as private enterprises and in cases where taxi operation would be most cost effective. This is just one example, and it has occurred in practice on several occasions.

A few paratransit demonstrations have been developed, and more are needed. So far, however, the city governments, not transit authorities, have been doing the contracting with taxi companies, thereby avoiding the prevailing wage rate issue and similar controversies which will be present when transit authorities and paratransit operators have to confront one another.

Indicative of the growing awareness of the complexity of emerging issues is the following excerpt from the March 16, 1976 address of Dan V. Maroney, Jr., International President Amalgamated Transit Union, to the TRB Meeting on Paratransit Development:

> "The labor policy issues presented by group-ride taxi services, especially if operating or capital assistance to such services is provided under the Urban Mass Transportation Act, are even more difficult and complex, because taxi and transit operations are typically coextensive and competitive in their coverage. It has recently been recognized that the emergence of shared-ride taxi services as a form of paratransit eligible for funding under the Urban Mass Transportation Act, poses the issue of taxi-transit competition in a very direct manner. As stated by Professor Altschuler's paper presented at the October 1975 Williamsburg conference on paratransit, such group-ride taxi services bring into question the legal and policy definitions of the term 'mass transportation' and 'affected employee' that have guided Federal policy over the past dozen years. A host of extremely difficult questions are presented, such as how to integrate taxicabs into transit planning, transit subsidy policy, and publicly subsidized competition. Finding an appropriate labor policy to govern the various applications of such shared-ride taxi services will also be difficult. From the viewpoint of organized transit labor, the introduction of shared-ride taxi

> service into the various UMTA programs gives rise to a serious concern that the ultimate effect may be to destroy conventional transit jobs and to undercut the transit worker's earnings' potential, by substituting low wage non-unionized taxi drivers for the better paid organized transit worker.
>
> "What, then, should be the government's labor policy where such shared-ride taxi services are to be integrated into the regional multimodal public transportation system, in accordance with current planning requirements and other UMTA policy statements and directives?"

We need to be mindful that these are tough issues, and also that collective bargaining will inevitably tend to protect the status quo. Best results may not be possible in the absence of appropriate guidelines and criteria which permit and encourage innovation.

PROPOSED REMEDIES

In the discussion under "burden of proof" above, we took up the subject originally discussed at this point in our April 8 memorandum--the suggestion of a "negative declaration" procedure with respect to Section 5 operating assistance grants. We think this is a viable and permissable administrative option for the typical Section 5 grant and is consistent with the law. The statute requires DOL to certify that labor protections are in place for employees "affected by such assistance." We read this to mean "adversely affected," and that DOL should make a negative declaration, subject to rebuttal, that the typical Section 5 grant involves no adverse impact. Protection arrangements could be appropriate when the project is defined discretely, as a particular service or operation.

1. Multi-year certifications, with stronger DOL role

The DOL memorandum comments that "applicants can seek to and do negotiate multi-year project, multi-year protective agreements" and that this is in keeping with the "spirit of the development of protective arrangements through collective bargaining." We believe that under this heading we are essentially suggesting some variations on this theme, with DOL encouragement. In particular, we think it appropriate to settle for a single certification for a given capital project funded through several successive grants or grant amendments.

Under this topic, the DOL memorandum reiterates "that it is neither appropriate nor useful to set fixed time limits on negotiations." As stated in other parts of this memorandum, we take exception to this position, and believe DOL is in a minority opinion on this point among evaluators of the 13(c) process. The problem with the option, however, is that it does not go far enough.

2. Negative declarations with changed burden of proof

The DOL memorandum calls our suggested categorization of projects and use of a negative declaration of impact statement a questionable practice under the statutory language which states that "the contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

We simply can't agree with such a narrow construction of the Department's administrative license. With respect to our suggestions for categorizing projects by level of impacts, and developing commensurate certification procedures, it is interesting to note that the administration of Section 13(c) began in this manner. A January 7, 1965 letter and memorandum from John C. Kohl (first Administrator of the mass transportation program) to James J. Reynolds, Assistant Secretary of Labor confirmed their agreement about such a system and described it. This procedure was abandoned at an early date by DOL in favor of the current method of operating; in view of several years' experience, we think it is worth reviving.

