The Impact of Section 13(c) of the UMTA on Labor-Management Relations at BART*

JOHN G. KILGOUR**

The San Francisco Bay Area Rapid Transit District (BART) was the first new mass transit system in the United States in sixty years that was more than a reorganization or expansion of existing systems.[1] Consequently, almost everything that was done broke new ground and set example and precedent for the industry of the future. There was more than the need to develop new concepts and technology. BART, for the first time in the industry, encountered the problems and opportunities of large-scale federal assistance to urban transit and the frustrations of dealing with numerous political jurisdictions, high rates of inflation, and concerns of equal employment opportunity, environmental protection, and the elderly and the handicapped. The application to transit of a job-protection concept drawn from the railroad industry was also new. It is this last problem and the developments that surround it that are the main topics of this article. As will be seen, the expansion of this concept and its application to an entirely new

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** Associate Professor and Director of Graduate Programs, School of Business and Economics, California State University, Hayward. B.A., University of Connecticut, 1966; M.I.L.R., Cornell University, 1968; Ph.D., Cornell University, 1972.

1. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT OFFICE OF PUBLIC INFORMATION, A HISTORY OF BART 7 (November 1976). BART is actually an interurban transit system. However, the distinction is unimportant for the present discussion.

system are disturbing demonstrations of the influence of organized labor in the public sector.

The idea of linking the East-Bay communities with San Francisco was first formally discussed in 1947 as an approach to the problem of traffic congestion caused by heavy post-war migration to the Bay Area. In 1957, the California legislature formed the San Francisco Bay Area Transit District. Construction officially began on June 19, 1964, and revenue service commenced on September 11, 1972. By 1977, the District was operating 450 cars over 71 miles of track with 34 stations and had an average daily ridership of 133,000.[2] Besides these aspects of the development of BART there were many political, administrative and legal controversies, including those related to labor-management relations.

BART's development took place against a backdrop of important changes in the transit industry. Total passenger rides for the industry declined from 23 billion in 1945 to 7 billion in 1976,[3] while transit employment declined from 242,000 to 162,000.[4] During the same period, transit revenue increased from $1.3 billion to $2 billion,[5] while total operating expenses went from $1.2 billion to $4 billion.[6] The difference between revenue and expenses was largely offset by various local, state and federal subsidies.

Throughout this period, many privately-owned transit systems found themselves in economic difficulty and facing the probability of going out of business. Since urban transit services have long been thought of as essential, the fact that they were going out of business was politically unacceptable. The result was that one company after another passed from private to public ownership. By 1976, 375 systems, 39% of the total, had become publicly owned, but these systems generated 88% of the operating revenue and carried 91% of the passengers.[7] Thus, almost without notice, and entirely without socialist or conservative rhetoric, an important American industry became government owned.

Although the shift from private to public control usually prevented the termination of service, it seldom provided the financial support needed to cope with the industry's fundamental problems, which were attributable mainly to the inherently superior personal transportation provided by the automobile. As the move to the car continued throughout the post-war pe-

2. *Id.* at 4.
3. American Public Transit Association, Transit Fact Book at 26 (1977).
4. *Id.* at 34. Public transit systems are defined as systems "owned by municipalities, counties, regional authorities, states or other governmental agencies including transit systems operated or managed by private firms under contract to governmental agency owners."
5. *Id.* at 22.
6. *Id.* at 23.
7. *Id.* at 19.

riod, service levels were reduced, equipment was allowed to deteriorate and technical innovation was ignored. The industry was in trouble.

The decline of the industry naturally made the labor unions very conscious of job security. The transit industry had long been about 95% unionized.[8] The main labor organizations involved in the industry are the Amalgamated Transit Union (AFL-CIO) and the Transport Workers' Union of America (AFL-CIO). In 1975, the ATU had 140,000 members and the TWU 150,000.[9] The ATU, or the Amalgamated as it is often called, is most closely identified with the industry in most cities.

FEDERAL ASSISTANCE

Given the plight and social importance of urban mass transit, it was inevitable that the federal government would become involved. However, that involvement was not simple or unopposed. Because of the inherently local character of urban transit, it has historically been outside of the national transportation policy of the United States and beyond the scope of federal regulation or support. Yet conceptually, it has been viewed as an extension of railroad passenger service.

As various railroads abandoned commuter service in the course of that industry's post-war decline, cities began to press Washington for aid to urban mass transit. This was considered a big-city problem and was opposed by Southern Democrats and Northern rural and suburban Republicans, and until the late 1960's progress was slow. By then, however, it was realized that problems of pollution, traffic congestion and mobility were spreading to the suburbs, and positions changed.[10]

The first federal support of urban transit was authorized by the Housing Act of 1961,[11] which made money available for transit demonstration projects. Other transit-support bills were introduced and reported in both houses of Congress in 1962 but not enacted.[12] Legislation was reintroduced in 1963 and 1964 which eventually became the Urban Mass Transportation Act of 1964.[13] Under this law, federal funds are granted through the Urban Mass Transportation Administration to local transit districts and agencies for construction and operating purposes.

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8. Barnum, *National Public Labor Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 170 (1976), [hereinafter cited as Barnum].

9. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1937, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1975 at 48, (1977).

