California Public Employee Relations Journal

Issue 164 *February* 2004

Binding-Nonbinding Arbitration: A New Process to Resolve Interest Disputes

Edmund D. Edelman and Daniel J.B. Mitchell

It's about convenience...

It's about progress...

It's about TIME...

CPER is going online!

And we hope you're coming with us

Beginning with this issue, subscribers will continue to receive a **print copy** in the mail **and** will be able to access their subscription **online.** Online access is possible, however, only after your email address is registered with Berkeley Electronic Press (BePress).

BePress now handles *CPER* subscriptions. Contact them at info@bepress.com for subscription and email information, and for other subscription questions.

In order for a larger audience of labor relations professionals to discover our publication, **online access now is open to subscribers and nonsubscribers, alike, but only until March 31, 2004.** Just go to http://cper.berkeley.edu. After that, online access to the journal will be available only to those who are subscribers and registered...so don't delay!

Subscribe and register for *CPER* today: info@bepress.com

Binding-Nonbinding Arbitration

A New Process to Resolve Interest Disputes

Edmund D. Edelman and Daniel J.B. Mitchell

OVER 400,000 LOS ANGELES-AREA public transit riders saw their service abruptly ended in October 2003 by a strike of mechanics — represented by Local 1277 of the Amalgamated Transit Union — at the Metropolitan Transportation Authority. As in all labor disputes, various issues were on the negotiating table and various personalities were involved in the bargaining. In this particular work stoppage, however, a new process was brought into play that ultimately put the buses and trains back into service. We refer to that process as "binding-nonbinding arbitration"or B-NBA, although it also has been termed "supermajority arbitration" or somewhat misleadingly described as a "mediation" plan. The terminology is not important. What matters is that binding-nonbinding arbitration produced a way out of the impasse and could be applied in other public transit disputes, and indeed in the public sector more generally.

Arbitration is used almost universally by unions, both public and private, to resolve grievances over the interpretation of existing contracts ("rights" disputes). It is used in about 20 public jurisdictions in California and in a number of public jurisdictions outside California when impasses are reached during the negotiation of new contracts. The U.S. Postal Service avails itself of binding arbitration. On occasion, private parties have established arbitration processes to resolve such "interest" disputes. Generally, arbitration is understood to be a binding decision prescribed by a neutral third party. But arbitration does not have to be binding; that element takes effect only when it is required by law ("compulsory arbitration" as in the postal case) or when it is agreed to as part of an enforceable contract by the parties.

In the MTA case, the parties agreed to arbitration but did not agree to give the arbitrators binding authority. Instead, they established a process whereby the arbitrators would propose a settlement that could be rejected by either side. However, rejection would require a supermajority vote by either party. MTA could

Edmund Edelman *is an arbitrator, mediator, and conciliator. He has served as a Los Angeles city councilman and county supervisor, was counsel to the special subcommittee on Labor of the U.S. House of Representatives and served as a special assistant to the NLRB's general counsel.* ***Daniel Mitchell*** *is Hosu Wu Professor at the UCLA Anderson Graduate School of Management and School of Public Policy and Social Research. He writes about labor relations and employee compensation, and drew on California history to illuminate the baby boomers' coming retirement in* Pensions, Politics, and the Elderly *(M.E. Sharpe, Inc., 2000).*

reject the proposal by a two-thirds vote of its 13-person board of directors, i.e., nine votes. The union also could reject it by a two-thirds vote of its governing board. Absent one or both of those supermajority rejections, the decision would be binding.

Advantages of Binding-Nonbinding Arbitration

The new process has several advantages for the parties and transit customers. Clearly, the most obvious advantage is that it settled the dispute and ended the strike. In more general terms, however, B-NBA has five major attractions:

- B-NBA avoids the "sovereignty" problem constructed when a matter that relates to public budgets is resolved by an unaccountable outside party. From the employer's perspective, final budgetary decisions rest with officials charged with formulating and approving fiscal expenditures. This issue has legal ramifications in California, described more fully below. However, even apart from the legal issues, B-NBA speaks to a genuine concern of officials who have ultimate responsibility for public funds.
- When privately negotiated, B-NBA gives the parties control of the process itself. They can determine, for example, the composition of the arbitration panel, the criteria to be used in making the arbitration decision, and the proportion of votes required to constitute a supermajority. The ability to have a voice in the process can make B-NBA more acceptable to both sides.
- B-NBA can avoid a strike and allow public services to continue while the process is in use. If MTA and ATU Local 1277 had negotiated a B-NBA process *in advance* of their contract negotiations, the service disruption of 2003 would not have occurred.
- B-NBA allows the parties to control what issues will be referred to the arbitrator or arbitrators. The entire contract does not have to be subject to B-NBA. Rather, the parties can submit only those items they are unable to resolve on their own. In the MTA-ATU case, the parties submitted only the issue of health insurance, the area in which the two sides were furthest apart.
- Under B-NBA, the arbitrator(s) initially can act as mediators. If mediation is successful, there is no need for a formal arbitration decision. And a matter resolved by the parties without arbitration is inherently acceptable to both sides.
- If either side rejects the decision of the arbitrator(s) under B-NBA, the parties reacquire the same rights they had before the process. The public agency can declare an impasse, impose new terms and conditions, and hire replacements. And the union can elect to strike. However, as a practical matter, the parties likely would find it difficult to reject a decision of the arbitrator(s) if it were seen as fair by the public.

In essence, B-NBA is a user-friendly form of arbitration that can be shaped by the parties to make it relevant to their particular situation. Even were such a system to be prescribed by law — a possibility discussed below — significant latitude for party input could be built in. At present, the law regulating public transit labor disputes in California involves a rigid and unproductive form of factfinding that offers few positive contributions to dispute settlement. In fact, under existing law, MTA and its predecessors have averaged a strike every three to four years since the transit system was publicly operated. Table 1 provides a history of these disputes.

Background to the 2003 Strike and Settlement

The Los Angeles County Metropolitan Transportation Authority operates its buses within five regional "transit service sectors" and operates its subway and light-rail systems through a rail service sector. Its largest collective bargaining unit comprised of bus drivers and rail operators is represented by the United Transportation Union. About 2,000 mechanics and maintenance personnel are represented by ATU Local 1277. There are smaller units of other workers represented by the Transportation Communications Union, the American Federation of State, County and Municipal Employees, and the Teamsters.

MTA employs about 9,200 workers in total; about 85 percent are union-represented. It has an executive staff and a 13-member board that includes the five Los Angeles County supervisors, four representatives of the City of Los Angeles, and representatives of other cities within the county. Its fleet consists of almost 2,400 buses. MTA rail operations — begun in 1990 — now cover over 70 miles of track and repre-

sent a major capital investment. Shortly before the strike, MTA had opened a new light-right system running from downtown L.A. to Pasadena. The rail systems and new rapid express buses are aimed at enticing commuters from their cars and reducing area traffic congestion and pollution. Apart from public transit, MTA has certain responsibilities for area freeways — such as promotion of carpooling and emergency towing service — and for bikeways.

Public transit in the Los Angeles area goes back to privately owned services of horse cars, cable cars, and local steam railways in the 19th century. In that era and into the early 20th century, such transit was seen as a means to develop otherwise inaccessible real estate. Over time, an extensive system of what would now be termed light rail developed, including a subway that operated from 1925 until 1955. The rail component was replaced by buses, mainly during the 1940s and 1950s.[1] Several ballot propositions hoping to move private transit operations to a public agency were placed before voters during the 1930s; these were unsuccessful despite the efforts of unions that were then in conflict with the private owners of the system.

During the 1950s, the Los Angeles Metropolitan Transit Authority, an earlier "MTA," took over much of the area's transit operations. However, some cities, such as Long Beach and Santa Monica, retain their own municipally owned bus systems. In 1964, LAMTA bus operations were transferred to the Southern California Rapid Transit District. The current MTA was formed in 1992 from a merger of the SCRTD and a planning agency, the Los Angeles County Transportation Commission.

