



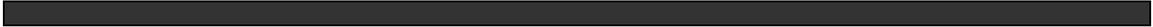
Bay Area Rapid Transit Collective Bargaining Report and Recommendations

Submitted September 5, 2014

by

Agreement Dynamics, Inc.





**This report was commissioned by and transmitted
to the following BART Board of Directors on
September 5, 2014:**

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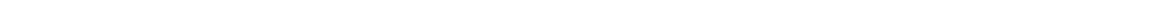
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- BART Executive managers
- Chief management negotiators
- Direct board reports
- Internal BART management negotiation team members
- Negotiation consultants retained by BART
- Administration and budget, information and operations managers
- Communication, marketing and research managers
- BART union officers, negotiators and attorneys
- Former BART staff associated with labor negotiations
- Labor and management negotiators from other transit agencies
- California-based management attorneys and labor attorneys
- Public-sector management and labor negotiators.

Executive review of this report by Dorothy Bullitt, distinguished practitioner and senior lecturer for the University of Washington Evans Graduate School of Public Affairs, provided important feedback to help ensure clarity, objectivity and relevant focus.

Cover photo courtesy of BART

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A.

BART Report Purpose

This report was commissioned by the Bay Area Rapid Transit (BART) Board of Directors as a board-directed, independent study and plan for progress. At the end of 2013 the Board President Joel Keller created an Ad Hoc Labor Negotiations Review Committee of four board members (James Fang, Zakhary Mallet, Gail Murray and Rebecca Saltzman) to guide the process. This report's primary author met regularly in public sessions with this ad hoc committee to discuss and receive direction and clarifying information to guide the development of specified study objectives.

The ad hoc committee designated those objectives to be:

1. Assess the processes and procedures utilized during 2013 collective bargaining between the District and AFSCME, ATU and SEIU unions from the perspectives of the board, labor and management participants and provide comments and lessons learned;
2. Determine what caused 4.8 and recommend ways to prevent similar situations in future negotiations;
3. Provide pros and cons of binding interest arbitration;
4. Review the Costa Mesa "COIN" ordinance and analyze and provide BART-specific external communications recommendations;
5. Provide recommendations for implementation by the District that will improve the process of labor negotiations and labor relations;
6. Offer safeguards to minimize future labor disputes.

Please note: This report does not review the circumstances regarding the deaths of two individuals that occurred during the second strike. The National Transportation Safety Board is currently conducting an investigation into this matter, and it is anticipated that a report will be issued later this year. While several interviewees asked that this report draw conclusions about what happened and why, that is not within the scope or charge of this undertaking. It is clear that many are still in mourning and will be deeply affected by this for a long time.

B. Methodology

Interviews:

As of August 29, 2014, study authors conducted over 200 hours of interviews and follow-ups with 60 individuals, including:

- BART Board of Directors
- Executive managers
- Direct board reports
- Internal BART management negotiation team members
- Negotiation consultants retained by BART
- BART administration and budget, information and operations managers
- BART communication, marketing and research managers
- BART union officers, negotiators and attorneys
- Former BART staff associated with labor negotiations
- Labor and management negotiators and managers from other transit agencies
- California-based management attorneys and labor attorneys
- Public-sector management and labor negotiators

Documents Reviewed (over 3,600 pages):

- Current labor contracts for Amalgamated Transit Union Local 1555 (ATU), American Federation of State, County and Municipal Employees, Local 393 (AFSCME), and Service Employees International Union Local 1021 (SEIU); sections of previous labor contracts were also reviewed for comparison purposes;
- MOU for San Francisco Municipal Transportation Agency and Transport Workers' Union Local 250-A (9163) and recent PERB charges related to interest arbitration;
- ATU, SEIU, AFSCME and management bargaining proposals for 2013 BART labor negotiations;
- Tentative Agreements signed in 2013 during BART labor negotiations;
- Lawsuits, Governor's Board of Investigation Report (August 8, 2013) and 2013 BART labor negotiations-related legal documents;
- Interview notes and related documents compiled for this report;
- Press clippings, press releases and videos regarding the 2013 BART labor negotiations, strikes and related actions;
- 2013 BART employee survey results;
- 2013 BART union publications and related documents;
- California transit interest arbitration awards, rulings on motions regarding binding interest arbitration and related documents;
- Costa Mesa COIN ordinance, contract proposals and related news articles.



Photo courtesy of BART

System Experience:

Nineteen hours of volunteered time riding all lines and visiting virtually every BART station to become familiar with the system.

Anonymity:

Individuals who were interviewed for this report were offered anonymity if they did not wish to have some or all of their comments attributed to them. All interviewees were told that the information gathered for this report would **not**, however, be confidential. To preserve anonymity when requested, all interview notes were destroyed after this report was drafted. Throughout the report, quotes are used in an attempt to accurately capture points made by interviewees.

Analysis:

The conclusions and recommendations in this report were drawn primarily by:

- Reviewing relevant documents
- Interviewing and seeking out the perspectives of those who were involved in the 2013 BART labor negotiations processes, strikes, legal actions and other related events;
- Consulting with outside labor and management negotiators, mediators, attorneys and other transit agency managers;
- Drawing on our own experience in labor-management negotiations and relations.

This report does not purport to be investigatory in the sense that the numerous contradictory assertions about various actions, motives or events are deemed to be resolved. More conventional fact-finding methods were applied to the report sections pertaining to Section 4.8, the “COIN” ordinance and binding interest arbitration. With respect to other report objectives, our charge was to seek to understand the differing perspectives about what happened and why in 2013 in order to develop recommendations for a positive path forward for all parties.

C. BART Agency Overview

“For more than 40 years, the Bay Area Rapid Transit (BART) has provided fast, reliable transportation to downtown offices, shopping centers, tourist attractions, entertainment venues, universities and other destinations for Bay Area residents and visitors alike.”¹

BART serves the San Francisco Peninsula and East Bay--26 cities in all--with over 104 miles of track and 44 stations.² BART’s fleet consists of 669 vehicles, which carries an average of more than 400,000 riders per weekday and is the fifth busiest heavy rail rapid transit system in the U.S.³



Service Map Courtesy of BART

¹ <http://www.bart.gov/guide>. Viewed 7/15/14.

² Four stations are shared with MUNI and one is shared with Caltrain.

³ http://en.wikipedia.org/wiki/List_of_United_States_rapid_transit_systems_by_ridership. Viewed 7/19/14.

The unique geography and density of the Bay Area make BART a vital link for all citizens in this eleventh largest U.S. metropolitan area.⁴ During major events like the 2010 and 2012 Giants World Series victory parades, BART brought communities together for these celebrations, recording the two highest ever, one-day ridership in its history. During a 2005 Bay Bridge shutdown for seismic retrofitting, BART ran trains around the clock to transport Bay Area residents and workers between the East Bay and San Francisco. After the 1989 Loma Prieta earthquake that closed the Bay Bridge for 30 days, thousands of commuters relied on BART to cross the Bay, pushing ridership records to new heights for that time. Because of the community's reliance on BART to carry them to their destinations, when there are service outages, the entire Bay Area suffers.

BART employs 3,317 people and most employees at BART are represented by five unions:

- Amalgamated Transit Union, Local 1555 (ATU) which represents approximately 945 employees who are mostly train operators, station agents and foreworkers.
- American Federation of State, County and Municipal Employees, Local 3993 (AFSCME) which represents approximately 210 employees, mostly middle managers.
- BART Police Managers Association (PMA) which represents approximately 41 sergeants and lieutenants.
- BART Police Officers Association (POA) which represents approximately 215 rank and file officers.
- Service Employees International Union Local 1021 (SEIU) represents more than 1,400 maintenance, service and professional employees.⁵

As BART continues to grow, the addition of stations and track also creates needed jobs in construction. For example, the Oakland Airport Connector project (due to open fall 2014) created over 1508 jobs, 934 of which were filled by Bay Area residents. Important also

⁴ <http://www.census.gov/compendia/statab/2012/tables/12s0020.pdf>. Viewed 7/19/14.

⁵ <http://www.bart.gov/news/articles/2013/news20130510>. Viewed 7/19/14.

to the community were the 170 construction-career entry apprenticeship positions created.⁶

With estimates that BART weekday ridership will grow to 500,000 within 5 years (and 750,000 a decade later), BART has identified its three biggest priorities as:

- 1) The replacement of its aging fleet of train cars;
- 2) Acquiring a modern train-control system to accommodate more and frequent trains, and
- 3) The Hayward Maintenance Complex to store and maintain a larger fleet. Together these priorities will cost over \$2 billion.⁷

BART is unique in that it is one of three major transit agencies in the country whose governing board is elected.⁸ A nine-member Board of Directors is the policy body for BART. Elected from nine BART districts, board members serve a four-year term. The board hires a general manager, who is responsible for the overall operation and management of the system. Other chief officers hired by the board are the general counsel, the controller treasurer, the district secretary and the independent police auditor.

A number of standing task force and advisory councils serve and inform the board on bicycle access, promotion of small business in BART contracting, policing, earthquake safety, addressing the needs of limited English proficiency ridership, Title VI and environmental justice populations, and transit security. In addition, ad hoc committees serve the board, like the Labor Negotiations Review Ad Hoc Committee that commissioned this study.

BART trains operate at a 94-95 percent on-time rate, which has remained fairly consistent over the past decade.⁹ BART is generally well regarded by its customers with 84% expressing overall satisfaction in a 2012 survey. Only 5% say they are dissatisfied with

⁶ BART 2014 Report to Congress.

⁷ BART 2013 Report to Congress.

⁸ <http://www.sfgate.com/bayarea/article/BART-riders-grumble-over-lingering-uncertainty-5018166.php>.

⁹ <http://www.sfgate.com/bayarea/article/BART-delays-data-reveals-many-causes-4343993.php>. Viewed 7/19/14.

BART's services. More than 90% of passengers would recommend BART to a friend or out-of-town guest.¹⁰

The consultants who authored this report spent over 19 hours of their own time during July and August riding BART trains to better understand and explore the BART system. Overall, our experience of the BART system was positive.

The trains, while older, seemed well maintained and they ran on time. The employees on the trains projected a positive attitude and gave a good impression of BART.

With few exceptions, BART employees were visible and attentive at the stations. They interacted well with their customers and provided a high level of service.

While this is a small sampling of the system and not intended to be a scientific assessment, we were impressed with the BART customer experience and the employees who support the system.

¹⁰ <http://www.bart.gov/sites/default/files/docs/BARTCustSat2012.pdf>. Viewed 7/19/14.

D. A Path Forward and Executive Summary of Findings

It is our belief that the primary value of this report is to spark a focus and collective determination to systemically change BART's labor-management relations and bargaining processes. With this in mind, we begin with a suggested path forward (which is repeated at the end of this report) and a summary of findings about what caused the dysfunctional bargaining process of 2013. These findings are explained and explored in the body of this report. High level conclusions regarding the topics of 4.8, the "COIN" ordinance and communication protocols as well as binding interest arbitration are also included in this executive summary.

BART managers and union leaders, we believe, have the ability to move mountains in terms of labor-management relations, if they are willing and committed to do so. Many of them worked seven days a week (sometimes 18-hour days) during labor negotiations. In developing this report we found them to be knowledgeable, sophisticated and highly capable. Our hope is their many talents will be channeled toward creating a new labor-management future at BART, which benefits employees, managers and the public.

It is also our conclusion that BART is fortunate to have a skilled and dedicated workforce. In interviews conducted for this report, numerous managers and union leaders alike lauded the many strengths of the vast majority of rank and file workers.

Key Conclusions for Positive Change

For both incremental and long term changes to take root at BART the parties must:

- Be committed to working together to ensure the other's success.

-
- Have both collective and individual accountability for using both the letter and spirit of a negotiation process that is mutually beneficial.
 - Demonstrate trustworthiness and respect for one another.
 - Regularly use constructive problem-solving approaches.

The challenge ahead is for the board to charter such a course and oversee its successful implementation.

Ideas to do so are provided in the following Roadmap for Change. This Roadmap includes:

- Recommendations to improve the process of labor negotiations and relations
- The “Plan”
- Safeguards against labor disputes.

Roadmap for Change:

Recommendations:

The following recommendations to improve the process of BART's labor negotiations and labor-management relations are offered for consideration. They are not listed in any order of priority. All recommendations are included (explicitly or implicitly) in the Roadmap Plan that follows. Because of the large number of recommendations, the agency will likely want to triage those they decide to implement, within a budgeted and sequenced scope of work. Some recommendations may already be underway at the release date of this report.

Direction Setting	1. Board ¹¹ develops a policy-level vision for a new and improved way of operating agency-wide regarding labor-management relations (cultural change).
Change Plan	2. The board, at a policy level, outlines a systemic change plan for labor-management relations/process with timelines.
Roles, Oversight, Resourcing	3. The board determines its role and how members of the board will engage to support successful implementation and oversight of the change effort. They also allocate resources to fund this undertaking.

¹¹ Unless the board is specifically referenced in a recommendation, it is suggested that execution of the recommendation is delegated.

Teambuilding	4. A customized teambuilding session for the board is recommended to enhance communication and the board's ability to operate as a consistent, supportive unit, even when all members don't agree.
Board Ground Rules	5. The board develops ground rules and accountability measures for how the board will operate in supporting constructive day-to-day labor-management relations, contract negotiations and, in so doing, operate at a policy level.
Accountabilities	6. The board establishes participation expectations and accountability measures for BART management and union representatives for this effort.
Objectives	7. The board sets measurable quarterly progress objectives.
Commitments	8. The board tasks the general manager with responsibility for ensuring managers throughout the agency participate in meeting these objectives. The board obtains assurances from the union presidents that they will do the same with their boards, shop stewards and membership.

<p>Management Participants</p>	<p>9. The board directs the general manager to ensure that managers with historically combative relationships and/or adversarial styles are removed from strategic involvement with and/or influence over labor-relations at BART. Every effort should be made to engage and utilize managers who are respected by and have credibility with the unions and the workforce. This is not a recommendation that managers must agree or capitulate to union positions. This is about operationalizing a style of communication and leadership that is constructive and collaborative.</p>
<p>Executive Team</p>	<p>10. The board establishes an expectation that all the board's direct reports operate as a team in supporting the change effort and that input is regularly solicited by the general manager regarding their views as well as their knowledge and strategic advice about labor-relations issues.</p>
<p>Consultant(s)</p>	<p>11. The board retains external consultant(s) to assist the board in developing its vision, change plan, expectations, accountabilities, roles, ground rules and an oversight/reporting process. The consultant(s) are also directed to facilitate labor-management efforts to meet quarterly objectives. The consultant(s) should make monthly reports to the board and/or the board committee chartered with oversight of the change process.</p>

<p>Progress Reports</p>	<p>12. The board (via the Ad Hoc Committee or other committee so designated) requests and receives monthly progress reports from the general manager, union presidents and the board-retained consultant/facilitator.</p>
<p>Joint Data Plan and Agreement</p>	<p>13. Develop a “data plan” for determination of data needed for contract negotiations, how to mine it with union involvement, an agreed upon joint labor-management data analysis criteria and procedure, as well as an education and communication strategy for disseminating data and budgetary information. Retention of a jointly-selected, third-party analyst (who is or can quickly become well versed in the intricacies of BART finances and its labor contracts) is recommended. This also includes a facilitated process whereby labor and management determine and agree on financial indicators to be used in shaping economic bargaining proposals and agreements. (Examples may include competitiveness data, comparables, COLAs, Consumer Price Index data, legal constraints/considerations, total compensation evaluations, local economic indicators, funding sources data, system needs information, financial forecasts, etc.)</p>

<p>Partnering Workshop</p>	<p>14. The board and/or board committee members participate with executive management and labor leaders in a partnering workshop to solicit input to:</p> <ul style="list-style-type: none"> • shape the change plan and process • clarify roles • communicate objectives • set timelines • agree on safeguards to prevent a breakdown of 2017 contract negotiations • discuss training needs and other support mechanisms • begin trust, respect and team building • agree on the data plan • determine a consistent agency-wide and union communication strategy
<p>Operating Guidelines</p>	<p>15. In facilitated session(s), labor and management develop operating guidelines for how they will work more effectively together day to day.</p>

<p>Personnel Policies</p>	<p>16. The board reviews and revises (at a policy level) the District’s personnel policies, programs, metrics, manuals, annual reviews to ensure they support the change process and plan.</p>
<p>Clarify and Align Roles</p>	<p>17. Develop a comprehensive written document that clarifies and aligns roles, responsibilities, adequate authority and resources for BART’s management team and staff to successfully carry out all elements of the board’s vision and change plan. Lack of clarity, continuity and communication of roles and responsibilities was a pervasive problem before, during and--to some extent--since 2013.</p>
<p>Labor Relations Resources</p>	<p>18. The board requests data and a plan to increase Labor Relations staff and resources to levels that are adequate to support agency needs and the change process.</p>

<p>Labor Relations Role</p>	<p>19. The role of Labor Relations is clarified and communicated agency wide. It is structured and supported to be the guiding voice of the organization on matters related to union relationships and interpreting the complicated contracts at BART. It should look to partner with the operational divisions of BART to create a “cradle to grave” relationship with the various unions so that BART can demonstrate a proactive and consistent approach to working with the unions and the contracts.</p>
<p>Labor Relations Continuity</p>	<p>20. Seek stability of Labor Relations staff and managers.</p>
<p>Succession Plan</p>	<p>21. Ensure Labor Relations has a succession plan so that when Labor Relations staff leave, there are up-to-speed, competent people to take their place who will continue implementing a consistent, long-term strategy for positive change.</p>
<p>Labor Relations Support</p>	<p>22. Provide support for strong collaborative leaders in Labor Relations who can operate without undue interference or second guessing. Ensure the support is sustainable over time.</p>
<p>Training</p>	<p>23. Provide training to support the change process in accordance with a training plan that is developed collaboratively by the parties.</p>

<p>Data Systems</p>	<p>24. Update internal data systems. For example, the data we have accessed to date on absenteeism seems incomplete and possibly not wholly accurate. There are many factors that impact attendance. Some things employees and management can influence. Some they cannot. These factors do not appear to have been fully identified or analyzed before conclusions were drawn and published. Anecdotal stories and beliefs appear to have influenced what should have been data-driven conclusions, in some instances. We also recommend reviewing and modifying data systems, as needed, to ensure coordination of relevant data.</p>
<p>Resolution Mechanisms</p>	<p>25. Set up mechanisms (including training, expectations and a joint labor-management agreement) to resolve issues at their earliest stages, clear up any backlog of grievances and settle cases before arbitration, whenever feasible.</p>
<p>Grievance Settlement</p>	<p>26. Seek assurances that “known loser” grievances are not arbitrated and that cases without merit are not taken to arbitration. This is time consuming, inefficient, and further frustrates constructive labor relations. Occasionally, both parties may need to arbitrate non-winnable cases. However, this should be the exception rather than the norm.</p>

<p>User-Friendly Contracts</p>	<p>27. Work with the unions to develop ways to make the labor contracts more user-friendly. Until this can be discussed and addressed in negotiations, consider other practices used in some industries, such as a “Cliff Notes Contract Version for Operations,” a question and answer handbook, and/or videos by labor and management jointly addressing interpretation issues.</p>
<p>Interest Arbitration Fallback</p>	<p>28. Discuss and obtain agreement within six months as to how a form of arbitration will be invoked, if necessary, to prevent a strike. See “Safeguards” recommendations on pages 42-44 and 166-168.</p>
<p>Bargaining Process</p>	<p>29. Begin exploring various negotiation processes and approaches with the unions. Agree on which process will be used for 2017 negotiations at least one year in advance of the start of these negotiations. Seek agreement on a non-adversarial, problem-solving approach.</p>
<p>Earlier Negotiations</p>	<p>30. Begin 2017 contract negotiations at least six (6) months before the contracts expire.</p>

<p>Negotiation Facilitation</p>	<p>31. Instead of mediation just before or after impasse, proactively use neutral facilitators¹² to help the parties prepare for bargaining, build trust, facilitate bargaining sessions and do early mediation (if needed) to prevent the threat of and/or initiation of strikes. Over the past 23 years when this approach has been used in public agencies (including transit authorities), not one strike has resulted.¹³</p>
<p>Joint Negotiation Training</p>	<p>32. Even with outside experts brought in to lead a process, it is best if all of the negotiation team members and executive management participate in training to understand behaviors that maximize the probability of a positive and productive process. Not everyone in leadership comes from an extensive contract negotiation background. Training allows for a foundation that is both</p>

¹² **Labor Negotiations Facilitator’s Roles and Responsibilities**

1. Be neutral (will not try to influence decisions and will not “take sides”)
2. Help the group stay on task during bargaining session
3. Reinforce the group’s use of their ground rules, agendas, decision and meeting models, etc.
4. Encourage full participation
5. Clarify “meanings” and translate messages as necessary to prevent misunderstandings and erroneous assumptions
6. Stimulate brainstorming as appropriate
7. Restate and summarize ideas, issues and group agreements
8. Respect the confidences of all parties
9. Help the parties prepare for bargaining sessions and attend caucuses when requested to do so
10. Play “devil’s advocate” with all parties, as needed, but will not arbitrate, judge nor decide issues between the parties

All parties agree that the facilitators will act before, during and after as a safe haven for sharing perspectives, venting, bouncing around ideas and problem solving. Therefore, the facilitators will not be requested or compelled to participate in any arbitration, deposition or adversarial legal proceeding between the parties. Notes taken by the facilitators shall remain their sole confidential property.

¹³ This is the experience of Agreement Dynamics, who developed this approach.

	<p>important and consistent for all users. Consider joint training with labor and management in the negotiation process the parties will be using. Board members should also attend or receive an abbreviated training.</p>
Release Time	<p>33. Discuss with the unions (probably in facilitated meetings) various ways release time can be structured for negotiations that begin at least six months before expiration. Reach agreement on this issue no later than four months before the start of those talks.</p>
Location	<p>34. Agree on a location for negotiations that is acceptable to both parties at least two months before the start of bargaining.</p>
Role of Legal	<p>35. Clarify the role of the Legal Department in bargaining to ensure that labor negotiators have sufficient authority to enter into tentative agreements in a timely and efficient manner. If attorneys from Legal are tasked with responsibilities beyond reviewing language for consistency and legality, then consider having them sit at bargaining tables as members of the team.</p>

Bargaining Team Roles	36. Clarify the roles and responsibilities of all bargaining team members (along with reporting relationships) in writing prior to forming the teams.
Bargaining Input	37. Set up an internal structure to support BART’s bargaining teams, receive regular input from members of these teams and provide direction on an ongoing basis.
Media Approach	38. Begin discussions as soon as possible with the unions about engagement with the media throughout the change process and during labor negotiations. Determine and implement mutually-agreeable and respectful protocols that will be used by all parties. Consider a media “time-out” and/or joint publications in accordance with recommendations made in Section J, pages 124 and 125, as long as negotiations are progressing.
Negotiation Guiding Principles	39. Consideration should be given to developing guiding principles and a strategic plan by the board and management of what changes they would like to see over the short- and long-term to ensure the economic viability of BART for the benefit of the region, its ridership and its employees. Those principles should be the basis of each negotiation strategy along with other considerations (see recommendation #13).

<p>Bargaining Priorities</p>	<p>40. The board and executive management develops a few priorities for 2017 labor negotiations. These priorities should be consistent with and supportive of a criteria that may include such things as:</p> <ul style="list-style-type: none"> • Support for strategic plan guiding principles and priorities referenced in #39. • Relevant data and metrics developed by labor and management • Respect and trust building internally and with all stakeholders • Assessment of pragmatic “realities” in terms of scope of contractual changes in one contract cycle.
<p>Reduce “Position-Based” Bargaining</p>	<p>41. Objectives for changing the labor contracts should be advanced in proposals or other ways that are not “position based” to the extent possible. Position-based proposals advocate for one specific way to address an objective and as such can be polarizing.</p>
<p>Contract Clarity</p>	<p>42. Consider making contract clarity and user-friendliness a key objective in 2017 negotiations.</p>
<p>Mediators</p>	<p>43. If mediation must be invoked to avoid impasse, cooperate with and listen to the mediators. If mediation efforts appear to be substandard or too passive, request a change of mediator and/or bring in private mediation services.</p>

<p>Internal Facilitators</p>	<p>44. As the change process progresses, train management and labor representatives to begin facilitating labor-management change committee meetings. This will reduce the costs of outside consultants and foster stronger internal process buy-in as well as resources.</p>
<p>Outside Transit Agency Resources</p>	<p>45. Consult with Transit Operations managers, Labor Relations managers, labor negotiators, and others who have and/or are successfully working day to day and in negotiations with their unions. Consider using their assistance and expertise to expedite change efforts. Such resources currently are available in California and some have had extensive experience working successfully in transit settings with labor unions.</p>
<p>Negotiation Ground Rules</p>	<p>46. Use a facilitated process to develop and agree on procedural and behavioral ground rules for 2017 labor negotiations. These ground rules should be signed by executive labor and management representatives, supported by the board, and published to all stakeholders before negotiations commence. They should be signed by all bargaining teams' members as well.</p>
<p>Employee Survey</p>	<p>47. Using the 2012-13 employee survey, continue current efforts and develop others to address findings about areas where morale is low. Conduct another survey within a year to chart progress and refocus efforts as necessary.</p>

Documents

48. Develop and use better systems for document control, for memorializing agreements and for easily accessing them now and in the future. For example:

- Set up redundant, consistent documents and record tracking systems with clear lines of authority identified.
- Generate and sign TAs in real time. Do not wait weeks or months later to generate or sign them. Sign TAs one at a time after reading each one.
- In addition to individual TAs, generate an economic term sheet with all economic changes recorded. Management and union negotiators review it separately and together, and then all the chief negotiators sign it before any ratifications are held.
- Attempt to conduct all bargaining sessions in one place that can be secured. The disruption and inefficiencies caused by moving back and forth to different locations throughout these negotiations was often reported to inhibit effective document control. Make sure technology needs can be met, there are sufficient rooms for caucusing and that basic comforts (such as air conditioning) are supplied.
- Hire a dedicated, in-house administrative staff person who is in charge of bargaining and labor-management relations note taking, tracking and archiving documents.

<p>Failsafe Mechanisms</p>	<p>49. Establish checkpoints and failsafe mechanisms¹⁴ throughout the bargaining process so that negative trends can be spotted and addressed before an impasse or a labor dispute occurs. Consider using the negotiation facilitator to assist with this.</p>
<p>Table Expertise</p>	<p>50. Make sure every bargaining table has labor relations professionals who deal with the unions day in and day out and are able to articulate with real life examples why certain changes to the contract/rules need to take place for the good of management, the workers and the riders.</p>
<p>Board Information</p>	<p>51. Keep the board informed, as a body, regarding the progress of bargaining. Ensure the board is hearing comprehensive updates together and that they are deliberating together about policy level, strategic decisions.</p>
<p>Management Chief Negotiator Candidates</p>	<p>52. Begin “test driving” potential chief management negotiators now. Use transit bargaining experienced management consultants or attorneys as participants in some of the facilitated labor-management discussions that are needed to implement cultural change. This may be an opportunity to determine who is a good fit for the agency, the desired relationship and who has the best skill set for 2017 negotiations.</p>

¹⁴ Failsafe as used here means procedures that are operationalized in the event something goes wrong or that are in place to prevent such an occurrence.

Internal Leadership	53. Also consider using an internal manager to lead negotiations with external consultants providing strategic and advisory support functions.
Safety	54. Restart and reset the conversation between labor and management about how best they can work together to maximize safety via a facilitated effort; establish a structure, objectives and a collaborative method for joint advocacy and outcomes regarding safety issues and procedures.
Success Examples	55. Solicit and share managers' positive labor relations experiences (what has worked for them). Seek out success specifics with respect to labor-management interactions and determine how they may be institutionalized.
Operationalizing Collaboration	56. Provide training, tools and performance-related expectations to managers in how they should operate in a collaborative way that will contribute to building improved labor-management relations.
Celebrate	57. Communicate and celebrate every success and/or milestone reached between labor and management.

<p>Communication Strategy</p>	<p>58. Stop the “bashing by hearsay and the stories of abuse.” We heard numerous references to the other parties’ bad motives, malicious intent and refusal to be cooperative. With some probing, we often discovered that the individual espousing that view had no first-hand knowledge and was repeating what had been passed down from others, who often did not have first-hand knowledge either. This wasn’t always the case, but it was prevalent enough to be concerning.</p>
<p>Modeling</p>	<p>59. Every effort should be made to inoculate and insulate new employees, managers and board members from the environment of “We’re in the bunker and it’s us against them.” We heard this over and over. Even the language used repeatedly by both parties tends to perpetuate the situation. This will take time, but can be modeled by the board, executive management and union officers.</p>
<p>Healthy Advocacy</p>	<p>60. Champion a new paradigm for advocacy. Management and labor can advocate for their respective interests without alienating or vilifying one another. This can often be accomplished by questioning assumptions, not automatically attributing ill intent, listening for the reasons behind the “ask,” clearly articulating concerns, exploring/analyzing a range of options and using jointly-mined data.</p>

Arbitrations	61. Consider hiring non-attorneys in labor relations who can conduct arbitrations in compliance with current ATU contract restrictions. This will provide more resources and options for conducting effective operations in labor relations.
Safeguards	62. Review and discuss the Safeguards provided on pages 40-45 and 164-169. Seek a joint labor-management agreement on a set of safeguards that will be activated to minimize the potential for labor disputes in 2017.
Debriefs	63. Conduct debriefings about this report with stakeholders. Focus on utilizing lessons learned and other suggestions to support the board's direction and vision for change.

The Plan:

Agreement Dynamics' team has concluded that there is no single action that will substantially improve BART's labor-management relations in the short- or long-term. Many well designed, appropriately sequenced, inclusive strategies are needed to effect an organizational change that supports constructive labor relations before, during and after negotiations. This includes certain safeguards against work stoppages in 2017 contract talks that will be discussed in the following section of this report.

This complex, challenging and intense effort will require significant commitment by all parties. Setbacks, while inevitable, need not stop the momentum leading to an organizational shift with benefits for all.

BART has tremendous capacity to break the cycle of adversarialism. There is a depth of skill, talent, experience, dedication and leadership in every stakeholder group. While daunting, this undertaking is not a mission impossible.

Success, we believe, depends on engaging all parties at the "right" times and in the "right" ways.

The following is a high-level look at some essential success strategies:

A. Board-Driven Change Process:

What? The board develops a policy-level vision for a new way of operating agency-wide regarding labor-management relations and adopts and allocates resources for an implementation plan, which the board oversees.

How? Via a facilitated process with an external consultant(s) retained by and reporting to the board.

Initially, the consultant will help the board coalesce around a vision for changing BART's labor-management culture and clarify the board's role in this effort.

The external consultant is also charged with ensuring that management and labor's various interests are respected and that they have every reasonable opportunity to engage, and impact the change process from the initial vision setting and

implementation plan development to the conclusion of the next round of contract negotiations and beyond.

As per the implementation plan, the external consultant will provide specified training, facilitation, coaching and consulting services in a manner that respects and supports management and labor (and in no way interferes or supplants their respective roles or authority).

B. Accountability for All:

What? Those who genuinely engage in the change process must be supported, while those who obstruct it must also have consequences.

How? The change process and plan should include measurable quarterly objectives. Progress should be shared with the board, who will institute accountability measures. Executive management will be responsible for ensuring constructive participation from managers throughout the agency. Union officers will be responsible for ensuring the same from their representatives, shop stewards and membership.

To ensure transparency and accountability for all, the board should receive reports, discuss what is working and what is not, and make modifications regularly.

Support and rewards for effort and positive outcomes should also be established along the way.

Giving participants a fresh opportunity and the “benefit of the doubt” as the change process begins will be challenging, but necessary for progress.