10. SMERK, AN EVALUATION OF TEN YEARS OF FEDERAL POLICY IN URBAN MASS TRANSPORTATION, in HILLE AND POIST, TRANSPORTATION: PRINCIPLES AND PERSPECTIVES 364, 359 (1974).

11. Pub. L. No. 87-70, title III, § 303, 75 Stat. 166 (codified in 42 U.S.C. § 1453 (1976)).

12. H.R. Rep. No. 204, 88th Cong., 2d Sess. (1963); S. Rep. No. 82, 88th Cong., 2d Sess. (1963); S. Rep. No. 83, 88th Cong., 2d Sess. (1963).

13. Pub. L. No. 88-365, 78 Stat. 302 (codified in 49 U.S.C. § 1601 (1976)).

Privately-owned transit systems with an annual gross revenue of $25,000 or more had long been under the jurisdiction of the National Labor Relations Board for collective bargaining purposes. As mentioned, the industry was almost completely unionized and collective bargaining, including the right to strike, was widely accepted. In 1962, a large transit system in Dade County (Miami), Florida, shifted from private to public ownership. As a result, the workers involved became public-sector employees and therefore exempt from the federal collective bargaining law. In spite of the efforts of the Amalgamated Transit Union they lost all collective bargaining rights.[14] Given the large number of transit systems that were then in financial difficulty and were thus in the process of shifting from the private to public sector, this was an ominous development for the unions.

Labor responded by lobbying successfully to add a provision to the proposed transit legislation designed to protect existing employee rights.[15] After revision and amendment, this became section 13(c) of the Urban Mass Transportation Act of 1964 and is now section 1609(c) of the Urban Mass Transportation Assistance Act of 1970 as amended in 1974.[16] The wording has remained unchanged, and the agreements entered into under its provisions are referred to as "section 13(c) agreements."

Section 13(c) requires an employer seeking financial assistance under the Act to enter into an agreement acceptable to the Secretary of Labor to protect the interests of employees affected by such assistance. The agreement is to include:

1. the preservation of rights, privileges 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 reemployment of employees terminated or laid off; and
5. paid training and retraining programs.[17]

The section further provides[18] that such protection of rights and benefits shall in no event be less than that established pursuant to section 11347 of the Interstate Commerce Act.[19] The latter reference locks 13(c) agreements into the railroad industry's Washington Job Protection Agreement of

14. Barnum, *supra* note 5, at 169. Stern, Miller, Rubenfeld, Olsen & Heshizer, Labor Relations in Urban Transit 66 (1977) (Technical Report prepared for the Urban Mass Transportation Administration, U.S. Dep't of Transportation) [hereinafter cited as Stern].

15. Barnum, *supra* note 8 at 170.

16. 49 U.S.C. § 1609(c) (1976).

17. *Id.*

18. *Id.*

19. 49 U.S.C.A. § 11347 (Supp. 1979). This section requires the ICC, as a condition of approving a coordination, to provide fair and equitable arrangements to protect the interests of

May 21, 1936, as expanded upon by various Interstate Commerce Commission decisions.[20]

BART's 13(c) Agreement

Although the original impetus for section 13(c) was the protection of employee rights (especially collective bargaining rights) when existing transit systems became public utilities, the language of the section makes it a condition of "any assistance" that the recipient enter into a 13(c) agreement.[21] Thus when BART, a brand new transit system, sought federal funds, it was required to negotiate such an agreement.

As early as October 1966, the U.S. Department of Labor assumed that BART would negotiate a 13(c) agreement.[22] In a capital grant received from the Urban Mass Transportation Administration in the spring of 1967, BART agreed that if any employees were adversely affected by the grant, "appropriate protective arrangements for such employees would be made as required by Section 13(c) . . ."[23]

During 1967 a series of meetings was held in Washington between representatives of BART, various labor organizations, and the Department of Labor.[24] Drafts were exchanged, and by leaving unresolved the critical issue of the degree to which BART would give "priority employment" to employees of existing transit systems, an agreement was reached. It was signed by 23 labor organizations, was ratified by BART's Board of Directors, and took effect on January 25, 1968.[25]

BART's 13(c) Agreement dealt with two important concepts. One was "adverse effect," which relates to those employees whose employment positions were worsened because of the construction or operation of BART. This part of the Agreement[26] closely followed the requirements of section

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affected railroad employees. Such employees may not be placed in a worse position with respect to their employment for a period equal to their length of service up to a maximum of four years.

20. Stern, *supra* note 14, at 80-81.

21. 49 U.S.C. § 1609(c) (1976).

22. Letter from James J. Reynolds, Assistant Secretary of Labor, to Leo P. Cusick, Director, Urban Transportation Administration, Dep't of Housing and Urban Development (October 19, 1966), directed to R. B. Stokes, General Manager of BART by David J. Speck, Counsel, Urban Transportation Administration (in possession of the author).

23. Urban Mass Transportation Capital Grant Contract between the San Francisco Bay Area Rapid Transit District, California, and the United States of America (Dep't of Housing and Urban Development, Urban Transportation Administration) Project No. CAL-UGT-6; Contract No. H-794 (1967).

24. The main labor organizations involved were the ATU, TWU, and the railroad unions.

25. Agreement Pursuant to Section 13(c) of the Urban Mass Transportation Act, as Amended [hereinafter cited as 13(c) Agreement]. BART signed a new 13(c) agreement for capital grants in 1976 and also signed the National Model 13(c) Agreement for operating grants. These matters lie beyond the scope of this paper. All references hereafter refer to BART's 1968 13(c) agreement.