MTA's total annual budget in fiscal year 2004 is projected to be $2.7 billion. A little more than one-third of this amount, about $940 million, is expected to be expended for transit operations. The remainder of the budget is largely used for various capital projects and project-related debt service. Thirty-one percent of the operating budget will come from fare and miscellaneous revenue; the rest will come from federal and state subsidies. Labor costs account for approximately 69 percent of operating expenditures.[2]

Because the transit system originally was largely private, workers were governed by federal labor law and had the right to strike. This right was retained when the system became public. In effect, elements of national labor law were incorporated into state law regarding public transit.[3] Under SCRTD, there were eight major strikes. Notable among these strikes was a 68-day work stoppage in 1974 and a 36-day stoppage in 1976. Thus, the 35-day stoppage in 2003 was the third-longest since the transit system went public. However, since the current MTA was created, there have been

Table 1: History of Strikes

Including the Los Angeles Metropolitan Transit Authority (1958-1964), Southern California Rapid Transit District (1964-1993) and Los Angeles County Metropolitan Transportation Authority (1993-Present)

(1) 11/16/60 to 11/20/60 - LAMTA struck by Brotherhood of Railway Trainmen - BRT (now UTU), resumed working 11/21/60. Strike duration: 5 days.
(2) 6/14/64 to 6/21/64 LAMTA struck by BRT (now-UTU), resumed working 6/22/64. Strike duration: 8 days.
(3) 2/28/72 to 3/4/72 SCRTD struck by ATU, resumed working 3/5/72. Strike duration: 6 days.
(4) 8/12/74 to 10/18/74 SCRTD struck by UTU, resumed working 10/19/74. Strike duration: 66 days.
(5) 8/23/76 to 9/27/76 SCRTD struck by ATU, resumed working 9/28/76. Strike duration: 36 days.
(6) 8/26/79 to 9/17/79 SCRTD struck by ATU and BRAC, resumed working 9/18/79. Strike duration: 23 days.
(7) 9/15/82 to 9/19/82 SCRTD struck by UTU, resumed working 9/20/82. Strike duration: 5 days.
(8) 7/23/94 to 8/3/94 LACMTA struck by UTU. Strike duration: 12 days.
(9) 9/16/00 to 10/17/00 LACMTA struck by UTU, ATU & TCU. Strike duration: 33 days.
(10) 10/14/03 to 11/17/03 LACMTA struck by ATU. Strike duration: 35 days.

Source: Prepared with the assistance of Glenda Mariner at the MTA's Dorothy Peyton Library.

strikes during each round of bargaining except one. Stoppages occurred in 1994 and 2000 (when a strike lasted 32 days). Generally, work stoppages have been prompted by drivers. In that respect, the 2003 dispute was an exception; the mechanics' labor discord was the impetus. However, the drivers refused to cross ATU picket lines in 2003, effectively closing down most of MTA's system.[4]

ATU Local 1277's leader is Neil Silver, first elected president of the local in 1987. (He was out of office during 1991-94.) Silver generally is described in press accounts as an old-line labor official, a label that seems to imply "adversarial." At the time of the 2003 strike, MTA's board chair was County Supervisor Zev Yaroslavsky. Both individuals made public statements during the strike that hindered dispute resolution. For example, Silver declared in an op-ed column in the *Los Angeles Times* that "MTA has perfected the arts of hypocrisy and divisiveness."[5] And Yaroslavsky declared that the strike was caused by Silver's political problems within his local. He remarked, "I really don't understand how one man's political interest in union politics has held the entire county hostage."[6] (After the strike ended, Silver was reelected president of the local with 56 percent of the vote.)

The failure to provide service ultimately has a negative effect on MTA apart from the evident cost to riders who have no viable substitutes for public transportation.