Examples of quarterly objectives may include (but not be limited to):

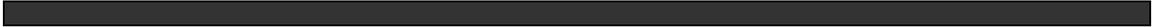
1. Development of agreed-upon safeguards (see pages 40-45 and 164-169) to maximize fair, open, and constructive 2017 contract negotiations that conclude by mutual agreement in a timely and peaceful manner;

-
2. Early agreement on financial data, economic criteria and joint financial analysis to be completed and shared with the board **before** bargaining begins;
 3. Participation in problem-solving tools/process training and team and trust building;
 4. Adoption and use of operating ground rules to support effective issue resolution and improve working relationships;
 5. Reduction of pending grievances and arbitrations;
 6. Resolution of issues earlier and by those closest to the situation;
 7. Joint examination and adoption of relevant best practices for BART labor-management relations and bargaining;
 8. Agreement on joint labor-management internal and external communications plan to maintain transparency without negotiating in the media;
 9. Implementation of ways to memorialize and celebrate successes.

C. Partnering Summit/Workshop:

What? Leaders meet to review and provide input to shape the change process, clarify roles, objectives, timelines, safeguards, as well as begin trust, respect and team building.

How? Board Committee, union officers, general manager, deputy general manager, general counsel, district secretary and AGMs participate in a facilitated 1-2 day off-site to launch the change process and begin using joint problem-solving tools. Check-ins and process modifications may be established via regular meetings of a subset of this group and/or this group may reconvene biannually.



D. Progress Reports, Assessments, and Process Modifications:

Status of the change plans progress and attainment of milestones and objectives are shared monthly with the board committee and quarterly with the full board. Modifications to ensure continued progress are recommended and, following board approval, are implemented.

BART Labor-Management Roadmap for Change

Start ▶ Board sets vision for new operating model for labor-management relations and change process.

Board institutes accountability measures.

Partnering summit to launch change process.

Negotiation safeguards agreed upon.

Quarterly objectives progress assessed and best practices instituted.

Grievances and arbitrations reduced, trust and respect increased, communication improved, day-to-day operational ground rules implemented, training and tools provided, and negotiation safeguards put in place.

Constructive bargaining process designed and used.

New agreements reached amicably before expiration.

Safeguards Against Labor Disputes:

Many interviewees referred to the events of 2013 as a “perfect storm.” Some said it was an “anomaly” that won’t be repeated. While there are a small number of outliers in all groups, it’s our conclusion that neither labor nor management has an appetite for more strikes.

That is not to say either party will agree to peace at any price. There is no guarantee a strike could not happen again. Therefore, putting safeguards in place to minimize such a recurrence makes sense. None of the following recommendations is a silver bullet, but taken together all will form a powerful disincentive to strikes or even threats of strikes.

1. Problem-Solving Process

Begin developing a different process now for discussing and resolving differences. How labor and management often interact, even day-to-day, has been adversarial. Differences are inevitable. How they are dealt with needs to be changed to an approach of problem solving, rather than posturing and locking down on positions. This will require joint training and facilitated practice on day-to-day issues long before the parties enter the next round of labor negotiations.

2. Supportive Participants

Change some of the “players.” There are managers and union representatives who are willing and able to transition to joint problem solving as a way of doing business. There are some who are not, or who simply have too much baggage and negative history to be credible with the other party. The board can direct the general manager to implement such a change within management. The unions elect their leaders and are autonomous bodies. They do have control over who they utilize and how they act with respect to resources, including attorneys and consultants. They also currently have leadership in place to influence how they and their representatives will engage with management. The board could meet with them and seek a commitment from labor to participate fully and with an open mind in the change process that includes leaders who will use problem-solving tools and techniques.

3. Joint Training

Enlist the unions’ support for a training plan and joint training of all who can influence the labor-management relationship. As advocates, disagreements should be expected. How those disagreements are handled,

with appropriate training, tools and spirit of intent, need not be acrimonious or destructive to either party.

4. Data Agreements

Charter a labor-management group to determine data needs, assumptions, collection and analysis methodologies. Select a mutually-agreeable expert/consultant to help the parties reach common understandings about relevant data and how it may be used in labor-management settings, including contract negotiations. Seek agreement from all parties to support an agreed-upon process to ensure data does not become a source of contention in 2017 negotiations.

5. Economic Indicators

Facilitate ongoing conversations between labor and management leaders about factors that may influence and shape economic discussions in 2017 labor negotiations. For example, the parties may explore using various indicators such as:

- competitiveness
- recruitment and retention data
- economic comparables
- consumer price index
- cost-of-living adjustments
- local and/or national economic trends and forecasts
- agency ability to pay
- others as identified

While it may not be necessary to reach agreement on how these kinds of factors will be used in upcoming negotiations, it would be useful to develop a joint understanding of each of them and a framework for bringing them to the table to shape tentative agreements.

6. Interest Arbitration Options

- a. Begin meeting with ATU to discuss the application of Section 20.2 of their International Constitution should negotiations proceed to impasse and there's potential of a strike. Section 20.2¹⁵ states, in part, that,

"A decision to strike requires a two-thirds vote of the membership voting on the question... the international president (IP), if no international officer has previously been assigned to the matter, shall, upon receipt of the notice of the results of the strike vote, proceed to the scene of dispute in person or by deputy, and in conjunction with the committee of the local union (LU) or joint bargaining council (JBC), shall make a thorough investigation and attempt to settle the matter in dispute. In case of failure thus to secure a settlement, the IP or the IP's deputy shall then, in conjunction with the local committee, prepare propositions of arbitration defining the points in dispute and the basis upon which they shall be arbitrated. If the company refuses to accept arbitration as tendered, the IP or the IP's deputy shall then communicate with the members of the general executive board (GEB) in writing or by telegram and obtain the consent of a majority the GEB before endorsing the strike. No strike sanction will be granted in the event the strike is deemed by the board to be in clear violation of any applicable law or contract."

This language requires ATU local unions to offer arbitration as an alternative to a strike, but is not specific about what kind of arbitration is to be proposed. The parties could craft an understanding of how a potential arbitration proceeding would be structured in 2017 that is non-precedential for future negotiations. This would also provide ATU and BART with an opportunity to use problem-solving techniques to reach an early accord on this important safeguard. This invitation should also be extended to SEIU and AFSCME. If, for example, SEIU declines to agree to a mutually-agreeable form of arbitration as a safeguard, the parties can still benefit by this approach. Should it be invoked in 2017 by ATU and BART, it may deter strike actions by other unions while arbitration outcomes are pending. The arbitration award may well set a framework for settlement of contract terms with other unions.

¹⁵ Section 20.2 is included in the Appendix, see page 213.

and/or

- b. Consider some “quid pro quo” options for ATU, SEIU and AFSCME to all enter into a non-precedential binding interest arbitration alternative in 2017 if negotiations break down.

and/or

- c. Agree on a binding/non-binding form of interest arbitration if impasse appears imminent. For example, the 2003 LACMTA model may be applicable. In this case, a three-member mediation/arbitration panel was designated to help the transit authority and ATU Local 1277 reach agreement on outstanding collective bargaining issues (which, in this case, were all related to health care benefits). If no agreement was reached at the end of a 15-day period, the panel would schedule an arbitration hearing to begin within 15 days. The panel recommended a resolution and the parties then had 20 days to accept or reject it. Either party could reject the proposed resolution by a 2/3 vote. If rejection occurred by 2/3 vote, the parties were free to pursue any available course of action, including the right to strike or lockout. This approach was proposed by former Los Angeles County Supervisor, mediator, arbitrator and 1994 MTA Board Chair Edmund Edelman in 2003.¹⁶ It successfully ended a 35-day strike. This process, or some variation, could be developed and put in place as a labor-dispute prevention measure.

¹⁶ See 11/6/03 *LA Times* article and the 2003 Mediation/Arbitration Agreement in the Appendix, see pages 217-218.

EXAMPLE
Binding/Non-Binding Interest Arbitration

1. Process invoked if impasse appears imminent.
↓
2. Three-member mediation/arbitration panel selected. (This board may be pre-determined prior to start of negotiations.) One member chosen by management, one member chosen by the unions and one neutral member selected jointly.
↓
3. Arbitration issues and related documents designated and forwarded to the panel within five days of the request for same.
↓
4. After Step 3 is completed, the panel assists BART and the unions in an attempt to resolve all outstanding issues. This effort will not exceed 15 days.
↓
5. If Step 4 does not result in an agreement, the panel schedules an arbitration hearing within 15 days.
↓
6. The panel issues its decision in writing to the parties within 15 days of conclusion of the hearing. The decision contains recommendations for settlement.
↓
7. The parties have 20 days to accept or reject the panel's recommendations. Rejection requires 2/3 votes.

7. Negotiation Facilitation

Use a neutral facilitator to help all parties prepare to negotiate using problem-solving tools. The facilitator should also attend all bargaining sessions and meet separately with the parties to ensure that clear, constructive communication is maximized, ground rules and data are used, trust is enhanced, creative options are identified and explored and breakdowns are avoided. The facilitator should meet regularly with the board to report on progress, discuss options for reaching mutually acceptable agreements. As mentioned earlier, this approach to labor negotiations, in the experience of Agreement Dynamics, has a 23-year history of success, with no strikes. This could change tomorrow, because this approach is not a guarantee. However, it has a good track record.

8. Outreach and Education

Labor and management leaders should meet with transit and other managers and union officers who have used the approach referenced in #7 above to obtain maximum information and insights about how and why it has worked.

9. Media Approach

The board should direct a “no negotiating in the press” strategy to be developed by the parties and recommended to the board for consideration and adoption for both the change process and 2017 labor negotiations. The board should articulate its interests about such a strategy to the parties before they begin discussions about it. Those interests may include such things as:

- ensuring transparency and openness to the public about ongoing labor-management initiatives, process, and objectives for 2017 negotiations while also respecting the interests of all parties and establishing a safe haven for successful contract talks.

Agreement specifics should be developed in a facilitated setting and signed by all parties as soon as possible. Prototypes used in other transit negotiations may be customized and adopted by BART and its unions.

10. Negotiation Work Plan

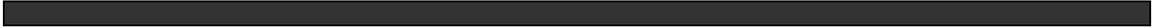
At the start of negotiations, the parties should jointly develop a work plan that contains all open issues, meeting schedule, order in which issues will be discussed, target dates for resolution of each issue and progress check points. Similar work plans have been used successfully in numerous previous public sector negotiations, including transit agencies such as Seattle Metro Transit, Intercity Transit, LACMTA, Sunline Transit, Ben Franklin Transit and Pierce Transit.

Executive Summary of Findings:

Many factors contributed to dysfunctional bargaining processes in 2013 and/or the resulting strikes. Those factors are referenced in sections E, F, G, H and I. They include:

- An escalating history of labor-management hostility and cynicism
- Deep and pervasive distrust between the parties
- Positioning for public support and negotiating in the press rather than at the bargaining table
- Public vilification and finger pointing by both parties
- Bargaining priorities not well defined or communicated
- Unrealistic expectations about outcomes
- Inconsistent signals about how BART intended to bargain
- Lack of clear bargaining/bargaining-related roles and responsibilities, consistency and organization within the agency
- Style, tactics and inadequate engagement of the chief management negotiator
- Picking “fights” at the outset rather than opening the process civilly and respectfully
- Lack of effective strategies and related activities to keep negotiations from breaking down
- Erroneous assumptions about how a strike would play out in terms of timing, duration, public opinion/support, involvement of elected officials, staying power of rank and file, etc.
- Internal decision-making processes that were not optional or options based
- Insufficient board unity and cohesiveness
- Too much posturing and positional bargaining versus problem solving

Section H assesses tentative agreement 4.8 causes and prevention recommendations. Fact finding efforts for this report concluded that this tentative agreement was erroneously generated and sent to SEIU and ATU because those who signed it did not read it before transmitting it. Seven recommendations for preventing similar future mistakes are included on pages 100-101.



The Costa Mesa Civic Openness in Negotiations (COIN) ordinance is reviewed in Section J. Reasons are offered to support the conclusion that this approach would likely be counterproductive at BART. Instead, an approach that preserves transparency objectives while giving the parties breathing room to work through differences productively is offered on pages 124-125.

Finally, the board's request to provide the pros and cons of binding interest arbitration at BART is provided in Section K. An alternative option that may be beneficial to all parties is referenced on page 139 and is described in more detail at the conclusion of this report on pages 167-168.



“Amber Alert Sign with the BART Strike Info”
By Aaron Anderer¹⁷ is licensed under CC BY-ND 2.0

E. Introduction: BART Labor-Management Relations - Death by 1,000 Cuts¹⁸

When suffering, and ultimately succumbing to death by a thousand cuts, lots of bad things are happening, none of which are fatal in and of themselves, but all add up to a slow and painful demise. Many cuts are superficial, while some run deeper. The cumulative effect results in devastating systems failures.

In examining what is “the problem” with BART’s labor relations as manifested day-to-day and in contract negotiations, interviews indicated that there is not a problem. Over time, many things have eroded healthy labor-management relations, which in addition to the devastating events of 2013, also impedes ongoing organizational efficiency, morale and the ability to effect long-term organizational change.

¹⁷ https://www.flickr.com/photos/aaron_anderer/ and <https://creativecommons.org/licenses/by-nd/2.0/>

¹⁸ A failure that occurs as a result of many smaller problems... or the failure of a plan as a result of a cumulative chain of events. <http://www.investopedia.com/terms/d/death-1000-cuts.asp>. Viewed July 1, 2014.

The death by 1,000 cuts syndrome is one in which the “problem” is not exclusively centered in one place or with one person. It has typically gone on for years and gets progressively worse. Interviews and information gathered for this report strongly suggests that this is precisely what has been happening at BART, which is not to say that no one is accountable. Mistakes and miscalculations were made and will be chronicled in this report. It is an over-simplification, we believe, to “blame” one person or one group as “**the**” cause of the 2013 strikes and all the related fallout.

At BART, a multitude of minor and significant mistakes, miscommunications, inaccurate assumptions, pervasive sense of mistrust, combative history, antagonistic tactics and feelings of victimization and futility all converged to poison the 2013 bargaining process. Interviews conducted over the last two and one-half months lead us to conclude that all parties have baggage and are deeply affected by what happened last year. Numerous interviewees used words such as “shell shocked,” “devoid of trust,” “angry” and “polarized” to describe their current state of mind. Still, many offered ideas for improvement and expressed a willingness to support change.

Turnaround at BART to a healthy state of labor relations presents many challenges, but we believe it is not hopeless. In fact, it is incredibly “doable.” It requires a comprehensive, strategic approach with an emphasis on discipline to adhere to the plan through the cynicism, setbacks and lack of large milestones. It is a process of continuous improvement that with the importance of BART’s operations, even small improvements across various issues can create significant change.

Consider the positive impact on employee relations, revenue, ridership and positive perception of BART if a 2% improvement can be made in one year on a number of metrics (i.e. reduction of arbitrations, grievances, overtime, etc.). Consider if, over the next year, another 2% or 5% improvement occurred across several categories. What kind of positive exponential growth begins? What a difference there would be instead of continuing the downward spiral of more grievances, arbitrations, overtime, etc. and the toll it takes on the workers, management, the board and, ultimately, the riders.

Hope followed by progress can only begin with a credible strategic process that is led by the board. The board has the opportunity to chart a course and vision and then give management and labor the tools to follow that course. The board must invest in management and labor to build alignment behind the vision and support them in the predictable ups and downs that will occur in any challenging, complicated process. The board should consider a structure to create transparency and accountability to ensure all parties are working to meet the spirit of the vision the board has communicated. This type of structure is important in the current situation in which trust has eroded so much that the board struggles to understand fact vs. “spin” based on the conflicting information given them in the present contentious and adversarial environment.

The plan offered at the beginning and end of this report, the proposed roadmap for change, is best practice in turning around a situation as described by those interviewed. It involves significant investment by the board in time, resources and perseverance. Interviews conducted for this report clearly suggested that the board, management and labor all care deeply about BART, its important role in the region and the women and men at all levels of the organization who have made BART such a successful transportation system.

Next, this report examines interview themes, perspectives and analysis about what happened that resulted in two strikes and the potential for a third, all within less than a year’s time.



"Dispute" by Michael Dunn¹⁹ is licensed under CC by 2.0

F. Themes from the Board, Management and Labor Interviews

After interviewing board members, BART management and labor representatives, themes were extracted from responses provided by each group. Those themes are supplied in this section to help illuminate the various perceptions in play. Please note that presentation of these themes is not an endorsement of any of them as objective facts. They do, we believe, represent the “reality” of many members of each group.

¹⁹ <https://www.flickr.com/photos/acidhelm/9221815626/in/photolist-f1uNTY-fdFEDw-gRw3Ra-gM7fHv-eZL7A1-eZyJZa-eZyJLP-eZyJUc-f79Lz2-f79LH6-f1xcMx-f1xcCM-aBfRMK-eZwAgn-fsGKED-gLnyr3-f3E31e-2b84zZ-aBCCvd-f3Udv9-f3Ue4u-n6v4xv-n6vc8P-oybviV-n6v8bk-n6vdGa-nqXk9T-oy1DAM-oeN6gc-f3UbUW-f3DYwg-f3Ucmd-bDA38G-bDA3g5-bDA2Nq-zuB5d-aBA1WD-fnBDHd-aBCUCG-aBCDUf-535FKs-owgpdS-oeXEJu-nn9bfA-nn9ccW-nuGL3K-nduMcz-n66gQc-n66fur-nuGKkc/> and <https://creativecommons.org/licenses/by/2.0/>

BART Board of Directors Themes:

All nine board members were individually interviewed and responded to a myriad of questions about their perspectives regarding the 2013 labor negotiations. The following are themes gleaned from those interviews. To be categorized as a theme, at least four board members must have made a similar comment on a specific topic.

Two themes articulated by every board member were:

1. The labor negotiation process was flawed. (Most used much stronger language, with one member saying, "I had contempt for the entire process.")
2. The board would like to build better labor-management relationships and find a path/process forward so that the events of 2013 are not repeated.

1. Process

In terms of the process, board members each focused on a variety of concerns.

Media: Almost all board members stated that there was too much media involvement throughout negotiations. They articulated specific concerns in both similar and different ways.

- Some board members questioned the public relations approach and whether BART should have been pushing its negotiation agenda prior to and during the negotiations.
- Some board members saw 2013 as "negotiating in the media," which they said cast the agency in a negative light, and at least one board member observed that when there was a media blackout at the end of the process a lot more got done.
- Past consultants, and some past employees, may have been responsible for inciting public anger and attacks against BART employees during 2009 labor negotiations. This is still being talked about today among the rank and file employees, according to some board members.

-
- The inability to control media leaks from within BART was raised by at least two members.
 - The use of social media to malign employees was mentioned as very detrimental.
 - The union's use of the media was also seen as a negative by some. Comments were made that labor was more strident than ever. Personally attacking the general manager, picketing her home, picketing some board members, vilifying management and putting flyers in stations with board members' pictures were examples referenced by some as offensive and unnecessary.

Board Role and Unity: Some board members commented that there was confusion and disagreement about the board's role at various stages of the process and that the board did not act in a unified way at some critical junctures. Comments were made such as:

- "The board's role was foggy. Should we have been in certain meetings and negotiations or not?"
- "The board strategy was too ad hoc."
- "The board did not have clear objectives and strategy like they did in 2009."
- "Often it was unclear who was in charge of the negotiations."
- "The board objectives were unrealistic."
- "We did not meet frequently enough as a board."
- "We didn't have agreement on numbers."
- "We had members at the opposite ends of the spectrum."
- "Concerns about leaks interfered with our ability to work together."

General Manager and Management Negotiators: While some criticized actions of the general manager, most board members supported her efforts. Comments included:

- “Grace²⁰ did a great job of keeping us informed.”
- “Grace was up front about her lack of bargaining experience and we were weak going in because of staff changes that left us without a seasoned team in place.”
- At least two board members maintained that the general manager should be held accountable for the failures of the process.

Most, but not all, board members were critical of the chief negotiator. Representative comments included:

- “In retrospect, hiring Tom Hock as lead negotiator for BART was not in the best interests of the agency; positive information on his national reputation in the transit industry was shared, but little perspective was given to the board on how ATU or other unions would perceive his involvement. His style was rigid and disrespectful.”
- At least one board member stated, “Tom Hock acted in accordance with the direction given him.”

Other Process Concerns:

- Pressure from legislators and the Governor’s Office was problematic and confused the process.
- The unions were entrenched and BART management was adversarial in their approach to the process.
- Some thought the 60-day cooling off period was a mistake, while others were not sure the time was well used by the parties.
- Some questioned why the 2009 chief negotiator, Carol Stevens, was not retained for the 2013 labor negotiations.

²⁰ Grace Crunican is the BART general manager.

They also stated their belief that key process mistakes would not have occurred under her leadership.

- Strikes appeared to some board members to have worked for the unions, and as a result, some questioned whether there's any incentive for labor to change.
- Various thoughts emerged about 4.8. Most who commented said 4.8 was a mistake that those involved have claimed responsibility for. It cost the agency a great deal to fix and, after the two strikes and worker deaths, made the agency appear incompetent and out of control.
- Costa Mesa Civic Openness in Negotiations: Of board members who weighed in on this issue, some liked the accountability and transparency that results from this approach, while others are skeptical about it hampering labor negotiations or are not sure it is right for BART.
- While opposed to strikes at BART, most board members do not support binding interest arbitration (BIA):
 - Most board members see adoption of BIA as relinquishing their role in representing the interests of the public.
 - An arbitrator would be more likely to "give away the store."
 - They believe a ballot measure, even if it were to succeed, would not pass in Sacramento, where a similar measure previously failed.
 - They see solutions to improve the process and working relations as a more effective approach at BART.

2. Improved Labor-Management Relations:

- The board wants a partnership between labor and management that strives for what's best for BART and builds mutual trust and respect.
- There's concern from the board that nothing will change at BART.

-
- Most board members indicated they have good relations with the labor leaders.
 - Most board members expressed support for the changes the general manager is trying to institute at BART.
 - Some raised concerns about continuous changes in union leadership (“ATU changes presidents like we change clothes.”) as a deterrent to lasting change.
 - Some asked that more work be done between negotiations to resolve issues and suggested the parties start bargaining earlier.
 - Requests for better data, metrics and the establishment of baselines were made.
 - Others called for a plan for change the board could rally ‘round and champion.



"Another Way to Work - Another bart strike forced a lot of commuters to find alternative ways to go to work. I chose the ferry." by Sonny Abesamis²¹ is licensed under CC by 2.0

BART Management Themes:

It is difficult to categorize management themes because “management,” as interviewed for this report, has many layers. Those interviewed fell into the following categories, which sometimes overlap:

- General manager and deputy general manager
- Assistant general managers
- General counsel
- District secretary
- Staff attorney

²¹ <https://www.flickr.com/photos/enerva/10355814015/in/photolist-fdFEDw-gRw3Ra-f1xcMx-f1xcCM-aBfRMK-gM7fHv-eZL7A1-eZyJZa-eZyJLP-eZyJUc-eZwAgn-fsGKED-gLnyr3-f3E31e-f79Lz2-f79LH6-2b84zZ-aBCCvd-f3Udv9-f3UbUW-f3DYwg-f3Ucmd-bDA38G-bDA3g5-f3Ue4u-n6v4xv-bDA2Nq-zuB5d-aBA1WD-n6vc8P-fnBDHd-aBCUCG-aBCDUf-535FKs-oybviV-owgpdS-n6v8bk-n6vdGa-oeXEJu-nn9bfA-nn9ccW-nqXk9T-oy1DAM-nuGL3K-nduMcz-n66gQc-n66fur-nuGKkc-oeN6gc-nwLkQD/> and <https://creativecommons.org/licenses/by/2.0/>

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- Labor relations staff and management bargaining team members
 - Operations managers
 - Chief information officer involved with the 4.8 issues
 - Temporary employees involved with the management bargaining team
 - Former manager of Labor Relations and chief negotiator for AFSCME bargaining
 - External consultants and contracted District negotiators
 - Senior staff in BART's External Affairs Department

The most diverse perspectives about what happened in 2013, and why it happened, came from management. This group was also the most concerned about having comments attributed to them and made the most requests for anonymity. While some would disagree with the following themes, unless otherwise specified, they were articulated by at least half of those who commented on an issue:

Unions “outgun” management:

- There is not a level playing field. BART is understaffed in Labor Relations, compared to the unions, and the unions have strong allies on the board and in Sacramento. The unions are seen by management as stronger in negotiations, in grievance handling and arbitrations. Turnover in Labor Relations has been huge and puts management at a disadvantage. Managers often voiced their opinion that the unions did better at BART in 2009 negotiations than their counterparts in the Bay Area, in California, and in the nation.

Beliefs about the unions and the workforce:

- There is no incentive for the unions to change the way they do business. The system works well for them. ATU doesn't negotiate; they offer a proposal and then don't move. SEIU brings “an army” and negotiates for a broader agenda beyond BART.

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- Strikes work for the unions and that is why they wanted to strike.
 - They talk nice to the board, but are completely different with management.
 - The unions have to be adversarial. Their hard line members won't let them be collaborative.
 - Some disagreed with these statements saying that "There are hard-line management radicals as well as union radicals. When we invest time on the front end, we usually have give and take and work things out with the union. Unlike the leadership, many managers and workers in the field have good relationships."
 - Some made a point of stating that "95% of employees are dedicated workers who love their jobs and who deliver at a higher level than those at other transit agencies."

Process:

- Hard line negotiations were seen by some managers as the only way to get concessions from the unions at BART. Management's reasons and beliefs for needing concessions were because 1) the system is over 40 years old and needs significant investment in the infrastructure, 2) BART workers are among the highest paid in the country. Others disagreed and thought management's bargaining objectives were far too "ambitious."
- Several who were not in management strategy team meetings²² said they were confused at times about who was in charge, what the end game was and who was doing what. When outside consultants came in, and former Manager of Labor Relations Rudy Medina was moved to the AFSCME table, there was a lack of clarity about what internal staff was supposed to

²² In preparation for, and throughout the 2013 labor negotiations and related disputes, BART management had a small group who met frequently to engage in strategy discussions and decisions. In this report, this group will be referred to as the "management strategy team." Regular attendees included the general manager, deputy general manager, the assistant general managers of operations and external affairs and the contracted chief management negotiator. Others, such as media consultants, BART's general counsel, the AGM of administration and budget, and the board secretary, rotated in and out periodically when invited to attend.

do versus the outside consultants. Many also commented that consistency throughout the bargaining process was an issue.

- Several said they were “appalled at our lack of document control and that management’s various tasks and responsibilities/roles were not clearly articulated or assigned.”
- Some members of management thought the process suffered because their input was not solicited by decision makers. Also, there wasn’t a system to vet things with the various players or to build teamwork inside management.
- There was concern about the involvement of external elected officials.
- The lack of unity on the board was troubling, as were concerns that one or more board members were leaking information to the unions.
- The belief that the unions were disingenuous about a number of their positions was voiced by a few.
- Many articulated the pain adversarial bargaining caused and that significant time is needed to help employees and managers “heal” after negotiations conclude.

Media:

- Some in management believed they had a good media strategy that put the public on their side and that the public was angry with the unions for demanding too much in their contracts.
- Others felt the media helped inflame and drive negotiations to greater contentiousness while causing employees to feel attacked by their employer.
- Still others said the unions “constantly attacked us publicly and personally in nasty and irresponsible ways, and we did not respond enough.”
- Most thought “negotiating in the media” was a destructive strategy for all parties.

Strike Threat and Causes:

- Despite warnings from some, various executive-level managers didn't believe the unions would strike or did not believe they would strike until after July 4, 2013.
- After the first strike, many managers didn't believe the unions would strike a second time.
- Management overwhelmingly stated the belief that they (management) never wanted a strike nor did management cause either strike.

Chief Negotiator:

In hindsight, many see the hiring and promotion of Tom Hock to lead negotiations as a mistake. While some who were in bargaining stated that he was very competent and professional, others said his style was arrogant, dismissive, and he often appeared disengaged. Representative comments from the two perspectives included:

- "Mr. Hock was professional and not antagonistic or angry, yelling or crying like the unions. He was given an amount of money to spend and he held a tight line."
- "He negotiated like a cowboy with one word answers, 'yes,' 'no,' 'not interested.' He was adversarial, disrespected people and did not listen to concerns."
- Some contrasted his style with that of the lead management negotiator for the SEIU Supplemental table,²³ and later chief negotiator, Bruce Conhain. "Bruce was not offensive like Tom. He was dignified and diplomatic."

Labor Relations History:

- Many expressed a sense of futility about the ability to change things for the better. There was a belief that things have historically been adversarial at BART and will continue to be so.

²³ ATU and SEIU have, for decades, engaged in joint bargaining with the District over what the parties refer to as "the Generals," which consist of the first ten articles of both unions' collective bargaining agreements and are identical. ATU and SEIU bargain separately with the District over supplemental provisions, which are set forth in their respective labor agreements. When negotiating, those bargaining as the "Generals" meet at a separate table with BART negotiators than those who negotiate the supplemental provisions.

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- Most interviewed detailed the negative history of BART labor relations, even if they had only worked at BART a short time.
 - Also, some commented that acrimonious history lives on and is passed down by employees and managers due to the fact that there are many longtime employees and now their children or other family members also work at BART.
 - Some expressed hostility toward the unions and characterized their actions historically and currently as “dishonest, over dramatizing, exaggerating and irresponsible.”
 - Some disagreed and did not see the unions as difficult to work with in the trenches if they are approached with respect. Most who commented said that “SEIU is more open to resolving issues and will talk to employees who have performance problems. ATU is seen as more rigid, with the approach that if there’s an issue it’s management’s problem.”

Hopelessness:

- There is a consistent theme that a state of extraordinary conflict between labor and management will always be present at BART.
- There is a belief that this situation is almost favored by some and so there is little hope that it may be reversed.
- Many described not being able to envision a way to change things, since various attempts in the past have not been successful.
- Some articulated a cycle of abuse that they say keeps repeating itself at BART. “We beat each other to a pulp during labor negotiations. Then afterwards, we lick our wounds and get ready to fight all over again.”
- Inside BART, there is a tendency to respond to ideas for change by saying, “We tried that already.”
- A few said stability in the Labor Relations Department and training for all who are involved in bargaining would help,

along with a plan to negotiate without the fallout affecting the work place.

- A few were hopeful and expressed the view that if BART makes an investment in their commitment to labor-relations that changes the culture of contract negotiations there will be significant improvements on all fronts of labor-management relations.

Contracts and Work Rules:

- The theme of a contract with work rules that are complicated and which gives management few tools to manage the workplace effectively was often voiced by interviewees. The contracts are long, complex and difficult (some said “impossible”) to administer. Others referred to parts of the contracts as arcane. They also commented that it’s not feasible for managers to become experts in these huge contracts with so many related sections, cross-references and interpretation history. Managers expressed hope that the board would understand the “need to prioritize cleaning up the contract so that management can take off their handcuffs in order to manage effectively.”

Political Influence:

- The fact that BART is operated under the direction of an elected board was raised numerous times.
- The political reality of elected officials having to curry favor with various constituencies to maintain their seat was mentioned.
- The most common theme related to political influence was local and state elected officials working to aggressively influence the negotiations process.

Management Negotiations Objectives and Strategy:

- Some members who participated in bargaining raised concerns that they were unclear throughout the process as to what they were supposed to achieve. This was often contrasted with 2009 negotiations where members said the goals were clear from the start to the finish.

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- Concerns were also raised that their input on strategy was not solicited. “It was discouraging to have 2-3 people disappear from our bargaining sessions and then come back and say ‘we’re doing X now’ and not tell us why or give us any understanding of context.”
 - Some managers emphasized that there are serious needs in the system as much of the equipment is old. It’s critical to save money to invest in the system and this was an important driver for negotiation objectives.