3. Federal definition of fair and reasonable arrangements

As an alternative to the above options, our April 8 memorandum suggested that DOL and DOT could collaborate to identify labor protective arrangements for UMTA grants which would be enforced through the grant contract. The DOL memorandum considers this contrary to the expressed congressional intent regarding collective bargaining, and cites the negotiated National Agreement as an approach reflecting the spirit of the legislative intent.

It seems apparent that there are alternative means to keep faith with legislative intent. Surely, years of collectively bargained agreements could serve as a basis for standard protections to be included in UMTA contracts--an approach well within the legislative intent. On the point of the ability of the Secretary of Labor to act on his own motion in defining acceptable arrangements, a January 19, 1967 letter to Mr. George O'Brien, Bus. Agent, Div. 589 (a Boston local) from John M. Elliott,

International President, Amalgamated Transit Union, makes very clear the Union's understanding of the law. Excerpt:

> "In other words, Sec. 13(c) of the Act merely requires the Secretary of Labor to determine what is fair and equitable to employees and to specify what protections shall be included in the contract between the Federal Government and the applicant for Federal assistance. An employee protection agreement between the union and the applicant is not a requirement of the Act. The failure to reach such an agreement will not prevent the Authority from obtaining Federal funds.
>
> "The second point to keep in mind is that in the absence of any agreement with Division 589, the Secretary of Labor will decide what is required to protect the members of Division 589. The Secretary will simply make the determinations required by law, irrespective of the views of the union, and these will be incorporated in the contract of assistance between the Authority and the Federal Government. Division 589 will not be a party to this contract and may not be able to enforce these protections without the intervention and assistance of the Federal Government. There can be little doubt that any protections awarded by the Secretary of Labor will not be as good as the union-negotiated protections contained in an agreement between the Authority and Division 589."

The DOL memorandum suggests a lack of clarity in our intent in a paragraph in which we discussed the need to ensure that 13(c) protective arrangements should not preempt productivity improvements, subject to whatever constraints on them were forthcoming from normal collective bargaining. We do not know how to be more clear about this, except to relate the discussion to that under the "burden of proof" problem--i.e., all adverse effects should not be able to be attributed to operating assistance grants, as seems possible under the National Agreement language.

4. Limitation of Section 13(c) to public takeovers

The DOL memorandum, in contending that our suggested limitation of the application of 13(c) would violate congressional intent, quotes a paragraph

of the 1963 Report of the House Banking and Currency Committee on the transportation legislation. The Report referred to recognizing that workers may be "adversely affected as the result of the introduction of new equipment or the reorganization of existing transit operations." It also contained other language generally supportive of DOL's position.

We agree that the DOL counter-argument on this proposed remedy is well taken, though we also think the mainstream of the legislative history provides a basis for our proposal. In any case, 12 years' experience with the application of 13(c) could now be a basis for reconsideration of intent.

5. Legislative approaches

Under this heading we noted the option of accomplishing the preceding clarification or amendment of intent through legislation. The five proposed categories of remedies in our memorandum were in an ascending order of departure from current practice. We stated our view that legislative amendment would be the least likely option to succeed. However, we do not rule it out as a possibility, particularly with respect to Section 5 problems, if it is thought that there is no administrative remedy.

NEXT STEPS AND TIMETABLE

The DOL memorandum suggests, "If the Section 13(c) program operated as has been alleged by DOT and others, modification would be called for." This is the question, to be sure, and we trust these written exchanges are helpful in shedding light on it.

Finally, in referring to studies currently underway (some funded by DOT), the DOL memorandum suggests it would not be appropriate to modify the Section 13(c) program until the results are known. We disagree. The problems are well known, and solutions are readily available through early administrative action.

We look forward to the opportunity to confer on this subject.

William T. Coleman, Jr.

Attachments

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MEMORANDUM FOR THE PRESIDENT

ATTENTION: JAMES E. CONNOR
SECRETARY TO THE CABINET

SUBJECT: SECTION 13(c), URBAN MASS TRANSPORTATION ACT OF 1964, AS AMENDED

This responds to Mr. Connor's memorandum of March 24, 1976, requesting a status report on Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

Section 13(c) requires that, prior to the Secretary of Transportation's approval of grants under the Act, the Secretary of Labor must certify that fair and equitable arrangements have been made to protect the interests of employees affected by such assistance. Minimum provisions that must be included in such arrangements are stipulated in the statute. In addition, the Senate and House reports on the legislation expressed the intent of Congress that wherever possible specific protective arrangements should be developed through local negotiations and collective bargaining.