26. 13(c) Agreement *supra* note 21, at 3.

13(c) of the Urban Mass Transportation Act[27] and section 5(2)(f) of the Interstate Commerce Act[28] as expanded by the so-called "New Orleans conditions."[29] BART now has an estimated adverse-effect liability of about $5.4 million,[30] but this part of the Agreement was not then controversial; BART claimed that it would have no adverse effect on employees of existing systems, and the unions were concerned with more immediate matters. Although not developed in the present discussion, this potential liability should be kept in mind when evaluating the overall impact of section 13(c).

The second and more controversial concept contained in BART's 13(c) Agreement was that of "priority employment" for employees of existing transit systems, a concept independent of proven adverse effect.

In section 1 of the 13(c) Agreement, the parties recognized that "some form of priority employment is appropriate for employees of existing mass transportation systems in the area to be served by BART."[31] The details were left for negotiation between BART and the unions of such employees. Section 2 stated that, pending the completion of negotiations, such employees would be given the "first opportunity to fill all non-supervisory, non-professional, non-construction jobs" under conditions to be agreed upon by the parties.[32] If no such agreement was reached, the matter was to be submitted to binding arbitration as provided for later in the Agreement. Section 3 required that if no agreement was reached on the extent and scope of priority employment by March 1, 1968, these matters were also to be submitted to arbitration.[33]

This was the first application of the concept of priority employment independent of adverse affect in a 13(c) agreement. It was to have an important impact on future labor-management relations at BART. From the unions' point of view, priority of employment was the only effective way of dealing with BART, since no adverse effect would occur until after the system went into operation and long after it was staffed; to limit their efforts on behalf of their members to compensation of those displaced by BART was viewed as inadequate. BART management was very unhappy with the in-

27. 49 U.S.C. §§ 1601-13 (1976).

28. Recodified in 49 U.S.C.A. § 11347 (Supp. 1979).

29. 13(c) Agreement, *supra* note 25, § 5. New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952). This case extended the benefit period for employees dismissed as a result of a coordination from four years from the effective date of the ICC order to four years from the date of the adverse effect. It also reduced the coordination payments by income earned from all employment during the period, instead of just from railroad employment.

30. F. SISKIND & E. STROMSDORFER, THE ECONOMIC COST IMPACT OF THE LABOR PROTECTION PROVISION OF SECTION 13(C) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, 155-56 (1978).

31. 13(c) Agreement, *supra* note 25, § 1.

32. *Id.* § 2.

33. *Id.* § 3.

clusion of the priority employment concept in the Agreement. BART's representatives at the original 13(c) negotiations were apparently unaware that priority employment had not been included in other 13(c) agreements. It is claimed that had they known the implications of what they were doing, they never would have signed.[34] This may be somewhat unrealistic; BART needed federal funding for its completion. The unions were in a position to delay, if not stop, that funding. In addition, there was a certain logic to the unions' contentions that would have found a sympathetic ear in the Department of Labor. Hindsight suggests that BART would have been better off negotiating for a specified degree of priority employment and the conditions under which those employees would begin employment at BART rather than leaving such an important question unanswered.

Section 14 of the Agreement established an arbitration procedure to resolve disputes between BART and the signatory unions in regard to application, interpretation, and enforcement. Sam Kagel, a highly respected labor arbitrator, was specifically named as the permanent arbitrator for the Agreement.[35]

The parties were unable to reach an agreement on priority employment by the March 1, 1968 deadline or thereafter. Although BART had agreed that some priority employment was in order, there was a standing disagreement among the parties as to the degree and conditions of such employment. On February 8, 1968, two weeks after signing the 13(c) Agreement, the BART Board of Directors issued a policy statement which noted the District's responsibility to hire from (minority) community groups and stated that any preferential hiring arrangements would not be exclusive. Further, it was stated that any agreement negotiated pursuant to section 13(c) would not be binding on the District until approved by the Board of Directors.[36]

On March 20, 1968, a negotiating session was held between BART and a number of labor organizations. The unions continued to demand 100 percent priority employment. BART continued to offer 10 percent beyond any arrangements made for employees of existing transit systems who actually suffered adverse effect. No agreement was reached. The parties did agree to a follow-up series of meetings to examine the impact of BART on existing transit systems on a run-by-run basis. Upon reflection, BART management and counsel concluded that the unions were attempting to

34. F. SISKIND & E. STROMSDORFER, *supra* note 23, at 163, 168.

35. In the event Kagel was unavailable or unwilling to serve, Benjamin Aaron was to arbitrate. In the event that neither was available, an arbitrator was to be chosen from a list furnished by the Federal Mediation and Conciliation Service.

36. BART Board of Directors, Policy Statement: Negotiation Guidelines to be Used with Labor Agreement of January 25, 1968 (February 8, 1968).

expand the concept of adverse effect and cancelled these meetings.[37] On April 4, 1968, BART unilaterally established a procedure to offer available jobs—on a right-of-first-refusal basis—to qualified employees of existing transit systems pending the outcome of the stalled priority-employment negotiations.[38]

The priority-employment talks remained deadlocked for the next two years. The unions made an unsuccessful attempt to pressure BART into a higher degree of preference by making the public claim that they were "following their work."[39] Although various proposals to reopen negotiations were made and discussed, the matter was eventually to be decided by arbitration. Meanwhile, BART notified the signatories to the 13(c) agreement of job openings as they occurred and hired employees as needed at terms established by management. Few employees came from existing transit systems; those that did joined BART as new employees and gave up any accrued rights with their former employer. By the time the matter went to arbitration, there was a large number of employees at BART who had been hired on a non-priority basis and a smaller number who had some claim to preference but had accepted BART's terms.