As is generally the case in labor disputes, both sides suffer when work stoppages occur. In the short run, workers lose wages. Even when strike funds exist, there is a significant loss of worker income. For MTA, however, the costs primarily have been political rather than economic. During a strike, MTA does not have to pay wages or fuel costs, yet the agency continues to receive income from sales tax and other sources. There are estimates that the agency gains as much as $20 million a month from a strike.[7] However, the failure to provide service ultimately has a negative effect on MTA and its programs, even apart from the evident cost to riders who have no viable substitutes for public transportation.[8]

While it is true that many transit users are low-income residents with poor voting records — many are non-citizens — MTA in the past has relied on the public's goodwill to support its programs. Its predecessor, SCRTD, received additional revenue from an increase in the sales tax beginning in 1971, pursuant to a voter-approved referendum. And MTA's plans to lure commuters from their cars to rail and improved bus service are critically dependent on subsidies. These plans are unlikely to succeed unless the unreliability of the transit system caused by repeated strikes is reversed. Appeals to the voters for additional public funding are unlikely to be well received if strikes occur whenever labor negotiators are at the bargaining table.[9] In addition, businesses that have been negatively affected by MTA disputes — because their customers or employees have been impeded — are not likely to support MTA in any future funding appeals.[10]

2003 Strike and Resolution

Most public sector workers in California are covered by a variety of collective bargaining statutes that are interpreted and enforced by the Public Employment Relations Board. The vast majority of MTA workers are not subject to PERB's oversight.[11] The statute that created MTA does not provide a regulatory framework for collective bargaining; it simply reassigned the responsibility for negotiating and approving labor agreements from SCRTD to MTA.[12]

However, there is a fairly well-established procedure for resolving bargaining impasses in the transit industry. Called the Public Transportation Labor Disputes Act,[13] it allows either party involved in a bargaining impasse to request gubernatorial intervention. If the governor believes that a threatened or actual strike or lockout will "significantly disrupt public transportation services and endanger the public's health, safety, or welfare," he or she can appoint a factfinding board of investigation. The board is given seven days to prepare a report. However, *the board is specifically forbidden to make recommendations.*[14] Once the report is prepared, the governor can direct the attorney general to ask a court to enjoin any work stoppage for 60 days.[15] After that period, a work stoppage can occur.

During the 2003 negotiations, attention initially was focused on the drivers, although both the drivers' and the mechanics' contracts were up for renegotiation. Governor Davis first invoked the factfinding/injunction process for the drivers, but not the mechanics. However, a two-week injunction for the mechanics later was obtained on August 13 and then extended through October 12.

As early as January 2003, ATU members voted by a 90 percent margin to authorize a strike. And Silver declared in late February that although he did not want a strike, "if need be, we will have a series of strikes in this town the likes of which we have never seen before."[16] By August, he was predicting a strike that would be longer than the 68-day strike of 1974.[17] MTA management officials believed that Silver was "posturing" and were surprised when the work stoppage occurred. Even after the strike was underway, one MTA board member said that "the strike should be over in 10 days or less."[18] It ended up lasting for 35.

Issues Behind the Strike

The precise terms of the offers and counteroffers that were exchanged at the bargaining table during the course of MTA-ATU negotiations are unclear. However, it is certain that health care was a major issue from the start. Health care costs for employers began rising dramatically after a brief hiatus during the 1990s. As a result, health care became a major issue in many union-management negotiations, including a major supermarket strike that began at nearly the same time as the MTA stoppage. But health care, by itself, need not have been the deal-breaker. Los Angeles County, for example, reached a settlement including health care issues with the Service Employees International Union while the MTA dispute was in progress.

In the case of MTA, while cost was an issue, administration of the health care fund also played an important role. Under an unusual arrangement, MTA contributes to a union-operated fund over which the agency had little administrative influence. More typically, employers either arrange health-care coverage after they have negotiated benefits or they co-administer the plan, with union and management having equal representation. MTA claimed that the union-operated plan did not have proper cost controls. During the course of the negotiations, MTA more specifically argued that the broker who provided coverage for the union's plan was paid a commission based on funding and thus had no incentive to hold down expenses.[19]

Apart from concerns over current health care cost increases and about administration of the fund, MTA wanted to rein in its exposure to future cost increases. Early in the negotiations, management pushed for a one-year contract with a wage increase of about 2.2 percent and a reported 16 percent increase in employer contributions to the health plan. It termed this proposal its "last, best, and final offer." In contrast, the union sought a five- or six-year contract that would have assured adequate contributions to the health plan to keep it afloat. Concerning the one-year proposal, Silver told the *Los Angeles Times*, "What I feel like saying about the MTA right now, you can't print it in the newspaper."[20] As part of its strategy, the union pushed a bill in the legislature — never enacted and vigorously opposed by MTA — that would have mandated MTA contributions to the health fund.[21]

