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BEFORE THE BOARD OF PERSONNEL APPEALS

BILLINGS SCHOOL BUS DRIVERS)
ASSOCIATION,)
)
Petitioner)
)
CHAUFFEURS, TEAMSTERS, &)
HELPERS, Local 190,)
)
Petitioner)
)
BILLINGS SCHOOL DISTRICT #2m)
KAL LEASING INC.,)
)
Respondents)

U.D. 18-78

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

On May 18, 1978, the Billings School Bus Drivers Association filed a unit determination petition with this Board petitioning for a unit described as "All full-time part-time and substitute bus drivers who drive school buses within the jurisdiction of Billings School District #2, Billings, Montana, for the transportation of school students to regularly scheduled classes and related school activities."

On May 31, 1978, Chauffeurs, Teamsters, & Helpers, Local #190 filed an identical unit determination petition proposing the identical unit.

Both School District No. 2 and KAL Leasing Inc. filed motions to dismiss on the ground that this Board lacked jurisdiction over the matter, because KAL Leasing Inc. is not a public employer as defined by section 59-1602 (1), R.C.M. 1947, (now 39-31-103(1), MCA) and that the bus drivers are not public employees as defined by section 59-1602 (2), R.C.M. 1947 (now 39-31-103(2), MCA). A hearing was conducted on the motion to dismiss to determine the relationship that existed between the school bus drivers and the school district and KAL Leasing Inc. After the hearing, briefs were submitted. Having reviewed the testimony and evidence presented at the hearing, and having reviewed the briefs submitted in this matter, the following are my findings of fact.

FINDINGS OF FACT

1
2 1. KAL Leasing Inc., is a Delaware corporation doing business
3 in the City of Billings and its only business in Billings is to
4 provide school bus service to School District No. 2. (Tr 3).
5 KAL Leasing operates in other states such as Minnesota, Illinois,
6 and Kansas and engages in car leasing or long-term equipment
7 leasing. It has a school bus division, a long-term leasing
8 division, and a car rental division and some other small
9 operations. (Simonsen, Tr. p.3)

10 2. A contract between School District No. 2 and Billings High
11 School District No. 2 and B. W. Jones and Sons, Inc. which was
12 later assigned to KAL Leasing Inc. establishes the contractual
13 relationship that exists between KAL Leasing Inc. and School
14 District No. 2. (KAL exhibit 1). The contract is a 5-year
15 contract scheduled to expire June 30, 1980.

16 a. The contract dictates the number and type of buses that are
17 to be supplied by KAL. The contract also provides the school
18 district with the right to increase the number of buses at its
19 discretion and to revise the numbers of children assigned to each
20 bus vehicle and the schools to be served as conditions require.
21 (KAL exhibit 1).

22 b. The contract provides that KAL shall provide school bus
23 services for the days as determined by the school calendar set by
24 the school district.

25 c. The contract establishes the type and amount of insurance
26 that KAL shall provide and that KAL shall indemnify the School
27 District, Board Member, and their employees from and against any
28 and all loss, damage, injury, liability, and claims or expenses
29 by reason of any loss, personal injury, death or other damage
30 arising in connection with the operation of the buses.

31 d. The contract further provides that the operator shall assume
32 all costs involved in teaching the Defensive Driving Course which
is mandatory for all school bus drivers and each driver is

1 required to complete the course once each three year period. The
2 school is to pay half of the cost of the pre-school Bus-Drivers
3 Clinic, including drivers' salaries and payroll taxes.

4 e. The contract provides that in the event there is a closing
5 of school for some unforeseeable circumstance and the services of
6 the operator is not needed for a total of 10 school days, then
7 the operator shall furnish the required services at such other
8 times as the school district may require.

9 f. The routes and operating time schedules shall be furnished
10 by the school district to the operator.

11 6. The Operator has the right to hire and fire¹ the bus
12 drivers. The hiring of the bus drivers is conditional on the
13 school district certifying the bus drivers which is required by
14 statute. (Simonsen, Anderson, 20-10-103 MCA).