Section 13(c) is based on the principle that employees in an industry should be afforded a measure of protection from adverse affects on their employment which result from organizational and technological adjustments carried out under the aegis of Federal law and with the support of public funds.

Major Problems

From the point of view of the Department of Labor, the major administrative problems involve coordination of Department of Labor certification activity with Department of Transportation project priorities and the lack of understanding of and knowledge about employee protection requirements and procedures on the part of many grant applicants. The first problem is a matter which is repeatedly addressed by the two Departments with varying degrees of success. The second problem can be ameliorated by the preparation and dissemination of informational material concerning Section 13(c).

The Department of Labor understands that the current controversy concerning Section 13(c) is not normally presented in the context of the above cited problems. Rather, there is strong opposition to the terms and conditions required in order that the statutory employee

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protective provision be satisfied and, further, substantial resistance by some--particularly public bodies without experience in collective bargaining--to the procedure (collective bargaining) used to arrive at specific protective arrangements. This opposition and resistance breeds conflict in the processing of projects for protective arrangement certification purposes.

The opposition to the type of protective terms and conditions required is primarily directed at the so-called 5(2)(f)-type benefits. The reference is to Section 5(2)(f) of the Interstate Commerce Act, which requires the development of arrangements to protect the interests of employees affected by railroad consolidations. Section 13(c), UMTA, requires that protective arrangements thereunder "include provisions protecting individual employees against a worsening of their positions which shall in no event provide benefits less than those established pursuant to section 5(2)(f) ... "

The resistance to the procedure used in the development of protective arrangements is to a large degree an expression of opposition to public employee collective bargaining. In an attempt to remove the strain from individual applicant bargaining situations, and also to better enable the program to cope with the high volume of applications anticipated under the operating assistance formula grant program enacted in 1974, the Department of Labor supported and encouraged an industry-initiated effort to develop a "model" protective agreement. This effort proved successful with the consummation of such an agreement in July, 1975, between the American Public Transit Association whose membership carries some 90+ percent of transit riders and six national union or union affiliated organizations representing the great majority of transit employees.

The industry was apparently quite divided in its support of the "model" agreement prior to its approval by the Association's governing body and, unfortunately, has become even more fragmented since with the "model" agreement becoming a focus for both internal industry debate and an attack on Section 13(c).

Analysis of Problems

The record of achievement of certification action under Section 13(c) belies the charges leveled against its administration. Since the passage of the Act, the Department of Labor has made in excess of 1350 certifications, including almost 250 under the new operating assistance grant program. In only a handful of cases has the Department been unable to make the required certification. Billions of dollars of Federal funds have been made available under the grant program for the improvement of public mass transportation; expenditures for employee claims have been minimal.

Many of the objections voiced about Section 13(c) go to its specific requirements (particularly the 5(2)(f)-type protection benefits) and as such would require legislative action to change. The Department of Labor does not believe such action is appropriate, nor is it likely that the Congress would be receptive to any proposed amendment to Section 13(c).

Following a Conference and Symposium on Transit Industry Labor-Management Relations Research held at the Department of Transportation on November 20, 1975, the following summary and conclusions were prepared by staff of the Urban Mass Transportation Administration:

> 1. Of the many factors which affect transit industry labor-management relationships, the provisions and implementation of Section 13(c) of the UMTA Act appear to be among the least significant, either in arriving at contractual agreements or in the substance of those agreements. Although the perception by those not involved in collective bargaining of the influence of 13(c) ranges from 'no effect' to 'blackmail,' the perception by the parties themselves is that 13(c) is not a significant issue in negotiations. It was the judgment of the researchers and most of the participants that if 13(c) had never been enacted, the problems and issues facing the industry in the area of labor relations would be similar, if not identical in magnitude and composition.
>
> 2. It was generally agreed that the attention and level of importance given to the ramifications of the jurisdictional dispute [DOT-DOL] involving 13(c) is misplaced and unwarranted. Such a confrontation takes out of context the overriding concern of the Act as a whole, which must be the Federal interest and the public interest in assuring a viable and a responsive mass transit system. It is in this framework that labor's and management's responsibilities, whether on the 13(c) issue or in the broader content of labor-management relations, should be assessed.