By summer, the parties were negotiating about a multi-year contract but were still far apart on the health-care issue. Little progress was reported by October 14, when the strike began. A complicating factor was that 4 of the 13 members of the MTA board — County Supervisor Gloria Molina, Los Angeles Mayor James Hahn, and Los Angeles City Council Members Martin Ludlow and Antonio Villaraigosa — were barred from taking part in the negotiations. Under an interpretation of MTA's ethics rules advanced by the county counsel, these officials, all of whom had received contributions from the ATU in the past, would have had a conflict of interest if they participated in the negotiations. A court challenge was filed by the two city council members. But while the case was pending, they did not participate in forging MTA bargaining strategy.

During the course of the strike, negotiating sessions were conducted under the auspices of a mediator from the State Mediation and Conciliation Service. These discussions tended to end in disputed versions of what was being offered. MTA originally wanted to take over administration of the health fund but later indicated it would accept 50-50 representation.[22] MTA spent several hundred thousand dollars on radio and newspaper ads to air its positions. In contrast, ATU made little effort at public relations.

On October 27, MTA CEO Roger Snoble announced that he had been "instructed" by the MTA board to declare an impasse, although the implications of that announcement were unclear. In a private sector dispute, such declarations often are aimed at setting the legal stage for hiring replacements for strikers. However, MTA denied it had such intentions.[23]

On October 31, ATU offered to return to work if MTA would submit the bargaining impasse to binding arbitration. As do almost all unionized employers, MTA has agreed to contractual agreements that include binding grievance arbitration. But when arbitration was proposed for the bargaining dispute with ATU, MTA's response was that it could not turn over responsibility for expenditures to an outside arbitrator. Moreover, MTA asserted that it already had made a "last, best, and final offer."[24] Some observers suggested that the MTA board had an aversion to the involvement of outsiders because of an earlier court decision ordering the purchase of buses and minimum service requirements.[25]

Despite MTA's aversion to binding arbitration, a proposal was made by the authors of this article in an op-ed piece published in the *Los Angeles Times* — and subsequently endorsed in a *Times* editorial.[26] The proposal called for the parties to adopt B-NBA to resolve their dispute. There was no immediate response by either side. However, MTA insisted that the union take management's "final" offer to its membership. On November 7, such a vote occurred and — not surprisingly — it was overwhelmingly rejected by a 1,267 to 87 margin. At the same time, a superior court judge issued a decision that allowed the four MTA board members who had been barred from negotiations to rejoin the board's decisionmaking process.

One returning board member — Gloria Molina — indicated that she backed management's final position. However, the other three members held a press conference endorsing some form of arbitration as a means to resolve the dispute and restart transit service. The combination of the novel B-NBA proposal, the union's overwhelming rejection vote, and the infusion of the new board participants ultimately led to an agreement to end the strike on November 17. Councilman Villaraigosa played an important role in bringing the two sides together and to their acceptance of the B-NBA proposal.[27] He reported persuading Silver and Yaroslavsky to get along well enough so that he thought they "were going to start exchanging recipes for matzo ball soup."[28] In any event, ATU members subsequently endorsed the deal, with B-NBA as an integral part, by an 86 percent margin.[29] The MTA board also gave the deal its blessing.

The B-NBA Settlement

Provisions of the B-NBA process were negotiated by the parties once it became apparent that the health insurance issue was not going to be resolved any time soon through bargaining. The key features were as follows:

- While the B-NBA process was underway, workers would return to their jobs and be covered by other provisions of the new collective bargaining agreement.
- While the B-NBA process was underway, MTA would contribute $4.7 million to the ATU Health Care Trust Fund and $1.56 million per month — about $780 a month per active covered employee.[30]
- The parties would select one member of the arbitration panel each. Those two members would, in turn, select a third neutral member. The selection would be from a list of six names, with three selected by each party. One name would be dropped by lot and the others removed one by one until one was left.
- The three-member B-NBA panel would make decisions by majority vote, i.e., two votes of the three would be sufficient.
- Both parties would provide each other with a list of documents to be released to the panel.
- For 15 days after required documents were assembled, the panel would engage in mediation.
- If after the 15th day, mediation was not successful, within a second 15-day period, the B-NBA panel would schedule hearings to reach its decision.
- Factors in such a decision would include comparisons of employer contributions to health plans of other transit agencies in California, comparisons of employer contributions to health plans of other public employers (not just transit agencies) in Southern California, maintenance of the financial stability of MTA, and maintenance of the financial stability of the ATU Health Care Trust Fund *if* it were retained as the

method of providing health coverage. (The panel could recommend alternative means of administering health coverage.)

- Within 20 days of the decision's announcement, the parties could reject it by a two-thirds vote of their governing boards. But absent a rejection by either party, the decision would become binding on both sides.

Other terms of the contract included scheduled wage increases totaling 7 percent with 2 percent retroactive to October 1, 2002 (an increase of 2.1 percent per annum), an expiration date of June 30, 2006, pension improvements, and a one-time floating holiday.

Lessons To Be Learned by the Parties to MTA Contracts

That MTA and its unions could benefit from a better climate of labor relations is not in dispute. Although the new rail lines give the appearance of expanding public transit in Los Angeles, the proportion of the traveling public regularly using such transit is small, perhaps 4 to 5 percent. During the 2003 dispute, estimates of transit users were generally in the 400,000-450,000 range. In the 1980s, however, the estimates were approximately 600,000. Declining market share ultimately will undermine the base of both parties. There will be greater and greater pressure to break up MTA, privatize it or contract out service, or substitute other forms of public transit such as "jitney" service.

Without developing the merits of these options, it is safe to say that MTA's unions oppose them. MTA likely would oppose at least some aspects of plans calling for transit alternatives. Yet continuation along the current path of strikes and disruption will push public opinion — and ultimately political opinion — in those directions. The current pattern of negotiating in the media instead of at the table —and of repeatedly announcing "final" positions that turn out not to be final — will lead to more turmoil in the future if not halted.

There are lessons to be learned from labor history. In the 1970s, for example, unions and major steel producers realized that strikes were pushing customers to rely on imports. Once customers sampled foreign alternatives, they did not necessarily return to American suppliers. As a result, labor and management agreed to a system of private binding arbitration in the event they could not come to an accord on a new contract. It is interesting to note that once the parties put the binding arbitration process into effect, they never used it; rather, they always came to agreement before the deadline at which arbitration would have been invoked.

When arbitration was proposed, MTA's response was that it could not turn over responsibility for expenditures to an outside arbitrator.

Still further back in history, there are other lessons for labor relations at MTA. At one time, the sharp distinctions that are made now between mediation and arbitration, and between rights versus interest arbitration, did not exist. Industries such as apparel relied on "umpires" who facilitated accords, whether over new contracts or in the resolution of grievances. In effect, the parties dealt with problems on an ongoing basis, not just at contract renegotiation time. While not a panacea for ending all frictions, informal processes for resolving disputes whenever they arise would benefit MTA and its unions.

If MTA and ATU could negotiate a B-NBA process for resolving the 2003 strike, they surely could negotiate a continuing process for resolving future disputes. Other unions that deal with MTA also could go that route. Permanent umpires, rather than one-time panels set up only when impasses in contract disputes arise, could help steer labor-management relations in a preventative direction. B-NBA could be a routine element in labor relations at MTA.

More Lessons To Be Learned

Although the 2003 MTA-ATU dispute was settled using B-NBA on a voluntary basis, it would be possible to mandate such a process for public transit in California or for other elements of state or local government. Indeed, for law enforcement and fire protection personnel, such a mandate

already exists. In 2000, the legislature enacted S.B. 402, which ushered in conventional (binding) arbitration beginning January 1, 2001, in police and fire impasses at the behest of affected unions. The law was challenged by Riverside County and declared in violation of the state Constitution by the California Supreme Court in April 2003.[31] The unanimous decision focused on the delegation of a budgetary issue regarding compensation of county law enforcement employees to an outside arbitrator. Such a delegation was found to violate provisions of the California Constitution.[32] As a result, the legislature enacted S.B. 440 in 2003, providing for arbitration similar to that mandated by the voided S.B. 402, but allowing the arbitration decision to be rejected only by unanimous vote of the local governing body.