15 7. Section 20-10-103 MCA sets out the criteria which a driver
16 must meet in order to be qualified to drive a school bus:

- 17 (a) he is not less than 18 years of age;
18 (b) he is of good moral character;
19 (c) he is a holder of a chauffeur's license;
20 (d) he has filed with the district a satisfactory medical
21 examination report, on a blank provided by the super-
22 intendent of public instruction, signed by any
23 physician licensed in the United States or, if
24 acceptable to an insurance carrier, any licensed
25 physician;

28 ¹In Petitioner's Exhibit 1, MONTANA PUPIL TRANSPORTATION HANDBOOK, p. 20,
29 VII, A. Role, second paragraph provides,

30 . . . Contractors who employ drivers should have the approval of
31 the district concerning procedure which is used to select, train
and dismiss drivers."

32 None of the witnesses knew of any policy or approval by the district
concerning approval of these procedures. I can find no statutory support for
the quoted statement, nor any regulation requiring such approval. I must
assume, therefore, that the above quoted statement is a suggestion and not a
regulation.

1 (e) he has completed a standard first aid course and holds
2 a valid standard first aid certificate from an a
3 authorized instructor; and

4 (f) he has complied with any other qualifications
5 established by the board of public education.²

6 8. KAL management makes decisions on the discipline of the bus
7 drivers. (Simonsen) In rare cases KAL would get recommendations
8 from the school district concerning disciplining bus drivers.
9 (Simonsen)

10 9. KAL management establishes the pay and the fringe benefits
11 that the bus drivers will receive. (Simonsen) KAL has its own
12 payroll in Billings and writes the payroll checks from its own
13 accounts.

14 10. The school district establishes the routes that the buses
15 must take as well as the time to be at the different stops.
16 (Simonsen) KAL Leasing determines what time the bus drivers are
17 to report for work for warm up and inspection both for the
18 morning run as well as the afternoon run. (Simonsen) The
19 different bus routes are assigned to the different drivers by KAL
20 Leasing. The assignments are currently made by a seniority
21 system which is established by KAL Leasing. (Simonsen) There
22 are certain policies and procedures established for the different
23 bus drivers to follow. There is input into those policies and
24 procedures by the school district as they affect the busing of
25 the students. The enforcement of those policies and procedures
26 is the responsibility of KAL leasing. (Simonsen)

27 11. The director of transportation monitors quite closely the
28 different buses, the times that they pick-up and deliver
29 children, the manner in which the vehicles are operated, and
30 different safety problems involved in the routes. (Anderson)
31 The usual chain of communication between the bus driver and the
32

²ARM 48-2.30(2)-S3010 provides that a bus driver must have 5 years of licensed driving experience to qualify to drive a school bus.

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2 school district is usually through the operation manager for KAL
3 Leasing. There are times, however, where the driver will talk
4 directly with the director of transportation for the school
5 district. (Anderson, Habner) There are times when the director
6 of transportation will communicate directly with the bus driver,
7 such as route changes and problems with the career center
8 busing. The general trend, however, is for the director of
9 transportation to communicate to the bus drivers through the
10 management at KAL Leasing. (Anderson, Habner)

11 12. The school district retains a significant amount of control
12 over the disciplining of students. In fact, it could be said
13 that they retain absolute control. Serious infractions of rules
14 are reported directly to the school district by the bus driver
15 on a school district form. The form has four copies. One copy
16 goes to the child, one for the driver's use, and two go to the
17 Supervisor of Transportation, one of which he retains and the
18 other goes to the school official in the school building the
19 student attends. (Habner) The discipline problem is then
20 resolved by the school officials. (Habner)

21 13. The career center is a location set up for students away
22 from the main school to attend various classes. Those bus
23 drivers driving those routes have an extra duty assigned them by
24 the school district of taking role and learning the various
25 student's names because of the discipline problems inherent with
26 the routes. (Habner)

27 14. The state of Montana through statutes and administrative
28 rules has considerable regulation over the transportation of
29 school children on school buses. As previously pointed out in
30 finding of fact number 7, the certification of bus drivers is
31 controlled by statute and administrative rules. Section
32 20-10-131 MCA, establishes a county transportation committee and
section 20-10-132 establishes the duties of that committee which