The Bargaining-Unit Decision

The 13(c) agreement was not the only important labor-relations matter pending at this time; a decision concerning the determination of the appropriate bargaining unit(s) for the new system was also at issue. Transit districts in California are created and governed by individual enabling statutes. Chapter 4 of BART's statute, titled "Labor Provisions," serves as a labor law for the District.[40] California Public Utilities Code section 28851 provides that in a question of representation, the matter will be submitted to the State Conciliation Service, which "shall promptly hold a public hearing and may, by decision, establish the boundaries of any collective bargaining unit and provide for an election to determine the question of representation."[41] When the Conciliation Service received the BART case, it named Sam Kagel, the same person named as the permanent arbitrator in the 13(c) agreement, as its hearing officer.

Mr. Kagel conducted thirteen days of hearings on the representation

37. BART Inter-Office Communication from Director of Personnel to Assistant General Manager (June 14, 1968).

38. Letter from William L. Diedrich, Counsel to BART, to Carl W. Putnam, Counsel to ATU (April 4, 1968).

39. Open letter from E. A. Cordeiro, Business Agent and Vice President ATU Division 192, sent to various state and national legislators (April 22, 1968), in Transit, May, 1968; BART Inter-Office Communication (June 14, 1968).

40. Cal. Pub. Util. Code §§ 28850-28855 (West 1973).

41. *Id.* § 28851.

issue during 1971, which generated over 1,500 pages of transcript. Most of the signatory unions to the 13(c) agreement plus other labor and community organizations were represented. The Listing of Appearances contains 79 entries.[42]

BART contended for a large bargaining unit exclusive of security guards, while the various unions sought different arrangements designed to protect and promote their particular positions and jurisdictions. The details of this matter, which involved exclusion of supervisory and confidential employees, as well as the lateral dimension or scope of the unit, lie beyond the limits of this discussion.

Mr. Kagel made his recommendation to the Director of the Department of Industrial Relations (within which the Conciliation Service is housed) by letter dated February 26, 1973. It called for: (1) a supervisory unit, (2) a security unit, and (3) a comprehensive "umbrella" unit containing three subunits for (a) transportation, (b) clerical, and (c) maintenance employees. The subunits were to have separate status for election purposes but were to bargain jointly as a single unit with BART after the election. In the event that more than one union won representation rights within the comprehensive unit, they were to work out their own internal arrangements for collective bargaining. The determination was based on BART's "unique characteristics," the community of interest of the employees, and the essentiality of the service provided by the system.[43]

The Department of Industrial Relations adopted Mr. Kagel's recommendations on March 6; a pre-election conference was held on March 14; and the election discussed later was conducted on April 18, 1973.

Interpretation of BART's 13(c) Agreement

Soon after the completion of the representation hearings, but before Mr. Kagel made his recommendations to the State Department of Industrial Relations, the parties conducted a closely-related set of hearings on the interpretation of BART's 13(c) agreement. These hearings began on November 15 and ended on December 21, 1971. The issues of the representation hearings and the 13(c) hearings tended to overlap: the 13(c) award would, to some extent, determine which employee-union members would staff and eventually vote in the bargaining units to be determined. On several occasions, the representation hearings got into 13(c)-related matters, and the 13(c) proceedings and exhibits were formally incorporated

42. Representation Proceedings Before Impartial Hearing Officer Under Provisions of Section 28851 of the California Public Utilities Code, In the Matter of Representation Hearing to Present Representation Claims on San Francisco Bay Area Rapid Transit District (June 21-October 14, 1971) [hereinafter cited as Representation Proceedings].

43. Letter and attachments from Sam Kagel to H. Edward White, Director, Department of Industrial Relations (February 26, 1973).

into the representation case to the extent relevant.[44]

The 13(c) case distilled the basic question of whether the term "employees affected" referred to the potential effects of BART on a general body of employees, as the unions contended, or whether it referred to particular employees who had to be identified as having suffered a worsening of their employment condition, as BART contended. No stipulation was possible on this basic question.[45] If the union position was adopted (as it later was), then the important issues became the degree and allocation of priority employment among the employees of existing transit systems and the appropriate wages, hours and conditions of these employees who came over.[46] It should be noted that there were numerous related and incidental questions that are not central to this discussion.

Mr. Kagel's 13(c) priority employment award was issued as three partial decisions dated June 20, July 15, and July 24, 1972, and as an amendment to the basic June 20 decision dated December 20, 1972.[47] It will be recalled that the bargaining-unit recommendation was dated February 26, 1973.[48]

The highlight of the 13(c) award was that BART was directed to interview and offer employment for presently available jobs to interested employees of five existing transportation systems by specified order and on the basis of the employees' seniority with the existing company. The priority employees were to bring with them their former wage rate (when higher than BART's the wages would be red circled),[49] certain benefit rights, and their old seniority dates. The award was not to affect the non-13(c) employees presently at BART, except that those who had already come over from existing transit systems were to retain their old seniority dates. Table 1 presents the companies in order of priority, the number of applications and hires from each, and the main labor organization on the property from which they came. It shows that the overwhelming majority came from systems in which the Amalgamated Transit Union was the main, although not the only, bargaining agent.