"Striking BART workers in Dublin, CA"

By Aaron Anderer²⁴ is licensed under CC BY-ND 2.0

Labor Themes:

The unions, American Federation of State, County and Municipal Employees Local 393 (AFSCME), Amalgamated Transit Union Local 1555 (ATU) and Service Employees International Union Local 1021 (SEIU) tended to be unanimous in their assessment of what happened. While each union has its own culture and ways of operating and they have at times been at odds with one another, their interviews were very similar in terms of common perceptions and themes:

Early Actions Signaled a Fight:

Labor's perception is that the agency "declared war" on them and top management wanted to bust or severely cripple the unions at BART. They cited examples to support their claims. Before bargaining started, the following were interpreted as launching an offensive against labor:

- Using the "guise of collaboration and interest-based bargaining (IBB)" to reduce release time and facilities that had historically been provided by management for negotiations.

²⁴ https://www.flickr.com/photos/aaron_anderer/ and <https://creativecommons.org/licenses/by-nd/2.0/>

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- Hiring Tom Hock in the fall of 2012 for \$99,000 was viewed as a way of “sneaking him in under the radar.” When he was elevated to chief negotiator, the perception was that the District purposely brought in the most anti-union negotiator they could find.
 - By merging the capital and operating budgets so capital absorbed operating surpluses, the unions saw this as management “deliberately cooking the books to come after even more from employees.”
 - Launching public relations efforts designed to paint the employees as “lazy, greedy, and overpaid.” Among other things, the unions maintain there were erroneous and misleading press releases about absenteeism, overtime, wages and charges against a station agent.
 - The belief that the District considered labor vulnerable due to an “anti-public sector union mood” prevalent in other parts of the country and that this could be an opportunity to break or seriously weaken the unions at BART once and for all.
 - Various occurrences resulted in the unions concluding that the general manager had been swayed by management hardliners and was talking “nice” to the employees and union officials, while preparing to “take them out in negotiations.” Most mentioned “the delivery to us of cake and awards while she was signing up Tom Hock.”

Previous Concessions:

Previous concessions played into the 2013 negotiations and the unions articulated their views:

- During the recession, BART was impacted by downturns in fare revenue, tax collection, and state subsidy funds. The unions agreed to no wage increases in their four-year contract in 2009. They gave millions in concessions at a time when the agency needed their help. As a result, the unions indicated that their members expected BART to make up for that in the 2013 contract.

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- In addition, in FY 2011 and 2012 BART announced budget surpluses and marked increases in ridership and fare revenue. While some union members may have felt they were duped into taking zeros for four years, the surpluses were seen by others as their opportunity to make up for concessions made in 2009.
 - Labor negotiators were skeptical of BART's announced budget shortfalls prior to the start of 2013 negotiations.

Anti-Union Perceptions:

The unions pointed to the following as evidence of management's anti-union animus:

- A previous BART spokesman told the public in 2009 to "confront station agents and ask why they needed a raise."
- BARTZ Brats website "mocked employees," by name, for trips or featured them standing next to expensive cars and not mentioning they were at car shows, etc.²⁵
- The hiring of Tom Hock as lead management negotiator was seen as "emblematic of the intent" of at least two top managers who were "intent on breaking the union."²⁶
- Reports from labor negotiators that Hock refused to discuss proposals with union negotiators, became angry when questioned about proposals, refused to meet during the cooling-off period, and that he drove the agency to a strike at the direction of top management.
- Labor indicated a four-year hiring freeze contributed to overtime and injuries. However, they were painted by management as greedy for getting and taking so much overtime. Their perception was that management was trying to use this negotiation to fix the system on the backs of the workers.
- Management's opening proposals were viewed as concessionary and extreme.

²⁵ Management disavows any involvement with or knowledge of who was responsible for this website.

²⁶ At least three union negotiators made a point in interviews for this report of saying that while Tom Hock was "rabidly anti-union" and did not understand the culture of BART or the Bay Area, he did what he was paid and directed to do.

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- One union negotiator summed up labor's views by stating that over many years of negotiating in many places, "I have never seen anything like it... They bargained in bad faith with no intent of getting a fair deal. The fact that three federal mediators threw up their hands AFTER the economics had been settled indicates that money was never the issue. For management and the board, it was always about putting the unions and our members in our proper, subjugated place."
 - Messengers outside BART warned a union negotiator that management was planning for at least a two-week strike so that workers would miss a paycheck, come back to work and the strike would be broken.
 - They cited other examples of what they believed were efforts to provoke a strike. ATU and SEIU officials both mentioned that just before their contracts expired management responded to their complaints about concessions by offering a \$1 lump sum at the end of four years to any employee who did not break even.²⁷ This was viewed as insulting and provocative.
 - Later, when the unions saw the following phrase in BART's 2014 second quarter financial report, "Unlike July (+\$3 million), the October strike (-0.1 million) did not provide savings," they saw this as confirmation that the agency wanted a strike as a means to reduce costs.
 - The unions emphasized that they did not want a strike and that they did all they could to prevent it. They said the uncertainty of strikes, the loss of wages, and the ill-will engendered from the public is not in the labor organizations' or members' best interests.

Safety:

- All union representatives interviewed emphasized various safety concerns. They voiced frustration that they have raised these issues repeatedly and that management was not responsive. The "simple approval" policy²⁸ was seen as

²⁷ Managers who were at the bargaining table stated that the point of the \$1 lump sum was to assure the unions that no one would be in the red as a result of their proposals and many would net more than \$1 at the end of the contract. Management told us this proposal was not intended to be inflammatory, but that the unions went "apoplectic over it."

²⁸ 6203 - Personnel accessing track ways or restricted areas under Simple Approval are individually responsible for providing their own protection. From *OR&P Manual* - Revision 6, January 2006.

indicative of management's unwillingness to deal effectively with safety concerns until two workers were killed during the second strike in 2013. Both ATU and SEIU representatives claimed that management refused to bargain over safety even though it's a mandatory subject. They also referenced a news article dated June 21, 2013, in which a BART spokeswoman is quoted as saying, "Lighting and other safety concerns are being addressed by management and don't belong at the bargaining table," as a clear indicator that BART's position was not to bargain over this mandatory subject.

Labor Relations:

- All three unions reported that the labor-management relationship has been problematic for years, but now it is the worst it's ever been in BART's history. Several talked about workers being ashamed to wear their BART badges and that many remove their uniforms immediately after work so they won't be identified as BART employees by members of the public. They all focused on the pride and dedication that the workforce has for the service they provide and the record of on-time performance, but said that the relationship with management is broken.
- They called for a need to change the culture. In that vein, interviewees focused on what they see as a culture where managers are taught to "rule by fear." While they gave examples of highly effective managers, they alleged that a longtime top manager leads by "bullying" and has a "personal vendetta against the unions" that fosters a culture of antagonistic relations with the workers and the unions. They all believe he advocated a hard line approach to the general manager, who agreed, and this is why the 2013 strikes occurred.

Binding Interest Arbitration:

- Labor unions at BART oppose a ballot measure for binding interest arbitration because giving up the right to strike is seen as a huge takeaway of basic union and workers' rights. They also raised concerns that it is expensive, time consuming and interferes with real bargaining because both sides are continually preparing their case for arbitration. They indicated they would oppose it at the ballot box and in the legislature.



Courtesy of SEIU 1021.org

Themes from All Parties:

In our experience, the interviewees used an unprecedented number of “us and them” and combat-type references. Examples that were used frequently are:

- “We just walked out of a war.”
- “It was like Vietnam.”
- “We are outgunned.” (Over 20 separate references)
- “They bring an army.”
- “A strike is war. That’s what they caused.”
- “Labor massacre.”
- “We came at them hard.”
- “They declared war.”
- “The bloodiest strike ever.”
- “They threw bombs.”
- “Held the Bay Area hostage.”
- “We battled before we started negotiations.”
- “He was our hired gun.”

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- “Aggression. They came at us for bear.”
 - “They try to provoke combativeness.”
 - “They escalate the tension.”
 - “We pick the fight every time.”
 - “We were winning the war.”
 - “The press was with us. Then they blasted us.”

Philosophical Approaches to Labor Negotiations: ALL Parties

Consistently, those interviewed mentioned the adversarial approach taken to labor negotiations that seemed to ignore the realities of the other side. Numerous times interviewees from all groups said that unrealistic expectations were brought into the process and held on to. The only time the parties eventually made meaningful movement was around political pressure or economic realities. There was no spirit of any type of interest-based or collaborative approach.

Lack of Consistency: ALL Parties

Frequently, the theme of consistency was raised, and most commonly in reference to management's application of the contract and frequent changes in union leadership. With respect to union leadership, both style and approach to labor relations has not been consistent. There is concern that even if one group of union leaders committed to a change process, either they'd be pressured to abandon it or voted out for supporting it.

Day-to-Day Attitude: ALL Parties

One theme voiced by many is that the day-to-day attitude of labor and management representatives carries over into contract negotiations and vice versa. This attitude is regularly described as labor grieving and litigating any and all attempts to manage the organization. Management's attitude is commonly perceived as inconsistently, incorrectly and punitively trying to enforce rules.

Lack of Trust: ALL Parties

There is a severe lack of trust in every direction and relationship amongst the involved stakeholders at BART. The management/labor lack of trust is the most acute. But consistent themes related to lack of trust were mentioned in interviews as it related to:

- Management internally
- The board internally
- Between unions
- Between some rank and file workers and union officials
- Between some rank and file workers and management
- Between management and the board
- Between labor and the board
- Between some members of the press and both labor and management.

Eroding Trust

In addition, a common theme was the eroding trust of the public and ridership with BART as a whole.



"We apologize" by Michael Dunn²⁹ is licensed under CC by 2.0

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Observations and Analysis of Factors Contributing to 2013 BART Labor Disputes and Ongoing Issues

Mistrust:

It is our conclusion that the 2013 BART strikes resulted from a pervasive sense of mistrust between the parties combined with initial decisions about the bargaining process, its leaders and the scope and content of proposed contractual changes. The conflict was exacerbated by a number of other things, such as public attacks, negotiating in the press, starting too late and the involvement of outside influences.

We believe the stage was set early on and, as a result, intransigence quickly enveloped all parties. Fueled by erroneous assumptions,

²⁹ <https://www.flickr.com/photos/acidhelm/9219037027/in/photolist-f3DYwg-f3Ucmd-bDA38G-bDA3g5-bDA2Nq-zuB5d-aBA1WD-fnBDHd-aBCUCG-aBCDUf-535FKs-owgpdS-oeXEJu-nn9bfA-nn9ccW-nuGL3K-nduMcz-n66gQc-n66fur-nuGKkc-nn8RY5-noUeqV-npdVEQ-noUfCL-oeTwBf-9ZZRS1-k2BFR-eifX9e-9iGfCf-f51PoC-dm13Ym-ot9KyA-owcJBM-owuD1g-7PN7Xp-nwLkQD-npbGba-gVmSrt-kMadM-f1uGHh-f1uHad-f1fpjt-f1uKdC-f1foAV-f1fn2r-f1fmwz-8SPpVT-gp7U3n-br1cZc-gSdLUu> and <https://creativecommons.org/licenses/by/2.0/>

lacking a clear direction or strategy to prevent a strike, inexperience and insufficient information/ understanding in some quarters, poor communication and weak initial mediation efforts, the first strike (July 1, 2013) was ironically both a surprise (timing wise) to management and a reluctant foregone conclusion to ATU and SEIU. While the first strike should have resulted in continuous negotiations to prevent another one, the situation further devolved, and precious time was lost. This happened, largely, because neither party believed the other would negotiate a deal they could accept. This nearly universal lack of trust played out in a myriad of ways and is reflected in most of the other contributing factors chronicled below.

Initial Decisions:

Initial management decisions about the bargaining process, its leaders and what could be achieved in one negotiation cycle set a trajectory for a system shutdown that virtually no one wanted. While some union representatives maintain that this was intentional, that is **not** what has emerged from our efforts to determine causative factors. Many things influenced these early decisions and it's much easier to see in hindsight why some of them were ill advised.

To facilitate better understanding and lessons learned, we looked closely at the planning stages for the 2013 bargaining. Management interviews indicate that initially Rudy Medina was tapped to be the chief negotiator for all the labor negotiations. Rudy had come out of the Federal Mediation and Conciliation Service and had a union background. He was a proponent of interest-based bargaining (IBB). He had been hired by the former general manager to establish better working relationships and a bargaining process that was not contentious. It appears that he discussed using this approach in upcoming negotiations with the current general manager and she was initially supportive.

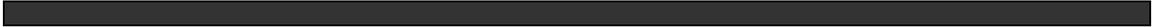
The general manager met with union officials and employees in the fall of 2012 and reassured them that things would be constructive in bargaining. She subsequently gave workers recognition awards, did a morale survey, and brought cake to employees.

Rudy set up IBB trainings and invited union officials to attend. Some did, others either did not or did so sporadically. The unions reported that in the fall of 2012 some trainings resulted in team building and a “feel good” sense. However, they remained skeptical about IBB and management’s motives for promoting it. Largely because of this mistrust, ATU and SEIU never bought into IBB. They appeared to send mixed signals for several weeks, partly because there was not unanimity within their own ranks. According to Rudy, SEIU and ATU weren’t committed to using IBB but did tell him they might engage in some form of collaborative bargaining.

What seems to have been misunderstood by some is that IBB cannot succeed in an atmosphere devoid of trust. Training and teambuilding, although essential, are not sufficient. While there are many variations of interest-based bargaining, it differs from traditional bargaining in that both management and union negotiators begin by articulating the issues they want to address and their reasons and needs for doing so. This is different than traditional bargaining, where each party submits a set of proposals (unilateral “demands”) and the parties typically start from widely divergent positions when opening negotiations. In IBB, they articulate their “interests” or reasons/needs for raising specific issues and then explore ways to meet these interests using data and creative problem-solving techniques. With respect to some issues they find win-win solutions, while in other cases, they compromise, decide to accept the status quo or even agree with the other party’s preferred solution. In the end, the entire agreement is mutually acceptable because both parties’ interests have been met to some extent. The key is to set up an environment of respectful, open dialogue and keep all parties focused on solving their differences together in practical and, sometimes, innovative ways.

To heal years of animosity, much less make this kind of major shift to IBB, significant foundation building and a cultural change over time would have been required. What happened at BART in the latter part of 2012 appears to have been a case of good intentions by some coupled with a lack of knowledge and experience of what is essential to transition from an adversarial to a constructive labor relations environment where IBB can succeed.

By early 2013, Rudy reported to the general manager and executive management team that ATU and SEIU had rejected IBB. This was



based on his conversations with various union leaders and from their subsequent rejection of an interest-based negotiation on the issues of release time and facilities for negotiations. The unions reported that what they rejected was, in their opinion, a management ploy to get them to relinquish critical bargaining mechanisms (i.e., release time and location issues) “under the guise of collaboration and IBB.” Rudy characterized these issues as simply “ground rules.” In interviews, some managers referred to these issues as “Labor’s Holy Grail.” One top manager, when interviewed stated, “We picked these fights. We knew this was their Holy Grail. We picked these fights early on purpose.”

Yet, Rudy, at this point, seemed to believe that these issues were ripe for practicing collaborative IBB tools, possibly because he was not involved in all the management strategy team discussions about this. The unions saw this as an initial shot across the bow and they started preparing accordingly. They also knew there was division within management philosophically and they expected the hardliners to prevail.

One misunderstanding here (among others) is that when first using IBB, issues should be ones selected mutually by the parties. Proposing to practice IBB on an issue that the other party viewed as threatening to their bargaining ability undermined the efficacy of the entire IBB process. It is likely that ATU and SEIU leaders would have rejected IBB anyway because they either did not support it philosophically³⁰ or did not believe it could work at BART.

After management was told that IBB had been rejected, discussions ensued about a traditional process and how it should be led. It appears that the general manager was looking for a middle ground between IBB and a potentially “nuclear” strategy allegedly advocated by an assistant general manager who left the agency early in 2013. A transition was made, wherein Rudy was replaced by Tom Hock, an outside contractor, as chief negotiator for SEIU and ATU negotiations. Rudy was assigned to lead the AFSCME negotiations, which he reported he conducted using a hybrid form of IBB until early July 2013.

³⁰ It appears that there also may have been misunderstandings about basic IBB requirements. For example, some union leaders were concerned it would hamper their ability to fulfill their responsibility to successfully advocate for their membership.

To the unions, Tom Hock was not a middle ground. He was a “call to battle.” The unions were vocal early and often about their objections and their belief that Tom Hock was a union buster. They already believed he’d been brought in under the radar in the fall of 2012 for nefarious reasons. This was not borne out in our information gathering. Initially Tom Hock was retained in an advisory, support capacity with no expectation that he lead negotiations.

Management viewed the unions’ protests as posturing. Two managers told us, “It didn’t matter if we brought God in to negotiate. They’d vilify him and still go on strike.” Others made similar statements during interviews.

Some managers were offended by what they viewed to be “character assassination” of Tom Hock by the unions. During our interviews, it became clear that they believed the unions were trying to shift the focus to Tom Hock “to change the conversation and move the attention away from their own actions and proposals.”

Our conclusion is that on this issue, the unions were not posturing, but were genuinely expressing their views. ATU officials in California have, for years, communicated to numerous transit managers and to other union leaders about their experiences with Tom Hock. In those conversations, he has been characterized as extremely adversarial, and ATU negotiators have often claimed that contracts could not be settled by negotiating with him. He is referred to in union circles as “Dr. No.” ATU local and international officials reported to us in interviews that whenever they dealt with Tom Hock they could not reach an agreement without threatening a strike, going directly to the board, elected officials, or in at least one case, binding arbitration. This information was shared at conferences with BART ATU officials. SEIU and ATU BART union representatives also did their own research and, as a result, concluded that the general manager had been either duplicitous when she gave assurances that this would be a constructive bargaining process or she had moved into the hard liners’ camp.

Due to so much mistrust of the unions’ motives, combined with information about Tom Hock’s wealth of transit bargaining experience, top management simply did not believe the unions’

concerns or see them as cause for alarm, so no further information about his bargaining style and/or history with ATU locals was obtained. Unfortunately, this, in hindsight, would prove detrimental to the process.

When the agency proposed an amendment to Tom Hock's contract on March 29, 2013, it stated that "The general manager has determined it to be in the best interest of the District to hire a consultant to provide traditional bargaining services for the ATU and SEIU." This reference to "traditional" bargaining was viewed by the unions as an indication that management was going to engage in an adversarial process with an anti-union chief negotiator.

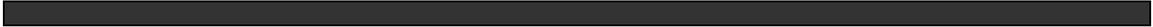
Information provided to the general manager about Tom Hock was that he was highly regarded and well qualified to lead these talks. This information was included in the requested amendment and provided to the board:

"Thomas Hock previously served on the BART negotiating team in 2001, and is a respected public transit industry labor attorney who has been involved in labor relations for nearly 40 years. Mr. Hock has negotiated close to 400 agreements in 38 states and serves on APTA's 13(c) and Legal Affairs Committees. Additionally, he is the author and editor of *Management Report on Transit Labor Issues*, which is an annual publication of data and trend information for the industry's labor professional.

"Veolia Transportation Services, Inc. was selected based on its ability to provide these highly specialized services at best value for the District, for its knowledge of BART labor issues and its availability and rates."³¹

Early mixed messages and decisions about process put the unions on high alert and escalated tensions before negotiations even started. The combination of actions such as retaining Tom Hock, seeking to reduce bargaining release time and press responses as early as Feb. 2013 maligning employees for absenteeism, convinced the unions that BART management had decided to engage in a combative form of bargaining.

³¹ From "Amendment to Agreement 6M4268 with Veolia Transportation Services, Inc.," dated 3/29/13.



Thus, the positive efforts initiated by the general manager (employee recognition awards, reaching out and soliciting feedback from union representatives, conducting a morale survey, providing training for IBB) were viewed by the unions as “smoke screens.”

Management’s initial economic proposal confirmed to the unions that the agency was seeking a confrontation. To the unions, this proposal was more concessionary than proposals advanced during the 2009 negotiations when the recession was in full swing. Even some management members of the bargaining team told us they thought these proposals were extremely “ambitious,” “unrealistic” and “would provoke a strike.”

Tom Hock stated in an interview that he had warned the general manager that her position, if not modified, would result in a strike. Others in attendance at some management meetings confirmed this, but added that Tom also stated that the strike would be brief because employees would return to work as soon as they missed a paycheck. While some top managers supported the general manager’s bargaining positions, others reported spirited conversations in which they told her these proposals were insulting to the bargaining units.

Some members of the management strategy team were equally shocked at the unions’ opening economic proposal as well as their attacks on Tom Hock.

Rudy Medina had spent time with Operations managers and others developing a top ten list of BART issues for negotiations. Yet, according to interviews with some management negotiators, “We didn’t use the top 10 list. We put in everything and the kitchen sink. It didn’t seem like there was a clear view of what was to be accomplished.”

Others commented that, “We had so many proposals and then Hock would withdraw seven in one session, signaling we were not serious.” Actually, the signal the unions received from this approach was that management had pre-determined these actions as a part of their “surface bargaining”³² strategy. To the unions,

³² Surface bargaining is a strategy in collective bargaining in which one of the parties “merely goes through the motions,” with no intention of reaching an agreement. In this regard, it is a form of bad faith

management was just going through the motions of negotiating and had every intention to force a strike. To some members of management the unions, by not moving off their proposals, were not really negotiating either.

In interviews, numerous members of the management bargaining team said they were convinced the unions were determined to strike. They espoused various reasons for this. For example: "SEIU wanted a strike to make a point. In the past, ATU--even though a smaller bargaining unit--has historically been the big dog in negotiations. SEIU had a chip on their shoulder. Josie, their chief negotiator said, we are a powerful union. Do not take us lightly. We are the big power players."

Others said they thought the unions felt it necessary to strike to get the board to cave. Some saw the unions' June strike authorization vote as proof they were going to strike. Yet another belief by some was that there was a larger union strategy with AC Transit (Alameda-Contra Costa Transit District) labor officials and others to "shut the Bay Area down." While we found grains of truth in all of these theories, we have concluded that they were generally based on incorrect assumptions.

It is true ATU and SEIU have clashed in past negotiations, as well as this one in 2013. These unions have different ways of operating. This is not unusual in the labor movement. Typically, unions, regardless of internal differences, unite in the face of any perceived strike threat. There is no evidence we could find that internal disputes or competitiveness was a factor in the decision to strike at BART. Similarly, there were discussions about utilizing outside resources and coordinating with other unions whose contracts were open (such as AC Transit), if a strike became imminent. Again, this is a typical strategy that unions evaluate and utilize if it is doable and will provide greater leverage in a labor dispute. There was, however, no executed master plan, as some managers suspected to either "shut down the whole Bay Area" or strike because SEIU "has a larger agenda to flex its muscles."

bargaining. http://en.wikipedia.org/wiki/Surface_bargaining. Viewed 7/12/14. From: Caisley, Kiely Thompson. *Collective Bargaining*. Auckland, New Zealand: CCH New Zealand, 2007. ISBN 978-0-86475-634-3 and Carrell, Michael R. and Heavrin, Christina. *Labor Relations and Collective Bargaining: Cases, Practice, and Law*. Upper Saddle River, NJ.: Prentice Hall, 2001. ISBN 0-13-019474-3.

Finally, strike votes, while certainly clearing a path to potentially strike are not typically the same as a decision to strike. In fact, most of the time, strike votes are taken for additional reasons, such as to break log jams, to demonstrate rank and file support for their negotiators' positions and to leverage decision makers to make movement in the direction of union proposals. We believe all of these factors and more were likely in play in June 2013 when strike votes were taken.

It is important to understand these unions, by their history, are not "strike happy." The last BART strike was in 1997. While it is true strike threats have been made in each contract cycle that is very different than acting on those threats.

By contrast, the Los Angeles County Metropolitan Transportation Authority (LACMTA) unions (which include ATU and AFSCME represented bargaining units, among other unions) had a history of striking regularly until they transitioned to a different way of bargaining after a 35-day strike in 2003.

L.A. TRANSIT STRIKES – 1972-2003³³

Date	Striking Union(s)	Length
Feb.-March 1972	Amalgamated Transit Union (ATU)	6 days
Aug. – Oct. 1974	United Transportation Union (UTU)	68 days
Aug. – Sept. 1976	ATU	36 days
Aug.-Sept. 1979	ATU; Brotherhood of Railway, Airline and Steamship Clerks	23 days
Sep. 1982	UTU	5 days
July-Aug. 1994	ATU	9 days
Sept.-Oct. 2000	UTU	32 days
Oct.-Nov. 2003	ATU	35 days

It appears the board was not provided with comprehensive or compelling analysis early on that management's bargaining positions, their choice of chief negotiator, along with their media

³³ Guccione, Jean and Rabin, Jeffrey; *L.A. Times*, "Three Unions Reach Rare Accord: The three-year deal represents the first time in almost 10 years that the agency's labor negotiations have ended without a strike," June 28, 2006, page B-3.

strategy would almost certainly be a formula for a strike. Not being privy to what was discussed in closed board sessions, we cannot conclude with certainty that such conversations never occurred. However, from interviews, it appears that no one had the experience, objectivity, or access to all that was happening to form such a perspective going into bargaining. There were BART executives and other managers with dissenting views, but their opinions did not seem to be elevated to board discussions.

Lack of Resolution Strategy:

Given that negotiations got off to a hostile start, and continued to spiral down, what was management's strategy for successfully conducting and concluding those negotiations by June 30th? One management interviewee summed up what we heard from many sources:

"When Tom Hock took over as chief negotiator, Grace had become hard line. There wasn't enough trust built, so we agreed it was traditional bargaining. Grace did not have experience or a full grasp of what this meant. Tom Hock thought a strike was inevitable. I don't know how we thought we could win. We did not even have the whole board supporting this. Tom pushed it to strike because Grace would not budge financially. So Tom said to Grace, 'You will have a strike with your position.' Management thought we could win the PR battle and the unions would cave. But the unions had the politicians. The press can turn on a dime. They did and our strategy backfired."

Two managers summed up what we heard from several:

"We did not have a Plan B to prevent a strike. We had more proposals than the unions did. This is unusual. We did not prioritize our proposals. Tom said, 'Put everything in and the kitchen sink.'"

"This strike was not productive. We never did a course correction and then there was another strike. Two people got killed. We spent millions to end up getting creamed and engendering hate."

In interviews, Tom Hock said he believed the strike would be very short and the unions would have to come back and reach an agreement before management would have to give in or move off their positions. He based this on the fact that the BART contract was very good from the employees' perspective and that Bay Area public sentiment was not in support of BART unions. He said media reports also heavily favored the management perspective. He believed the union leadership did not have the influence necessary to keep their members out for long. Hock said he believed if there had not been leaks to the unions and the board had been more forthright in their dealings, they could have arrived at an agreement that was more fair to the management and the ridership of BART. He criticized the board who he said made it very difficult for staff because they leaked information to the unions, "made deals behind management's back," and reversed direction without any rationale. He went on to claim that two board members who were in opposing camps were at least clear about their views, whereas the others were "disingenuous" to each other and management.

Hock believed that the money offered by BART in the contract was fair. He said when outside politicians came and met with him, they never mentioned that BART had to put more money toward an agreement. He said they just came to be seen and encouraged everyone to keep talking and find an agreement.

He described the local politicians who contacted board members as having a tremendous impact on the board. He said SEIU and ATU had such a strong influence on the politicians that the board caved under the pressure.

He was critical of the group advising the general manager, who he described as not qualified to play that role. He mentioned that as players on the BART management side left, the staff who advised the general manager were all inexperienced at that level of negotiations.

Tom said the distraction of the unions trying to discredit or threaten him did not bother him. He said it is inaccurate to describe him as a union buster. He said his business is to negotiate for transit organizations, not for unions, as this is neither his desire nor is it feasible. He said in every one of the hundreds of negotiations he has been a part of there is still a union in every one



of those transit organizations after he completed negotiations. He expressed the view that the elected board structure, the political influence base of the unions and the inexperience of BART management in labor negotiations made it problematic to accomplish effective negotiations.

Our analysis points to the fact that negotiations at BART have almost always been difficult, but have usually concluded without strikes. While we do not know what transpired in closed sessions, we could find no evidence that board members were making deals “behind management’s back” with the unions nor were we able to obtain specifics or confirmation about his claims that board members were “disingenuous.” The conditions cited by Tom Hock above (elected board, politically strong unions, inexperience in labor negotiations) have existed in prior negotiations when no strikes resulted. So, it is important, in our opinion, to also explore other factors that contributed to the breakdown of these negotiations.

Additional Factors Led to the July 1 Strike:

Management was not expecting a strike on July 1 when the contract expired. Some management bargaining team members reported they were caught off guard because they did not believe the talks were at an impasse. Some who were interviewed stated:

- “We’d made it clear that our initial wage proposals were not our last.”
- “In 2009, we kept talking for three weeks beyond the expiration date so I thought that’s what would happen.” (Other managers said that in 2009 the Chief Management Negotiator Carol Stevens took a strong leadership role in keeping the negotiations going.)
- One manager expressed the belief that the unions would not strike until after July 4 in order to collect holiday pay.

All of these turned out to be incorrect assumptions. The unions had given their 72-hour notice and they reported they thought management’s eleventh hour offer was designed to offend and provoke them, which it did.

Additionally, there was criticism about the efforts of the two state mediators. Some management negotiators said:

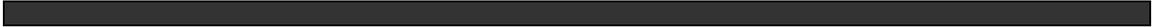
- “They were the worst mediators I’ve ever seen.”
- “We didn’t hear from them for hours, and we’d sit there and we thought there would be another meeting and then there wasn’t. No one took the lead as mediators. Typically, in a case like this, a mediator would come to both parties and say ‘we’re working this out, we’re not going on strike,’ and would take leadership. These mediators didn’t do that and were non-communicative. So the unions left and went out on strike.”

Some on the management bargaining team voiced opinions that the strike could have been averted if Bruce Conhain or someone similar had been the chief negotiator because, “He was really good at keeping discussions going and was respectful.” One manager summarized this view by saying, “At the end of June, the conversation stalled. Tom Hock just let it stop.” Others disagreed, maintaining that the parties were just too far apart.

ATU says they offered binding interest arbitration to Tom Hock as an alternative to striking. If so, this was not communicated to the management team. At least one member of the management bargaining team reported being present when the unions “asked us in passing, ‘What would BART think about sending safety issues to binding arbitration?’” According to this negotiator, there was no formal proposal made by the unions before the first strike to go to interest arbitration. Just this informal remark. Tom reported to top management that ATU’s constitution requires them to offer to arbitrate, but they had not done so.

ATU’s constitution requires them to explore all reasonable avenues to avert a strike, so it’s perplexing why the chief management negotiator would not have formally asked ATU to comply with their constitutional provision. Some opined that it would have been a waste of time. It may have been, but with such high stakes, it seems unwise not to explore all avenues to prevent a labor dispute and related system shut down.

It is also concerning that no one seemed to assume a leadership role in seeking to keep the talks alive. Then between July 1 and October



18 (commencement of the second strike) there did not appear to be strong efforts to get a deal. This was over 3 ½ months.

What could have been done differently? First, the parties needed to keep meeting continuously. Again they both blamed each other for a lack of commitment to meet. The union reports that chief negotiator Hock often was unavailable and reportedly said to them at the beginning of the 60-day cooling-off period (August 11, 2013), “See you on day 59.” Management disagrees, responding that the unions exaggerated Hock’s time away and stating they would have met without him if the unions had so requested. In hindsight, more should have been done to get productive negotiations going in the time between the first and second strikes. This could have been an opportunity to try any number of things. For example, an attempt could have been made to utilize the services of a mutually-acceptable, private fact-finder/mediator who also could have worked with parties separately and together. The mediator may have sought a cease-fire in regard to “negotiating in the press,” along with other measures.

Mediation:

By nearly all accounts, the two federal mediators who came from Washington, D.C., before the second strike (including presidential appointee and Director of the Federal Mediation and Conciliation Service, George Cohen) were both highly skilled and worked hard to help the parties reach a deal. Some management team members observed that the mediators were treated “disrespectfully, like errant school children” by two members of the management team. When they left without a settlement, the parties had utilized a total of seven mediators since June. This is rare.