The Department of Labor subscribes to the above statements.

At the moment, there are at least five major studies at varying degrees of completion which are directed at or touch on Section 13(c). These studies are as follows:

1. Labor Relations Problems, Practices, and Policies in the Transit Industry
DOT funded: University of Wisconsin
Final report date: September, 1976

2. Improving Urban Transit Productivity
UMTA funded: Harvard University
Final report date: September, 1976

3. Analysis of Unions, Management Rights, and the Public Interest in Mass Transit
UMTA funded: University of North Florida
Final report date: June, 1976

4. Study of cost impact of Section 13(c), to include impact on collective bargaining and technological change.
DOL Office of the Assistant Secretary for Policy, Evaluation and Research
Final report date: December, 1976

5. General Accounting Office review of DOL's administration of Section 13(c) undertaken at request of Senator Tower
Final report expected: June, 1976

Recommended Action

Given the amount and scope of research efforts currently underway, there is certainly no need for further study at this time. The results of current studies will produce a data and information base upon which any necessary decisions can be made.

Action can be taken now to prepare for the receipt and review of information generated by the current studies. Also, prior to the availability of that information in final report form, efforts can be directed to promoting more effective program coordination between DOT and DOL. Because we believe the Section 13(c) controversy is symptomatic of broader based labor-management problems in the transit industry, the action recommended below is directed at that broad base.

The Department of Labor recommends the creation of a permanent DOL-DOT committee with the major purpose of promoting improved labor-management relations in the transit industry. In addition to this major purpose, the committee should be responsible for coordination between DOT and DOL on priorities concerning the UMTA grant program and review of the results of current research efforts as they relate to Section 13(c) for the purpose of determining whether any recommendations should be made concerning the administration of Section 13(c).

Following creation of the committee, consideration should be given to establishing a direct and continuing liaison with the industry and organized labor, perhaps through an advisory committee.

Timetable

Although the committee recommended herein is intended to be permanent, a specific deadline may be set for a report on Section 13(c) if necessary. Inasmuch as current research will not produce final reports until as late as December, 1976, it is proposed that the committee have until March, 1977, to review study results and arrive at any recommendations.

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

April 21, 1976

MEMORANDUM FOR THE PRESIDENT

ATTENTION: James E. Connor
Secretary to the Cabinet

SUBJECT: Section 13(c), Urban Mass Transportation Act of 1964, as amended

This memorandum follows up on a meeting held on Tuesday, April 13, 1976, between David H. Lissy of the Domestic Council Staff, Administrator Robert E. Patricelli and Robert McManus of the U.S. Department of Transportation's Urban Mass Transportation Administration, and John C. Read, Executive Assistant/Counselor to the Secretary of Labor. At the conclusion of the meeting it was agreed that the Department of Labor would prepare a memorandum in response to the DOT Memorandum for the President dated April 8, 1976, concerning Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. A copy of DOT's April 8, 1976 memorandum is attached.

Prior to commenting on individual items in the DOT memorandum, there are some initial comprehensive observations that must be made. First, we believe that there is among public bodies, transit systems, and others who become involved in the UMTA grant process a widespread lack of understanding of the employee protection requirements and the procedures utilized by the Department of Labor in processing grant applications for certification purposes. There also is a strongly-felt opposition by some to the specific statutory protection requirements. This lack of understanding and opposition is reflected in the overall thrust of the DOT memorandum. Thus, many of the proposals set forth therein are contrary to the specific letter of the law. Others run counter to the statute's spirit and intent. Accommodation of DOT's position on these matters cannot be accomplished through administration action, but instead would require amendment to the existing legislative requirements.

As a second initial observation, we would emphasize that since the passage of the Act, the Department of Labor has made in excess of 1350 certifications. In only a handful of cases has the Department been unable to make the required certification. Given the many diverse and complex situations in which the protection requirements must be implemented, we believe that this record is commendable. A 1971 evaluation by an outside contractor concluded that the Department of Labor's performance in administering Section 13(c) had been "uniformly excellent."

PROBLEMS

Six problem areas are cited in the DOT memorandum, as follows:

1. Applicability.

DOT questions whether "protective arrangements developed in the context of public subsidies to privately owned transit companies and of railroad mergers and consolidations are appropriately applied to what is now a publicly owned transit industry."