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44. 13(c) Proceedings, *supra* note 24, at 309.

45. *Id.* at 169-73.

46. *Id.* at 21.

47. In the Matter of Controversy between the Signatory Unions to the Agreement Pursuant to Section 13(c) of the Urban Mass Transportation Act, As Amended, January 25, 1968, and San Francisco Bay Area Rapid Transit District (BART), Re: The Application and Interpretation of the 13(c) Agreement, Partial 13(c) Decision of Sam Kagel, Arbitrator, San Francisco, California (June 20, July 15, July 24, 1972); and Amendment to Partial 13(c) Decision of June 20, 1972 (December 29, 1972). [hereinafter referred to as Partial 13(c) Decisions].

48. *Supra* note 43.

49. When a wage rate of an employee or group of employees is "red circled" it remains unchanged until the rates of others employed in the job classification catches up with it.

Table 1. Origin and Number of BART's Priority Employees

Company	Number of Applicants	Number of Hires	Labor Organization
1. Peerless Stages	17	4	ATU, Division 1225
2. Greyhound Lines West	441	90	ATU, Division 1225
3. AC Transit	214	41	ATU, Division 192
4. San Francisco MUNI	126	14	TWU, Local 250A plus various craft unions
5. Southern Pacific	237	9	Various railroad unions
Total:	1,035	158	

Source: Information provided by BART.

Union Organization and Representation Election

A theme that ran through the representation and 13(c) proceedings was that the employees in existing transit systems had a right to "follow their work." There was also an implication that the unions involved would follow their members. Neither was an unreasonable expectation. The 13(c) agreement defined BART as a "coordination" as the term is used in the railroad industry. In transportation this term usually refers to the voluntary or compulsory integration of rates, services or operations by carriers or modes. Coordination often involves questions of through rail rates, joint rail-water rates or the use and operation of common terminal facilities by several carriers. It is difficult to see how BART constitutes a coordination in any operational sense. In the opinion of the author, the use of the term in the 13(c) agreement was an oversight on the part of BART management.

In the railroad industry the employees affected by a coordination would usually be absorbed by the surviving carrier(s). In the BART context, this translated into priority of employment. If the unions had succeeded in attaining their 100 percent priority objective at an early enough date to significantly influence the staffing of BART, this would almost guarantee that the organizations with representation rights on the properties from which they came would win the representation election at BART. However, with one exception, this was not to be.

While the unions with bargaining rights with existing transit companies were busy with the negotiation and litigation surrounding the 13(c) agreement and the representation proceedings, the United Public Employees' Union, Local 390 (hereinafter referred to as Local 390) of the Service Employees' International Union (AFL-CIO) was busy organizing existing BART employees. Local 390 began organizing BART's office staff in 1968 when BART's offices were still in San Francisco. This was before any transportation employees had been hired and long before any priority employees

came over from existing systems.[50] By July 1972, when the representation hearings were in progress, Local 390 claimed to represent 350 of the 550 non-managerial and non-professional employees then on the BART payroll.[51]

Local 390 had not been a party to the 13(c) agreement because it did not represent employees in existing transit systems; however, it did participate in the representation and 13(c) hearings in a minor way. Its main concern was the protection of the employees then at BART. Mr. Kagel's initial 13(c) award was viewed as a threat to those employees. After Local 390 threatened court action and a strike on their behalf, the award was clarified to the effect that it was not "to affect or place limitations on the relationship between BART and its present non-13(c) employees with respect to wages, hours and working conditions."[52]

By the time the representation and 13(c) proceedings were complete, BART had been fairly well organized by a union that had not been heavily involved in the legal events that led up to the election. Alternately, the unions that were involved in the litigation would be sending their members into an already partially unionized situation.

Local 390 did an effective job in organizing the priority employees as they came into BART. When the representation election was held on April 18, 1973, in the units and under the procedures recommended by Mr. Kagel, Local 390 won the clerical and maintenance subunits of the comprehensive bargaining unit. Division 1555, a newly-chartered division of the ATU, won the transportation subunit which had been largely staffed with priority employees.[53] However, even here, Local 390 made a respectable showing. The details of the representation election are presented in Table 2.

The apparent effect of the comprehensive "umbrella" unit with its three subunits was to protect the position of the ATU among the priority employees concentrated in the transportation subunit. Although one can never say with certainty who would have won an election had the choices been different, given its late start, it is clear that the ATU would have had little chance of winning the whole comprehensive unit. Local 390, on the other hand, would have had a good chance of picking up enough votes to win the larger unit had the election been on that basis and a very good chance of winning a run-off election had no union received a majority on the first ballot, as would have been required.

50. Interview with Paul T. Cooper, BART Employee Relations Manager (May 25, 1968).

51. CAL. PUB. EMPLOYEES REL., Nov. 1972, at 42.

52. Partial 13(c) Decisions, *supra* note 47.

53. No records are available on which priority employees went into which units and subunits. However, the timing of the hiring and the skills involved, as well as the outcome of the election, strongly suggest that the transportation subunit was staffed mainly with priority employees.