In interviews, some top managers criticized the required marathon sessions and how “pushy” the mediators were. This likely indicates a lack of experience with, and understanding of how, mediation works. A few managers who were present said the chief management negotiator was “dismissive” toward the mediators.

Movement Toward Settlement:

Another factor that again, according to some managers, interfered with settlement on their part was that “Tom Hock was furious with management for not standing their ground more.” He referred to some managers as “amateurs” and blamed them and the board for not being tough enough. Others said management had a history of bargaining against itself during this process. Some cited multiple last, best and final offers that they viewed as mistakes. Still others maintained that management’s positions were untenable and destined to be withdrawn.

All of these varied opinions were supplied to us by managers. It appears that support for conflicting strategies about movement toward settlement further confused and gridlocked the process.

In many, if not most strikes, both parties make movement to break the log jam. While one party may move farther than the other or dollars may be reconfigured, settlement is usually contingent on some shift in both parties’ positions.

Political Engagement:

During negotiations and settlement efforts after the first strike, outside involvement and pressure from elected officials began mounting on all parties to get an agreement. Management viewed this as the unions using their political clout to influence the process in a manner benefitting them. That is undoubtedly true. In fact, it apparently began before the start of the first strike with outside elected officials contacting and, in some cases, pressuring board members to modify their positions.

Some managers reported warning Tom Hock before the first strike that this is not a “right-to-work state” where the union’s political influence is weak and, “The unions will activate the politicians in a strike.” Regardless, our conclusion is that in spite of the criticism by many interviewees about electeds “interference,” they were not the **cause** of either strike. Their involvement was primarily an **effect**.

The Governor did what any responsible elected leader would be expected to do; he brought pressure to bear to get the trains running. Other legislators and local officials should have been

expected to engage because their constituents were demanding results and a resolution.

Incredibly, there seemed to be a lack of understanding of what to expect during a labor dispute. Strikes are almost always chaotic, under a media microscope and unpredictable with many new players entering the fray. For example, in 2000, numerous elected officials intervened and Jesse Jackson flew to Los Angeles to try to end a 32-day strike at the Los Angeles County Metropolitan Transportation Authority.

This is not to suggest that either party should “cave” in order to settle. The conclusion we draw is that all parties should have developed, in advance, contingency strategies in the event of a strike to “land the plane.” Creativity and greater flexibility in generating solutions is also critical. This did begin to happen, we were told, at the end of negotiations when Bruce Conhain became chief negotiator and others such as BART’s general counsel joined bargaining efforts.

Media Strategy:

We heard how both the unions and management were holding press conferences and/or talking to the press frequently while bargaining.

Interestingly, both parties claimed they were simply providing facts to the press and public while the other was distorting them. One manager who was in bargaining said it was “exhausting.” Another noted, “Some days we got nothing done because we were so busy responding to information and media requests.” Most interviewees now see the “negotiating in the press” approach as a mistake.

We agree. Reviewing the large volume of press releases, print stories, television and website postings, it was clear no one ultimately benefited by the details, the barrage of perspectives and “the spin” supplied to the media. These activities further poisoned relationships and hardened positions. Precious time and energy was diverted from negotiating with each other to negotiating in and with the media.

Internal Decision-Making:

Unions typically have spirited internal debates and sometimes messy processes to get to hotly contested internal decisions. However, it is a means to vet different views and allow for democracy to function within the organization.

While management operates under a different model, effective decision-making often requires devil's advocacy-type discussions. Internally at BART, it appears that all voices did not believe they were heard. Dissenting perspectives about strategy were not perceived to be solicited, according to numerous management sources. In hindsight, it would have been important for the management strategy team to tap into the wealth of experience, backgrounds, and thinking of more managers and some mid-level consultants who had rich bargaining histories, insights and ideas.

Safety:

It is our conclusion that both labor and management care about safety at BART. However, their mutual distrust has prevented them from actually hearing each other's perspectives and concerns, problem solving issues effectively together or operating as true partners in this critically important arena. Key points made about safety in bargaining sessions, as reported to us, fell on deaf ears because management thought the unions were just posturing and the unions thought the management was refusing to engage.

AFSCME Process:

Those at BART who were the most traumatized by the events of 2013 may be the officers and some members of the American Federation of State, County and Municipal Employees (AFSCME) Local 3993. They represent approximately 210 supervisors, managers, planners, analysts, administrative programmers, and train controllers. Their member Christopher Sheppard was killed during the second strike, along with an outside contractor, Laurence Daniels. Christopher's picture is prominently displayed in the entrance of their office. There is tremendous anger and blame towards certain high level managers by AFSCME officers who

believe their warnings about safety--and what would happen if trains were run during a strike--were not heeded.

The unions' officers talked at length with us about the "nastiness" that has not subsided, the exceptionally low morale, their collective "exhaustion" from constant fighting and their belief that one longtime, top manager "hates the unions and tries to bully us into submission." One AFSCME official said, "I really don't know if this agency can recover. I still hope the culture can be changed. It has been exceptionally miserable for over a year now."

Ken Phillipe, BART principal labor relations representative, was originally assigned to lead AFSCME negotiations. By May 2013, Rudy Medina had been removed as chief negotiator for ATU/SEIU and assigned to be chief negotiator for AFSCME negotiations. Rudy, Ken and the union negotiators confirmed they had agreed to ground rules specifying, among other things, that:

"Depending upon the issue or subject, negotiations will be conducted using either a traditional 'proposal/counterproposal' process or a 'collaborative problem-solving process.'

"A. The collaborative problem-solving process will be used only by mutual agreement. In the event that the parties reach impasse on an issue or subject using the collaborative problem-solving process, the moving party may then submit it to the traditional process."

They were the only bargaining unit to use this approach. It ultimately did not work for numerous reasons.

AFSCME reported that Rudy was not given authority and, therefore, could not make real commitments on behalf of the agency. Some managers confirmed that they also believed this to be the case. Union negotiators were frustrated by his inability to sign tentative agreements (TAs). Instead they reported Rudy could only negotiate something he called "pre-TAs." Others in management said they think Rudy was trying to clarify to the union that all potential TAs had to be vetted with Legal and some management strategy team members before he could sign them. This information was conveyed by Rudy to AFSCME negotiators. It served to confirm union officials' belief that he did not have the requisite authority to negotiate. Union negotiators recounted

conversations in which they asked Rudy if he was empowered to negotiate and, that eventually, he told them he really did not have authority. They also referenced hearing a top manager in a room next to theirs during bargaining loudly telling Rudy that he was not in charge of these negotiations.

There was also frustration about the snail's pace of their bargaining sessions. "We'd spend weeks discussing how many could be on our team and how often to meet." While some at that table confirmed this, they also said they were often on hold, waiting for news from managers at the "Big Dogs Table," meaning ATU and SEIU.

AFSCME negotiators reported they would frequently come to bargaining sessions at the appointed start time, only to be told that management was caucusing. "They would take forever to come back on silly stuff."

Things broke down between BART and AFSCME at the beginning of the first ATU/SEIU strike. This occurred over what management referred to as a "Most Favored Nations Agreement"³⁴ and what current AFSCME officials called the "Scab Agreement."

AFSCME President Jean Hamilton-Gomez, Rudy Medina and BART's general manager all signed an agreement on July 2 that guaranteed AFSCME-represented employees would be entitled to receive the same economic provisions and package as ATU/SEIU were offered or, ultimately, settled for. In exchange, the agreement stated that "AFSCME agrees that it will strongly advise its members to report to work effective immediately upon the signing of this agreement."³⁵

Apparently, upon signing, the AFSCME president publicly announced that AFSCME had settled and AFSCME members should return to work. This resulted in an uproar inside the union, with some believing this agreement was an attempt to use AFSCME to break the ATU/SEIU strike. There was talk that AFSCME supervisors and managers would be asked to operate trains so some service could be restored. Management disagrees with this account.

³⁴ See agreement in Appendix, page 179.

³⁵ From "Most Favored Nations" Agreement Between BART and AFSCME Local 339 regarding 2013 ATU/SEIU Negotiations," signed 7/2/13.

Almost immediately, Jean Hamilton-Gomez stepped down as AFSCME president, and her replacement repudiated this agreement.

All semblance of collaborative or interest-based bargaining died at this point. Negotiations did continue off and on, and a settlement was reached in October 2013. Conversations and attempts to rebuild the relationship between the parties have been made since that time, but there are still misunderstandings and hard feelings.

Employee Survey:

Commissioned by the general manager's Working Group Committee (aka Employee Engagement Committee) a BART employee survey was conducted in late 2012, early 2013. The results were released in May 2013, near the beginning of labor negotiations.

The survey was conducted online and by paper survey. A total of 1,173 surveys were completed, which is a 37% response rate. According to Survey Monkey.com 30% is an average response rate for online surveys,³⁶ so the combination of online and paper surveys undoubtedly increased the response rate.

We learned of the existence of the employee survey through interviews for this report.

BART Employees Agree that Labor-Management Relations are Not Well Functioning:

One key finding from the survey is that it supports the same theme raised by the board, management and the unions at BART:

- Only 18% of BART employees who responded to the survey agree that labor and management work well together.

³⁶ www.surveymonkey.com.

Other Findings to Address:

While 80% of employees who responded to the survey agree they are proud to work at BART and 67% agree they are satisfied with their jobs, there are other areas that reflect or contribute to low morale in the workplace:

- 37% agree their co-workers are satisfied with their job at BART
- 37% agree their work is appreciated by top management
- 36% agree they receive appropriate recognition for their service to BART
- 35% agree BART cares about its employees
- 38% agree they feel informed about what is going on at BART
- 25% agree BART considers employees' suggestions

These are low percentages and were generated before the strikes and the protracted negotiation process.

Follow-Up or Initiatives Resulting from the Survey:

Some changes resulting from the survey responses were mentioned in interviews with Operations managers, and we were told there appears to be more training (technical and soft skills) offered to the staff working at the BART headquarters.

These efforts are important and should continue in conjunction with a comprehensive, coordinated plan to build more effective labor-management relations. These results can also serve as a baseline for measuring the success of ongoing efforts and to help inform decision-making in this regard. The survey results are included in the Appendix of this report.

Ongoing Efforts:

Outreach efforts by the general manager to union leaders is ongoing and the board's hiring of a new AGM of employee relations to improve labor-management relations are both positive steps.



"You can't get there from here" by Michael Dunn³⁷ is licensed under CC by 2.0

H. Tentative Agreement 4.8: Causes and Prevention Recommendations

Section 4.8³⁸ was a proposal submitted by SEIU and ATU during 2013 labor negotiations. It ultimately was formatted into a tentative agreement, signed by BART's chief negotiator, assistant general manager of operations and labor relations manager, and then forwarded to ATU and SEIU. Controversy arose as to the efficacy of this tentative agreement just prior to a board meeting in November 2013 in which the board was to vote on all elements of a tentative agreement.

When the board declined to ratify the SEIU and ATU agreements with 4.8 included, more hostility, finger pointing and legal actions resulted. These events were played out in the media as well.

³⁷ <https://www.flickr.com/photos/acidhelm/9221811744/in/photolist-fdFEDw-gRw3Ra-f1xcMx-f1xcCM-aBfRMK-gM7fHv-eZL7A1-eZyJZa-eZyJLP-eZyJUc-eZwAgn-fsGKED-gLnyr3-f3E31e-f79Lz2-f79LH6-2b84zZ-aBCCvd-f3Udv9-f3UbUW-f3DYwg-f3Ucmd-bDA38G-bDA3g5-f3Ue4u-n6v4xv-bDA2Nq-zuB5d-aBA1WD-n6vc8P-fnBDHd-aBCUCG-aBCDUf-535FKs-oybviV-owgpdS-n6v8bk-n6vdGa-oeXEJu-nn9bfA-nn9ccW-nqXk9T-oy1DAM-nuGL3K-nduMcz-n66gQc-n66fur-nuGKkc-oeN6gc-nwLkQD/> and <https://creativecommons.org/licenses/by/2.0/>

³⁸ The disputed 4.8 TA is included in the Appendix, pages 177-178.

The BART Board of Directors requested that this report determine what caused 4.8 and recommend ways to prevent similar occurrences in future negotiations.

After interviewing the individuals associated with 4.8, including the forensic analyst, Chief Information Officer Ravi Misra, commissioned by BART to reconstruct the sequence of events, and examining all relevant documents, we have concluded that 4.8 was a mistake made by the chief management negotiator. It was not a clerical error, a case of union sabotage or the fault of internal legal counsel, as some have suggested.

It is significant as a lesson learned, because, among other things, it underscores the inadequate document control, lack of clear roles and lines of authority and laissez-faire approach to negotiation administration by the chief negotiator that resulted in confusion throughout the bargaining process. These issues and concerns were raised repeatedly by some management bargaining team members. As one BART staff member who was involved throughout the process told us:

“If Tom Hock had read it before he signed it, 4.8 would not have happened.”

A tentative agreement (TA) titled “4.8 Family Medical Leave,” signed by BART representatives Tom Hock, Paul Oversier and Rudy Medina dated July 19, 2013, was transmitted to the unions on or about July 19, 2013. It provides for “Six weeks of paid time off to take care of a seriously ill child, spouse, parent or domestic partner or to bond with a new child.”

All three who signed the 4.8 TA told us in interviews that they did so without reading it. Rudy Medina stated he did not understand why he was asked to sign TAs for agreements made at negotiation sessions that he had not attended. Paul Oversier reported that “There were so many TAs regarding changes that I just started signing.” Tom Hock told us it was a mistake on his part not to read it, but that the BART internal process he inherited was that all matters related to written material exchanged in negotiations were the responsibility of the lawyer assigned to the negotiations. This is disputed by the general counsel and the attorney assigned to

bargaining. Nor could we find any evidence of such a procedure, policy or process in existence in 2013.

Management claims 4.8 was rejected by them in June 2013 and then withdrawn by the unions, who disagree. The District maintains that in the union proposal of June 5, 4.8 was withdrawn. The unions contend that on June 24 they told Tom Hock their withdrawal of 4.8 was contingent on acceptance by the District of the package they had proposed and given to him on June 5. The District made comprehensive package proposals on June 27, 29, and July 2 which included all negotiated TAs, but not union proposal 4.8. Then a 4.8 TA, according to management, was erroneously created on July 11 and dated and signed July 19.

Both ATU and SEIU point to the August 7, 2013 materials provided to the Governor's Board of Investigation,³⁹ in which the unions indicated that Section 4.8 had been tentatively agreed upon. The District, according to the unions, said nothing to call that into question until after the entire memberships of both unions had ratified the whole final package agreement on November 1.

BART management points to their August 10, 2013 final offer listing all TAs, which did not include 4.8. Another Last, Best, Final Offer was made by the District on October 13, 2013; that also did not include 4.8 with the additional six weeks of paid leave. ATU and SEIU maintain they received three different Last, Best and Final Offers from management between October 13 and 17. All parties agree a tentative agreement was reached on October 21. ATU provided a "Tentative Agreement Synopsis" dated October 21, 2013, which references "Section 4.8 Family Medical Leave (New)."

TA inventory meetings were held between management and SEIU on October 22-23. At these meetings, TAs were listed by number, but not by content. According to union attendees, TA 4.8 was called out along with many other references to contract sections. Management representatives in attendance say it may have been called out, and if so, they just missed it. ATU provided BART a

³⁹ In order to seek a 60-day cooling off period from the state courts, the governor must appoint an impartial fact-finding board in compliance with Sections 3612 and 3613 of the California Government Code. This board of investigation conducts an inquiry into the contract dispute, clarifies the points of difference between the proposals, takes testimony from the public and issues a written report to the governor.

copy of all the TAs, including Section 4.8 on October 28. On October 31, ATU received a comprehensive package from BART of all its TAs, including Section 4.8 and a coversheet in which 4.8 is referenced as an agreement.

The District reported the 4.8 error was discovered by them on November 4, when they were preparing a document for a board ratification meeting. Union contract ratification votes had already occurred on November 1.

Interestingly, Ravindra Misra, who had no involvement in the negotiations and was later tasked by the general manager with determining how the 4.8 TA made its way to final review, determined management had no notes or references to any bargaining session discussions about 4.8 once it was rejected by the District in June. According to Ravi, "It was very common to find conversation on all other TAs, but there was no record of 4.8. It just surfaced at the end."

The contract paralegal and temporary employee who typed the 4.8 TA recounted her involvement in an interview. She explained she was a temporary employee hired from Robert Half legal staffing agency and she started in approximately April 2013 and worked on the project until approximately August 2013 when she received a full-time, permanent job elsewhere. Her background is in legal contract administration and she has worked in biotech and the biopharmaceutical markets for the past ten years. When she began working on the BART negotiations, she had never worked on labor negotiations before.

She typed proposals, logged notes and created on paper what was being discussed at the table, including tentative agreements. She tried to keep things organized so everyone was working from the same copy of updated documents.

She said she did not receive any training when starting BART negotiations. She said it was not too complicated. It was just a Word file and people with experience in working with those types of files would not need much training. She did mention there was different language being used and she did not feel it was universal for all members in the bargaining process.

Commenting on the context of negotiations, she saw there was a lot of bad blood and a very hostile environment.

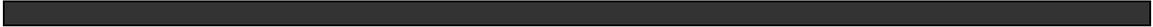
Describing the reporting relationship, she said it was very unclear who was in charge. Tom “seemed to be the guy who called the shots and there was no consistency in the process.” On small issues, she would be regularly referred to Labor Relations. Tom seemed, to her, to handle the bigger issues. She became very concerned about the lack of consistency, which she felt increased due to the volatility of the atmosphere. Because of the tense atmosphere and feeling it’s not her place, she said nothing.

As it related to tracking of the agreements, she thought she did a good job keeping it all straight, though, she was extremely surprised the agreement tracking system had nothing built into it to verify what had exactly occurred. She mentioned that in other industries where she had worked, there are systems and approvals that document what direction is given by date and time and who gave the direction.

She described each person on the BART team as having their copies of the contract, agreements, etc., in a gigantic binder. She recounted copying boxes of paper for each meeting with changes so that everyone had their own set of the latest papers. She made copies for everyone, while each member of the negotiation team did what they wanted with those copies, and they would make notes, etc., on the pages in the binder. The process was vulnerable to not being consistent. She observed papers being passed so many ways that everyone could have had a different version in front of them.

She described how 4.8 was created and signed, based on her perspective. In July, prior to a meeting with the unions, Tom Hock asked her to compile all the logs, notes and tentative agreements. Tom asked her to check with everyone to make sure that they all were working off the same set of notes and all the paperwork in front of the management teams was the same.

She then went to the Labor Relations staff person she was assigned to work with to go over with him what she had and compare it to what he had. He was very busy with other labor negotiation duties and handed her his binder to use to complete her task.



After receiving his binder, she went through each of the pages and compared her notes to his. As she went through his binder she noticed on 4.8 that “TA”⁴⁰ was written on the top of the 4.8 proposal page. After seeing this, she then reflected 4.8 as a tentative agreement on the master list. She kept and made copies for everyone of her most updated paperwork prior to that meeting.

After she made the change to 4.8, checking and organizing all her notes and compiling a master set, she gave it to Tom Hock.

Her observations as an outsider seeing the negotiation process up close were that the system was flawed and the personalities and drama involved made it worse. She believes a more regulated process for the BART team regarding tracking discussions, agreements and directives (time, place, who) would greatly assist the process.

We also discovered a proposal tracking system had been developed and the agency had some good tools at its disposal for determining the status of proposals and TAs. There did not, however, appear to be consistent use of these tools.

Some question whether the unions knew this was a mistake and took advantage of the situation. What exactly the unions knew is the subject of speculation (but not evidence) by some. The unions maintain their calculations indicated that, based on the District’s data regarding actual FMLA use, Section 4.8 represented a relatively minor cost item for the District. Therefore, the signed 4.8 TA did not raise any flags for them.

To make matters worse, one high-level manager initially suggested that the unions falsified this TA. This accusation enraged the unions. At least one board member told us there is still “suspicion that someone on behalf of the unions had a key and snuck in, added 4.8 and attached management signatures from a different TA to 4.8.” Our investigation found this to be without merit.

To the general manager’s credit, she launched an extensive effort to determine exactly what happened, but confusion and misimpressions lingered. Unfortunately, this whole episode only

⁴⁰ There is a discrepancy between what this temporary employee recalls seeing in the binder and a notation that the Labor Relations staff person said he’d made regarding whether 4.8 was a TA or not.

deepened the distrust between the parties and was an example of a serious cut in the death by 1,000 cuts syndrome.

The important takeaway here is that had there been any semblance of a good relationship, management could have brought this to the unions' attention, appealed for understanding and the parties may well have worked it out. This study's authors have been involved in hundreds of labor negotiations and, in our experience, all parties make mistakes, large and small. Human error is often a part of a complex and lengthy process. When good will exists, the parties usually agree to fix the mistake. It is trickier if ratification has already occurred, but even then, they often find a mutually-acceptable way to resolve things without legal action or public fights.

Finally, while it is true that there were multiple opportunities for management to discover this mistake before the unions ratified on November 1, the responsibility lies with those who signed it without first reading it. The chief negotiator is, in our opinion, where the buck stops. Therefore, the person in that role is accountable.

To prevent such reoccurrences, the following is recommended:

1. Clearly specify in contracting or other relevant documents that the chief negotiator is responsible for reviewing and ensuring all TAs are accurately delineated in writing before signing. This, we believe, is an inherent responsibility of this position, but greater clarity and specificity of all roles is helpful. It is our understanding that BART has since drafted such a document to use prospectively.
2. Set up redundant, consistent documents and record tracking systems with clear lines of authority identified.
3. Generate and sign TAs in real time. Do not wait weeks or months later to draft or sign them.
4. Sign TAs one at a time after reading each one.
5. In addition to individual TAs, generate an economic term sheet with all economic changes recorded, not just the article or section numbers. Management and union negotiators should

each review this term sheet separately and then together. Lastly, all the chief negotiators should read and sign it before any ratifications are held.

6. Attempt to conduct all bargaining sessions in one place that can be secured. The disruption and inefficiencies caused by moving back and forth to different locations throughout these negotiations was often reported to inhibit effective document control.
7. Hire a dedicated, in-house administrative staff person(s) who is in charge of bargaining and labor-management relations note taking, tracking and archiving documents. While the temporary employee assigned to type the TAs appeared to be highly competent, her role was limited. A permanent, experienced labor relations administrative staff person who had a history of attending negotiating sessions may have questioned the validity of a TA such as 4.8. Without training, experience and permission to do so, temporary note takers cannot assume such a role.



Courtesy of SEIU 1021.org

I. Lessons Learned and Takeaways

1. The Labor-Management Culture is Broken, But Not Beyond Repair:

The biggest takeaway we have gleaned from this effort is that the agency faces a decision crossroad between continuing business as usual in terms of conflict-laden labor-management relations or mandating and implementing an overhaul of the entire system and culture. We do not see a partial or half-way strategy working in this situation.

We believe there is currently a real opportunity to effect change that may not come around again for some time.

By many accounts, things have hit an unprecedented low point in the agency's history. A longtime manager summed it up this way:

"This time, unlike any other time, we have severely damaged our relationship with the rank and file, even worse

than 1997. They feel vilified in the press and antagonized. They think we tried to turn everyone against them, calling them lazy and greedy. Many rank and file people won't even talk to us since the negotiations. This is the worst it's ever been."

We believe the events of 2013 will be remembered and passed down for decades and even for generations. This is usually what happens as a result of one strike, much less two strikes within one contract negotiation period.

In over 41 years of working in labor-management relations and negotiations, the dysfunctionality of the situation at BART ranks in the top 5 of all the hundreds of groups this report's primary author has consulted with, mediated, trained, facilitated or studied.

The death by 1,000 cuts syndrome has been operational at BART for decades. This is especially troubling, since the agency is so young.

2. Previous Efforts:

Past attempts to change labor-management relations have not been sustained or comprehensive and therefore, never endured. For example, the more collaborative labor-management committee effort which was instituted about 15 years ago was operational, according to interviewees, for about one to two years. Some in management claim the unions walked away and some in the unions say it was a "flavor of the month" project that happened to be in vogue at the time. At the time there were apparently discussions about engaging in a more collaborative or interest-based form of bargaining, which BART management sources said was rejected because the rank and file "would have crucified the union's leadership."

3. Support for Balance:

The “tail has wagged the dog” is another takeaway. Interviewees often pointed to “extremists” or “radicals” from the unions and management taking charge and influencing labor-management relations to the detriment of positive change. This has helped to create an entrenched “us” and “them” culture at BART and, at the very least, these influences need to be neutralized or taken out of play. Their baggage and animus toward one another appears to us to continue to fuel mistrust between labor and management.

This is especially concerning as new people are hired at BART and brought into Labor Relations, management and the rank and file. We have observed and experienced an environment that quickly affects (and even indoctrinates) employees, managers and union officials to distrust one another. There is a palpable pressure and message of “You are either with us or against us.”

We also learned many managers and employees in the trenches do not want to demonize each other and have quietly found ways to work together.

We also discovered many are afraid they will face negative consequences if they are not seen as agreeing with the “hardliners who perpetuate war mode.” We believe many, if not most, employees and managers are weary of all this conflict. They just want to get the job done in a safe and supportive workplace.

(See Roadmap for Change Recommendations 9, 56 and 58-60 on pages 142, 156 and 157.)

4. Positive Signs:

There are currently leaders in labor and management who want to engage in a meaningful change process. There are also bright spots, such as some labor-management committees, that the parties involved report are functioning well at this time. The general manager’s ongoing outreach and those of the new

AGM of Employee Relations appear to also be signs of progress.

(See Roadmap for Change Recommendation 57 on page 156.)

5. Selection of Leaders, Approach and Objectives:

People, process and proposals matter. Determining who should lead labor negotiations in terms of experience, qualifications, commitment and labor-management philosophy needs to be a more in-depth undertaking. It should probably occur **after** management and the board determine what they are seeking to accomplish and “how.” Labor negotiations need not be a choice between an adversarial, position-based process and a collaborative, interest-based one. There are many approaches between these two poles. Education on this, as well as how a specific process supports desired outcomes is advised well in advance of selecting a chief negotiator.

Similarly, examining short- and long-term labor negotiation objectives is critical. There appeared to be a fundamental misunderstanding of what could be accomplished in one bargaining cycle, especially after the previous concessionary contract. Some top managers defended the breadth of concessions sought in 2013 as necessary not only to support system infrastructure needs, but also because BART employees did not suffer as many concessions in 2009 as did others, such as state employees.

The fact that BART employees had four years of zeros and efficiency concessions that were not as deep as those of other agencies does not appear to be a relevant basis for determining bargaining objectives. BART’s financial situation and that of the State of California, for example, were and are different. That is not to opine about whether or not economic concessions were warranted at BART in 2013. The point here is that the need and rationale for various contractual changes probably deserved more in-depth evaluation, discussion and “reality checking” before they were set in concrete.

Some interviewees referred to the Bay Area as an “epicenter of trade unionism.” Labor leaders told us BART’s ATU contract is

a crown jewel of their international organization and will always be supported at all costs. Still others told us that management decision-makers' negotiation agenda was unrealistic. It does not seem that an objective analysis was undertaken of these factors and their implications, either in advance or as negotiations unfolded. We believe too much stock was placed in outside public relations advisors and strategies in order to influence bargaining by prevailing in the court of public opinion.

Finally, the impact on the labor-management relationship needs to be factored in. Negotiation is not just about terms. How the parties bargain impacts day-to-day operations long after the contracts are signed.

(See Roadmap for Change Recommendations 9, 18-23, 29, 40 and 52 on pages 142, 146, 147, 149, 152 and 155.)

6. Release Time and Facilities Strategy:

How the issues of release time and location were raised and pursued not only provoked hostility and combativeness, it turned out to hurt both parties throughout the process. Some questioned, "Was this the hill to die on?"

Management had every right to scrutinize the costs associated with bargaining and to seek a more level playing field with the unions. The timing and the manner in which it was done, however, was ill-advised. How logistics and release time is handled in California transit agencies is not standardized, from our assessment. There are many practices. All have pros and cons. A deeper look at ways to provide release time as efficiently and cost-effectively as possible, we believe, was warranted. A different sort of early engagement with the unions that focused on mutually beneficial solutions may not have worked in the labor-management culture of 2012-2013. However, it would not have launched negotiations in such a combative manner or lost precious bargaining time.

In addition, both labor and management negotiators reported that shuffling around from location to location was inefficient, and made document control more burdensome. Some of the

facilities only heightened tensions due to excessive heat, lack of adequate technological support and other factors.

(See Roadmap for Change Recommendations 33 and 34 on page 150.)

7. Media:

What happened in 2013 was an extraordinary case of negotiating in the media and it was detrimental to all parties, including the public. Transparency can be preserved without continuous, detailed messaging about proposals and positions, or publicly vilifying the other party. Fighting in the press over positions made it harder to reach an agreement. Publicly committing to specific positions and types of proposals, rather than bargaining objectives, boxed the parties into corners that limited options and creative approaches to settlement. In addition, the effect on employees and operating managers of this public mudslinging has been horrific.

(See Roadmap for Change Recommendation 38 on page 151.)

8. Role of Electeds:

It's important to understand and accept the role of elected board members as well as state and local elected officials. We heard a lot of criticism about how various electeds "interfered" during the negotiations, especially just before as well as during the first and second strikes and beyond.

It appears the general manager did a good job of keeping elected officials apprised of events as they unfolded, as well as appealing to those outside BART to let the agency handle negotiations internally. This apparently worked in the initial stage of bargaining.

As the June contract deadline drew closer, we heard reports of outside contacts to influence board members. This escalated after the first strike and later included visits by elected officials and requests to sit in on bargaining sessions. Some interviewees maintained that the unions were using various elected and other political allies to pressure the board to modify

management's proposal. This is highly likely in our experience and not unusual, particularly when bargaining is adversarial. Political pressure and engagement is far less likely when the parties engage in collaborative and/or problem-solving forms of bargaining.

Both parties politicized the process via the use of external media and political strategies. As stated earlier, once a labor dispute occurs, elected officials will engage, especially when public pressure mounts and unions trigger political options. That certainly happened here. It did confuse the process, pressure the board and appeared to result in some key players becoming more entrenched.

(See Roadmap for Change Recommendation 46 on page 153.)

9. Board Involvement:

Better coordination and group communication could have occurred with the BART Board. Some board members had never been through labor negotiations, much less strikes before. They were not on the same page about their role or even the outcomes they supported. Going forward, this is something the board, in consultation with management, should come to an agreement about at the beginning of labor negotiations, with regular checkpoints along the way. The board may want to adopt its own labor negotiation operating ground rules. This will also help clarify roles and what should be done at the board policy level (versus implementation) as well as how the board provides oversight as the process unfolds. In addition, it's important that board members receive more briefings as a body.

They also would have benefited from an initial, in-depth analysis of the pros and cons of various negotiation strategies, approaches and objectives as well as a strategically-structured decision-making process. That said, the board itself needs to come together and act as a body with respect to labor policy. Some have questioned whether this was possible in 2013. We often heard that this board was simply too fractured, and in some cases, too "individualistic" to coalesce around a common strategy and purpose.

(See Roadmap for Change Recommendations 3-6, 11 and 12 on pages 140-143.)

10. Need to Establish Clarity:

A lack of focus and prioritization of negotiation objectives, led to poor communication within management and the board. Unlike the 2009 negotiations, this time there appeared to be uncertainty from the beginning as to the board and the management strategy team's critical negotiation objectives. In addition, there was confusion about roles, responsibilities and strategy.

For example, almost no one interviewed knew who was in charge of all aspects of the negotiation process. Aligning the entire management team behind a few specific goals could create significant progress toward a more credible and effective process.

In addition, we heard from numerous managers throughout the organization that they did not believe top management had a thoughtful, comprehensive or realistic strategy for overall labor relations that is key to a successful contract negotiations process.