There is very little room for administrative discretion under Section 13(c) in this area. Section 13(c) requires that protective arrangements certified thereunder "shall include provisions protecting individual employees against a worsening of their positions which shall in no event provide benefits less than those established pursuant to Section 5(2)(f)" of the Interstate Commerce Act. (Underscoring added.) This language could not be more clear. The Secretary of Labor cannot certify protective arrangements under Section 13(c), UMTA, which do not include Section 5(2)(f), ICA, benefits or the equivalent thereof. Moreover, we believe it appropriate that a uniform level of protections apply to employees who are affected by Federally sponsored and/or funded activity, no matter what particular industry is involved. What should vary from industry to industry is the application of the required levels of protection to place them in harmony with particular industry and area practices. This can be and is best accomplished through negotiations between industry and employee representatives.

Interestingly, no Federal funds are involved in normal Section 5(2)(f) applications, merely the Federal (ICC) approval of a private industry "consolidation". In the transit industry application on the other hand,

substantial Federal grant money accompanies the employee protection requirements, and under the UMTA operating assistance program, grant money can be used to pay employee protection costs.

DOT's memorandum acknowledges that employee claims for benefits under Section 13(c) have been small in number and states "[T]herefore, Section 13(c) is probably producing very little in terms of necessary protection, while its operation is causing significant frustration, red tape, and intrusion on labor-management relations . . ." The lack of large numbers of employee claims is no indication that Section 13(c) is producing "little in terms of necessary protection". The development of the specific protective arrangement for application to a particular project situation resolves many issues that would otherwise lead to claims. This is particularly true in the area of preservation of pension and other fringe benefit programs. Claims for protection of such benefits are in effect resolved by the parties in advance. Similarly, arrangements to give retraining and priority employment rights to employees who would otherwise be deprived of employment as a result of the Federal assistance reduce the number of future claims.

The claim that Section 13(c) causes "significant frustration, red tape, and intrusion on labor-management relationships" simply is not true as a general proposition. Comments on specific points raised in the DOT memorandum with respect to this theme are set forth below. We would merely point out here that no evidence or documentation has been offered in its support. Also, we would cite the following two statements concerning Section 13(c) contained in a report prepared by UMTA staff following a November 20, 1975 Conference and Symposium on Transit Industry Labor-Management Relations Research:

> 1. Of the many factors which affect transit industry labor-management relationships, the provisions and implementation of Section 13(c) of the UMTA Act appear to be among the least significant, either in arriving at contractual agreements or in the substance of those agreements. Although the perception by those not involved in collective bargaining of the influence of 13(c) ranges from 'no effect' to 'blackmail,' the perception by the parties

themselves is that 13(c) is not a significant issue in negotiations. It was the judgment of the researchers and most of the participants that if 13(c) had never been enacted, the problems and issues facing the industry in the area of labor relations would be similar, if not identical in magnitude and composition.

2. It was generally agreed that the attention and level of importance given to the ramifications of the jurisdictional dispute [DOT-DOL] involving 13(c) is misplaced and unwarranted. Such a confrontation takes out of context the overriding concern of the Act as a whole, which must be the Federal interest and the public interest in assuring a viable and a responsive mass transit system. It is in this framework that labor's and management's responsibilities, whether on the 13(c) issue or in the broader content of labor-management relations, should be assessed.

Whatever frustrations and red tape exist in the process arise out of the labor-management and collective bargaining relationships which are allowed to operate and not from any Federal intrusion on these relationships.

2. Labor unions veto.

The DOT memorandum states that the operation of Section 13(c) "gives labor unions an effective veto power over UMTA grants." The memorandum then goes on to expand on the problems which arise for grant applicants in the bargaining process utilized by Secretaries of Labor in the development of protective arrangements under Section 13(c).