Table 2. Results of Representation Election, April 18, 1973.

Unit	Ballots Counted	No Union	Local 390	ARSA[1]	ATU[2] Division 1555	BPOA	Craft[3] Unions	Other
Supervisory Unit	39	15 (38%)	9 (23%)	9 (23%)				6 (15%)
Security Unit	53	2	2			49 (92%)		
Clerical Subunit	147	57 (39%)	87 (59%)					3 (—)
Transportation Subunit	210	20 (10%)	45 (21%)		143 (68%)			2 (—)
Maintenance Subunit	555	34 (6%)	305 (55%)				191 (34%)	25 (5%)
Total Comprehensive Umbrella Unit	912[4]	111 (12%)	437 (48%)		143 (16%)		191 (21%)	30 (3%)

Source: State of California, Dep't of Industrial Relations, Conciliation Service, Results of Bay Area Rapid Transit Election, April 18, 1973. Percentages do not sum because of rounding.

[1] American Railway Supervisors Ass'n.

[2] This was a new Division of the ATU chartered for BART.

[3] Transport Council of Bay Area Craft Unions.

[4] Excludes six unresolved challenged ballots.

It will also be noted in Table 2 that the security unit was overwhelmingly won by the BART Policy Officers' Association. This union became Local 1008 of the Service Employees' International Union (SEIU), the same international union with which Local 390 is affiliated.[54]

Although a majority of the employees involved voted, no union received a majority of the votes in the supervisory unit. A run-off election was held on May 17, 1973, in which the supervisors chose to remain unrepresented.[55] Three years later, on June 19, 1976, the supervisors voted to be represented by the BART Supervisory and Professional Association (BARTSPA).[56]

Consequences and Evaluation

By the summer of 1973, BART employed about 1,000 non-managerial, non-professional persons, over 900 of whom were in the three subunits

54. CAL. PUB. EMPLOYEES REL., March 1973, at 58.

55. STATE OF CALIFORNIA, DEP'T OF INDUSTRIAL RELATIONS, CONCILIATION SERVICE, RESULTS OF BAY AREA RAPID TRANSIT ELECTION. (April 18, 1973).

56. Agreement between San Francisco Bay Area Rapid Transit District and BART Supervisory and Professional Association (effective January 8, 1977 through December 31, 1979), § 4 at 3.

of the large comprehensive bargaining unit (see Table 2). Over 150 had come from other transit systems on a priority basis that provided that they retain their former wage rate and their old seniority date for benefit purposes (See Table 1). Thus, a large number of employees scattered throughout BART, and especially throughout the comprehensive unit, were receiving as much as $2 per hour more than their fellow employees who were doing the same work.[57] This naturally resulted in feelings of inequity and introduced a major emotional issue into the negotiation of the first labor agreement between the parties.

When formal negotiations for the comprehensive unit began in early May 1973, the unions (Local 390 and Division 1555) demanded that BART equalize wages between priority and non-priority employees.[58] No agreement was reached on this issue through May and June, and the unions struck BART at 12:01 a.m. on July 2. During the strike, the definition of "parity" changed from that of equalizing the wage rates of the people employed by BART to bringing BART's wages into line with those of other transit systems in the Bay area.[59] The strike lasted until August 1, during which time the system was entirely shut down. When a settlement was finally reached, it included an agreement that inequities would be eliminated during the three-year life of the agreement. It also included a generous (uncapped) cost-of-living allowance, various fringe benefits, a union-shop provision, and a no-strike clause.[60]

In retrospect, the 1973 strike appears inevitable. It may also have been constructive from an industrial relations point of view. In addition to the usual problems of a newly-recognized union and its leadership having to prove its militancy to the membership and the company, BART had two special problems that reduced the chances of a peaceful settlement. One was the existence of two separate, and until then competing, unions negotiating jointly for the first time. No doubt there were communication and leadership problems that had to be worked out in the course of negotiating a first agreement that was to cover three different employee groups. This, in itself, would have made a settlement without a strike a major accomplishment.

The other special problem was, of course, a phenomenon of the wage and benefit disparity between priority and non-priority employees. The only way management could correct this problem was to spend a large amount of money. It is doubtful that BART's Board of Directors would have, or

57. CAL. PUB. EMPLOYEES REL., August 1973, at 45.

58. Letter from James E. Terry, Director of Employee Relations (BART), to Ernst Stromsdorfer, Deputy Assistant Secretary of Policy Evaluation & Review, U.S. Dep't. of Labor (August 26, 1976), *reprinted in* F. SISKIND & E. STROMSDORFER, *supra* note 30 at 189.

59. *Id.*

60. CAL. PUB. EMPLOYEES REL., December 1973, at 47.

politically could have, accepted such a settlement without a reasonable show of determination for the sake of the public and, especially, for Sacramento.

Once both sides had shown themselves and their respective constituencies that they could strike or take a strike, the relationship between BART and the two unions in the comprehensive unit seems to have quickly improved. The eventual elimination of the 13(c)-related inequities, the high wage rates, and generous fringe benefits also helped that relationship.