(See Roadmap for Change Recommendations 10, 17, 19, 35-37 and 40 on pages 142, 145, 146, and 150-152.)

11. Data:

Another lesson learned is that relevant data should be mined and analyzed much earlier and, optimally, jointly by labor and management. While this would not equate to a meeting of the minds on how the data should apply to all negotiation positions or outcomes, it would help inform decision making and pre-empt a number of disagreements. Data mining, utilizing both labor and management representatives, often facilitates trust building. Also, some data that was used to support certain proposals and news articles may not have been accurate. Nor does it appear that all of BART's data systems are coordinated or organized for optimal use.

(See Roadmap for Change Recommendations 13 and 24 on pages 143 and 147.)

12. Budget:

By all accounts, the union leaders are sophisticated and have advisors who thoroughly understand the agency's finances and budget. Like most public agencies, BART experienced negative financial impacts of the recession and has real infrastructure needs. Combining the operating and capital budgets for the purpose of making this case was seen by the unions as a ploy. From their perspective that approach would always create a deficit because there are typically more projects and capital needs than any system can fund. Operating surpluses, which is what the workforce can influence, through more productivity and efficiency, is an important indicator to labor about the financial health of the agency and their contribution to it. Some of this, we believe is semantics and some is perspective. However, in such a volatile and suspicious environment, management's message had no credibility with labor.

Similarly, the unions thought management believed they could save money during a strike and, therefore, it was an attractive option for them. We did not find this to be the case. While some transit agencies do save money during strikes, BART does not appear to us to be structured to do so. We learned from BART financial analysts that, "At BART, approximately 75% of our operating revenue is from passenger fares so we lose more than we save. There's no financial incentive to have a strike. The costs for running substitute bus service during the strikes was over \$1 million."⁴¹

The lesson learned here is that it is important to begin many months before negotiations reviewing the budget and other financial data in a joint labor-management setting, probably with a mutually acceptable third party financial analyst/consultant. These meetings should be small and the parties may need facilitation to help them reach a common understanding of the numbers and how this information will be messaged and used in upcoming bargaining.

(See Roadmap for Change Recommendation 13 on page 143.)

⁴¹ From interviews with Carter Mau, Assistant GM, Administration and Budget.

13. Start Earlier:

Negotiations started too late. Some have told us nothing happens until the eleventh hour, so why waste time bargaining for weeks or months? It is true that usually the biggest movement occurs close to deadlines. However, what takes place to lay a foundation for movement occurs over a period of time. The parties tend to use weeks, and even months, in our experience, to determine levels of respect, trust and willingness to listen to each others' needs. Union members and officials need to vent and discuss longstanding concerns. Management needs to listen and then present financial and other relevant data when receptivity levels are highest. This can be very productive time or it can simply escalate into a stalemate, as happened here. Discussion of reasons for proposals, openness to alternative ways to meet respective needs, data sharing, respectful behaviors and incremental movement usually are necessary precursors to "shedding" many positions and proposals and reaching common ground in the final days before a contract deadline.

(See Roadmap for Change Recommendation 30 on page 149.)

14. Labor Relations:

Labor Relations staff worked long, hard and diligently throughout the bargaining process. Almost all who commented about them said this department is understaffed and under-supported. Systems, records and institutional memory have been lost over the years because of turnover and inadequate staffing. Numerous managers told us that the lack of investment in this department has been very problematic. For example, apparently there has been only one person assigned to assist with administration of the ATU contract, which is more than 400 pages long.

(See Roadmap for Change Recommendations 18-21 on pages 146-147.)

15. Input and Diverse Views:

Constructive dissent and input mechanisms need to be built into the planning, decision making and implementation stages of labor negotiations. While everyone can't make the strategy decisions, they all should have an opportunity to provide their two cents and they should understand both the strategy and the key objectives of their leaders. The takeaway here is that "group think" is easy to succumb to in both labor negotiations and day-to-day relations. While no group was monolithic in their views, there were missed opportunities for course corrections because common beliefs and assumptions were neither challenged nor re-examined.

(See Roadmap for Change Recommendation 37 on page 151.)

16. Role of Union Leaders:

Union leaders must meaningfully and constructively engage for any real change to occur. This takeaway may seem obvious, but it has challenges and risks associated with it. As elected officers, union leaders must be responsive to their constituents, especially those who vote. Some managers reported in interviews that union officers "have to malign us in front of some workers whether they want to or not."

Change can begin with small steps. For example, on April 15, 2014, SEIU and ATU sent a letter to the District withdrawing their lawsuit regarding bargaining-related unfair labor practices and the issue of 4.8. This is standard practice after a contract is settled. The language in the letter, however, was viewed by some managers and board members as inflammatory, offensive and threatening. To them it was evidence the unions want to continue the fight rather than work with the District to build a better relationship. Union leaders also need to stop the bashing and the hyperbole in order to chart a better course for the future.

It appears to us that ATU, AFSCME and SEIU at this time all have leaders who are open to change and who, in spite of their own differences, want to work better together and with the District. They are wary, which is why incremental steps--along with education, communication and training of their members

in the purpose and benefit to them of a change process--are essential for success.

(See Roadmap for Change Recommendations 6, 8, 14, 15 and 32 on pages 141, 144 and 150.)

17. The Size and Complexity of Union Contracts:

This is a factor in the strain between union and management. For example, certain issues/work rules/procedures, etc. referenced in one area of a labor contract may relate to something else in a completely different part(s) of that contract or in a side letter, etc. This can make it difficult for managers trying to abide by the contracts to do so properly. A lesson learned for us is that mutually addressing this issue, while not glamorous or headline grabbing, could be a major step forward.

(See Roadmap for Change Recommendation 27 on page 148.)

18. Breaking the Cycle of Mistrust:

While both parties have accused the other of causing the July strike, it is our conclusion that virtually everyone wanted to reach an agreement without any disruption.

Repeatedly in interviews, we heard, "They played us" or "They are playing you." Many members of both labor and management are so cynical they seem to dismiss concerns (regardless of their validity) if the messenger is a member of the other "camp." In our opinion, this has created blind spots and erroneous assumptions which have cost this agency, those involved with it, their families and the public dearly.

Many things will need to occur to change this. Probably the most important is a clear and consistent message from the board that they expect the finger pointing to stop. Our takeaway about this is that the only catalyst for reversing this cycle lies with a united policy mandate and implementation oversight by the board.

(See Roadmap for Change Recommendations 1-3, 9, 11, 14, 15, 25, 29, 31-34, 41, 49 and 60 on pages 140-142, 144, 148-150, 152, 155 and 157.)

19. Management Needs to “Go First”:

Unions are usually “reactive,” in terms of how bargaining and day-to-day labor relations are conducted. “We wait to see how they want to play,” one union official told us. This is consistent with our experience in facilitating labor negotiations from beginning to end in other agencies. It is important because typically management sets the tone and initially is often in a better position to influence the process. This means aligning words and actions and operating consistently in the application of constructive labor relations strategies. At BART, the unions are suspicious of management’s motives and vice-versa to a degree that some have labeled “unprecedented.”

We have seen these entrenched views changed in transit agencies and other workplaces, but almost always it is when management leads the way. This means taking the high road and not reverting to “tit-for-tat” paybacks when the unions react provocatively. It takes time and patience to demonstrate commitment and build trust, especially when initial efforts may be rebuffed. One party must stop the merry-go-round of “they are extreme, so we need to be extreme,” reactivity. This is not to suggest that management should endure abuse or that the unions should not be accountable for their actions. It is a sequence in which managers model the changes they seek. It establishes credibility, builds trust and incentivizes similar responses.

(See Roadmap for Change Recommendations 58-59 on page 157.)

20. Labor Relations is about Relationships and Results:

The extreme competitiveness and hostility that permeated the 2013 labor negotiations could not be compartmentalized. It had, and continues to have, a profound influence on how the parties regularly communicate, interact and view one another's trustworthiness. This is not a new phenomenon at BART, but in 2013 it appeared to escalate to extremes not experienced since the storied 1979 labor-management showdown. The worker occupation of the Concord shop--complete with helicopter food drops--and the related "lockout-strike" dispute is an example of a story that is still passed down from worker to worker at BART.⁴²

Our takeaway is that it's time to begin a new chapter that gives labor and management a sense of shared accomplishments rather than battlefield stories. One operations managers summed it up this way,

"We need a hard re-set. Management needs to stop vilifying its own workforce and the unions need to show more willingness to solve problems. Both must stop politicizing negotiations and work on a mutually respectful relationship."

(See Roadmap for Change Recommendations 1, 2, 6, 8, 9, 14, 15, 23, 25, 26, 44, 47, 49, 55-60 and 63 on pages 140-142, 144, 147, 148 and 153-158.)

⁴² "In 1979 there was a 90-day lockout by management or a strike by union workers, depending upon who one believes. The trains ran during this period because one of the unions, AFSCME, was then only an informal association known as BARTSPA, and management and BARTSPA had enough staff to keep trains running." http://en.wikipedia.org/wiki/History_of_the_Bay_Area_Rapid_Transit. Viewed 8/12/14.

J.

Costa Mesa “Civic Openness in Negotiations” (COIN) Ordinance and Recommendations for External Communication Protocols

COIN Background:

In 2012, the Costa Mesa, California City Council passed the Civic Openness in Negotiations (COIN) ordinance⁴³ that pertains to labor negotiations with public employee associations.

“Among COIN requirements:

- “The city must hire an independent negotiator (in Costa Mesa, prior councils had an executive level public employee handle the negotiations).
- “Before contract talks with an employee association begin, an independent economic analysis must be done on the fiscal impacts of each contract term and the results of that analysis must be made public 30 days prior to negotiations.
- “Each council member must disclose if he or she had any communications about the negotiations with representatives of the employee association.
- “As negotiations begin, the City Council must report publicly after closed sessions any prior offers and counter offers and their fiscal impact to the taxpayer.
- “Any meet-and-confer-related bargaining positions received or made by either side that are no longer being considered must be disclosed.

⁴³ COIN Ordinance is provided in its entirety in the Appendix of this report, see page 205.

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- “Before the City Council can vote on an employee contract, it must be discussed in at least two City Council meetings and the proposal posted on the city’s website at least seven days prior to the first meeting.”⁴⁴

Why Was it Passed?

Excerpts from an *Orange County Register* editorial:

“...Salaries and benefits account for 75 percent of Costa Mesa's operating budget, and contract negotiations often were handled by high-ranking city managers who stood to benefit from the terms of the deals they reached.

“...COIN provides for an independent negotiator.

“...COIN also gives the public much-needed time--30 days and two council meetings before any vote may take place--to independently evaluate any union contract pending before the city council.”⁴⁵

From the *Daily Pilot*:

“...According to a Costa Mesa Pension Oversight committee member Costa Mesa's unfunded pension liability has grown exponentially, he said, from an estimated \$9 million in 2002 to \$228 million in 2012.

“ Of that \$228 million, the police officers' pensions are unfunded by \$83 million, the firefighters by \$61 million, and the municipal employees by \$84 million.

“...The unfunded figure shot up, according to the committee, partially because of CalPERS's bad investment returns, increases in pension benefits and growth in salaries and cost-of-living adjustments.”⁴⁶

⁴⁴ City of Costa Mesa, CA website. <http://www.costamesaca.gov/index.aspx?page=1570>. Viewed 7/21/14.

⁴⁵ *Orange County Register Opinion Editorial*: COIN flips balance of power in Costa Mesa, 9/11/12; updated 8/21/13. <http://www.ocregister.com/articles/mesa-371068-costa-city.html>. Viewed 8/10/14.

⁴⁶ Zint, Bradley. “City’s retirement burden tallied.” *Daily Pilot*, 2/5/14. http://articles.dailypilot.com/2014-02-05/news/tn-dpt-me-0206-costa-mesa-pension-oversight-report-20140205_1_pension-oversight-committee-calpers-pension-problem. Viewed 8/11/14.

From the *Voice of Orange County*:

“...Secrecy provisions in the Brown Act allow local agencies other than public education boards to negotiate, deliberate and decide labor agreements entirely behind closed doors, deferring public exposure of what the unions have won until the pay and benefit packages are locked in.

“Efforts by the California Newspaper Publishers Association and others to amend the act to shed some daylight on what’s on the table have, thanks largely to the League of California Cities, gone nowhere in the Legislature.”⁴⁷

From Larsen Woodard LLP website:

“...Mayor Pro Tem Steve Mensinger said that previous negotiations for the City were done by staff members who were part of the very union they were at the negotiation table with, and they stood to personally benefit from the contracts they were negotiating. This created a potential conflict of interest that also brought into question the impartiality of the City’s negotiators.”⁴⁸

Other Opinions on the Ordinance:

Antonie Boessenkool in an 8/28/13 article in the *Orange County Register* provided additional perspectives on the COIN Ordinance:

“The City Council approved COIN unanimously last September. Though she voted for it, Councilwoman Wendy Leece had said previously the ordinance didn’t go far enough to make council actions transparent regarding negotiated contracts.

⁴⁷ Francke, Terry. *Voice of Orange County*, “Open-government expert: COIN law is on the right track”. 12/12/13; updated 1/6/14. http://www.voiceofoc.org/countywide/who_says_you_can_t_fight_city_hall/article_9943e880-634e-11e3-b731-001a4bcf887a.html. Viewed 8/10/14.

⁴⁸ Larsen Woodard LLP. “Costa Mesa City Council passes COIN, a transparency law aimed to shine light on city negotiations with public employee unions.” 10/16/12. <http://www.larsenwoodard.com/2012/10/costa-mesa-city-council-passes-coin-a-transparency-law-aimed-to-shine-light-on-city-negotiations-with-public-employee-unions>. Viewed 7/21/14.

“Leece said Tuesday that although she supports open-government measures, COIN is one-sided and hurts the collaborative relationship the city has created with its employees.

“COIN has inserted a vengeful spirit into the negotiations when in the past we had collaborative, face-to-face meetings to come to win-win cost-saving solutions to provide the most economical, efficient and customer-oriented services to our residents,” Leece said. “This was especially true starting in ’08 when the economy started to crash. Our employees worked with the council to pay more into their retirements and take furloughs.”

“COIN also won’t help the city solve its pension liability problem,” Leece said. “The city is facing a massive unfunded pension liability for its employees and asked union-represented workers to contribute more to their retirement.”

“Other cities are working with their employees to solve the unfunded liability problem,” Leece said. “COIN is not the answer to the unfunded liability problem. What other city has passed COIN? None.”⁴⁹

“Councilwoman Leece also added:

“I believe in open government but COIN is not helpful. COIN comes from an extreme ideology that seeks to destroy the collaborative relationship we have had with our employees and diminish the number of public employees overall. It is one-sided and not truly transparent. If negotiations with employees must be held to a high standard of openness, then why not all negotiated contracts coming to the city?

“COIN is a destructive tool devised by the majority to negotiate salary and benefit contracts in the media and to continue to portray Costa Mesa employees as greedy and unreasonable enemies of the council and the public good. Unfortunately, many of our residents believe that our

⁴⁹ Boessenkool, Antonie. *Orange County Register*, “Costa Mesa Ordinance bargaining, bickering in public eye,” page 2. Published 8/27/13; updated 8/28/13. <http://www.ocregister.com/articles/city-523060-coin-employees.html?page=2-4>. Viewed 8/10/14.

employees are enemies because of what they read in the paper. But that is not true.”

Boessenkool provided others’ opinions under the subheading “Voices: Is the COIN process a good idea for labor negotiations in Costa Mesa?”

“I feel the COIN ordinance is a good thing for the residents of Costa Mesa. It hopefully will give the public insight into the negotiation process and they will get a chance to voice their opinions to the level of pay and benefits their public servants receive.

- Ed Everett, president of the Costa Mesa Police Officers’ Association

“I think this will obstruct a constructive negotiating process, especially under the circumstances in Costa Mesa. The council majority is much more interested in ideology than what’s right for the city. That said, I am all for transparency. I would like to see it more as a matter of fact from the council majority not just for negotiations with employees but for things like the apparently non-existent contract for the Costa Mesa 60th Anniversary celebration or the trail at Fairview Park and a number of other things.”

- Billy Folsom, former president of CMCEA and a retired city mechanic

“COIN isn’t a neutral process. In part, that’s because the employee unions don’t have a say in choosing the auditor to conduct the financial analysis of each contract proposal. Whether the outside auditor is truly neutral himself is an open question.

“The problem with this proposal is that it is being introduced in a very contentious environment where there is very little trust, very little goodwill between the City Council and the employees. In that context, it is very difficult to see how this is going to actually help to bring the two parties together.”

- Kent Wong, a UCLA professor of labor studies who also observes Costa Mesa labor relations⁵⁰

⁵⁰ Boessenkool, Antonie. Ibid, page 4.

From the OC Watchdog:

"We've asked the city's unions and associations for their take on COIN. Jennifer Muir, assistant general manager of the Orange County Employees Association, said it's political opportunism.

"We are absolutely advocates for transparency, but much like the city of Costa Mesa's other attempts at convincing the public that they care about real transparency, this ordinance is not what it seems," Muir said by email. "It increases costs for taxpayers and adds a cumbersome bureaucracy to the negotiations process -- all in an effort to create a one-sided venue for the council to frame political attacks on Costa Mesa employees. This ordinance clearly was not written in the spirit of respect and collaboration that has led past city councils and employee groups to forge meaningful reforms. The backer of this ordinance has only one goal in mind: political opportunism."

"OCEA represents general city workers in Costa Mesa."⁵¹

From the *Daily Pilot*:

Costa Mesa Mayor Jim Righeimer recently praised how well the city's new COIN ordinance worked during their more than one year negotiation with city employees. He maintained the ordinance brought "unprecedented transparency to what was traditionally a backroom deal with virtually no public input."⁵²

The mayor also noted that public comment opportunities on the merits of the labor agreement will be provided at two city council meetings in September.

⁵¹ OC Watchdog: "Will Costa Mesa force light into labor negotiations?" 8/20/12. Updated 8/22/13. <http://www.ocregister.com/taxdollars/strong-478885-city-council.html>. Viewed 8/10/14.

⁵² Righeimer, Jim; *Daily Pilot*, "Pact with employees will save Costa Mesa millions," 8/9/14. <http://www.dailypilot.com/opinion/tn-dpt-me-0810-commentary1-20140809,0,6213202.story>. Viewed 8/12/14.

Observations and Conclusions:

While supporting openness and transparency, the external labor and management attorneys interviewed for this report did not view the “COIN” approach as helpful to constructive labor negotiations. According to longtime management attorney Dan Cassidy of Liebert Cassidy Whitmore, “Transparency does not require either negotiating in the media or process micromanagement. Labor negotiations are difficult enough without having requirements such as publication and costing of every proposal. Sometimes hundreds of proposals are exchanged. Some are ‘throwaways,’ made for political reasons, or some are trial balloons. It’s an inefficient use of time and resources to cost and report on every proposal.”

We agree. There are several reasons why this approach will likely be problematic at BART. First, and foremost, it is our opinion that BART management and its unions need to stop negotiating in the press and focus their energies and considerable knowledge on problem solving and two-way communicating at the bargaining table.

Probably, one of the biggest concerns this report’s authors have about this ordinance is that it appears to prescribe a traditional form of bargaining that involves positional proposals, which can quickly become competitive and adversarial. It is our belief that all parties at BART and the public could benefit by a completely different method of negotiation. While it may not be realistic to expect BART labor and management to engage in full-blown, interest-based bargaining, they could adopt a problem-solving format. There are numerous variations of this approach. For example, rather than proposals and counter proposals, they could begin bargaining in the fall of 2016 with prioritized lists of the issues they each want to address. Then they could focus on understanding why each issue has been raised and what information or data will help inform their collective understanding of the issue. After jointly collecting and analyzing the data, they could use creative problem-solving techniques to identify contractual or other options to address as many issues as possible.

Another concern raised by this ordinance is the requirement to hire an independent, outside negotiator. This may make sense for some negotiations for various reasons, but in our experience, numerous transit agencies conduct productive and cost-effective labor

negotiations with the use of internal managers leading the talks. Often, outside experts (attorneys, actuaries, and financial advisors) are utilized as needed. The concern that managers are conflicted and, therefore, can't be trusted to advocate effectively for the agency is more fiction than fact, based on our more than 40 years of observing public sector bargaining from the inside of both management and labor caucuses and across the table. On rare occasions we have heard a manager quietly urge a union to stand firm on a particular economic proposal. If there were ever any concerns about this happening at BART, one solution would be to uncouple non-represented employees' compensation increases from those negotiated via collective bargaining as long as it is done in a manner that preserves internal equity. By all accounts, BART labor and management negotiators are light years away from any form of collusion. They will need to stretch a great deal simply to transition to a place of constructive dialogue over economic issues and other differences.

We also believe the COIN ordinance is too narrow and rigid to support trust building and exploration of bargaining process improvements. For example, hiring an auditor to determine the fiscal impacts of each benefit in each labor contract and publish a report analyzing them all at least 30 days before negotiations is, we believe, likely to be contentious, cost prohibitive and difficult to accurately accomplish, especially with someone who is not intimately familiar with the interpretation, practical application and associated costs of all of the provisions of these complex agreements. Developing and implementing a "data plan" with a jointly-selected third party analyst as referenced on page 143 is an alternative. It could provide the parties and the public with credible, useful information that is obtained in the most timely and cost-effective manner.

If some or all of the roadmap for change recommendations in this report are adopted, the transparency objectives of the COIN ordinance will likely be met. For example, the board's change plan for labor-management relations and negotiations will be a public document. It will include published objectives and data and, at least, quarterly progress reports submitted at board meetings. Some objectives will involve bargaining-related information such as:

- Early joint financial data collection and analysis (regarding such things as labor costs, agency budget issues, financial

forecasts, consideration of comparables, consumer price indices and other criteria for shaping bargaining outcomes);

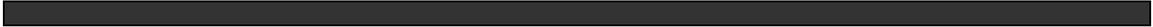
- Key agency and unions' bargaining priorities;
- Bargaining process and timeline;
- Safeguards against work stoppages agreement.

All of this information and more will be a matter of public record, pursuant to statutes and board-adopted policies. Further, we recommend that the parties design and communicate their specific progress together via joint press releases, a labor-management website or in other ways that demonstrate commitment to openness and working together. **Please note, this does not require the parties to always agree, nor does it in any way undercut their advocacy roles.**

During the 2017 labor negotiations, we would recommend that the parties adopt external communication protocols which essentially keep all day-to-day bargaining discussions "in-house" so long as all parties are satisfied that the problem-solving process they've agreed to implement is being used. Either party may notify the other in writing of their intent to opt out of the process and/or communication protocols. For this to work, neither party may directly or indirectly publicly disclose the content or specific bargaining discussions or criticize the other externally. The public's right to know is protected with these kinds of protocols because all financial data, key criteria for evaluating proposals and the process and priorities of the parties will be a matter of public record prior to the beginning of labor negotiations.

Joint labor-management external communication protocols used by other transit and public sector agencies may be made available for the parties to utilize in shaping those that will work best at BART.

As with other important contractual commitments, the board's role is to assess them in accordance with their standards of fiscal responsibility and all other relevant policies and interests. This is not a secretive procedure. The board's action of ratifying or rejecting tentative labor agreements is conducted at public meetings after an opportunity for public comment. These proposed contracts are a matter of public record.



One of the most important lessons learned from information gathered for this report is that the parties' continual, public point/counter-point throughout 2013 further cemented their monumental hostility and mistrust. As a result, they weren't able to forthrightly communicate in ways that could have prevented breakdowns. This is not to suggest that other factors were not in play. However, what we believe is needed to positively change these dynamics is a safe haven for real dialogue at the bargaining table. In every productive negotiation we've observed or participated in, the parties may, on occasion, disagree, pound the table and even storm out. But overall, they feel comfortable expressing concerns, fears and even admitting to their own foibles. They brainstorm ideas and options that sometimes lead to mutual solutions. None of this occurs when either party is worried that something they say or propose will show up on the 10 o'clock news or as a headline in the morning papers.

Developing, adopting and using respectful communication protocols will be a challenge for BART and its unions. It will require some risk taking, trust and strength to push through missteps. The board's willingness to lead on this critical issue and hold the parties accountable for conversing inside--instead of outside the room--is paramount, we believe, for progress.



"MacArthur BART Station on the first day of strike" by [Cathy=](#)⁵³ is licensed under CC by 2.0

K. Pros and Cons of Binding Interest Arbitration for BART

Binding interest arbitration or BIA is a process that is used in some public agencies after an impasse is reached in labor negotiations. It requires the final decision on contract terms (such as wages, benefits, hours and/or working conditions) to be made by an outside party, such as an arbitrator, arbitration panel or board. The decision of the arbitrator is final and binding. It can be overturned by a court in very limited circumstances.

Presently, 21 of California's 478 cities have some form of binding interest arbitration to resolve contract disputes, primarily with public-safety employee unions.⁵⁴ With respect to California transit

⁵³ <https://www.flickr.com/photos/ycathyhuang/9184066443/in/photolist-fdFEDw-gRw3Ra-f1xcMx-f1xcCM-aBfRMK-gM7fHv-eZL7A1-eZyJZa-eZyJLP-eZyJUC-eZwAgn-fsGKED-gLn3r3-f3E31e-f79Lz2-f79LH6-2b84zZ-aBCCvd-f3Udv9-f3UbUW-f3DYwg-f3Ucmd-bDA38G-bDA3g5-f3Ue4u-n6v4xv-bDA2Nq-zuB5d-aBA1WD-n6vc8P-fnBDHd-aBCUCG-aBCDUf-535FKs-oybviV-owgpdS-n6v8bk-n6vdGa-oeXEJu-nn9bfA-nn9ccW-nqXk9T-oy1DAM-nuGL3K-nduMcz-n66gQc-n66fur-nuGKkc-oeN6gc-nwLkQD/> and <https://creativecommons.org/licenses/by/2.0/>

⁵⁴ City of Vallejo, CA website - FAQ: <http://66.161.26.67/GovSite/default.asp?serviceID1=764&Frame=L1>. Viewed 7/31/14.

agencies, very few prescribe the use of binding arbitration in the event of an impasse.

San Francisco mandates BIA for both safety and non-safety employees. This includes the San Francisco Municipal Railway (MUNI).⁵⁵ However, there is a current unfair labor practice charge pending with the California Public Employment Relations Board⁵⁶ filed by MUNI to compel arbitration. This year, when the union stated they would not arbitrate, the arbitrator declined to hold a hearing which resulted in the City Charter's deadline for process completion to be missed.⁵⁷

According to California labor attorney Will Flynn of the firm of Neyhart, Anderson, Flynn and Grosboll, Stockton (San Joaquin Regional Transit) is by statute "required to submit disputes to interest arbitration."⁵⁸ They have rarely in recent years reached an agreement and have gone to interest arbitration. Mr. John Kagel did two and Mr. William Riker did the most recent one."⁵⁹

Sacramento Regional Transit District (SRTD) also has an obligation to utilize interest arbitration via its 13(c) agreement.⁶⁰

Interestingly, Flynn continues, in 1997 "ATU Local 256 and Sacramento RT reached a tentative agreement which was rejected by the ATU membership. My recollection is that the neutral basically went with the tentative agreement but added another year and gave a pay increase in the fourth year."⁶¹ According to the

⁵⁵ Yeung, Tim. CA PERB Blog; "Status of binding interest arbitration in California; 12/29/10. <http://www.caperb.com/2010/12/29/status-of-binding-interest-arbitration-in-california>. Viewed 6/11/14.

⁵⁶ The Public Employment Relations Board is a state agency responsible for enforcing the collective bargaining laws covering employees of public schools and community colleges, state civil service, the University of California, California State University and Hastings College of Law, cities, counties and special districts; trial court employees; and supervisory employees of the Los Angeles County Metropolitan Transportation Agency. www.perb.ca.gov. Viewed 7/22/14.

⁵⁷ Information provided by Mike Helms, San Francisco MUNI.

⁵⁸ See Public Utilities Code Section 50120.

⁵⁹ Flynn, Will email to Rhonda Hilyer dated 7/28/14.

⁶⁰ Section 13(c) is a set of transit employee labor protections certified by the U.S. DOL as a precondition for public agencies to receive federal funding. Originally in Section 13(c) of the Urban Mass Transportation Act of 1964, 13(c) is now found at 49 U.S.C. Section 5333(b) of the Federal Public Transportation Act. It protects existing public/private sector collective bargaining rights and the mandatory and/or traditional subjects of bargaining. It also protects jobs and benefits against adverse impacts resulting from cuts in federal funding. Section 13(c) provides a resolution procedure for disputes over collective bargaining agreements and the terms of the Section 13(c) Agreements. From: www.atu.org/atu.../training/ATU-57th-Conv.

⁶¹ Flynn, Will email. Ibid.

SRTD general manager, “Four negotiation impasses have been settled using this method since the strikes of the late ‘70s.”⁶²

Long Beach Transit (LBT) has also used interest arbitration to resolve contract terms. The most recent arbitration decision was issued on April 4, 2011 by arbitrator John Kagel. According to Flynn, “The ATU has taken the position that the LBT 13(c) agreement requires interest arbitration. LBT disagrees but has always agreed to voluntary interest arbitration and no one has ever litigated the issue of whether the 13(c) agreement requires interest arbitration.”⁶³

In 2010, ATU Local 192 successfully sued the Alameda Contra Costa Transit District (AC Transit) and the court ordered interest arbitration under the agency’s 13(c) agreement. The agency was enjoined from imposing its last, best and final offer or “...any change from the status quo as set forth in the parties’ collective bargaining agreement...” or “...taking any action that would frustrate, prevent, or impair the effectiveness of the arbitrator’s final award.”⁶⁴

Large transit agencies in the U.S. that have BIA include New York City Transit Authority, Washington Metropolitan Area Transit Authority, Chicago Transit Authority, Massachusetts Bay Transportation Authority, Metropolitan Atlanta Rapid Transit Authority.⁶⁵ Transit agencies in Seattle and Portland also have BIA.

There are different types of BIA:

“Final Offer” interest arbitration requires the arbitrator to adopt the final offer or one of the parties’ offers in its entirety. The arbitrator has no discretion to fashion any compromise between the parties’ final offers. There are two types of “final offer” interest arbitration:

⁶² Wiley, Mike; Sacramento Regional Transit District; Transit Talk with the General Manager, July 5, 2013. <http://portal.sacrt.com/WebApps/Onlinechat/QASession.aspx?SessionID=70>. Viewed 7/22/14.

⁶³ Ibid.

⁶⁴ In the Superior Court of California, County of Alameda, Order Granting Motion for Relief from Stay and Granting Preliminary Injunction: Amalgamated Transit Union Local 1972 (Petitioner) versus Alameda Contra Costa Transit District, Respondent. RG10522627 http://www.leonardcarder.com/news/articles/8.2.10_Order_Granteeing_Mtn_for_Relief_fm%20Stay_Granteeing_Prelim_Inj.pdf, Viewed 8/10/14.

⁶⁵ American Public Transportation Association’s Ridership report; 4th quarter 2013 <http://www.apta.com/resources/statistics/Documents/Ridership/2013-q4-ridership-APTA.pdf>

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- “Final Offer – Issue by Issue: Allows the arbitrator the freedom to find in favor of one party on some of the issues and for the other party on the remaining issues. It may encourage parties to keep all issues on the table – even fairly nominal contractual terms – under the realization that they have nothing really to lose. This tends to keep the issues broad in number and may lead to costly and time-consuming proceedings.
 - “Final Offer – Total Package: The true ‘winner-takes-all’ approach to interest arbitration. Each party submits as a complete package its final offer on all issues in dispute, and the arbitrator must adopt one of the parties’ packages in its entirety. It may encourage parties to narrow the issues considerably and lead to shorter, more efficient proceedings.
 - “Night-Time Baseball: This type of proceeding is a variation on final offer interest arbitration, wherein the arbitrator does not know the parties’ final offers. The arbitrator’s post hearing decision that is the closest to the **undisclosed** (to the arbitrator) party’s last offer will result in that offer being deemed the award of the arbitration.