The DOT memorandum itself states that "[T]he legislative history of Section 13(c) clearly indicates that Congress contemplated collective bargaining as a method of arriving at the labor protective arrangements to be followed in the transit industry . . ." To quote

from the Report of the Senate Committee on Banking and Currency dated March 28, 1963: "The committee does not believe that it is feasible to enumerate or set forth in great detail the provisions that may be necessary to assure the fair and equitable treatment of employees in each case. In this regard, it is expected that specific conditions will be the product of local bargaining and negotiation, subject to the basic standard of fair and equitable treatment." (underscoring added)

In point of fact, we would note that we have had to make "determinations" of protective arrangements over union objections in project situations in Denver, Delaware, Chicago, Detroit, and Boston. This fact certainly tends to discredit the "union veto power" charge

The DOT memorandum states that the Department of Labor "has issued no regulations to guide the operation of law". With cooperation and involvement by representatives from UMTA, regulations in the form of guidelines were drafted during calendar years 1974 and 1975. Those regulations received the internal approval of Department of Labor officials. However, when final UMTA concurrence and/or comment was sought, none could be obtained and the proposed regulations were never finalized.

The DOT memorandum alleges that "labor's effective veto over UMTA grants gives labor an important hostage in collective bargaining on issues unrelated to labor protection . . ." However, the memorandum admits that "such abuses have not been documented." We of course would be interested in reviewing any factual situation supporting this allegation, however it is our belief based on twelve years' experience under the statute and over 1350 certification actions that abuses of the process have been virtually nonexistent.

3. Impression of clumsy management.

The basis for this problem area is that "UMTA cannot reliably plan which capital projects will receive funding in any given year because of the uncertainties of Section 13(c) negotiations."

We would point out here that UMTA and the applicants for assistance always have the most control over timing of grant application processing and 13(c) negotiations. At the request of certain applicants, we have commenced negotiations prior to submission of a project application to UMTA and occasionally have been in a position to certify a project prior to UMTA's formal referral of it to us.

There are and always will be certain fiscal year-end crises. However, avoidance of such crises seems to be most within the control of applicants and UMTA.

4. Burden of proof.

The DOT memorandum apparently seeks to make two points under this heading: first, that the Department of Labor requires that protective arrangements be developed even if there is little likelihood of adverse impact on employees and secondly, that grant recipients must carry the burden of proof in claims cases and are therefore at a disadvantage, particularly in the context of an operating assistance grant situation.

With respect to the first point, we would refer to the last sentence of Section 13(c), which states that "[T]he contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements." (underscoring added) Interpreted in the context of the legislative history, we believe that this language clearly contemplates the development of specific protective arrangements in each project situation. The Department of Labor has continually interpreted Section 13(c) as requiring the development of protective arrangements in advance of final project approval, so that all parties will be aware of their rights and obligations thereunder. Also, in the event of disputes as to whether valid claims exist, or as to the proper administration of those claims, procedures will be available in the protective arrangement for the orderly resolution of such disputes.

With respect to the second point raised in the DOT memorandum under the "Burden of proof" heading, it would seem that DOT is concerned that employees may now be protected against any adverse effect that takes place during the course of UMTA assistance, whether or not the adverse effect is a result of that assistance. The model agreement, which was negotiated for specific application to operating assistance projects, defines the terms "Project" and "as a result of the Project" as follows:

> The term "Project", as used in this agreement, shall not be limited to the particular facility, service, or operation assisted by Federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided. The phrase

> "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this agreement. (underscoring added)

On the basis of the underscored language, it is clear that employees are not provided protection against adverse effects unrelated to the Federal assistance.

Finally, we would point out that under most protective arrangements claiming employees have an obligation to identify the project and specify the pertinent facts of the project relied upon. The burden is then placed on the grant recipient to prove that factors other than the project affected the employee. The rationale for this arrangement is that normally only the grant recipient possesses the information necessary to establish the validity of or disprove an individual employee's claim. Were the burden of proof on the employee, he would find it impossible to meet in virtually every case because of the lack of availability of necessary factual information to him.

5. National Agreement.

The DOT memorandum states incorrectly that the "Department of Labor has been unwilling to accommodate specific geographic differences" in connection with the operation of the so-called National Agreement. At the time the industry and union representatives who negotiated the National Agreement presented that agreement to the Secretary of Labor, they also proposed the utilization of certain specific procedures which themselves contemplated possible modifications to the National Agreement. The National Agreement has been applied in a number of instances both with and without modification. In still other instances, other arrangements than the National Agreement have been utilized.

The DOT memorandum then states that the "National Agreement contains a great number of specific provisions that overly constrain management decisions--for example, a requirement that a 60-day

notice plus 80-day appeals/arbitration period be given to local unions before any schedule or route modification can be implemented."