In July 1976, upon the expiration of the first agreement, BART, Local 390 and Division 1555 reached a second three-year labor agreement without a work stoppage and without much recrimination. In addition, this settlement called for no wage increase beyond cost-of-living adjustments, a 25 percent reduction in entry-level rates for certain new employees, and a 15 percent reduction for certain promoted employees during a 90-day probationary period.[61] The author is informed that, while there are still some problems to be worked out, relations between BART and Local 390 and Division 1555 are now on a sound and professional level.[62]

Of course this does not mean that new controversies have not and will not emerge from time to time. On July 8, 1977 a one-day surprise strike occurred when Division 1555 claimed that the manning of two control room electronic consoles with one rather than two persons was unsafe. An agreement was signed at 11:00 a.m. to the effect that BART would go back to using two persons temporarily and if the matter was not resolved by July 22, it would be submitted to binding arbitration. The State Public Utilities Commission subsequently told BART to use two employees on the consoles.[63]

Another dispute between the District and the BART Police Officers' Association (Local 1008 of the SEIU) resulted in a 13-day strike upon the expiration of their first agreement in August 1977. The dispute ended in a Memorandum of Understanding which established that police officers may not honor the picket lines of other BART employees, but they may refuse to do non-police work during a strike.[64] A question of amnesty for the strikers was left unresolved with 20 police officers facing possible contempt of court penalties pending litigation.[65]

The economic impact of BART's 13(c)-related experience is more difficult to determine. In a study reported on April 4, 1978, BART compared its

61. CAL. PUB. EMPLOYEES REL., September 1976, at 106.
62. Interview with Charles A. Simon, BART Manager of Labor Relations (May 19, 1978).
63. CAL. PUB. EMPLOYEES REL., September 1977, at 40.
64. CAL. PUB. EMPLOYEES REL., December 1977, at 24.
65. *Id.*

wages and benefits with those of other organizations.[66] Table 3 presents some wage data extracted from that study; it shows that BART's wage rates are substantially above those of other employers in the area and other systems in the industry. In addition, BART's benefits and cost-of-living allowance equal or exceed those in any of the organizations surveyed.

Table 3: Comparison of BART Wage Rates with Other Organizations for Selected Classifications, December 1977. (Percent figures indicate percentage by which BART rates exceed those of other organizations surveyed.)

Classification	All Organizations	Local Organizations	Transit Organizations
Clerk Typist	+23%	+22%	+19%
Storekeeper	+19%	+31%	+10%
Janitor	+26%	+36%	+21%
Senior Electrician	+10%	+6%	+11%
Train Operator	+17%	—	+17%
Bus Operator	+20%	+17%	+21%
Station Attendant	+44%	—	+44%

Source: San Francisco Bay Area Rapid Transit District, Employee Relations Dep't, "Wage Survey of Technical and Office Support Personnel." December 1977.

Obviously, BART's labor costs are high. Whether or not they are higher than they would have been in the absence of its 13(c) agreement is an interesting but unanswerable question. BART would have been under strong pressure to approximate the wage and benefit levels of other transit systems in the Bay Area regardless of which union or unions ended up representing its employees and regardless of the way in which those employees were hired. In the Bay Area, the San Francisco Municipal Railroad (MUNI) sets the pattern for other transit systems. Rates at the MUNI are required by charter to be as high as the two highest transit systems in the United States in cities of over 250,000 population with 400 or more operators. In recent years the comparison has been made with two systems in New York City.[67] Thus, it is likely that BART's labor costs would have been just as high in the absence of section 13(c), priority employment, the particulars of the bargaining-unit decision, and the outcome of the election. To say that the elimination of the inequities caused by the priority employment concept was expensive assumes either that the pre-strike wages and benefits established by management were "appropriate" or, that in the absence of the priority employees, the unions would have held out for less. Neither assumption is easy to accept. BART's pre-1973 wage rates had been based on a survey that included non-transit employers in the area and were

66. San Francisco Bay Area Rapid Transit District, Employee Relations Department, Wage Survey of Technical and Office Support Personnel (December 1977).

67. 13(c) Proceedings, *supra* note 20, at 436, 553.

admittedly low.[68] It is highly probable that the wage and benefit levels at BART would have approximated those of other transit systems in the Bay Area in a short time independent of the events discussed in this paper. However, it is possible that these levels would have been attained without the cost and benefit of the strike of 1973.

The probable high cost of the priority employment concept results from the fact that the employees who came from other transit systems brought with them their old seniority date for benefit purposes in addition to their former higher wage rate. As of June 30, 1973, the 73 priority employees who had joined BART had an average seniority of about six years. This resulted in an extra 126 weeks of vacation and 393 days of sick leave.[69] No doubt some of this cost was offset by the acquisition of a partially-trained, stabilized, and industry-committed work force. Counter to this, it has also been argued that in the absence of priority employment, BART would have been faced with an even larger number of adverse-effect claims.[70] This too would have offset some of the cost directly associated with the priority employment part of the 13(c) agreement.

Conclusion and Comment

What is the importance of BART's 13(c) experience? Obviously, it was and is of considerable importance to BART management and to the unions and employees involved. It may also be of some financial importance to the BART District taxpayers who pay an additional one-half of one percent sales tax to support the system and, less directly, to the taxpayers in the rest of California and the rest of the United States. However, there is also a more general, non-financial lesson to be drawn from the events outlined in this article.