“Conventional Offer” interest arbitration requires the arbitrator to evaluate the parties’ proposals and fashion an award the arbitrator deems appropriate in light of various criteria – often statutory, in the public sector – and under all of the given circumstances. This is typically viewed as the ultimate compromise, as arbitrators often ‘split the baby’ and select portions of each party’s proposal when crafting the award. Some schemes even allow the arbitrator the discretion to award more than the union is demanding or less than the employer is offering. Parties may avoid this method in light of the considerable discretion granted to arbitrators, or may limit the number of issues subject to this method, as often neither party is completely satisfied with the result achieved by the arbitrator’s compromise. One of the risks of ‘conventional’ arbitration is that there is little incentive for the parties to negotiate or moderate their respective positions prior to arbitration. Also the decision is truly taken out of the parties’ hands, as the arbitrator has virtually unlimited discretion to craft an award.

“Hybrid’ approach: Depending on the characterization of a proposal or contract term as ‘economic’ or ‘non-economic’ the above-noted methods of arbitration can be combined and modified

to create a “hybrid” approach. For instance, final offer interest arbitration may be adopted for all economic items, while conventional arbitration may be used for all non-economic items.”⁶⁶

The parties may stipulate criteria the arbitrator is to apply to reach a decision or the criteria may be established by statute. It may include such things as:

- Comparables (wages, benefits, working conditions of comparable agencies)
- Cost of living
- Employer’s financial ability to pay
- Total compensation of employees
- Stipulations of the parties
- Past practices and/or agreements
- Public welfare/interests
- Trade- or agency-specific characteristics or issues
- Other factors at the arbitrator’s discretion or as prescribed

Management attorney Bruce Barsook of Liebert Cassidy Whitmore provides a succinct summary of the advantages and disadvantages of BIA:

“Proponents of interest arbitration typically claim that the primary benefit of interest arbitration is that it is an alternative to strikes. Another claimed advantage to arbitration is that it brings finality to the bargaining process. Proponents assert that once the arbitration award has been made, the parties know what the terms and conditions will be for a specified time and are then able to return to work. Another advantage, proponents claim, is that bargaining

⁶⁶ Amy Moor Gaylord, Franczek Radelet, P.C., “Interest Arbitration—Pros, Cons, and How To’s” presented to the ABA Annual Meeting – Section of Labor and Employment Law, p. 1. Aug. 5-10, 2010. <http://apps.americanbar.org/labor/lel-aba-annual/2010/materials/data/papers/Gaylord.pdf>. Viewed 7/1/14.

disputes are decided by a neutral decision maker who uses objective standards to resolve the bargaining dispute.

“Those opposing interest arbitration do not agree that the stated advantages outweigh the disadvantages. Perhaps the most often cited concern is that interest arbitration transfers an enormous amount of decision-making authority to the arbitrator, a non-elected, unaccountable individual. Even if it were possible to find a truly neutral decision-maker who used objective factors to reach a decision, which is an unlikely scenario, the fact remains that interest arbitration still divests a city council of the ultimate authority to determine how and where public monies will be spent.

“Opponents also claim that interest arbitration tends to result in more costly labor packages (through wage comparability or "throwing money at the table" to avoid the process), and at a minimum, creates a significant uncertainty in financial planning. Another concern involves the time and expense of protracted arbitration proceedings. Typical interest arbitrations take weeks or months to complete and cost from \$100,000 to \$200,000.

“Critics also worry about the tendency of interest arbitration to serve as a disincentive to good-faith negotiations within the context of the bargaining process. Reliance upon interest arbitration may deter efforts to actually resolve conflicts through negotiation. It may discourage compromises on contract issues in order to improve a position through arbitration. Additionally, an imposed resolution tends to be less stable and satisfactory to the parties' relationship than one agreed upon voluntarily.”⁶⁷

The primary benefit of BIA is that it prohibits strikes and lockouts. This is usually an effective deterrent to system disruptions. However, it is not foolproof. For example, New York City transit workers engaged in a wildcat strike in 2005, even though severe penalties were imposed. The agency requires BIA.

⁶⁷ Barsook, Bruce: “Interest Arbitration: Should Your City Prepare for New Legislation?”; Liebert Cassidy Whitmore; January 10, 2001; <http://www.lcwlegal.com/64261>. Viewed 7/22/14.

“The NYC mass transit workers strike, which lasted 60 hours, resulted in a \$2.5 million fine levied against the union, each striking worker lost two days’ pay for each day the worker was out on strike, the president of the union spent three and one-half days in jail, and the union lost its automatic dues check off for a three-month period.”⁶⁸

In June of this year the San Francisco Municipal Railway (MUNI) engaged in sick-outs that resulted in cancellation of cable car service as well as other major service disruptions. The sick-outs were apparently sparked by opposition to a proposed labor agreement.

“Muni workers, like all San Francisco city employees, are prohibited from striking. Under a law approved by voters in 2010, if the union rejects the contract, the two sides go before an arbitrator who cannot rule against Muni management's proposals unless the union proves its interests outweigh ‘the public interest in efficient and reliable transit.’

“Union officials have complained that the standard is too high. In a statement on the union's website last week, Local 250-A President Eric Williams called the arbitration procedure ‘a lopsided and unfair process. The membership must take a stand, which will be communicated through your vote.’”⁶⁹

Interestingly, Mike Helms, manager in labor relations for MUNI, confirmed that the agency has agreed in writing to waive the use of this standard.

Nevertheless, these examples are consistent with the opinion offered in our email dated August 1, 2014 from management attorney Bruce A. Barsook:

“Critics would also argue that although binding interest arbitration eliminates lawful strikes (or other withholding of services), it doesn't eliminate the possibility that a

⁶⁸ <http://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v2/067.pdf>. Viewed 7/30/14.

⁶⁹ Cabanatuan, Michael and Ho, Vivian; “Muni sickout causing delays across city” - SFGate.com; 6/2/14; <http://www.sfgate.com/bayarea/article/Muni-sickout-causing-delays-across-city-5522044.php>. Viewed 7/30/14.

disgruntled employee organization, or group of employees, will engage in a withholding of services anyway (i.e., irrespective of its legality) to pursue its/their bargaining objectives.”⁷⁰

A risk of BIA is that unelected arbitrators may be given the power to render costly awards that can require service reductions, tax or fare increases and/or other negative system impacts according to California management attorney, Bill Schaffer.

“Unlike the BART Board of Directors, arbitrators are not elected, and they do not report to the electorate. As the United States Supreme Court observed in *Abood v. Detroit Board of Education*, 431 U.S. 209, 228 (1977): ‘Finally, decision making by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters--taxpayers, users of particular government services, and government employees.’”⁷¹

An example of this occurred in the most recent arbitration award rendered to the Washington Metropolitan Area Transportation Authority (WMATA and ATU Local 689). On November 4, 2009 (during the recession), the arbitration board awarded 3% wage increases each year beginning on 7-1-09, 7-1-10, and 7-1-11. WMATA sought to have this award overturned arguing that the arbitration award did not comply with National Capital Area Interest Arbitration Standards Act. (The Act prohibits an arbitrator from rendering an award that provides for salaries and other benefits that exceed the interstate compact agency's funding ability; allows an increase in pay rates only if any costs to the agency do not adversely affect the public welfare; and requires the arbitrator to issue a written award that demonstrates all of the factors in the Act.⁷²) Ultimately, the District Court of Maryland ruled against WMATA indicating the arbitrators had proven they did comply with the Act. In a press release dated August 4, 2011, WMATA

⁷⁰ Barsook, Bruce email to Rhonda Hilyer, 8/1/2014.

⁷¹ Shaeffer, Bill; Letter re Management Perspective Binding Interest Arbitration for Transit Agencies, Rutan & Tucker, LLP, Costa Mesa, CA, May 27, 2014, page 3.

⁷² In the United States District Court for the District of Maryland Civil Suit No. PJM09-3030 - WAMATA (petitioner) vs. Local 689 ATU (respondent). <http://www.scribd.com/doc/61125174/WAMATA-ATU-Local-689-Arbitration-Judge-Decision>. Viewed 7/30/14.

accepted the binding arbitration award that gave Local 689 employees an annual three percent wage increase for the fiscal years 2010-2012:

“We strongly disagree and were dismayed to learn the Court’s perspective that wage increases are easily absorbed by our riders and stakeholders, a view we do not share,” said Metro Board Chair Catherine Hudgins. “These increases are not sustainable by our customers or by our funding jurisdictions.”

“Instead of prolonging this three-year legal dispute and incurring additional legal expenses, the board said that it would not appeal the U.S. District Court’s decision.

“We want to put this matter behind us so that our employees can remain focused on serving our customers, but clearly we regard an award of this magnitude as generous given the extraordinary economic constraints under which our customers and our taxpayers are living,” Hudgins said. “Many people in the region have received less, including zero increase in wages, furloughs and pay cuts.

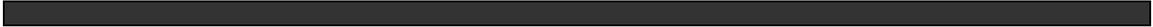
“Hudgins said that with this decision, she is looking for Metro employees to become active partners with the board and GM/CEO in setting a new benchmark for customer service by consistently delivering the high level of service exhibited by Metro’s most exemplary employees.

“Regardless of how one accounts for this expense, Metro’s customers are paying for this Award through their fares and local taxes, and as such, deserve better service,” she said.

“The total cost to Metro is estimated at \$96 million in wages, with an additional \$8 million projected increase in pension contributions. The Authority had reserved funds consistent with accounting rules, and therefore this increase will not adversely impact Metro’s budget this year.”⁷³

BIA is often supported by labor unions, as has been the case with Seattle-based ATU Local 587 and other public sector unions in

⁷³ Excerpted from WMATA news release issued at 11:44 a.m. on 8/4/11.



Washington state. Paul Neil, ATU 587 recording secretary, reported to us that he supports it because “It gets to a settlement and the members don’t lose wages by going out on strike.”

Another reason that many unions support BIA is because arbitration awards tend to favor economic increases and rarely mandate concessions. In recent years, the cities of Vallejo, Stockton and Palo Alto have voted to repeal BIA because of economic awards to public safety unions that were financially onerous.⁷⁴

Interestingly, the unions at BART oppose mandatory BIA. They have articulated various reasons for this position, including cost and a chilling effect on bargaining. The primary reason appears to be the belief that the right to strike is a fundamental workers’ right. We would opine that their opposition may also be fueled by the strength of the labor movement in the Bay Area and the unions’ considerable political influence.

According to John Arantes, President of the BART Chapter of SEIU Local 1021,

“An effective negotiations process leads to positive solutions that are beneficial to both parties. Submitting issues to binding arbitration is somewhat a roll of the dice. Issues at BART are too important for the riders, workers and management to leave it to chance.”⁷⁵

⁷⁴ Ballotopedia electoral outcomes for Vallejo (2010), Stockton (2010), and Palo Alto (2011). Viewed 7/31/14.

⁷⁵ Arantes, John email to Rhonda Hilyer, 7/25/14.

Typically-Cited Pros and Cons of BIA Include:

PROS ⁷⁶ +	CONS -
Prevents most strikes/work stoppages and lock-outs.	Does not prevent all strikes, sick-outs, slow-downs or other types of work actions.
Can include provisions for expedited decisions by mutual agreement. Not typically used due to risks involved.	Can add significant time to determine contract terms and conclude the bargaining process. Usually adds several months or sometimes years.
Less costly than a prolonged strike or lock-out.	Expensive and requires significant use of additional resources (arbitrators' fees/expenses, and fees for attorneys, actuaries, financial analysis, research, court reporters and transcripts).
	Can discourage good faith collective bargaining because the parties are preparing, protecting, and positioning their case for the possibility of arbitration.
	Would reignite combative relationships between BART and its labor unions and render efforts to change the adversarial nature of the labor-management relationship impossible for the foreseeable future.

⁷⁶ Not in order of priority; Pros and Cons are presented from a governing board's perspective.



<p style="text-align: center;">PROS ⁷⁶</p> <p style="text-align: center;">+</p>	<p style="text-align: center;">CONS</p> <p style="text-align: center;">-</p>
<p>Cost, time involved and risk of a negative award may incentivize parties to settle on their own.</p>	<p>This depends on the type of binding arbitration used and other factors.</p>
<p>Some types of arbitration are weighted toward management, but carry other risks, such as sick-outs and slow-downs.</p>	<p>Board is potentially “handing over the keys” to a third party. (See letter from management attorney, Bill Shaeffer, in the appendix of this report.)</p>
	<p>Agencies can be subject to costly awards in times of recession or “out of context” awards.</p>
<p>Concern about arbitrators’ discretion in making awards can be mitigated with a non-conventional form of arbitration and specific restrictions in the enabling legislation.</p>	<p>Some arbitrators “split the baby” and some are given discretion to award more than either the union or management proposes.</p>
<p>Risks can be reduced by carefully crafting the type of arbitration required and by having sufficient control over the legislative process to do so.</p>	<p>There are risks inherent in virtually all forms of arbitration that may mandate expensive and inefficient contract terms.</p>
	<p>Unlikely to easily find a mutually-acceptable arbitrator or arbitration panel with sufficient knowledge of BART’s contract terms, historical context, contract applications as well as transit operational experience/understanding.</p>



<p style="text-align: center;">PROS ⁷⁶</p> <p style="text-align: center;">+</p>	<p style="text-align: center;">CONS</p> <p style="text-align: center;">-</p>
	<p>Imposed solutions tend to be less satisfactory to one or both parties than those voluntarily agreed upon. This can damage ongoing working relationships and lead to increases in grievances, arbitrations, inefficiencies, and in some cases, work actions.</p>
	<p>Some claim that interest arbitration tends to result in more costly labor packages, and at a minimum, creates uncertainty in financial planning.⁷⁷</p>
	<p>Critics maintain it is fiscally irresponsible for a non-elected third party (arbitrator) to make binding financial decisions on a public agency and that elected officials should not delegate this governance role.</p>

⁷⁷ Bruce Barsook, "Interest Arbitration: Should Your City Prepare for New Legislation?", Liebert Cassidy Whitmore, January 10, 2001; <http://www.lcwlegal.com/64261>. Viewed 6/9/14.

Conclusion:

Opinions and experiences about the advisability of BIA are mixed. It would be a controversial approach to pursue at BART. However, there is another form of interest arbitration that may merit consideration.

Another Option:

There is a form of interest arbitration that may be a useful tool for BART and its unions to consider. While this approach was used in 2003 to settle an ATU strike at Los Angeles Metropolitan Transportation Authority, it could also be used at or before impasse to likely prevent a strike. The exact terms of the binding/non-binding ATU and LACMTA interest arbitration agreement could be modified if necessary by the parties to further customize it to fit labor and management interests at BART.⁷⁸

One advantage of this approach is that the parties work with a combination mediator/arbitrator or such board to reach an agreement when impasse appears imminent. If no agreement is reached the mediator/arbitrator who will hear the case and issue a decision/recommendation already knows the parties and their outstanding issues and dynamics. Since either party may reject the mediator/arbitrator's decision by a 2/3 vote, the theory is that the decision will likely be crafted so as to maximize its acceptability to all parties. Lastly, this process and the recommendation/decision coming out of it may be difficult for either party to publicly walk away from.

This option is explained in more detail on pages 167-168 and is recommendation #6 of Safeguards Against Labor Disputes.

⁷⁸ See Mediation/Arbitration Agreement in Appendix, page 219.

L. Roadmap for Change:

Recommendations:

The following recommendations to improve the process of BART's labor negotiations and labor-management relations are offered for consideration. They are not listed in any order of priority. All recommendations are included (explicitly or implicitly) in the Roadmap Plan that follows. Because of the large number of recommendations, the agency will likely want to triage those they decide to implement, within a budgeted and sequenced scope of work. Some recommendations may already be underway at the release date of this report.

Direction Setting	1. Board ⁷⁹ develops a policy-level vision for a new and improved way of operating agency-wide regarding labor-management relations (cultural change).
Change Plan	2. The board, at a policy level, outlines a systemic change plan for labor-management relations/process with timelines.
Roles, Oversight, Resourcing	3. The board determines its role and how members of the board will engage to support successful implementation and oversight of the change effort. They also allocate resources to fund this undertaking.

⁷⁹ Unless the board is specifically referenced in a recommendation, it is suggested that execution of the recommendation is delegated.

Teambuilding	4. A customized teambuilding session for the board is recommended to enhance communication and the board's ability to operate as a consistent, supportive unit, even when all members don't agree.
Board Ground Rules	5. The board develops ground rules and accountability measures for how the board will operate in supporting constructive day-to-day labor-management relations, contract negotiations and, in so doing, operate at a policy level.
Accountabilities	6. The board establishes participation expectations and accountability measures for BART management and union representatives for this effort.
Objectives	7. The board sets measurable quarterly progress objectives.
Commitments	8. The board tasks the general manager with responsibility for ensuring managers throughout the agency participate in meeting these objectives. The board obtains assurances from the union presidents that they will do the same with their boards, shop stewards and membership.

<p>Management Participants</p>	<p>9. The board directs the general manager to ensure that managers with historically combative relationships and/or adversarial styles are removed from strategic involvement with and/or influence over labor-relations at BART. Every effort should be made to engage and utilize managers who are respected by and have credibility with the unions and the workforce. This is not a recommendation that managers must agree or capitulate to union positions. This is about a style of communication and leadership that is constructive and collaborative.</p>
<p>Executive Team</p>	<p>10. The board establishes an expectation that all the board's direct reports operate as a team in supporting the change effort and that input is regularly solicited by the general manager regarding their views as well as their knowledge and strategic advice about labor-relations issues.</p>
<p>Consultant(s)</p>	<p>11. The board retains external consultant(s) to assist the board in developing its vision, change plan, expectations, accountabilities, roles, ground rules and an oversight/reporting process. The consultant(s) are also directed to facilitate labor-management efforts to meet quarterly objectives. The consultant(s) should make monthly reports to the board and/or the board committee chartered with oversight of the change process.</p>

<p>Progress Reports</p>	<p>12. The board (via the Ad Hoc Committee or other committee so designated) requests and receives monthly progress reports from the general manager, union presidents and the board-retained consultant/facilitator.</p>
<p>Joint Data Plan and Agreement</p>	<p>13. Develop a “data plan” for determination of data needed for contract negotiations, how to mine it with union involvement, an agreed upon joint labor-management data analysis criteria and procedure, as well as an education and communication strategy for disseminating data and budgetary information. Retention of a jointly-selected, third-party analyst (who is or can quickly become well versed in the intricacies of BART finances and its labor contracts) is recommended. This also includes a facilitated process whereby labor and management determine and agree on financial indicators to be used in shaping economic bargaining proposals and agreements. (Examples may include competitiveness data, comparables, COLAs, Consumer Price Index data, legal constraints/ considerations, total compensation evaluations, local economic indicators, funding sources data, system needs information, financial forecasts, etc.)</p>

<p>Partnering Workshop</p>	<p>14. The board and/or board committee members participate with executive management and labor leaders in a partnering workshop to solicit input to:</p> <ul style="list-style-type: none"> • shape the change plan and process • clarify roles • communicate objectives • set timelines • agree on safeguards to prevent a breakdown of 2017 contract negotiations • discuss training needs and other support mechanisms • begin trust, respect and team building • agree on the data plan • determine a consistent agency-wide and union communication strategy
<p>Operating Guidelines</p>	<p>15. In facilitated session(s), labor and management develop operating guidelines for how they will work more effectively together day to day.</p>

Personnel Policies	16. The board reviews and revises (at a policy level) the District's personnel policies, programs, metrics, manuals, annual reviews to ensure they support the change process and plan.
Clarify and Align Roles	17. Develop a comprehensive written document that clarifies and aligns roles, responsibilities, adequate authority and resources for BART's management team and staff to successfully carry out all elements of the board's vision and change plan. Lack of clarity, continuity and communication of roles and responsibilities was a pervasive problem before, during and--to some extent--since 2013.

<p>Labor Relations Resources</p>	<p>18. The board requests data and a plan to increase Labor Relations staff and resources to levels that are adequate to support agency needs and the change process.</p>
<p>Labor Relations Role</p>	<p>19. The role of Labor Relations is clarified and communicated agency wide. It is structured and supported to be the guiding voice of the organization on matters related to union relationships and interpreting the complicated contracts at BART. It should look to partner with the operational divisions of BART to create a “cradle to grave” relationship with the various unions so that BART can demonstrate a proactive and consistent approach to working with the unions and the contracts.</p>
<p>Labor Relations Continuity</p>	<p>20. Seek stability of Labor Relations staff and managers.</p>

Succession Plan	21. Ensure Labor Relations has a succession plan so that when Labor Relations staff leave, there are up-to-speed, competent people to take their place who will continue implementing a consistent, long-term strategy for positive change.
Labor Relations Support	22. Provide support for strong collaborative leaders in Labor Relations who can operate without undue interference or second guessing. Ensure the support is sustainable over time.
Training	23. Provide training to support the change process in accordance with a training plan that is developed collaboratively by the parties.
Data Systems	24. Update internal data systems. For example, the data we have accessed to date on absenteeism seems incomplete and possibly not wholly accurate. There are many factors that impact attendance. Some things employees and management can influence. Some they cannot. These factors do not appear to have been fully identified or analyzed before conclusions were drawn and published. Anecdotal stories and beliefs appear to have influenced what should have been data-driven conclusions, in some instances. We also recommend reviewing and modifying data systems, as needed, to ensure coordination of relevant data.

<p>Resolution Mechanisms</p>	<p>25. Set up mechanisms (including training, expectations and a joint labor-management agreement) to resolve issues at their earliest stages, clear up any backlog of grievances and settle cases before arbitration, whenever feasible.</p>
<p>Grievance Settlement</p>	<p>26. Seek assurances that “known loser” grievances are not arbitrated and that cases without merit are not taken to arbitration. This is time consuming, inefficient, and further frustrates constructive labor relations. Occasionally, both parties may need to arbitrate non-winnable cases. However, this should be the exception rather than the norm.</p>
<p>User-Friendly Contracts</p>	<p>27. Work with the unions to develop ways to make the labor contracts more user-friendly. Until this can be discussed and addressed in negotiations, consider other practices used in some industries, such as a “Cliff Notes Contract Version for Operations,” a question and answer handbook, and/or videos by labor and management jointly addressing interpretation issues.</p>
<p>Interest Arbitration Fallback</p>	<p>28. Discuss and obtain agreement within six months as to how a form of arbitration will be invoked, if necessary, to prevent a strike. See “Safeguards” recommendations on pages 166-168.</p>

<p>Bargaining Process</p>	<p>29. Begin exploring various negotiation processes and approaches with the unions. Agree on which process will be used for 2017 negotiations at least one year in advance of the start of these negotiations. Seek agreement on a non-adversarial, problem-solving approach.</p>
<p>Earlier Negotiations</p>	<p>30. Begin 2017 contract negotiations at least six (6) months before the contracts expire.</p>
<p>Negotiation Facilitation</p>	<p>31. Instead of mediation just before or after impasse, proactively use neutral facilitators⁸⁰ to help the parties prepare for bargaining, build trust, facilitate bargaining sessions and do early mediation (if needed) to prevent the threat of and/or initiation of strikes. Over the past 23 years when this approach has been used in public agencies (including transit authorities), not one strike has resulted.⁸¹</p>

⁸⁰ **Labor Negotiations Facilitator’s Roles and Responsibilities**

11. Be neutral (will not try to influence decisions and will not “take sides”)
12. Help the group stay on task during bargaining session
13. Reinforce the group’s use of their ground rules, agendas, decision and meeting models, etc.
14. Encourage full participation
15. Clarify “meanings” and translate messages as necessary to prevent misunderstandings and erroneous assumptions
16. Stimulate brainstorming as appropriate
17. Restate and summarize ideas, issues and group agreements
18. Respect the confidences of all parties
19. Help the parties prepare for bargaining sessions and attend caucuses when requested to do so
20. Play “devil’s advocate” with all parties, as needed, but will not arbitrate, judge nor decide issues between the parties

All parties agree that the facilitators will act before, during and after as a safe haven for sharing perspectives, venting, bouncing around ideas and problem solving. Therefore, the facilitators will not be requested or compelled to participate in any arbitration, deposition or adversarial legal proceeding between the parties. Notes taken by the facilitators shall remain their sole confidential property.

⁸¹ This is the experience of Agreement Dynamics, who developed this approach.

<p>Joint Negotiation Training</p>	<p>32. Even with outside experts brought in to lead a process, it is best if all of the negotiation team members and executive management participate in training to understand behaviors that maximize the probability of a positive and productive process. Not everyone in leadership comes from an extensive contract negotiation background. Training allows for a foundation that is both important and consistent for all users. Consider joint training with labor and management in the negotiation process the parties will be using. Board members should also attend or receive an abbreviated training.</p>
<p>Release Time</p>	<p>33. Discuss with the unions (probably in facilitated meetings) various ways release time can be structured for negotiations that begin at least six months before expiration. Reach agreement on this issue no later than four months before the start of those talks.</p>
<p>Location</p>	<p>34. Agree on a location for negotiations that is acceptable to both parties at least two months before the start of bargaining.</p>
<p>Role of Legal</p>	<p>35. Clarify the role of the Legal Department in bargaining to ensure that labor negotiators have sufficient authority to enter into tentative agreements in a timely and efficient manner. If attorneys from Legal are tasked with responsibilities beyond reviewing language for consistency and legality, then consider having them sit at bargaining tables as members of the team.</p>

<p>Bargaining Team Roles</p>	<p>36. Clarify the roles and responsibilities of all bargaining team members (along with reporting relationships) in writing prior to forming the teams.</p>
<p>Bargaining Input</p>	<p>37. Set up an internal structure to support BART's bargaining teams, receive regular input from members of these teams and provide direction on an ongoing basis.</p>
<p>Media Approach</p>	<p>38. Begin discussions as soon as possible with the unions about engagement with the media throughout the change process and during labor negotiations. Determine and implement mutually-agreeable and respectful protocols that will be used by all parties. Consider a media "time-out" and/or joint publications in accordance with recommendations made in Section J, pages 124 and 125, as long as negotiations are progressing.</p>
<p>Negotiation Guiding Principles</p>	<p>39. Consideration should be given to developing guiding principles and a strategic plan by the board and management of what changes they would like to see over the short- and long-term to ensure the economic viability of BART for the benefit of the region, its ridership and its employees. Those principles should be the basis of each negotiation strategy along with other considerations (see recommendation #13).</p>

<p>Bargaining Priorities</p>	<p>40. The board and executive management develops a few priorities for 2017 labor negotiations. These priorities should be consistent with and supportive of a criteria that may include such things as:</p> <ul style="list-style-type: none"> • Support for strategic plan guiding principles and priorities referenced in #39. • Relevant data and metrics developed by labor and management • Respect and trust building internally and with all stakeholders • Assessment of pragmatic “realities” in terms of scope of contractual changes in one contract cycle.
<p>Reduce “Position-Based” Bargaining</p>	<p>41. Objectives for changing the labor contracts should be advanced in proposals or other ways that are not “position based” to the extent possible. Position-based proposals advocate for one specific way to address an objective and as such can be polarizing.</p>
<p>Contract Clarity</p>	<p>42. Consider making contract clarity and user-friendliness a key objective in 2017 negotiations.</p>

Mediators	43. If mediation must be invoked to avoid impasse, cooperate with and listen to the mediators. If mediation efforts appear to be substandard or too passive, request a change of mediator and/or bring in private mediation services.
Internal Facilitators	44. As the change process progresses, train management and labor representatives to begin facilitating labor-management change committee meetings. This will reduce the costs of outside consultants and foster stronger internal process buy-in as well as resources.
Outside Transit Agency Resources	45. Consult with transit operations managers, labor relations managers, labor negotiators, and others who have and/or are successfully working day to day and in negotiations with their unions. Consider using their assistance and expertise to expedite change efforts. Such resources currently are available in California and some have had extensive experience working successfully in transit settings with labor unions.
Negotiation Ground Rules	46. Use a facilitated process to develop and agree on procedural and behavioral ground rules for 2017 labor negotiations. These ground rules should be signed by executive labor and management representatives, supported by the board, and published to all stakeholders before negotiations commence. They should be signed by all bargaining teams' members as well.

<p>Employee Survey</p>	<p>47. Using the 2012-13 employee survey, continue current efforts and develop others to address findings about areas where morale is low. Conduct another survey within a year to chart progress and refocus efforts as necessary.</p>
<p>Documents</p>	<p>48. Develop and use better systems for document control, for memorializing agreements and for easily accessing them now and in the future. For example:</p> <ul style="list-style-type: none"> • Set up redundant, consistent documents and record tracking systems with clear lines of authority identified. • Generate and sign TAs in real time. Do not wait weeks or months later to generate or sign them. Sign TAs one at a time after reading each one. • In addition to individual TAs, generate an economic term sheet with all economic changes recorded. Management and union negotiators review it separately and together, and then all the chief negotiators sign it before any ratifications are held. • Attempt to conduct all bargaining sessions in one place that can be secured. The disruption and inefficiencies caused by moving back and forth to different locations throughout these negotiations was often reported to inhibit effective document control. Make sure technology needs can be met, there are sufficient rooms for caucusing and that basic comforts (such as air conditioning) are

	<p>supplied.</p> <ul style="list-style-type: none"> • Hire a dedicated, in-house administrative staff person who is in charge of bargaining and labor-management relations note taking, tracking and archiving documents.
Failsafe Mechanisms	49. Establish checkpoints and failsafe mechanisms ⁸² throughout the bargaining process so that negative trends can be spotted and addressed before an impasse or a labor dispute occurs. Consider using the negotiation facilitator to assist with this.
Table Expertise	50. Make sure every bargaining table has labor relations professionals who deal with the unions day in and day out and are able to articulate with real life examples why certain changes to the contract/rules need to take place for the good of management, the workers and the riders.
Board Information	51. Keep the board informed, as a body, regarding the progress of bargaining. Ensure the board is hearing comprehensive updates together and that they are deliberating together about policy level, strategic decisions.
Management Chief Negotiator Candidates	52. Begin “test driving” potential chief management negotiators now. Use transit bargaining experienced management consultants or attorneys as participants in some of the facilitated labor-management discussions that are needed to

⁸² Failsafe as used here means procedures that are operationalized in the event something goes wrong or that are in place to prevent such an occurrence.

	implement cultural change. This may be an opportunity to determine who is a good fit for the agency, the desired relationship and who has the best skill set for 2017 negotiations.
Internal Leadership	53. Also consider using an internal manager to lead negotiations with external consultants providing strategic and advisory support functions.
Safety	54. Restart and reset the conversation between labor and management about how best they can work together to maximize safety via a facilitated effort; establish a structure, objectives and a collaborative method for joint advocacy and outcomes regarding safety issues and procedures.
Success Examples	55. Solicit and share managers' positive labor relations experiences (what has worked for them). Seek out success specifics with respect to labor-management interactions and determine how they may be institutionalized.
Operationalizing Collaboration	56. Provide training, tools and performance-related expectations to managers in how they should operate in a collaborative way that will contribute to building improved labor-management relations.
Celebrate	57. Communicate and celebrate every success and/or milestone reached between labor and management.