The new bill was signed into law by Governor Gray Davis shortly after the recall election of October 7, 2003. It has not yet been tested in the courts, and so it is unclear whether the requirement of a unanimous vote — the maximum possible supermajority — will face some future constitutional challenge. However, that legislation conceivably could be amended to pose a lower supermajority hurdle if it turns out that unanimity does not pass constitutional muster. A lower proportion such as two-thirds might increase the odds that that legislation would be upheld as constitutional. As noted, the MTA-ATU arbitration scheme allowed for a two-thirds rejection by either side. In addition, MTA and similar *state*-created agencies would not be subject to the same constitutional restrictions that apply to cities and counties. Moreover, because the 2003 MTA-ATU accord was voluntary, the constitutional issue may not arise.

Alternatively, it would be possible to add a B-NBA process to the statutory procedure system that now applies to transit disputes. But the kind of bare-bones factfinding the law requires, with no recommendations permitted, seems unproductive. If an arbitration component were to be enacted, it would be more useful to drop the provision prohibiting the board of investigation from making a recommendation concerning the issues in dispute. Obviously, arbitrators involved in a B-NBA process will, in the course of their investigations, assess and determine the facts of the dispute. So the B-NBA procedure carries with it a factfinding process.

The lack of a dispute resolution mechanism other than the strike raises an important policy issue for state lawmakers. Transit users usually have no inexpensive substitutes for public transportation services when they need to travel to work, school, or other locations. Repeated and lengthy strikes also undermine the longer-term goal of increasing reliance on public transit. The continued occurrence of strikes could erode earlier public support that has been expressed in the form of voter approval of sales-tax funding to hold down fares and increase services. While there presently is no groundswell of support in the legislature for a B-NBA process, future strikes unfortunately might provide impetus for such a movement. But parties can sidestep that route by implementing B-NBA on a voluntary basis.

The lack of a dispute resolution mechanism other than the strike raises an important policy issue.

Certainly, mediators from the State Mediation and Conciliation Service would encourage voluntary use of B-NBA in transit and other public sector impasses. And even if a version of B-NBA were to appear on the books, the parties voluntarily could negotiate some variant to settle disputes. The constitutional provisions restricting the delegation of budgetary decisions apply to cities and counties. It would not be a violation of the Constitution to require binding arbitration for state-created agencies such as MTA or other transit authorities. Enacting a B-NBA procedure clearly would be an option.

B-NBA bridges the gap between conventional binding arbitration, in which the final decision is left entirely to a third party, and the current mediation and factfinding approach, which may not produce a resolution. It gives each side a way out of a hardened or intractable dispute, while keeping their respective feet on the brake in case the decision of the arbitrator(s) is unreasonable or unacceptable to either party. The parties, if they agree to B-NBA and it fails to work to their satisfaction, do not give up their future rights. The union can strike. And the public agency can declare an impasse, hire replacements, and impose new contract terms and conditions. ❋

1 Limited streetcar service persisted until the early 1960s. Some of the new rail service operates on the old rail system right-of-ways. Most, however, is newly constructed.

2 Budget information for MTA is available at www.mta.net.

3 For example, the California Department of Industrial Relations conducts public transit representation elections in a manner similar to the federal National Labor Relations Board.

4 A new contract for drivers was negotiated not long after the ATU strike ended.

5 Neil Silver, "The MTA Bargains in Bad Faith and Makes Unacceptable Proposals," *Los Angeles Times*, November 2, 2003.

6 Sharon Bernstein and Kurt Streeter, "MTA Talks Advance," *Los Angeles Times*, October 24, 2003.

7 Kurt Streeter, Patrick McGreevy, and Mitchell Landsberg, "Tangle of Causes Fueled Dispute," *Los Angeles Times*, October 16, 2003.