The National Agreement was negotiated by highly skilled and capable negotiators on the industry side. In toto, we believe that it compares quite favorably from the applicant side with previously negotiated Section 13(c) agreements.

The specific National Agreement provision cited in the DOT memorandum--and interpreted therein as requiring that "a 60-day notice plus 80-day appeals/arbitration period be given to local unions before any schedule or route modification can be implemented"--was addressed and highlighted by the Department of Labor in the context of a recent proceeding to determine its appropriate application to a Los Angeles, California operating assistance grant. In its January 29, 1976 letter of determination in that case, the Department of Labor found that the notice provision clearly was not intended to apply to normal schedule and route modifications. To quote from the Department of Labor's determination:

> "Indeed, it is difficult to construe any events arising 'as a result of' an operating assistance project which would require notice and negotiation of what are commonly called implementing agreements. The mere acceptance of Federal operating assistance funds certainly does not make every action of the District 'a result of the Project'."

6. Stifling innovation.

The DOT memorandum states that Section 13(c) has a "seriously inhibiting effect on innovation in the transit industry."

We are aware of no idea or experimental method of operation jeopardized or prevented by Section 13(c). Over the past year we have been able to develop protections for novel and experimental endeavors such as the Knoxville van pooling and Rochester dial-a-ride projects. To quote Daniel Roos of MIT who studied the application of Section 13(c) to para-transit projects: "Many labor

difficulties arise from approaching labor unions with suspicion and mistrust." Professor Roos noted that problems existed; he stated that "[W]e tend, however, to exaggerate those labor problems and thus establish potential conflict situations between labor and management."

We do not understand the statement that Section 13(c) "perils the continued survival of the private taxi industry which would likely benefit from paratransit development." DOT determines the projects and applicants which are eligible for Federal funds and it is our understanding that certain taxi or taxi-related projects have already been funded.

Proposed Remedies

DOT proposes six remedies "to rectify the problems of 13(c) as they apply to all categories of UMTA capital grants." Prior to listing those remedies, however, the DOT memorandum states that "it is clear that Section 13(c) is being misapplied in connection with Section 5 grants for operating assistance . . ." The DOT memorandum suggests that the Secretary of Labor use alternative administrative practices from those used in capital grant situations in applying Section 13(c) to operating assistance grant applications. It is stated that this is "wholly consistent with the statute" and that "Congress had to apply 13(c) to Section 5 in order to cover the capital grant aspect," apparently suggesting that Congress may not have intended that 13(c) apply to operating assistance grants under the Section 5 formula grant program.

We would point out here that during the consideration of the legislation which eventually became the National Mass Transportation Assistance Act of 1974, and provided Federal money for the first time for the subsidization of operating expenses, DOT proposed a "technical revision" to a pending bill which would amend it so as to make Section 13(c) inapplicable to operating subsidy grants. The Department of Labor opposed the proposed revision and it apparently was not seriously considered by the Congress. The language of the statute in Section 5(n)(1) clearly applies Section 13(c) to operating assistance projects and the legislative history supports its application just as for the capital grant program.

The Department of Labor's comments on the six options set forth in the DOT memorandum follow under the same headings as used by DOT:

1. Multi-year certifications, with stronger DOL role

In accordance with what we interpret to be the legislative mandate, the Department of Labor approaches the development of protective arrangements on a project by project basis. For many applicants and projects, this produces a multi-year certification. The model agreement is in effect a multi-year protective arrangement for application to operating assistance grants.

In the light of a legislative history calling for the development of specific protective arrangements through collective bargaining in the context of particular projects it is inappropriate for the Department of Labor to attempt to predetermine such arrangements. Applicants can seek to and do negotiate multi-project, multi-year protective agreements. This is in keeping with the spirit of the development of protective arrangements through collective bargaining. It appropriately limits such arrangements, however, to specifically anticipated project situations.

The Department of Labor continues to feel that it is neither appropriate nor useful to set fixed time limits on negotiations. Instead, the Department expects involved parties to make a good faith effort to reach agreement on appropriate and mutually acceptable protective arrangements. If, having made a good faith effort to reach agreement, the parties find themselves unable to consummate an agreement, either party may request that the Secretary of Labor determine the terms and conditions upon which he will base his certification. As pointed out earlier, this is a process that is most in the control of applicants and the Department of Transportation.