<p>Communication Strategy</p>	<p>58. Stop the “bashing by hearsay and the stories of abuse.” We heard numerous references to the other parties’ bad motives, malicious intent and refusal to be cooperative. With some probing, we often discovered that the individual espousing that view had no first-hand knowledge and was repeating what had been passed down from others, who often did not have first-hand knowledge either. This wasn’t always the case, but it was prevalent enough to be concerning.</p>
<p>Modeling</p>	<p>59. Every effort should be made to inoculate and insulate new employees, managers and board members from the environment of “We’re in the bunker and it’s us against them.” We heard this over and over. Even the language used repeatedly by both parties tends to perpetuate the situation. This will take time, but can be modeled by the board, executive management and union officers.</p>
<p>Healthy Advocacy</p>	<p>60. Champion a new paradigm for advocacy. Management and labor can advocate for their respective interests without alienating or vilifying one another. This can often be accomplished by questioning assumptions, not automatically attributing ill intent, listening for the reasons behind the “ask,” clearly articulating concerns, exploring/analyzing a range of options and using jointly-mined data.</p>

Arbitrations	61. Consider hiring non-attorneys in labor relations who can conduct arbitrations in compliance with current ATU contract restrictions. This will provide more resources and options for conducting effective operations in labor relations.
Safeguards	62. Review and discuss the Safeguards provided on pages 164-169. Seek a joint labor-management agreement on a set of safeguards that will be activated to minimize the potential for labor disputes in 2017.
Debriefs	63. Conduct debriefings about this report with stakeholders. Focus on utilizing lessons learned and other suggestions to support the board's direction and vision for change.

The Plan:

Agreement Dynamics' team has concluded that there is no single action that will substantially improve BART's labor-management relations in the short- or long-term. Many well designed, appropriately sequenced, inclusive strategies are needed to effect an organizational change that supports constructive labor relations before, during and after negotiations. This includes certain safeguards against work stoppages in 2017 contract talks that will be discussed in the following section of this report.

This complex, challenging and intense effort will require significant commitment by all parties. Setbacks, while inevitable, need not stop the momentum leading to an organizational shift with benefits for all.

BART has tremendous capacity to break the cycle of adversarialism. There is a depth of skill, talent, experience, dedication and leadership in every stakeholder group. While daunting, this undertaking is not a mission impossible.

Success, we believe, depends on engaging all parties at the "right" times and in the "right" ways.

The following is a high-level look at some essential success strategies:

A. Board-Driven Change Process:

What? The board develops a policy-level vision for a new way of operating agency-wide regarding labor-management relations and adopts and allocates resources for an implementation plan, which the board oversees.

How? Via a facilitated process with an external consultant(s) retained by and reporting to the board.

Initially, the consultant will help the board coalesce around a vision for changing BART's labor-management culture and clarify the board's role in this effort.

The external consultant is also charged with ensuring that management and labor's various interests are respected and that they have every reasonable opportunity to engage, and impact the change process from the initial vision setting and

implementation plan development to the conclusion of the next round of contract negotiations and beyond.

As per the implementation plan, the external consultant will provide specified training, facilitation, coaching and consulting services in a manner that respects and supports management and labor (and in no way interferes or supplants their respective roles or authority).

B. Accountability for All:

What? Those who genuinely engage in the change process must be supported, while those who obstruct it must also have consequences.

How? The change process and plan should include measurable quarterly objectives. Progress should be shared with the board, who will institute accountability measures. Executive management will be responsible for ensuring constructive participation from managers throughout the agency. Union officers will be responsible for ensuring the same from their representatives, shop stewards and membership.

To ensure transparency and accountability for all, the board should receive reports, discuss what is working and what is not, and make modifications regularly.

Support and rewards for effort and positive outcomes should also be established along the way.

Giving participants a fresh opportunity and the “benefit of the doubt” as the change process begins will be challenging, but necessary for progress.

Examples of quarterly objectives may include (but not be limited to):

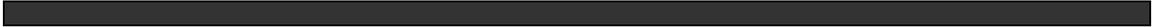
1. Development of agreed-upon safeguards (see pages 164-169) to maximize fair, open, and constructive 2017 contract negotiations that conclude by mutual agreement in a timely and peaceful manner;

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2. Early agreement on financial data, economic criteria and joint financial analysis to be completed and shared with the board **before** bargaining begins;
 3. Participation in problem-solving tools/process training and team and trust building;
 4. Adoption and use of operating ground rules to support effective issue resolution and improve working relationships;
 5. Reduction of pending grievances and arbitrations;
 6. Resolution of issues earlier and by those closest to the situation;
 7. Joint examination and adoption of relevant best practices for BART labor-management relations and bargaining;
 8. Agreement on joint labor-management internal and external communications plan to maintain transparency without negotiating in the media;
 9. Implementation of ways to memorialize and celebrate successes.

C. Partnering Summit/Workshop:

What? Leaders meet to review and provide input to shape the change process, clarify roles, objectives, timelines, safeguards, as well as begin trust, respect and team building.

How? Board Committee, union officers, general manager, deputy general manager, general counsel, district secretary and AGMs participate in a facilitated 1-2 day off-site to launch the change process and begin using joint problem-solving tools. Check-ins and process modifications may be established via regular meetings of a subset of this group and/or this group may reconvene biannually.



D. Progress Reports, Assessments, and Process Modifications:

Status of the change plans progress and attainment of milestones and objectives are shared monthly with the board committee and quarterly with the full board. Modifications to ensure continued progress are recommended and, following board approval, are implemented.

BART Labor-Management Roadmap for Change

Start ▲ Board sets vision for new operating model for labor-management relations and change process.

Board institutes accountability measures.

Partnering summit to launch change process.

Negotiation safeguards agreed upon.

Quarterly objectives progress assessed and best practices instituted.

Grievances and arbitrations reduced, trust and respect increased, communication improved, day-to-day operational ground rules implemented, training and tools provided, and negotiation safeguards put in place.

Constructive bargaining process designed and used.

New agreements reached amicably before expiration.

Safeguards Against Labor Disputes:

Many interviewees referred to the events of 2013 as a “perfect storm.” Some said it was an “anomaly” that won’t be repeated. While there are a small number of outliers in all groups, it’s our conclusion that neither labor nor management has an appetite for more strikes.

That is not to say either party will agree to peace at any price. There is no guarantee a strike could not happen again. Therefore, putting safeguards in place to minimize such a recurrence makes sense. None of the following recommendations is a silver bullet, but taken together all will form a powerful disincentive to strikes or even threats of strikes.

1. Problem-Solving Process

Begin developing a different process now for discussing and resolving differences. How labor and management often interact, even day-to-day, has been adversarial. Differences are inevitable. How they are dealt with needs to be changed to an approach of problem solving, rather than posturing and locking down on positions. This will require joint training and facilitated practice on day-to-day issues long before the parties enter the next round of labor negotiations.

2. Supportive Participants

Change some of the “players.” There are managers and union representatives who are willing and able to transition to joint problem solving as a way of doing business. There are some who are not, or who simply have too much baggage and negative history to be credible with the other party. The board can direct the general manager to implement such a change within management. The unions elect their leaders and are autonomous bodies. They do have control over who they utilize and how they act with respect to resources, including attorneys and consultants. They also currently have leadership in place to influence how they and their representatives will engage with management. The board could meet with them and seek a commitment from labor to participate fully and with an open mind in the change process that includes leaders who will use problem-solving tools and techniques.

3. Joint Training

Enlist the unions’ support for a training plan and joint training of all who can influence the labor-management relationship. As advocates, disagreements should be expected. How those disagreements are handled,

with appropriate training, tools and spirit of intent, need not be acrimonious or destructive to either party.

4. Data Agreements

Charter a labor-management group to determine data needs, assumptions, collection and analysis methodologies. Select a mutually-agreeable expert/consultant to help the parties reach common understandings about relevant data and how it may be used in labor-management settings, including contract negotiations. Seek agreement from all parties to support an agreed-upon process to ensure data does not become a source of contention in 2017 negotiations.

5. Economic Indicators

Facilitate ongoing conversations between labor and management leaders about factors that may influence and shape economic discussions in 2017 labor negotiations. For example, the parties may explore using various indicators such as:

- competitiveness
- recruitment and retention data
- economic comparables
- consumer price index
- cost-of-living adjustments
- local and/or national economic trends and forecasts
- agency ability to pay
- others as identified

While it may not be necessary to reach agreement on how these kinds of factors will be used in upcoming negotiations, it would be useful to develop a joint understanding of each of them and a framework for bringing them to the table to shape tentative agreements.

6. Interest Arbitration Options

- a. Begin meeting with ATU to discuss the application of Section 20.2 of their International Constitution should negotiations proceed to impasse and there's potential of a strike. Section 20.2⁸³ states, in part, that,

"A decision to strike requires a two-thirds vote of the membership voting on the question... the international president (IP), if no international officer has previously been assigned to the matter, shall, upon receipt of the notice of the results of the strike vote, proceed to the scene of dispute in person or by deputy, and in conjunction with the committee of the local union (LU) or joint bargaining council (JBC), shall make a thorough investigation and attempt to settle the matter in dispute. In case of failure thus to secure a settlement, the IP or the IP's deputy shall then, in conjunction with the local committee, prepare propositions of arbitration defining the points in dispute and the basis upon which they shall be arbitrated. If the company refuses to accept arbitration as tendered, the IP or the IP's deputy shall then communicate with the members of the general executive board (GEB) in writing or by telegram and obtain the consent of a majority the GEB before endorsing the strike. No strike sanction will be granted in the event the strike is deemed by the board to be in clear violation of any applicable law or contract."

This language requires ATU local unions to offer arbitration as an alternative to a strike, but is not specific about what kind of arbitration is to be proposed. The parties could craft an understanding of how a potential arbitration proceeding would be structured in 2017 that is non-precedential for future negotiations. This would also provide ATU and BART with an opportunity to use problem-solving techniques to reach an early accord on this important safeguard. This invitation should also be extended to SEIU and AFSCME. If, for example, SEIU declines to agree to a mutually-agreeable form of arbitration as a safeguard, the parties can still benefit by this approach. Should it be invoked in 2017 by ATU and BART, it may deter strike actions by other unions while arbitration outcomes are pending.

⁸³ Section 20.2 is included in the Appendix, see page 213.

and/or

- b. Consider some “quid pro quo” options for ATU, SEIU and AFSCME to all enter into a non-precedential binding interest arbitration alternative in 2017 if negotiations break down.

and/or

- c. Agree on a binding/non-binding form of interest arbitration if impasse appears imminent. For example, the 2003 LACMTA model may be applicable. In this case, a three-member mediation/arbitration panel was designated to help the transit authority and ATU Local 1277 reach agreement on outstanding collective bargaining issues (which, in this case, were all related to health care benefits). If no agreement was reached at the end of a 15-day period, the panel would schedule an arbitration hearing to begin within 15 days. The panel recommended a resolution and the parties then had 20 days to accept or reject it. Either party could reject the proposed resolution by a 2/3 vote. If rejection occurred by 2/3 vote, the parties were free to pursue any available course of action, including the right to strike or lockout. This approach was proposed by former Los Angeles County Supervisor, mediator, arbitrator and 1994 MTA Board Chair Edmund Edelman in 2003.⁸⁴ It successfully ended a 35-day strike. This process, or some variation, could be developed and put in place as a labor-dispute prevention measure.

⁸⁴ See 11/6/03 *LA Times* article and the 2003 Mediation/Arbitration Agreement in the Appendix, see pages 217-218.

EXAMPLE
Binding/Non-Binding Interest Arbitration

1. Process invoked if impasse appears imminent.
↓
2. Three-member mediation/arbitration panel selected. (This board may be pre-determined prior to start of negotiations.) One member chosen by management, one member chosen by the unions and one neutral member selected jointly.
↓
3. Arbitration issues and related documents designated and forwarded to the panel within five days of the request for same.
↓
4. After Step 3 is completed, the panel assists BART and the unions in an attempt to resolve all outstanding issues. This effort will not exceed 15 days.
↓
5. If Step 4 does not result in an agreement, the panel schedules an arbitration hearing within 15 days.
↓
6. The panel issues its decision in writing to the parties within 15 days of conclusion of the hearing. The decision contains recommendations for settlement.
↓
7. The parties have 20 days to accept or reject the panel's recommendations. Rejection requires 2/3 votes.

7. Negotiation Facilitation

Use a neutral facilitator to help all parties prepare to negotiate using problem-solving tools. The facilitator should also attend all bargaining sessions and meet separately with the parties to ensure that clear, constructive communication is maximized, ground rules and data are used, trust is enhanced, creative options are identified and explored and breakdowns are avoided. The facilitator should meet regularly with the board to report on progress, discuss options for reaching mutually acceptable agreements. As mentioned earlier, this approach to labor negotiations, in the experience of Agreement Dynamics, has a 23-year history of success, with no strikes. This could change tomorrow, because this approach is not a guarantee. However, it has a good track record.

8. Outreach and Education

Labor and management leaders should meet with transit and other managers and union officers who have used the approach referenced in #7 above to obtain maximum information and insights about how and why it has worked.

9. Media Approach

The board should direct a “no negotiating in the press” strategy to be developed by the parties and recommended to the board for consideration and adoption for both the change process and 2017 labor negotiations. The board should articulate its interests about such a strategy to the parties before they begin discussions about it. Those interests may include such things as:

ensuring transparency and openness to the public about ongoing labor-management initiatives, process, and objectives for 2017 negotiations while also respecting the interests of all parties and establishing a safe haven for successful contract talks.

Agreement specifics should be developed in a facilitated setting and signed by all parties as soon as possible. Prototypes used in other transit negotiations may be customized and adopted by BART and its unions.

10. Negotiation Work Plan

At the start of negotiations, the parties should jointly develop a work plan that contains all open issues, meeting schedule, order in which issues will be discussed, target dates for resolution of each issue and progress check points. Similar work plans have been used successfully in numerous public sector negotiations, including transit agencies such as Seattle METRO Transit, Intercity Transit, LACMTA, Sunline Transit, Ben Franklin Transit and Pierce Transit.

For both incremental and long-term changes to take root at BART the parties must:

- Be committed to working together to **ensure the other's success.**
- Have both collective and individual accountability for using both the letter and spirit of a negotiation process that is mutually beneficial.
- Demonstrate trustworthiness and respect for one another.
- Regularly use constructive problem-solving approaches.

The challenge ahead is for the board to charter such a course and oversee its successful implementation.



Photo courtesy of BART

M. APPENDIX

- ATU & SEIU Negotiations Chronology 2013
- Acronyms Used in this Report
- Tentative Agreement 4.8
- “Most Favored Nations” Agreement Between BART and AFSCME Local 3393 Regarding 2013 ATU/SEIU Negotiations
- Rutan and Tucker Letter Regarding Management Perspective on Binding Arbitration for Transit Agencies
- Employee Survey Results
- Costa Mesa “COIN” Ordinance
- Amalgamated Transit Union Constitution Section 20.2
- *LA Times* Article, November 6, 2003
- 2003 Mediation/ Arbitration Agreement
- Agreement Dynamics, Inc. Background Information



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ATU and SEIU Negotiations Chronology 2013*

April 1, 2013	Exchange of proposals
April 18, 2013	Agreement reached providing SEIU with full-time release for bargaining commencing May 13 with bargaining to be held at SEIU in San Francisco and district offices on alternating every 2 weeks
May 1, 2013	Meeting to discuss proposals with SEIU
May 2, 2013	Meeting to discuss proposals with ATU
May 13, 2013	Commencement of bargaining with ATU/SEIU (commencement of full-time paid release for ATU and SEIU)
June 11, 2013	District requests mediator assistance
June 24, 2013	ATU/SEIU file unfair labor practices lawsuit
June 27, 2013	ATU and SEIU give 72-hour notice of their intent to strike beginning July 1, 2013
June 30, 2013	Expiration of contract; strike declared at 12:01 a.m., July 1
July 1-4, 2013	ATU and SEIU strike. Numerous AFSCME members honor the strike
July 4, 2013	Agreement for 30-day contract extension; strike ends midnight July 4
August 4, 2013	District requests 60-day cooling off period
August 5, 2013	Governor Appointed Board of Investigation
August 11, 2013	60 day cooling off period commences
October 13, 2013	Federal mediators arrive

** Chronology dates obtained from BART legal counsel, ATU records and the 2013 Governor's Board of Investigation Report.*

October 17, 2013	Talks break down. FMCS director and deputy leave for D.C. Strike commences at midnight.
October 19, 2013	Two BART workers killed.
October 21, 2013	Agreement reached; strike ends.
October 22-25, 2013	Unions and district work out final language in TAs.
October 31, 2013	ATU provides district its complete set of TAs, which includes 4.8.
November 1, 2013	SEIU ratifies contract ATU ratifies contract
November 5, 2013	District determines 4.8 had been signed by management
November 6, 2013	District contacts unions regarding 4.8
November 21, 2013	District board rejects 4.8 and agrees to ratify contract without 4.8
December 3, 2013	ATU and SEIU amend lawsuit to add claims regarding the ratification process and TAs
December 18-20, 2013	Parties negotiate regarding various contract changes in exchange for agreements without Section 4.8, requiring ratification by both ATU and SEIU
December 21, 2013	Resolution of 4.8 issues
January 2, 2014	Board votes to approve labor contract
January 3, 2014	ATU ratifies labor contract
January 13, 2014	SEIU ratifies labor contract

* Chronology dates obtained from BART legal counsel, ATU records and the **2013 Governor's Board of Investigation Report.**

Acronyms Used in this Report

Acronyms	Acronym Meanings
AC Transit	Alameda Contra Costa Transit
AFSCME	American Federation of State, County and Municipal Employees
AGM	Assistant General Manager
APTA	American Public Transportation Association
ATU	Amalgamated Transit Union
BART	Bay Area Rapid Transit
BIA	Binding Interest Arbitration
CC	Creative Commons
CEO	Chief Executive Officer
COIN	Civic Openness in Negotiations
COLA	Cost of Living Adjustment
DOL	Department of Labor
FMCS	Federal Mediation and Conciliation Service
FMLA	Family and Medical Leave Act
GEB	General Executive Board
GM	General Manager
IBB	Interest-Based Bargaining
IP	International President
JBC	Joint Bargaining Council
LACMTA	Los Angeles County Metropolitan Transportation Authority
LBT	Long Beach Transit
LU	Local Union
MOU	Memorandum of Understanding
MTA	(Los Angeles County) Metropolitan Transportation Authority
MUNI	San Francisco Municipal Railway
OCEA	Orange County Employees Association
PERB	Public Employee Relations Board
PMA	Police Managers Association
POA	Police Officers Association
PR	Public Relations
PUC	Public Utilities Code
RT	(Sacramento) Regional Transit
SEIU	Service Employees International Union
SRTD	Sacramento Regional Transit District
TA	Tentative Agreement
WMATA	Washington Metropolitan Area Transportation Authority

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SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
ATU/LOCAL 1555 and SEIU/LOCAL 1021 GENERAL NEGOTIATIONS

TENTATIVE AGREEMENT – FAMILY MEDICAL LEAVE

July 19, 2013

The San Francisco Bay Area Rapid Transit District ("BART"), SEIU/Local 1021 ("SEIU"), and ATU/Local 1555 ("ATU") have negotiated and reached a tentative agreement on this provision of the Collective Bargaining Agreement ("CBA"). No tentative agreement shall be a final agreement except as a part of a total package agreement between the parties. All parties agree that final approval of the tentative collective bargaining agreement is subject to ratification by SEIU membership, ATU membership and the BART Board of Directors.

The parties agree to revise Section 4.8 as follows:

4.8 FAMILY MEDICAL LEAVE

The District maintains a policy and procedure which provides for family and medical leave to District employees in accordance with the Family Medical Leave Act of 1993, as amended (FMLA) and the California Family Rights Act of 1993, as amended (CFRA).

The District shall grant leave to all employees in accordance with the terms and conditions of that policy and in accordance with all applicable federal and state laws and regulations.

The District shall pay all FMLA/CFRA eligible employees 6 weeks of paid time off to take care of a seriously ill child, spouse, parent or domestic partner or to bond with a new child.

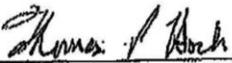
If the paid leave is being used for CFRA (bonding with a new child) then the leave is limited to the first year after birth, adoption or foster care placement of a child.

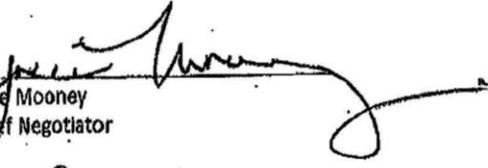
Employees who are not eligible for family leave either due to insufficient hours worked during the year, or because they need more time than is available under the FMLA and/or CFRA in a given year, may request a leave of absence from the District and such leave requests shall not be unreasonably denied.

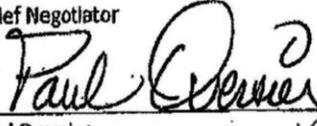
The District shall collaborate with the Union to provide training to management and ATU 1555 and SEIU 1021 Union Stewards and other union representatives alike and to distribute materials including the District's family leave policy, however the provisions of this section regarding training and the distribution of materials are not subject to the grievance arbitration procedure. Each employee retains all statutory rights, remedies or procedural protections and retains any and all individual rights to pursue claims against the District arising from any alleged violations of the District Policy or procedure and/or alleged statutory violation.

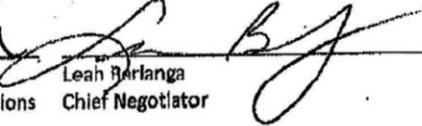
FOR THE DISTRICT

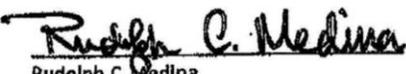
FOR SEIU


Thomas P. Hock
Chief Negotiator

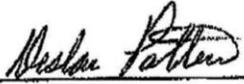

Josie Mooney
Chief Negotiator


Paul Oversier
Assistant General Manager of Operations


Leah Barlanga
Chief Negotiator


Rudolph C. Medina
Labor Relations Manager


John Arantes
President 1021 BART Chapter


Deslar Patten
President BART Professional Chapter

FOR ATU


Antonette Bryant
President/Business Agent, ATU Local 1555

"Most Favored Nations" Agreement Between BART and AFSCME Local 3393 regarding 2013 ATU/SEIU Negotiations

The San Francisco Bay Area Rapid Transit District ("the District") is committed to ensuring AFSCME, Local 3993 represented employees receive an equivalent level of compensation and benefits as those received by employees represented by ATU Local 1555 and SEIU Local 1021. To that end, the District promises that AFSCME represented employees will receive the same wages, pensions, and health benefits package, including employee contributions, as those negotiated with ATU and SEIU representatives. This agreement will be known as a "Most Favored Nations" provision.

The "Most Favored Nations" provision provides AFSCME the following:

1. If a "last, best final" offer is made to ATU/SEIU bargaining units, AFSCME represented employees will be entitled to receive the same wages, pensions, and health benefits package, including employee contributions in that offer;
2. However, if ATU/SEIU and the District settle on a better wages, pensions, and health benefits package, including employee contributions, AFSCME will be entitled to the better wages, pensions, and health benefits package, including the employee contributions.

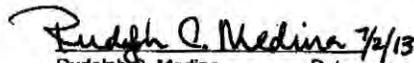
In consideration for the District's agreement to the "Most Favored Nations" provision, AFSCME agrees that it will strongly advise its members to report to work effective immediately upon the signing of this agreement.

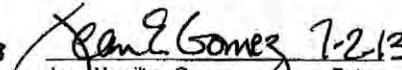
The parties acknowledge that negotiations on other issue not covered herein are still ongoing.

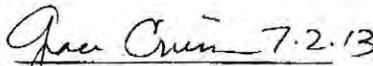
This letter of agreement is on a non-precedent setting and non-citable basis.

Concur for the District

Concur for AFSCME


Rudolph C. Medina Date 7/2/13
Department Manager, Labor Relations


Jean Hamilton-Gomez Date 7-2-13
President


Grace Crunican Date 7-2-13
General Manager

May 27, 2014

**VIA E-MAIL AND
FIRST CLASS MAIL**

Rhonda Hilyer, President
Agreement Dynamics
P.O. Box 33640
Seattle, WA 98133

Re: Management Perspective Binding Interest Arbitration for Transit Agencies

Dear Ms. Hilyer:

You have asked me to address my perspective as a management attorney on binding interest arbitration.

1. Introduction.

Governing boards typically do not want to surrender to an outside arbitrator or arbitration panel the final decision on agency financial decisions on employee compensation. Employee compensation and benefits are frequently the major portion of the public agency's budget.

Preliminarily, the governing statutes and enabling statutes for the Transit District must be first evaluated to confirm binding interest arbitration is permitted. For example, attempts to establish binding arbitration of economic disputes for law enforcement and firefighter personnel in California have been proposed twice in Labor Code § 1299-1299.9. On each occasion, the courts have declared that the statute is unconstitutional on the grounds that the legislation impermissibly delegated to a private party – an arbitration panel – the power to interfere with county money (by potentially requiring the county to pay higher salaries than it chooses), and to perform municipal functions determining compensation for county employees in violation of Article 11, §§ 1 and 11, of the California Constitution. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322).

Public Utilities Code § 28850 governs collective bargaining for the San Francisco Bay Area Rapid Transit District ("BART"). Public Utilities Code § 28850(a)(1) permits, but does not require, disputes over the terms of a written contract governing wages, salaries, hours or working conditions "may" be submitted to an arbitration board. The decision of a majority of the arbitration board shall be final.

Rhonda Hilyer, President
May 27, 2014
Page 2

It is established by precedent that inclusion of an interest-arbitration provision in a collective bargaining agreement is not a mandatory subject of bargaining. Thus, a party may not legally insist on inclusion of interest arbitration in the agreement. See, e.g., *Laidlaw Transit*, 323 NLRB 867 (1997).

Assuming the threshold issue is resolved and binding interest arbitration is not prohibited by any governing statute, I generally do not support binding interest arbitration for the reasons discussed below. I believe the better approach is to use or hire labor negotiators who patiently approach negotiations in more of a collaborative or interest based approach. By law, bargaining in good faith requires a serious attempt to resolve differences and reach a common ground with the Union. Nevertheless, it is critical to remember that the obligation of the employer to bargain in good faith does not require the employer to yield on a position that is fairly maintained, including subjects within management's rights. Collaborative or interest based bargaining does not require management to agree to everything the employees want. Rather, it is designed to be a more respectful process than position based bargaining.

The use of a good facilitator during negotiations can be instrumental in achieving successful negotiations. In my experience, where acrimony exists as a result of prior negotiations or in the application of an existing agreement, a good facilitator can assist the parties in reaching a successful agreement.

1. The Shortcomings Of Binding Interest Arbitration.

The principal argument in favor of binding interest arbitration is that the suspension of operations as a result of a strike or lockout brings great hardship on others, and arbitration offers a way out of this predicament. For example, in *Reading St. Rwy.*, 6 LA 860, 870 (Simkin, 1947), one arbitration board stated as follows:

Arbitration should be a last resort and not an easy pillow on which to fall just because difficulties are encountered. There is some evidence that in the transit industry there has not been the fullest utilization of collective bargaining just because there has existed a ready alternative. But, on the other hand, it cannot be denied that even some minor over-use of arbitration is preferable to long and costly strikes in this vital utility.

a. Arbitrators Are Unelected And Do Not Report To The Electorate.

As previously stated, the primary objection against arbitration of interest issues in the public sector is the justifiable reluctance of governing boards to delegate to a third party the final decision on economic matters pertaining to its employees. Unlike the

BART Board of Directors, arbitrators are not elected, and they do not report to the electorate. As the United States Supreme Court observed in *Abood v. Detroit Board of Education*, 431 U.S. 209, 228 (1977):

Finally, decision making by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters – taxpayers, users of particular government services, and government employees.

b. Binding Interest Arbitration Can Impede Regular Negotiations.

The second objection to binding interest arbitration is that it may impede healthy development of the labor-management relationship by the parties who become dependent on the procedure. The use of interest arbitration may impair collective bargaining by causing what has been described as “a narcotic effect: dependence on arbitration in future negotiations.” Kleintop & Loewenberg, *Collective Bargaining, Compulsory Interest Arbitration and the Narcotic Effect: A Longitudinal Study of Delaware County, Pennsylvania*, 19 *Journal of Collective Negotiations in the Public Sector* 113 (Vol. 2)(Baywood Publishing Co., 1990).

c. Lack Of Definite Standards.

The third objection to binding interest arbitration is that definite principles or standards to govern the decision are lacking. Unless specific criteria are established in the agreement to govern the decision, the decision of the arbitrator or arbitration panel can be based on the proclivities of the arbitrator which can find support in awards rendered by arbitrators throughout the country.

Arbitration can be based on an assessment of the equities of each party’s proposal, or a choice between the parties’ final offers. “Final offer” arbitration avoids the problem of unions not bargaining in good faith and holding out for a better deal from an arbitrator or arbitration panel. “Final offer” arbitration only on economic items reduces the number of issues which are the subject of arbitration.

Specific criteria that the arbitrator or arbitration panel must follow in setting the terms of an economic proposal are essential to avoid a runaway arbitration award, but specific criteria are difficult to achieve because the specific criteria has to be bargained. The parties can spend as much time bargaining over the specific criteria governing the

RUTAN
RUTAN & TUCKER, LLP

Rhonda Hilyer, President
May 27, 2014
Page 4

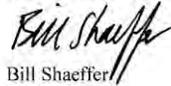
resolution of a future dispute that may be submitted to arbitration, as they spend bargaining on the substantive terms of an agreement.

Because of the difficulty in reaching agreement on the criteria, some states have addressed the issue in legislation. There are specific criteria governing non-binding fact finding in California. See, e.g., Government Code §§ 3505.2. *et seq.* (Meyers-Milias-Brown Act) and Government Code §§ 3548 (Educational Employment Relations Act). There are also some states, Illinois and Wisconsin, which require binding interest arbitration, and which establish criteria the arbitrator is to use.

These are my general thoughts, and there is literature available on this topic. Please let me know if you need anything else. You are free to include a copy of this letter in your report to BART.

Sincerely,

RUTAN & TUCKER, LLP



Bill Shaeffer

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May 2013



Employee Survey Highlights of Findings

BART Employee Engagement Committee



Background

- In Spring 2012, a General Manager Working Group Committee was formed to address and improve the employee culture at BART with the ultimate aim of providing better service to the Bay Area. The committee, initially referred to as the "Cultural Change Committee", has since become known as the "BART Employee Engagement (BEE) Committee".
- Guided by the philosophy of "*let's start by listening*", an Employee Survey Sub-Committee was formed. The Survey Sub-Committee sought to learn how BART employees viewed themselves, their work environment, their peers, the organization as a whole, and how well BART was fulfilling its mission and what if anything might be done to improve its performance and make BART a better place to work.

Methodology

- Last Fall, the Committee sought and obtained assistance from the Marketing and Research Department to conduct a survey. A questionnaire that was crafted with Committee input and distributed to all BART employees.
- The Survey was available online and on paper. All employees with a bart.gov email address were sent an email link to the online survey. All others had a paper survey and a postage paid return envelope either mailed to their home or included with their pay check stub.
- The survey was conducted from Dec. 6, 2012 – Jan. 10, 2013.
- A total of 1,173 surveys were completed which is a 37% response rate. To ensure the results reflected the feedback of BART employees as a whole, the data was weighted by report location and whether the respondent is a supervisor or not.

86% agree that *the work they do contributes to the success of BART*

78% agree that *their work contributes to the quality of life in the Bay Area*

80% agree that *they are proud to work at BART*

70% agree that *BART as a whole provides good customer service*

67% agree that *they are satisfied with their job at BART*

37% agree that *their co-workers are satisfied with their job at BART*

57% agree that *working at BART has met the expectations I had when I was hired*

Feeling Appreciated at Work

62% feel that *their work is appreciated by their immediate supervisor*

37% agree that *their work is appreciated by top management*

36% agree that *they receive appropriate recognition for their service to BART*

35% agree that *BART cares about its employees*

Access to Information

58% agree that *they have adequate information they need to do their job*

38% agree that *they feel informed about what is going on at BART*

Providing Input

36% agree that *they have input on decisions that affect their job*

25% agree that *BART considers employee's suggestions*

Safety

76% agree that *BART provides safe public transportation*

52% agree that *BART is a safe workplace*

54% agree that *they feel safe from crime at work*

56% agree that *they feel respected in the workplace*

Job Training

53% agree that *they receive the training they need to do their job*

44% agree that *they have the opportunity to learn new skills and have opportunity for advancement. Interest expressed in improving computer skills, management/leadership skills and receiving technical training*

60% agree that *my job makes good use of my abilities and skills*

BART Overall

54% agree that *I clearly understand BART's Vision/Mission*

20% agree that *the Board and Management work well together*

18% agree that *Management and Labor work well together*

58% agree that *the people I work with care about me*

46% agree that *I feel like part of a team at BART*

Interest in Wellness Related Activities

<i>Would you participate in the following?</i>	Definitely and Probably
A BART sponsored gym membership	75%
A BART sponsored walking/jogging club	44%
A BART sponsored weight loss program	39%
A community project sponsored by BART (e.g., coastal clean-up, Lake Merritt clean-up, AIDS Walk, etc.)	39%
A BART sponsored social event outside of work hours	36%
A BART sponsored day care	28%
A BART sponsored smoking cessation program	19%

GM Recognition Events

Recently the General Manager held service recognition events throughout the District to honor employees for their years of service.