8 Non-MTA public transit agencies continued to provide service during the strike, as did certain private bus operators that function under MTA contracts. These other operators, however, did not expand their routes to substitute for MTA lines. Taxi service remained available but expensive compared with public transit.

9 Due to various scandals relating to the construction of the subway, there current is a ban on the use of sales tax to extend the system underground. Repeal of that ban would require consent of the voters in Los Angeles County.

10 The negative impact on businesses is likely to show up in lost sales tax and other tax receipts. Reliable data on the economic impact of the 2003 strike are not available, however.

11 Effective January 1, 2004, the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, which applies exclusively to MTA supervisors, is administered by the Public Employment Relations Board.

12 California Public Utilities Code Sec. 130051.

13 Labor Code Secs. 1137-1137.6.

14 Transit strikes at the SCRTD and the Bay Area Rapid Transit Authority in 1979 led the legislature to look for a dispute resolution process. The legislature considered use of final-offer arbitration, but that approach was opposed by unions and management. It appears that in order to win agreement on a procedure, the bar to recommendations was included. See "New Impasse Procedure for Transit Services," *CPER* No. 51 (December 1981), pp. 66-67.

15 California Labor Code Sec. 1137. As is the case for most other public sector workers, the right to strike of transit workers is not explicitly granted or denied in the state Labor Code. However, court decisions have required the legislature to ban strikes explicitly if it wishes to deny the right to strike.

16 Kurt Streeter, "Union Threatens MTA Strike," *Los Angeles Times*, February 21, 2003.

17 Kurt Streeter, "Extension Sought on MTA Talks," *Los Angeles Times*, August 13, 2003.

18 Kurt Streeter, Jennifer Oldham, and Mitchell Landsberg, "No Negotiations in Sight to End Transit Strike," *Los Angeles Times*, October 15, 2003; Kurt Streeter, Patrick McGreevy, and Mitchell Landsberg, "Tangle of Causes Fueled Dispute," *Los Angeles Times*, October 16, 2003.

19 Sue Fox and Kurt Streeter, "Health-Care Rift is the Flashpoint for MTA Strike," *Los Angeles Times*, October 15, 2003.

20 Kurt Streeter, "Union Threatens MTA Strike," *Los Angeles Times*, February 21, 2003.

21 A.B. 1720. See MTA press release of May 8, 2003, for the official response to this proposed legislation.

22 Kurt Streeter, "MTA Backs Off on Union Health Insurance Issue," *Los Angeles Times*, October 21, 2003.

23 Kurt Streeter, "MTA Ends Talks With Mechanics," *Los Angeles Times*, October 28, 2003; Kurt Streeter, "MTA to Make Offer Directly to Mechanics," *Los Angeles Times*, October 29, 2003.

24 MTA press release dated October 31, 2003.

25 The litigation was brought by the controversial "Bus Riders Union," a group that had backed MTA labor unions in prior strikes as well as supporting unrelated movements such as the Palestinian cause in the Middle East.

26 Edmund D. Edelman and Daniel J.B. Mitchell, "Arbitration Can Be the Key, Despite MTA's Resistance," *Los Angeles Times*, November 6, 2003; "New Voices in MTA Strike," *Los Angeles Times*, November 10, 2003.

27 Kurt Streeter and Sharon Bernstein, "Villaraigosa Is Praised for Getting MTA Talks on Track," *Los Angeles Times*, November 28, 2003.

28 "A Permanent MTA Solution" (editorial), *Los Angeles Times*, November 18, 2003.

29 The vote was 1,159 in favor, 191 opposed, and 5 voided ballots. ATU Local 1277 press release, November 19, 2003.

30 The health plan also covers about 800 retirees. Retirees received coverage from Medicare so their cost to the plan comes from expenses not paid by Medicare.

31 *County of Riverside et al., petitioners v. the Superior Court of Riverside County, Respondent; Riverside Sheriff's Assn., Real Party at Interest* (2003) 30 Cal.4th 278, 160 CPER 19.

32 The provisions at issue were Art. XI, Sec. 1(b), and Art. XI, Sec. 11(a).