1 includes establishing transportation service areas and approving,
2 disapproving, or adjusting the school bus routing submitted by
3 the school district trustees. Section 20-10-141 MCA, sets out
4 the maximum reimbursement a district can receive from state and
5 county sources by mileage for the transportation of children.
6 Section 20-10-144 MCA, provides for the computation of revenues
7 for the transportation budget. ARM 48-2.30(6)-S3020 through
8 48-2.30(10)-S30760 provide very complete requirements for the
9 type of buses that can be used in transportation of students.
10 ARM 48-2.30(14)-S30820 further regulates contracts between
11 school districts and contractors as to when a contract must be
12 signed, and its permissible duration. Section 20-10-125 MCA,
13 provides for the process of bid letting for such contracts and
14 when bid letting is not required.

15 DISCUSSION

16 The issue presented by the fact situation in this matter is
17 a very difficult problem to resolve. If we were faced with the
18 situation where the school district directly hired the personnel
19 involved such as school teachers, there would be no problem, for
20 those individuals would obviously come under this Board's act.
21 On the other extreme if the school was contracting out a service
22 which was totally nonstudent connected such as janitorial
23 services, there again would be no question that there was no
24 jurisdiction under this Board's act. We are, however, faced
25 with a situation where we are dealing with a service which is
26 highly regulated by statute and the school district is directly
27 involved by necessity because of the direct relationship to the
28 student and because transportation of students is an integral
29 function of the school district itself. Obviously, if there
30 were no students being transported to the school, then there
31 would be little need for the school itself.
32

1 The National Labor Relations Board has consistently refused
2 to exert jurisdiction over bus companies whose major function is
3 the transportation of students to schools.³ In Roesch Lines, Inc.
4 and Southern California District Council of Laborers, 92 LRRM
5 1313 at 1315 the NLRB explained its position:

6 "In reaching this conclusion, [NLRB has no juris-
7 diction over the bus company transporting students],
8 we note, moreover, that the Board [NLRB] traditionally
9 has refused to assert jurisdiction over employers
10 engaged primarily in local bus services. Since
11 Employer's school-related operation are essentially
12 local in character and operate primarily in aid of
13 local communities and of the State in the field of
14 education, they do not qualify for jurisdictional
15 purposes under Board's standard governing transit
16 systems."

17 Section 39-31-103(2) defines public employee as,

18 "(2) 'Public employee' means a person employed by a
19 public employer in any capacity. . ."

20 Section 39-31-103(1) defines public employer as,

21 "(1) 'Public employer' means the state of Montana or
22 any political subdivision thereof, including but not
23 limited to any town, city, county, district, school
24 board, board of reagents, public and quasi-public
25 corporation, housing authority or other authority
26 established by law, and any representative or agent
27 designated by the public employer to act in its interest
28 in dealing with public employees."

29 Section 39-31-201, MCA provides that public employees have
30 the right to form labor organizations or join labor organizations,
31 to bargain collectively through representative of their own
32 choosing on questions of wages, hours, fringe benefits, and other
33 conditions of employment, and to engage in other concerted acti-
34 vities for the purposes of collective bargaining or other mutual
35 aide or protection free from interference, restraint, or coercion.

36 I'm certain that no one is questioning whether or not the
37 Billings School District is a public employer. Section 39-31-103
38 (1) makes that issue quite clear that it is. Likewise no one is
39 arguing that KAL Leasing is a public employer. It is obvious

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³The NLRB has refused jurisdiction over the Billings School Bus Drivers and KAL Leasing, Inc. SEE: Case No. 19-RC-8801.

1 from the record that KAL is not.

2 Section 39-31-103 (1) goes on to state that "any representa-
3 tive or agent designated by the public employer to act in its
4 interest in dealing with public employees" will be considered a
5 public employer. No where in the record is there sufficient
6 evidence to show that the bus drivers in question are employed by
7 the school district rather than KAL Leasing Inc. The evidence is
8 unrefuted that the employees in question are employed by KAL
9 Leasing, Inc. Therefore, even if arguendo KAL Leasing was a
10 representative or agent for the school district, it is still not
11 dealing with public employees and therefore will not be
12 considered a public employer.

