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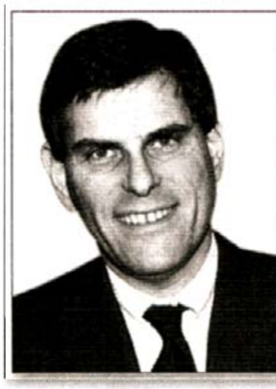
Managing Complex Transactions

In order to achieve the goals of city policy-makers, Law Department attorneys are often called upon to engage in complex transactional work that proceeds through many phases involving many players.



Such transactions require our attorneys, usually drawn from several divisions of the Law Department, to resolve multiple issues, negotiate and, sometimes, litigate with multiple parties and coordinate the efforts of numerous city offices and agencies. One notable example is the long effort, ultimately successful, to merge the New York Police Department (NYPD), transit police and housing police in 1995. Another, requiring perseverance and the application of considerable skills, is the recent transfer of the city's franchise bus service from private companies to the Metropolitan Transportation Authority (MTA).

For decades, the city's Department of Transportation (DOT) supplemented the bus service provided by the MTA through a mix of local and express bus lines operated, most recently, by seven private bus companies on franchises awarded by DOT. This system had a fleet of approximately 1,250 buses, and ran a total of 82 local and express routes servicing passengers in Queens, Brooklyn, the Bronx, and Manhattan. Although the private companies originally paid the city franchise fees, the city eventually owned almost all of the buses and, since 1974, subsidized their operating costs, recently by as much as $189 million per year.

To seek efficiencies from having a single authority provide bus service throughout the city, on April 19, 2004, Governor George Pataki, Mayor Michael Bloomberg and MTA Chairman Peter Kalikow announced that bus service in the areas in which the seven private bus lines operated would be transferred to the MTA with a city subsidy. The MTA eventually created a new subsidiary, the MTA Bus Co. (MTA Bus), to provide service in the areas formerly served by the franchised private companies.

The transition began on Jan. 3, 2005 when MTA Bus began service in the areas previously served by one of the companies, Liberty Lines. Transitions continued throughout 2005 and into 2006 as the city reached agreements with the remaining companies. With the transition of service of the last remaining company, Triboro Coach, on Feb. 20, 2006, MTA Bus now provides service in all of the areas previously served by the private companies.

Although the transfer process may appear rather straightforward, it was in fact complex and attenuated, involving separate and parallel negotiations between the city and the MTA, the private companies, the unionized employees of those companies, the nonunionized employees of the same companies, and the federal government. Each set of negotiations presented its own issues of labor, environmental or pension law, to name only a few of the more salient areas, its own technical difficulties and its own business considerations. Before the end of the process, seven divisions of the Law Department, eight other city agencies and four private consultants performed various project-related tasks for the city.

On the city's side, negotiations for the transfer were conducted primarily by the mayor's Office of Management and Budget (OMB) and by the Contracts and Real Estate Division of the Law Department. OMB was involved in all aspects of the project and made key decisions on the business terms of the various deals. The Law Department acted with OMB as lead negotiator and drafted substantially all of the transactional documents. Law Department attorneys also, among other things, defended six legal actions instituted either to stop the transfer or to improve the negotiating position of various parties to the transfer; drafted local legislation to extend the operating authority of the private bus companies through the transition period; analyzed environmental issues arising from conditions at some of the bus depots owned by the private companies; and assisted in the development of procedures to resolve pending tort claims against the private companies.

MTA and MTA Bus Co.

While the April 19, 2004 transfer announcement committed the city and the MTA to the project, the administrative and operational details of the transition had not yet been determined. The MTA had to decide how the new bus service would be provided, eventually opting to create a new subsidiary, MTA Bus. The city and the MTA also had to negotiate the details of the city's financial subsidy and the transfer of certain assets (e.g., buses and bus depots), culminating in a formal agreement on Dec. 8, 2004. Throughout the transfer process, the city worked closely with the MTA and MTA Bus to resolve significant operational issues and ensure that the results of the city's negotiations with the other parties enabled MTA Bus to provide a seamless transition of service to the riding public.