The centerpiece of BART's industrial relations development was its 13(c) agreement. Once this had been agreed to, everything from Mr. Kagel's interpretation of that agreement to the strike of 1973 was all but programmed. Given the unique fact situation, the language of the Urban Mass Transportation Act[71] and BART's 13(c) agreement, and the established practices and interpretations in the railroad industry, it is unlikely that the award of any qualified arbitrator would have been substantially different from Mr. Kagel's. Regardless of what bargaining-unit structure was

68. Letter from James E. Terry, Director of Employee Relations (BART), to Ernst Stromsdorfer, Deputy Assistant Secretary of Policy Evaluation & Review, U.S. Dep't of Labor (August 26, 1976), *reprinted in* F. SISKIND & E. STROMSDORFER *supra* note 30 at 190.

69. BART, "Comparative Benefits of 13(c) Priority Hires Contrasted With Those Non-13(c) Personnel Hired From Other Sources," *reprinted in* F. SISKIND & E. STROMSDORFER, *supra* note 30 at Appendix A-9.

70. F. SISKIND & E. STROMSDORFER, *supra* note 30 at 179.

71. 49 U.S.C. § 1601 (1976).

adopted, the existence of the priority employees and the attending wage and benefit inequities would have made it most unlikely that a first agreement could have been arrived at without a strike.

The history of section 13(c) and its ancestral statutes, agreements, decisions, and interpretation over the past 40 years has been one of continual expansion and elaboration. What started as a simple concept to protect employee interests during railroad consolidations has grown into a monster when applied to the urban mass transit industry.

There is nowhere else in American industry, other than the railroads (which stand as a very poor example for the rest of the economy), where employees are statutorily given such job protection. It may be argued that all employees are due a degree of job security, but it is difficult to accept the idea that railroad and transit employees have a special claim to such protection.

The application of the 13(c) concept to transit is an historical accident resulting from the shift from private to public ownership of much of the industry. The initial arguments were in the nature of protecting collective bargaining rights under such conditions. Job protection, as developed in the railroad industry, was an afterthought and more reflective of the political muscle of organized labor at the national level than a reasoned approach to any problems that might have been caused by UMTA[72] funding. The expansion of that concept to include priority employment in a newly-constructed system was especially questionable.

It may be argued that BART willingly entered into the 13(c) agreement and, therefore, no recriminations are in order. It may be that BART's management and counsel were less alert than they should have been. It may also be that the unions took advantage of an opportunity to advance the interests of their members and/or that the Department of Labor failed to exercise the leadership and balance that it should have. But that is not enough.

The tragedy in BART's 13(c) experience is that it is only one example of a much larger and continuing problem. That problem centers on the interaction of public ownership, control, and/or support of various activities and the political influence and expertise of organized labor.

American labor unions are among the greatest institutions in the free world and their political involvement is an integral and important part of the democratic process in the United States. However, the character and personality of the labor movement developed, and to a great extent continues to develop, in the private sector. There the companies have traditionally been relatively free of the need to placate Washington and the state capitals. Indeed, they have considerable political influence and have

72. Urban Mass Transportation Administration.

tended to counter what might otherwise have become a serious political imbalance. In public transit and other similar situations, however, the "company" is dependent upon governmental decision for its very existence. This dependence, which is not limited to UMTA grants, presents the labor lobby with many opportunities to apply the pressure of an organized interest group pursuing a limited purpose. Examples include the addition of section 13(c) in the Urban Mass Transportation Assistance Act and the inclusion of priority employment in BART's 13(c) agreement. No doubt the reader can think of many others.

None of these events is particularly newsworthy. Yet, when we step back and survey the 40-year development in the railroad and transit industries, we are confronted with a powerful, almost glacial, evolutionary force. To this observer, the overall development is most disturbing.

While job protection and priority employment may be to the advantage of some employees and their unions, it is to the disadvantage of others. If it were measurable, the net benefit would approach zero.

The direct impact of section 13(c) on the management of a particular transit system may be negligible or, at least, acceptable. In addition to the reasons for this developed above, transit systems are almost always subsidized monopolies. As such, they can shift additional cost either forward to the rider in the form of higher fares or poorer service or backward to the taxpayer. However, the costs of job protection and priority employment to the *economy* are considerable. In addition to the direct expense of adverse effect and priority employment touched upon in this paper, most economists would agree that there are important, but subtle, costs associated with the misallocation of resources whenever economic decisions are made for non-economic reasons. In the immediate example they would include the additional replacement and training costs to the companies from which the priority employees came and the administrative and legal expenses of processing them and the other employees who may claim to be "affected." They would also include the cost to BART of having had restricted its recruitment pool to a small fraction of the potential applicants available, which presumably results in a poorer average quality of employee hired.

This is not a call to return to pure competition. In public transit that would be especially inappropriate. It would quickly eliminate most of the industry and deny the country the social and indirect economic benefits of urban mass transit. However, it must be remembered that job protection and priority employment are not "free goods;" they cost money. The fact that the cost may be shifted forward in the form of higher fares or poorer service or backwards in the form of higher taxes may make it more palatable to transit management and the labor organizations with which it deals. This only disperses the problem; it does not eliminate it.

The railroad and transit industries have set a bad example by agreeing

to the unions' demand for job security, and they are less efficient because of it. Unfortunately, it would be politically impossible to reverse this development for these industries. The best that can be hoped for is that its expansion can be arrested. However, it is not too late to prevent the extension of these concepts to other industries, especially other transportation industries.