13 Petitioner argues that the case decided by the Main Labor
14 Relations Board, Baker Bus Service and Teamsters Local Union 48,
15 is applicable here. With that argument, I cannot
16 agree. The Maine Board dealing with a very similar fact
17 situation found that it had jurisdiction in the matter and found
18 that Baker Bus Service was a public employer. The statute that
19 the Main Board is working under is not similar to our own
20 39-31-103 (1). The Main statute reads:

21 "Public employer" means any officer, board,
22 commission, council, committee or other persons or
23 body acting on behalf of any municipality or town or any
24 subdivision thereof or of any school...district..."

25 (Emphasis supplied)

26 The Maine Board decided that the phrase "or body acting on
27 behalf of" gave the Maine Board jurisdiction. No similar phrase
28 exists in this State's definition of public employer. Therefore,
29 the Maine decision is not applicable here.

30 Petitioner argues that Local 2390 of American Federation of
31 State, County, Municipal Employees, A.F.L. - C.I.O. v. City of
32 Billings, 555 P.2d 507 (1976) is applicable to the fact situation
involved here. The AFSCME decision is of questionable

1 application here. The AFSCME decision cites National
2 Labor Rel. Bd. v. Hearst Publications, 322 U.S. 111, 64 S.Ct.
3 851, 88 L Ed 1170. In that decision the U.S. Supreme Court
4 sanctioned the NLRB's deviation from a strict application of the
5 Independent Contractor test and allowed the NLRB to review what
6 it termed "economic realities" to determine whether an
7 employee-employer relationship existed. Congress, however,
8 promptly reacted to that decision in the Taft-Hartley amendments
9 of 1947, and expressly stipulated in section 2 (3) that the
10 "independent contractor" was to be excluded from the definition
11 of "employee," and thereby imported the common law "right of
12 control" test as a standard of statutory coverage. The NLRB has
13 since proceeded to utilize the common law analysis, and does
14 place special weight on the "right of control" test.⁴

15 The bus drivers asserts that the Montana Supreme Court's
16 "control test" as stated in State ex. rel. Ferguson v.
17 District Court 519 P.2d 151, if applied to the fact situation of
18 this case would establish that an employer-employee relationship
19 exists between the school district and the bus drivers. The
20 Montana Supreme Court is, of course, merely applying the common
21 law "control test", adopted by Congress and presently used by the
22 NLRB in determining whether or not under the LMRA an individual
23 is an employee or an independent contractor. The ninth circuit
24 court of appeals in Brown v. NLRB, 462 F.2d 699, 80 LRRM 2850
25 (1972) stated that the NLRB emphasizes three factors in
26 distinguishing the employee from the independent contractor: (1)
27 the entrepreneurial aspects of the dealer's business, including
28 the "right to control", (2) the risk of loss and opportunity for
29 profit, and (3) the dealer's proprietary interest in his
30 dealership.

31 Entrepreneurial aspects: The contracts that exists between
32

⁴Gorman, Basic Text on Labor Law, p. 29

1 the parties shows that KAL holds the School District harmless
2 against tort action. The findings of fact clearly show that KAL
3 Leasing, Inc, has the right to hire and fire, set wages, hours,
4 fringe benefits and working conditions. It does not have
5 absolute control in these areas. The record shows that the
6 school district is given some input in the area of the right to
7 hire and fire. In order to hire a bus driver, the school board
8 must certify the bus driver and the bus driver must meet certain
9 statutory criteria. The record, however, reveals that the school
10 board meets this statutory obligation with a minimum of
11 interference with KAL's hiring procedure. In fact, there is no
12 approval by the school district over the procedure used by KAL
13 for its hiring and firing contrary to the suggestion in the
14 MONTANA PUBLIC TRANSPORTATION HANDBOOK. The hours for the school
15 bus drivers are certainly set by the school district by its
16 establishing the routes and the times that the students are to be
17 picked up and delivered to the various schools. The exact time,
18 however, for reporting to work, the number of hours worked, and
19 the time to leave work are controlled by KAL Leasing.