2. Negative declarations with changed burden of proof.

The DOT suggested categorization of projects and use of a negative declaration of impact statement is a questionable practice under the statutory language, which states that "[T]he contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements." (underscoring added) Attempts to develop specific protections only after claims of adverse impact are made

would obviously be difficult. We have repeatedly interpreted 13(c) as requiring protective arrangements in advance of project approval so that all parties will be aware of their rights and obligations thereunder. Also, should disagreements arise as to whether valid claims exist, procedures are already in place for the resolution of such disputes.

3. Federal definition of fair and reasonable arrangements

This DOT suggestion is in our view contrary to the expressed congressional intent. The recently negotiated national or model agreement, on the other hand, is an approach which reflects the spirit of the legislative intent and sets forth a set of presumably reasonable protections for application in the majority of project situations while allowing for modification to accommodate special local circumstances.

Both industry and union representatives have raised the possible future development of other model agreements for application to other types of UMTA projects. This approach is in keeping with the spirit of the development of specific protective arrangements through collective bargaining as opposed to by Government fiat.

The DOT memorandum at this point devotes a paragraph to the relationship of employee protective arrangements and productivity improvements.

We are not completely clear as to the intent of this paragraph. However, the Report of the House of Representatives Committee on Banking and Currency when it reported out the Urban Mass Transportation Act of 1963 bears on this point in attempting to strike a balance between public and private interests:

> 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 the result of the introduction of new equipment or the reorganization of existing transit operations. The principle of protecting workers affected as a result of adjustments in an industry carried out under the aegis of Federal law

is not new, particularly in the transportation industry. Thus, railroad employees for years have enjoyed Federal protection against adverse effects attendant upon railroad consolidations. The problems of worker protection presented by the bill are not necessarily identical to those presented under other laws. The committee believes, however, that workers for whom a standard of benefits has already been established under other laws should receive equally favorable treatment under the proposed new program. The committee also believes that all workers adversely affected by adjustments effected under the bill should be fully protected in a fair and equitable manner, and that Federal funds should not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers.

4. Limitation of Section 13(c) to public takeovers.

DOT's proposal here would clearly violate the Congressional intent. Note the reference in the House report cited immediately above to workers "adversely affected as the result of the introduction of new equipment or the reorganization of existing transit operations."

5. Legislative approaches

The Department of Labor does not believe that efforts to amend or repeal the employee protection provisions of the Urban Mass Transportation Act are appropriate. Moreover, it is highly unlikely that the Congress will be receptive to any proposed amendment to Section 13(c).

NEXT STEPS AND TIMETABLE

DOT's memorandum proposes steps to achieve the "effective resolution of the positions of the Departments of Transportation and Labor." As suggested at the outset, the Department of Labor seriously questions whether problems exist to the extent one would be lead to believe by the DOT memorandum. If the Section 13(c) program operated as has been alleged by DOT and others, modification would be called for.

However, the record of more than 1350 successful certifications during the past twelve years does not support the modification proposals.

The DOL memorandum forwarded to Dr. Connor on April 7, 1976 listed some five current studies underway which are directed at or touch on Section 13(c). Three of those studies are DOT funded. A fourth is being conducted by the General Accounting Office. It would not be appropriate to modify the Section 13(c) program until the results of these studies are known.

Secretary of Labor

Attachment

cc: James Cannon
Secretary Coleman

C

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

June 1, 1976

MEMORANDUM FOR JIM CONNOR

FROM: DAN MC GURK

SUBJECT: Jim Cannon Memo on Section 13(c)
UMTA Act of 1964

We think the memorandum to the President somewhat understates the difficulties involved. The underlying papers clearly indicate that one of the main reasons that the "problem" has not been resolved by the two departments is that Secretary Usery does not agree there is a problem.

Second, the specific proposals listed on page 4 have all been proposed by Secretary Coleman and specifically rejected by Secretary Usery.

It is obvious that a lot of hard work by someone outside the two departments is going to be necessary to get the two departments to work out a joint decision paper that hones the disagreement down to its essentials. I think the Domestic Council would be a fine forum for this if they recognize the amount of staff time it is going to take. However, no solution is likely unless the Department of Labor accepts the fact that there is a problem.

Dan McGurk