	Yes	No
Where you aware of this?	69%	30%
Did you attend?	34%	60%

Survey Appendix

	Agree (strongly and somewhat)	Neutral	Disagree (strongly and somewhat)	Don't Know / NA
The work I do contributes to the success of BART	86%	9%	3%	1%
I am proud to work at BART	80%	12%	7%	0%
The work I do contributes to the quality of life in the Bay Area	78%	16%	4%	1%
BART provides safe public transportation	76%	11%	13%	<1%
BART as a whole provides good customer service	70%	17%	10%	2%
I am satisfied with my job at BART	67%	13%	18%	0%
My department provides good service to other departments	63%	21%	9%	6%
I feel that my work is appreciated by my immediate supervisor	62%	14%	22%	1%
My job makes good use of my abilities and skills	60%	18%	21%	<1%
The people I work with care about me	58%	21%	18%	1%
I have adequate access to the information I need to do my job	58%	19%	22%	<1%
It is important to me that BART and its employees participate in community service	58%	33%	7%	2%
Working at BART has met the expectations I had when I was hired	57%	18%	23%	<1%
BART is a good neighbor in the communities in which it operates	57%	29%	8%	4%
I feel respected in the workplace	56%	19%	23%	0%
I clearly understand BART's vision/mission	54%	27%	15%	3%

	Agree (strongly and somewhat)	Neutral	Disagree (strongly and somewhat)	Don't Know / NA
I feel safe from crime at work	54%	16%	28%	<1%
I receive the training I need to do my job	53%	23%	23%	1%
BART is a safe workplace	52%	19%	28%	<1%
My immediate supervisor has good management skills	50%	23%	24%	1%
I feel like part of a team at BART	46%	25%	27%	<1%
I have the opportunity to learn new skills	44%	23%	31%	<1%
I have opportunity for advancement	44%	24%	30%	1%
My second-level manager has good leadership skills	42%	25%	27%	5%
I feel like I am informed about what is going on at BART (e.g., extensions, Board meetings, and news about BART)	38%	29%	32%	1%
I feel that my work is appreciated by top management	37%	23%	36%	4%
Most of the people I work with are satisfied with their jobs at BART	37%	29%	31%	3%
I have the opportunity to be involved in decisions that affect my work	36%	21%	40%	1%
I receive appropriate recognition for my service at BART	36%	30%	32%	2%
BART cares about its employees	35%	27%	38%	1%
BART considers employees' suggestions	25%	32%	36%	4%
The Board and management work well together	20%	37%	25%	16%
Labor and management work well together	18%	29%	47%	5%

Q 2. If you rated anything 'somewhat' or 'strongly disagree', please explain why

Management/supervisors insincere; not effective; not interested in helping employees do a good job, behave unprofessionally; act as an impediment, not a help	37%
Training doesn't match what I do/doesn't address what actually needs to be done/is non-existent/was canceled/is not encouraged/is needed but never done	24%
My work is recognized/appreciated/no incentive	21%
Promotion is based on office politics/things other than how qualified you are to do the job (e.g. favoritism, racism, etc.)	19%
There does not appear to be any path to advancement/career development	18%
No suggestion system/system doesn't work	14%
Labor/bart relations are very bad/problematic	14%
Complete lack of communication/basic information, particularly on items need to know/from management; basic items like policies, procedures, etc., which should be easy to find are not	14%
I work hard/go above and beyond expectations, but am not compensated for it/never thanked/overlooked for promotion/just given more work	9%
Culture of disrespect; employees don't treat other employees with respect/shout at others/don't care about others	9%
Company culture promotes good/fair values in word, but not deed; bart leadership does not 'walk the walk' even though they 'talk the talk'	8%
Those slacking on the job are not dealt with/ addressed	8%
I need more empowerment/independence than I currently have at my job; have to go through too many managers/feel underutilized	7%
Security/crime issues workplace not secure (piggybacking, homeless, strangers loitering, strangers with access to bart worksite); too many non-paying people (jumping gates) make system less safe	7%
A lot of employees don't seem committed to their job/complain too much/ don't seem willing to work for their compensation	6%
Safety issues (not crime) – worksite/work area is unsafe	6%
Supplies/resources/staff– not enough kept in stock; insufficient amount to do the job; etc.	5%
Pay/benefits/training is lower/less compared to others in this field in the bay area/other bay area agencies	5%
Board of directors out of control/has its own agenda/doesn't work in bart's best interest	5%
Management/supervisor wants to keep department cut off/'siloes'	4%
Relationship with bart board/between board and management needs to be overhauled	4%
Internal applicants are never hired/I've applied for too many vacancies and been turned down	4%
Bart needs to upgrade its technology	4%
Need to re-focus on what is important – providing train service; avoid branching into other areas which are not part of this focus	3%
Consultants and contractors are given more interesting/challenging work than regular employees	3%

Q. 14 if you were in charge, what would you do to make bart a better place to work? N=1,055

Improve communication, particularly bart/ overall management's communication to employees at large. Need more opportunities where management provides information and listens to employee feedback.communicate better when decisions are made (why a decision was made go one direction rather than another) and minimize the creation of rumors to fill the gap	60
Train all new employees/ increase training for existing employees/hire more trainers	48
Make employees accountable/increase accountability	44
Recognize & reward employees for excellent performance (general)	42
Break down departmental 'silos' – offer more resources so employees know/get to know those from other departments and work together across departments to get things done; avoid situations where 2 departments do the same work or one department does something another department cannot use	34
Develop existing employees more and promote from within, rather than hiring from outside	29
Fire/address problem employees/poor performers (don't just move them around)/no more 'retiring at their desk'	27
Eliminate managerial nepotism/favoritism/ensure promotions are based on qualifications & process is transparent	27
Find a way to motivate employees positively & boost morale – even those working 10-20 years at jobs with no/ few prospects of promotion	27
Create a culture of treating employees/co-workers with respect	24
Offer more employee activities (go beyond picnic)	23
Restructure pay so it reflects a person's skill level/professional level	23
Improve managerial training/performance –positive attitude, communication, motivating employees in a positive way/creating a positive (tensionfree) environment	20
Provide mandatory leadership & supervisory training for supervisors/managers (eg smart courses).	19
Develop career paths/career advancement programs/training	19
Increase communication about issues/concerns which impact all departments/hold more meetings to inform staff(particularly for employees not in an office all day)	19
Reward hard work; don't allow most/all rewards to be years-of-service based; make many/most performance-based consider merit (not just seniority) when promoting	18
Create more flex-time, part-time, job sharing, work-at-home, and other flexible work options	15
Create a suggestion program – include multiple ways to participate; dissemination of suggestions made; and whether a suggestion is implemented (how/when) or not (why)	15
Ensure necessary parts/ equipment at all maintenance yards; make it easier to access tools, supplies, parts, and information when it is needed	14
Work with the unions (more than lip service)– expect to reach a consensus with them to solve problems; don't assume discussions are always adversarial;jettison the 'us vs them' mentality. End the conflict between unions and employees; don't broadcast disagreements to media: work at making a cleaner more reliable product	14
Create raises (step increases) for non-union employees	13
Make sure employees have the necessary skills to perform the work	12
Provide a gym sponsored program or worksite wellness program	11
General manager is doing a good job; needs to keep keep doing/do more (employee recognition, accountability, picnic etc)/ upper management needs to perform more like mer/layer below gm needs to improve or leave	11
Institute cross- departmental training/ shadowing	11
Cut management staff/limit managers/establish a management to employee ratio and stick to it	10
Speak/listen directly to employees – do not always rely on what supervisors say	10
Gm and upper management need to make solo unannounced visits to departments/locations (without an entourage to act as buffer/avoid difficult questions)	10

Q. 15 what would you do to enable bart to serve the public better? N=1.055

Keep cars clean/make cleaner	45
Increase police presence in stations & parking lots	38
Improve customer service: provide training for all bart front line employees	36
Make stations cleaner/keep them clean	35
Increase hours of operation	25
Bart does a great job, continue to do so	21
Reduce fares (by eliminating waste)	19
Provide discounts on certain holidays, rewards programs, students or kid-friendly days or to specific events	18
More community orientated outreach activities	17
Increase parking at stations	17
Increase police presence on trains.	16
Provide best possible public safety and security	16
Make it clear/easy for riders to provide comments/criticism	16
Deal with homeless issue (enforcement)	16
Open public restrooms in underground stations & put garbage cans back on platforms & trains	15
Improve announcement system & install video display in every car	14
Bigger, better signs (digital) in stations & on trains /directions to airports	14
Improve on-time performance	13
Enforce no eating/drinking, fare evasion, bicycle and other rules	13
Require bart police to ride trains more often	12
Have an ongoing dialogue with the public e.g. via web; include blogs about the tough decisions or innovative things bart has to work on; discuss what the issue is and how to rectify the problem	12
Ensure all elevators and escalators are functioning	12
Do patron/customer satisfaction surveys – and be open to the feedback	11
Increase public service announcements/tv, radio, or other media ads	11
Increase frequency of trains	10
Real time train arrival at concourse level, parking garage & other areas	10

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COIN ORDINANCE

8D-1

ORDINANCE NO. 12-7

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COSTA MESA, CALIFORNIA, AMENDING CHAPTER VI OF TITLE 2 OF THE COSTA MESA MUNICIPAL CODE TO ORGANIZE EXISTING SECTIONS INTO ARTICLE 1 AND ADD A NEW ARTICLE 2 REGARDING CIVIC OPENNESS IN NEGOTIATIONS.

WHEREAS, the City Council of the City of Costa Mesa finds that civic openness during labor negotiations is essential to good government; and

WHEREAS, Government Code section 3500 *et seq.* is known as the "Meyers-Millias-Brown Act" ("the Act"); and

WHEREAS, Government Code section 3500 provides in pertinent part that the purpose and intent of the Act is "to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed"; and

WHEREAS, the City Council finds that public information and knowledge is enhanced by virtue of employees and public agencies undertaking their duties and obligations pursuant to the Act in an open and transparent manner; and

WHEREAS, the City Council finds that the communication between the City and its employees required by the Act, regarding changes in wages, hours and other terms and conditions of employment, would benefit from the opinions of an informed and knowledgeable public; and

WHEREAS, it is the determination of the City Council that performance by the City and its employees of their respective duties and obligations under the Act will be facilitated when undertaken in the presence of an informed public.

WHEREFORE, the City Council of the City of Costa Mesa does hereby ordain as follows:

Section 1. Article 1 is hereby added to Chapter VI (Personnel) of Title 2 of the Costa Mesa Municipal Code to include existing Sections 2-210 through 2-235. Article 1 shall be titled, "Purpose, Rules, and Retirement."

Section 2. Article 2 is hereby added to Chapter VI (Personnel) of Title 2 of the Costa Mesa Municipal Code to read as follows:

ARTICLE 2. – CIVIC OPENNESS IN NEGOTIATIONS

Section 2-236. - Applicability. This article shall apply to all meet and confer processes undertaken pursuant to the Meyers-Milias-Brown Act, where either a recognized employee organization or the city, through their respective representatives, propose changes in wages, hours, or any other terms or conditions of employment. In an effort to avoid inherent conflicts of interest, the principal representative negotiating on behalf of the city 1) shall not be an employee of the city, 2) shall not be a member of any retirement system providing a defined benefit to the member, and 3) shall have a demonstrated expertise in negotiating labor and employment agreements on behalf of municipalities. The city council shall designate one or more Executive employees to be present during negotiations and to assist the principal negotiator as the city council and/or principal negotiator deem appropriate.

Section 2-237. - Independent Economic Analysis.

- (a) In order to implement the requirements of section 2-236, the city shall have prepared on its behalf, by an independent auditor in cooperation with the Finance Director, a study and supplemental data upon which the study is based, determining the fiscal impacts attributed to each term and condition of employment made available to the members of all recognized employee organizations.
- (b) The above report and findings of the independent auditor shall be completed and made available for review by the city council and the public at least thirty (30) days before consideration by the city council of an initial meet and confer proposal to be presented to any recognized employee organization regarding

negotiation of an amended, extended, successor, or original memorandum of understanding.

- (c) The above report shall be regularly updated by the independent auditor to itemize the costs and the funded and unfunded actuarial liability which would or may result from adoption or acceptance of each meet and confer proposal. These measurements shall display the fiscal impacts of the employee association and/or city proposals. The report shall be prepared in the following format, including all benefit and or pay aspects of each MOU, and shall include written council member acknowledgement that the report has been read and considered by the signing council member.

REPORT FORMAT

	ASSOCIATION						
BENEFIT/PAY	VALU E OF BENE FIT/ PAY	EXIS TING COST TO CITY	PROJE CTED COST TO CITY	EXISTI NG UNFUN DED LIABILI TY	PROJE CTED UNFUN DED LIABILI TY COST	EXISTI NG FUND ED LIABILI TY	PROJE CTED FUNDE D LIABILI TY COST

- Base Salary
- Pension/Retirement
- Benefit
- Cafeteria - Health
- Benefits
- Bilingual Pay
- Shorthand Pay
- Holiday Allowance
- Pay
- Longevity Pay
- Class A/B License
- Pay
- Shift Differential Pay
- Shift Differential Pay -
- A/M
- Emergency Med
- Dispatch Pay
- Canine Care Pay
- Motor Officer

Maintenance Pay
Motor Officer
Assignment Pay
Motor Training Officer
Assign Pay
POST Advanced
Certificate Pay
POST Intermediate
Certificate Pay
Uniform Pay-Patrol -
2.5%
Paramedic
Assignment Pay
1st Medic Re-
Certification Pay
2nd Medic Re-
Certification
3rd Medic Re-
Certification Pay
Medic Recertification
Bonus Pay
Investigator II
Certification Pay
Instructor II
Certification Pay
Instructor III
Certification Pay
Prevention Officer II
Certification Pay
Prevention Officer III
Certification Pay
Public Education
Officer Certification
Pay
Driver/Operator
Certification Pay
Rescue Specialist
Certification Pay
Confined Space Oper
Tech Certification Pay
Specialized Rescue
Tech Certification Pay
Firefighter II
Certification Pay
Fire Officer
Certification Pay

Chief Officer
Certification Pay
Fire Certification Pay -
60 Units
Fire Certification Pay -
120 Units
Fire Certification Pay -
180 Units
Fire Certification Pay -
AS / AA Degree
Fire Certification Pay -
BS/BA Degree
Fire Certification Pay -
MS/MA Degree
Others as deemed
necessary

COUNCIL MEMBER ACKNOWLEDGMENT	
Council member _____	(Initials) Dated _____
Council member _____	(initials) Dated _____
Council member _____	(Initials) Dated _____
Council member _____	(Initials) Dated _____
Council member _____	(Initials) Dated _____

Section 2-238. – Civic Openness in the Meet and Confer Process.

- (a) Government Code section 3505, as it currently exists, mandates that changes in wages, hours and other terms and conditions of employment be preceded by participation of representatives from both the recognized employee organization and the city in good faith "meet and confer." Government Code section 54957.6 authorizes the city council to meet in closed session with its designated representatives for the purpose of reviewing its meet and confer position and instructing its designated representatives as to how to participate in the meet and

confer process. The city council shall report out from such closed session the facts, including their significance and impacts, relating to any and all prior offers, counteroffers, and meet and confer-related bargaining positions made by either the city and representatives of any employee organization, which were communicated to the city council during the closed session and are no longer being considered. City council representatives shall have a duty to advise the city council during any such closed session of offers, counteroffers, information, and/or statements of position discussed by employee organization and city representatives participating in the meet and confer process since the last such closed session. This section shall not mandate publication of city council-directed future proposals and/or the analytical thought process utilized by the city council in addressing issues subject to the meet and confer process.

- (b) Each city council member shall disclose both publicly and during closed sessions, the identity of any and all employee association representatives with whom the city council member has had any verbal, written, electronic or other communication(s) regarding a subject matter of a pending meet and confer process.

Section 2-239. - Adoption of Memorandum of Understanding.

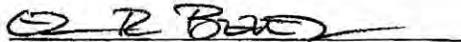
Excepting the resolution of any meet and confer impasse, the rendering of a final city council determination regarding adoption of a memorandum of understanding shall only be undertaken after the matter has been heard at a minimum of two (2) city council meetings wherein the public has had the opportunity to review and comment on the matter. Not less than seven (7) days prior to the first city council meeting where the matter shall be heard, the city shall post on its website those materials explaining the basis for the memorandum of understanding under consideration for adoption.

Section 3. Inconsistencies. Any provision of the Costa Mesa Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and or further, is hereby repealed or modified to the extent necessary to affect the provisions of this Ordinance.

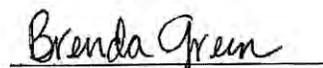
Section 4. Severability. If any provision or clause of this Ordinance or the application thereof to any person or circumstances is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions or clauses or applications of this Ordinance which can be implemented without the invalid provision, clause or application; and to this end, the provisions of this Ordinance are declared to be severable.

Section 5. Publication. This Ordinance shall take effect and be in full force thirty (30) days from and after the passage thereof, and prior to the expiration of fifteen (15) days from its passage shall be published once in the ORANGE COAST DAILY PILOT, a newspaper of general circulation, printed and published in the City of Costa Mesa or, in the alternative, the City Clerk may cause to be published a summary of this Ordinance and a certified copy of the text of this Ordinance shall be posted in the office of the City Clerk five (5) days prior to the date of adoption of this Ordinance, and within fifteen (15) days after adoption, the City Clerk shall cause to be published the aforementioned summary and shall post in the office of the City Clerk a certified copy of this Ordinance together with the names and members of the City Council voting for and against the same.

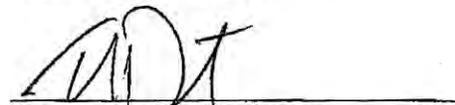
PASSED AND ADOPTED this 4th day of September, 2012.


Eric R. Bever, Mayor

ATTEST:


Brenda Green,
Interim City Clerk

APPROVED AS TO FORM:


Thomas Duarte, City Attorney

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss
CITY OF COSTA MESA)

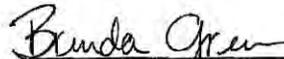
I, BRENDA GREEN, Interim City Clerk of the City of Costa Mesa, DO HEREBY CERTIFY that the above and foregoing Ordinance No. 12-7 was duly introduced for first reading at a regular meeting of the City Council held on the 21st day of August, 2012, and that thereafter, said Ordinance was duly passed and adopted at a regular meeting of the City Council held on the 4th day of September, 2012, by the following roll call vote, to wit:

AYES: COUNCIL MEMBERS: LEECE, MENSINGER, MONAHAN, RIGHEIMER

NOES: COUNCIL MEMBERS: NONE

ABSENT: COUNCIL MEMBERS: BEVER

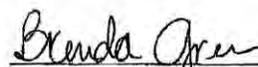
IN WITNESS WHEREOF, I have hereby set my hand and affixed the seal of the City of Costa Mesa this 5th day of September, 2012.



BRENDA GREEN,
INTERIM CITY CLERK

(SEAL)

I hereby certify that the above and foregoing is the original of Ordinance No. 12-7 was duly passed and adopted by the Costa Mesa City Council at the regular meeting held September 4, 2012, and that the summary of the adopted ordinance was published in the Newport Beach-Costa Mesa Daily Pilot on Friday, September 14, 2012.



BRENDA GREEN,
INTERIM CITY CLERK

(SEAL)

**CONSTITUTION
&
GENERAL LAWS**
of the
AMALGAMATED TRANSIT UNION
affiliated with the
**AMERICAN FEDERATION OF LABOR-
CONGRESS OF INDUSTRIAL ORGANIZATIONS**
and the
CANADIAN LABOUR CONGRESS



ORGANIZED AT INDIANAPOLIS, INDIANA
September 15, 1892
Revised, Amended, and Adopted at
THE FIFTY-SEVENTH CONVENTION AT
SAN DIEGO, CALIFORNIA
August 26 - 30, 2013

Note: Titles of sections are for reference purposes only and such titles are not to be considered as part of the language of the section for any other purpose. Constitution and General Laws changes mandated by the 57th Convention are underlined throughout the document.

SEC. 20 STRIKES AND LOCKOUTS: 20.1 Notice of Dispute. When difficulty arises between the members of any LU or JBC and their employer, regarding wages, hours of labor, or any other question that may result in a strike or lockout, the LU or JBC shall notify the IP who shall determine whether an international officer shall be sent in at that stage to assist the LU or JBC. The dispute shall then be taken up by the executive board of the LU or JBC or by a committee appointed by the LU or JBC for that purpose, and they shall make a thorough investigation and seek, through conferences with the company, to get the matter satisfactorily adjusted. The committee, after having finished the work of negotiation with the company, shall submit a full report to a meeting of the LU or JBC.

20.2 Strike Sanction. If by compliance with Section 20.1 the committee has been unable to secure a settlement of the matters in dispute satisfactory to the LU or JBC, and the LU or JBC believes that the matters in dispute are of such importance that a strike should be

ordered, the LU or JBC shall give timely notice to the IP of intention to strike and advise with the IP before taking any such vote. Failure to give timely notice to the IP shall be a factor to be considered by the GEB in determining whether to grant strike sanction. If, after consultation with the IP, it is determined that a strike vote shall be taken, the question of a strike shall be submitted to a secret ballot vote of the membership of the LU or JBC. If necessary to reach the membership of the LU or JBC, the ballot shall be taken by referendum, ballots being prepared and so distributed to give every member an opportunity to vote. A decision to strike requires a two-thirds vote of the membership voting on the question. If two-thirds of the membership voting upon the question decide in favor of suspending work, and if an international officer is not present at the time of the taking of the vote, the LU or JBC shall at once notify the IP. If an international officer has been assigned to assist the LU or JBC, the international officer shall proceed in the same fashion as hereinafter set forth for governing situations in which no international officer has yet been assigned up to this stage of the matter. The IP, if no international officer has previously been assigned to the matter, shall, upon receipt of the notice of the results of the strike vote, proceed to the scene of dispute in person or by deputy, and in conjunction with the committee of

the LU or JBC, shall make a thorough investigation and attempt to settle the matter in dispute. In case of failure thus to secure a settlement the IP or the IP's deputy shall then, in conjunction with the local committee, prepare propositions of arbitration defining the points in dispute and the basis upon which they shall be arbitrated. If the company refuses to accept arbitration as tendered, the IP or the IP's deputy shall then communicate with the membership of the GEB in writing or by telegram and obtain the consent of a majority of the GEB before endorsing the strike. No strike sanction will be granted in the event the strike is deemed by the Board to be in clear violation of any applicable law or contract. Before any strike authorized by the membership may be ordered, the membership shall be given an opportunity to vote upon the company's last proposal for settlement of the dispute. If, during the dispute, a two-thirds strike vote has previously been taken, any subsequent rejection of proposals does not require an additional two-thirds vote to authorize a strike.

From the *LA TIMES* 11-6-03

**<http://articles.latimes.com/2003/nov/06/opinion/oe-edelman6>.
Viewed 8/13/14.**

Commentary

Arbitration Can Be the Key, Despite MTA's Resistance

November 06, 2003 | Edmund D. Edelman and Daniel J.B. Mitchell | Edmund D. Edelman, a former Los Angeles County supervisor and now a mediator and arbitrator, was MTA board chairman in 1994. Daniel J.B. Mitchell is a professor of management and public policy at UCLA, where he teaches courses in labor relations.

Since mid-October, a strike by MTA mechanics has made a fundamental government service -- public transit -- unavailable to 400,000 bus and train riders. Many of these riders are low-income people whose resources are severely strained. So far, there has been too much public posturing on both sides and insufficient focus on a process that can produce a reasonable contract.

Collective bargaining negotiations have broken down. The MTA has insisted that its "final offer" be taken to a vote of the union members. That vote will occur on Friday and is very likely to produce a rejection.

The union has requested that after the vote -- if the plan is rejected -- the dispute be submitted to binding arbitration. The MTA has balked, arguing that it would be wrong for a public agency to "turn over responsibility for negotiating contracts worth hundreds of millions of taxpayer dollars to an arbitrator who is not accountable to taxpayers."

Arbitration is a well-known procedure -- especially in the public sector -- for labor dispute resolution. States such as Michigan, Wisconsin, New Jersey and Massachusetts use it in various forms. Urban transit systems in cities such as Atlanta, Boston and Washington have also used it.

After a postal strike in the early 1970s, Congress enacted a system of arbitration for future postal labor disputes. Arbitration is employed whenever postal negotiations break down. Where arbitration is required, the parties may well settle prior to the arbitration deadline. In May, for example, the mail handlers union and the Postal Service reached a settlement covering 58,000 workers without going to arbitration. In the 1990s, however, the Postal Service and its various unions did end up in arbitration, and strikes were avoided and mail service continued uninterrupted.

Arbitration is not the end of collective bargaining, nor is it irresponsible for a public agency to use it. The MTA in fact uses arbitration to settle individual worker grievances, as do virtually all unionized employers.

However, the MTA's prior rejection makes it hard to accept binding arbitration now.

Fortunately, there is a way out of the impasse if both sides will bend and drop the emphasis on the word "binding." Arbitration could be constructed so that a supermajority of the MTA board could reject any arbitration decision reached. For example, under recent California legislation applying to police and firefighters, local authorities are subject to arbitration if an impasse is reached. But a unanimous vote of the governing authority (such as a city council) can reject the decision. Of course, a supermajority would not require unanimity.

It's possible that faced with impending arbitration, the union and management negotiators would reach a settlement. If not, we believe that if the MTA and the union accept some version of arbitration, the current dispute will soon be resolved. Arbitrators of public-sector disputes certainly take account of the financial condition of the employer, i.e., the taxpayers' interest, as well as the workers' interest.

There are various forms of arbitration. Conventional arbitration permits the arbitrator to compromise between union and management. Final-offer arbitration requires the arbitrator to select one of the two proposals. Arbitration panels can be made up entirely of neutrals or have some union- and management-appointed members.

At this point, the dispute should be about what kind of arbitration to choose, not whether to use arbitration.

CRJ

MEDIATION/ARBITRATION AGREEMENT

The Los Angeles County Metropolitan Transportation Authority (MTA) and the Amalgamated Transit Union, Local 1277, (ATU) agree to the following as a means of resolving their current labor dispute:

1. Upon the ratification of this agreement, the ATU will terminate its strike and require its members to return to work within 72 hours.
2. Upon the return to work of the ATU members, the MTA and the ATU will operate under the terms and conditions set forth in Exhibit A, until the process set forth herein is completed or until the parties reach an agreement on a new collective bargaining agreement, whichever occurs first. During such period, the terms and conditions of Article 36, Health Plan, as contained in the recently expired collective bargaining agreement will apply, except that for the interim period, until a final arbitration award is either accepted or rejected as discussed herein, the MTA shall make payments into the ATU Health Care Fund as follows: a payment of \$4.7 million within 10 days and monthly payment of \$1.56 million beginning in November 2003. If the number of ATU employees increases (decreases) during this period, the \$1.56 million monthly payment will increase (decrease) by a like percentage.
3. A mediation/arbitration panel of three members will be selected. The MTA and the ATU will each choose one member. These members will select a neutral mediator/arbitrator who will be a person with expertise in the field of employee health benefits. The neutral mediator/arbitrator cannot be anyone who has provided services as an employee or a consultant to either the MTA or one of its unions in the last 5 years. The neutral member will be selected from a list of 6 names, 3 provided by each party. One name will be removed by lot and the other stricken alternatively until one is left. If the neutral arbitrator is not able to meet the timelines herein, a different arbitrator will be selected using the process herein. All decisions of the panel will be by majority vote.
4. Within 5 days of the ratification of this agreement each side will provide the other side with a list of the documents and other records that must be made available as part of the mediation/arbitration process. All requested records must be produced and presented to the other side within 5 days of the request. Any disputes related to the production of records or any other procedural disputed throughout this process will be conclusively determined by the mediation/arbitration panel by majority vote.
5. For a period not to exceed fifteen days after all requested documents have been produced, the mediation/arbitration panel will attempt to help the MTA and the ATU reach an agreement on all collective bargaining issues related to the provision of health care benefits. This includes whether the MTA or the ATU will be the actual providers of health benefits, whether the MTA or the ATU or a

combination thereof, will administer and / or manage any trust fund through which health benefits are provided, the MTA contribution levels, the employee and contribution levels, the level of any co-payments for services, and any other related issues pertaining to Article 36:

6. If this process results in the MTA and the ATU reaching an agreement on the health care issues, that agreement, along with all other terms contained in Exhibit A will become the new collective bargaining agreement between the MTA and the ATU.
7. If there is no agreement between the parties on the health care issue at the end of the fifteen-day period described in paragraph 5 the mediation/arbitration panel will schedule an arbitration hearing to begin within 15 days. At the hearing each side will present its position within 15 days. Thereafter the panel will issue its decision in writing to the parties within 15 days which will include a recommendation for the content of article 36. The recommendation may cover any of the issues listed in paragraph 5, and will be based upon a consideration of the following:
 - Comparisons to the contribution and benefit levels of other transit agencies in California
 - Comparisons to the contribution and benefit levels of other public agencies in southern California
 - Maintaining the financial operating stability of the MTA
 - Maintaining the financial stability of the health benefit fund if it is retained as the method through which health benefits are provided

The panel member appointed by each party will be consulted before the final recommendation is made and each panel member is free to discuss the anticipated recommendation with the party the member represents.

8. After a recommendation under paragraph 7 is made the parties will have 20 days to consider and discuss the recommendation. During this 20-Day period either party may reject the proposal if such rejection is approved by at least 50% (or 2/3) vote of its governing board. However, if the proposal is rejected by either party within the 20-day period, it will become binding on the parties, and along with the other terms and conditions contained in Exhibit A, will become the new collective bargaining agreement between the MTA and the ATU.
9. If either party rejects the recommendation from the mediation/arbitration panel as described in paragraph 8, the parties will then be free to pursue any course of action available to them, including the right to strike notwithstanding the no-strike clause, under the applicable labor laws to resolve their labor dispute. If no strike

is called, the terms and conditions listed in Exhibit A will be maintained except that the MTA may impose Article 36 from its Last, Best and Final Offer of October 28, 2003.

10. The parties will share equally in the costs for the neutral arbitrator and the court reporter and will bear their own costs for their panel member and attorneys fees.

Accepted by MTA:

Subject to the approval of MTA Board
Zev Yaroslavsky
Chair, MTA Board of Directors

11/16/03

Date

Signed at 11:15

Pm

Accepted by ATU:

Neil Silver
Neil Silver
ATU President

11/16/03

Date



About Agreement Dynamics, Inc.

"When failure is not an option, I call Agreement Dynamics. No question about it."

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- In both the public and private sector;
- To every level of public entities and private business;

-
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Agreement Dynamics' report authors and researchers:

- Rhonda Hilyer, Chief Executive Officer and primary report author
- Ginny Ratliff, Chief Operating Officer, report researcher, interviewer, note taker and report layout/design
- Scott Vermeer, Senior Associate, report contributor and interviewer



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