20 Wages and fringe benefits seem to be in the sole control of
21 KAL Leasing. There is no indication from the record that the
22 school district exerts any control over the fringe benefits or
23 wages of the bus drivers.

24 Complaints from parents are handled by the school district,
25 possibly, because parents naturally turn to the school district
26 when problems arise instead of KAL Leasing because they are more
27 familiar with the school district. The school district through
28 the transportation director, monitors quite closely the time of
29 picking up and letting off of students, and the manner of driving
30 the buses. Of course the disciplining of the students is solely
31 in the control of the school district. Although in some areas
32 there is a great deal of autonomy, this is certainly not a
situation of "your job is to pick up and deliver the school

1 children and we will leave everything else to you."

2 Loss and Profit Aspects

3 Risk of loss and opportunity for profit. KAL Leasing Inc.
4 is an interstate corporation. Although its sole function in
5 Billings is the transportation of students for School District
6 No. 2, at an interstate level they are engaged in busing other
7 school children in other states and the leasing of cars and heavy
8 machinery. Corporate losses and profits are hardly limited or
9 controlled by the school district.

10 Proprietary Interest

11 KAL Leasing Inc. owns its own buses. It has its own offices
12 and has hired its own personnel. Its capital investment is quite
13 significant.

14 As pointed out previously, we are not dealing with a black
15 or white case. If we were, this matter would probably not have
16 come to hearing. We are instead dealing with a gray area. And
17 as with any gray area, when you apply a litmus type test, you
18 never come out with a conclusive answer. After applying the 3
19 major factors set out by the NLRB in determining whether or not
20 an independent contractor relationship exists, I must conclude
21 that indeed, KAL Leasing Inc. is an independent contractor. The
22 school district is not the employer of KAL Leasing Inc., or its
23 employees.

24 I should, however, point out that in my study of this matter
25 I find that there are two basic areas of management that were
26 looked at: (1) labor relations and (2) busing responsibilities.
27 In the labor relations area there is absolutely no doubt that KAL
28 Leasing Inc. has almost complete control. In the busing respon-
29 sibility the School District exerts significant control, probably
30 more so than KAL Leasing. In Columbia Transit Corporation and
31 Amalgamated Transit Union 93 LRRM 1396 Member Fanning of the NLRB
32 dissented from the majority position of refusing to assert over
enterprises engaged in the bussing of school children. He stated,

1 ASSOCIATION, U.D.18-78 since it involves employees who are not
2 public employees as defined by the Public Employees Collective
3 Bargaining Act.

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6 RECOMMENDED ORDER

7 The Motion to Dismiss filed by the School District and KAL
8 Leasing Inc. is granted; the Unit Determination petition filed in
9 this matter by Petitioner is dismissed for lack of jurisdiction.

10 Dated this 9th day of April, 1979.

11
12
13 Jerry L. Painter
14 Jerry L. Painter
Hearing Examiner

15
16
17 NOTICE

18 Pursuant to the rules of this Board, if no written
19 exceptions are filed to the hearing examiner's FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER within 20 days after
their service, then the RECOMMENDED ORDER shall become the FINAL
ORDER of this Board.

20 CERTIFICATE OF SERVICE

21 This is to certify that the foregoing was duly
22 served by mail upon parties or attorneys of
record at their address or addresses the 9th
day of April, 1979

23 STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

24 Jerry L. Painter
Box 202 - Capitol Station, Helena, MT. 59601

25 506:a

JONES, OLSEN & CHRISTENSON
720 N. 30th St.
Billings, MT 59101

26 LONGAN and HOSMSTROM
319 SECURITIES BLDG
BILLINGS, MT 59101

27 CROWLEY, HAUGHEY, HANSON, TOOLE AND
DIETRICH
500 Electric Bldg
Billings, MT 59101

28 CHAUFFEURS, TEANSERTS & HELPERS LOCAL #190
437 Kuhlman Drive
P.O. Box 1017
29 Billings, MT 59103