Private Bus Companies

The city's negotiations with the private bus companies were, in essence, four separate negotiations. Three of the companies negotiated separate agreements on their own behalf. The remaining four companies, while under separate ownership, negotiated together. While the negotiations were often contentious, and suits challenging the transfer were filed by some of the companies in federal and state court, ultimately the city reached agreements with each of the companies. The central features of each agreement concerned the bus company's cooperation in the transition of service to MTA Bus, the transfer of bus depots from the companies to the city through an acquisition in fee or long-term leases, the transfer of related personal property, appropriate compensation to the companies, and the city's assumption of pension and health plan obligations.

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Although the city, strictly speaking, could have terminated its franchise agreements with the private companies and ended its relationship with them at any time, the transition would have been difficult to complete or, at best, would have been significantly delayed if it had not proceeded on a voluntary basis. Moreover, the companies owned six of the eight depots from which service was provided. The city therefore needed either to reach an agreement with the companies regarding the depots, to find locations for and construct new depots, or to take the existing depots by condemnation. Since neither alternative could have been accomplished without significant cost and delay, the bus companies' cooperation was important if the transition was to occur without disruption of service.

The bus companies, for their part, asserted property rights to intangible assets such as the bus routes and schedules, good will of the riding public and the value of a trained work force. However, the companies depended on ongoing city subsidies and, in addition, faced significant long-term financial obligations through pension and health plans, which they wanted the city to assume. Since they needed the city's cooperation in these matters, the companies ultimately decided to compromise and reached agreement with the city.

Federal Transit

In the past, the city had used federal funds to purchase buses and construct two bus depots for use of the private bus companies. The city and MTA had to reach agreement with the Federal Transit Administration (FTA) regarding the transfer of those assets from the city to the MTA. Since the assets in question were being transferred to a responsible party and still being used for public transportation, the FTA readily approved the transfer.

Bus Company Employees

Workers at the bus companies were represented by three different union locals. When the city and the MTA announced the transfer plan, the MTA stated that it would "assume all union employees and will honor existing collective bargaining obligations until new agreements are negotiated." Because of this guarantee, the transition issues raised by the unions were not whether union employees would keep their jobs but, primarily, what to do with their pension plans and health benefit trusts. The specific issues varied by company.

In order to ensure continued health care coverage for employees during the course of the transition, the city agreed to pay the health insurance companies for the deficits owed by the bus companies' health benefit trusts. Since the MTA agreed to match the pension benefits of unionized employees in the MTA's Defined Benefit pension plan, substantive pension benefits were protected. However, litigation over certain aspects of those plans is still pending. The parties also differed as to whether the existing private plans should be merged into the MTA Defined Benefit Plan or remain private plans. Those issues were resolved differently in each agreement.

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For the companies' nonunion employees, there was no unconditional guarantee of employment at the time the transition was announced due to uncertainty over how many such employees there were and what tasks they performed. In the end, MTA Bus offered employment to all nonunion employees other than certain senior members of management (including some who had received and accepted offers of continuing employment with companies affiliated with the private bus companies), and family members of the owners of certain companies. Nonunion employees retained by MTA Bus will receive their existing salaries and benefits that are, in the aggregate, comparable to their previous benefits.

Throughout the transfer process, the city and MTA faced litigation from both unionized and nonunion employees over whether the transfer triggered the job protection requirements of 49 USC §5333(b), commonly referred to as §13(c) of the Federal Transit Act, and whether those requirements ran not only to the city but also to MTA Bus. Under §13(c), employees who are worsened in the terms of their employment "as a result of a federal project" are entitled to damages. In addition, in cases of an acquisition of a mass transportation system with federal funds, §13(c) requires an assurance of employment to the employees of the acquired entity.

In order to be entitled to benefits under §13(c), an employee must be shown to be disadvantaged "as a result" of a federal project, or there must be a federally funded acquisition of a bus company. Because no federal funds were used to purchase any assets from the bus companies or otherwise to facilitate the transfer of service to the MTA, the city and the MTA do not believe that §13(c) applies. The unions and the nonunion employees disagree, and this question is currently being litigated in state court and before a U.S. Department of Labor hearing officer.

Conclusion

The transfer of franchise bus service to MTA Bus is an important step toward the improvement of service in certain areas of the city. It was also a significant accomplishment in coordination, negotiation and legal and technical analysis for Law Department attorneys and their colleagues in other city agencies.