

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 6-84:

INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, CHAUFFEURS,)	
WAREHOUSEMEN & HELPERS OF)	
AMERICA, LOCAL 45.)	
)	FINDINGS OF FACT;
Petitioner,)	CONCLUSIONS OF LAW;
)	RECOMMENDED ORDER
vs.)	
)	
GREAT FALLS TRANSIT DISTRICT,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

This matter is before the Board of Personnel Appeals on remand from the District Court of the Eighth Judicial District to reconsider the Board's earlier decision in light of the changes in the Management Agreement between Great Falls Transit District (District), and ATE Management and Service Company, Inc. which were made after this Board's original decision. The District is represented by Robert Goff. Teamsters #45 is represented by Emilie Loring.

The Petitioner asked for a new unit determination and election on March 1984 seeking a unit made up of all full and part time divers, mechanics and maintenance employees of the employer and its Great Falls facility.

The District responded alleging that it is not the employer, and that the employees are employees of Transit Management of

1 Great Falls (TMGF) which is a separate entity from the District.
2 The District further asserts that there is no appropriate unit of
3 its employees because it has no employees.

4 The parties stipulated that the described employees would
5 constitute an appropriate unit for purposes of collective
6 bargaining and that the District is a public employer. The only
7 issue before the Board is the identity of the employer in
8 question.

9 II. FINDINGS OF FACT

10 1. On August 9, 1982 the Petitioner filed a certification
11 petition with the National Labor Relations Board for a unit
12 identical with that sought in this action. The petition listed
13 TMGF as the employer. The NLRB subsequently determined that
14 TMGF did not meet the Board's jurisdictional standards for
15 transit systems, \$250,000 gross revenue, and declined to exercise
16 jurisdiction over the parties.

17 2. The District is empowered to provide public transit
18 services in the transit district created in Great Falls. The
19 District has contracted with ATE Management and Service Company,
20 Inc. to manage the transit system. The original agreement
21 extended from July 1, 1981 through June 30, 1983. Successor
22 agreements were effective July 1, 1983, July 1, 1986, and July 1,
23 1987.

1 3. Under these contracts ATE agreed to keep in existence a
2 Montana corporation, TMGF, to perform all services and assume all
3 obligations and rights which were extended under the contracts
4 (Article XI). ATE furnishes a full time general manger to TMGF.
5 The District has the right to approve or disapprove the general
6 manager and may cause his removal. The general manager, however,
7 remains an employee of ATE. The general manager provides the
8 active management and direction of TMGF in its operation of the
9 transit system. This includes transportation operations,
10 equipment and building maintenance, schedule operations, labor
11 relations and labor contract negotiations, equipment purchasing,
12 accounting and employee selection and training (Article V). TMGF
13 is designated as the employer of all employees necessary for the
14 operation of the transit system and has the right to exercise
15 full control and supervision over the subject employees, their
16 compensation and discharge. It directs the employees,
17 transfers, hires, fires, suspends, lays-off and recalls
18 employees. The District has not attempted to exert control over
19 employees.

20 4. The District pays ATE management a fee which ranges
21 from \$81,500 to \$89,000 annually. In addition, the District
22 provides ATE with all work funds and operating expenses "under
23 procedures and controls adopted by GFTD." The District also
24 furnishes all real estate, buildings, equipment, buses, motor
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1 vehicles, materials and supplies necessary for the operation of
2 the transit system. This equipment remains the property of the
3 District (Article XIII).

4 5. The agreement between the District and ATE may be
5 terminated in the event of a default by either party. The
6 agreement may also be terminated for bankruptcy, receivership,
7 attachment of property or inability to pay debts within 60 days.

8 Formerly upon contract termination the District became the
9 employer of all persons who were employees of the transit system,
10 including the subject employees, immediately prior to expiration
11 or termination. Under the revised agreement, the District does
12 not automatically become the employer of transit system
13 employees, but may elect at its option to act as employer of
14 said employees upon termination of the agreement with ATE.

15 6. The agreement provides that ATE will manage the transit
16 system under the District's policies (Article II).

17 7. The revenue from the operation of the transit system is
18 the absolute property of the District (Article XII).

19 8. Under the former Management Agreements, labor
20 agreements negotiated by ATE required approval of the District
21 (Article XX). Under the management Agreements made after the
22 Board's original decision, the District has no right to approve
23 or otherwise affect or control labor agreements made by TMGF.
24 TMGF now has sole responsibility to negotiate labor contracts for
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1 the subject employees and to supervise and direct those
2 employees.

3 9. As a result of the amendments to the Management
4 Agreement between the District and ATE, the District cannot, by
5 its action, affect the working conditions of the employees of
6 TMGF whether through negotiation of labor contracts or otherwise.

7 III. DISCUSSION

8 In its original decision, the Board adopted the Right to
9 Control Test set forth in National Transportation Service, Inc.
10 and Teamsters Local 728, 241 NLRB NO. 64, 100 LRRM 1263 (1979).
11 The Board, applying the "control test" found that TMGF and the
12 District were joint employers because the agreement between the
13 District and ATE and thus TMGF required that any labor agreement
14 negotiated with TMGF's employees was to be approved by the
15 District. The Board finding of joint employer status was based
16 upon the right of the District to approve labor agreements
17 because this power gave the District the ability to affect the
18 terms and conditions of the employees in question.

19 Under National Transportation, the only consideration in the
20 "control test" is the ability to bargain effectively about the
21 terms and conditions of employment of the employees in question.
22 By giving up its right of approval of labor agreements negotiated
23 by TMGF, the District has given up the ability, which the Board
24 previously found it had, to bargain effectively about the terms
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1 and conditions of employment of the employees in question.
2 Likewise, the District under the agreement may not interfere in
3 the supervision of the employees or to otherwise affect their
4 employment.

5 Because TMGF is now the only entity with the power to
6 negotiate effectively about the terms and conditions of
7 employment of the employees in question, the District can no
8 longer be held to be a joint employer of these employees.
9 Accordingly, the Petition for a New Unit Determination and
10 Election should be denied and dismissed.

11 IV. CONCLUSIONS OF LAW

12 1. As a result of the changes in the Management Agreement,
13 Transit Management of Great Falls is the sole employer of
14 employees which are the subject of this proceeding. The Great
15 Falls Transit District is not a joint employer of these
16 employees.

17 2. Transit Management of Great Falls is not a public
18 employer within the meaning of Section 39-31-103(1), MCA.
19 Because Great Falls Transit District and Transit Management of
20 Great Falls are not joint employers, this Board will not assert
21 jurisdiction over the employees of Transit Management of Great
22 Falls for purposes of collective bargaining.

1 V. RECOMMENDED ORDER

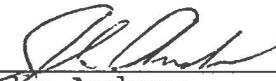
2 The Petition for New Unit Determination and Election is
3 denied and this matter is dismissed.

4 NOTICE

5 Written exceptions to these Findings of Fact, Conclusions of
6 Law and Recommended Order may be filed within twenty days. If
7 no exceptions are filed with the Board of Personnel Appeals
8 within that time, the Recommended Order shall become the Order of
9 the Board. Exceptions shall be address to the Board of Personnel
10 Appeals, P.O. Box 1728, Helena, Montana 59620.

11
12
13 Entered and dated this 29th day of June, 1990.

14
15 Board of Personnel Appeals

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17 By: 
18 John Andrew
19 Hearing Examiner
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CERTIFICATE OF MAILING

The undersigned does hereby certify that a true and correct copy of the Findings of Fact, Conclusions of Law, and Recommended Order in the matter of Unit Determination No. 6-84 was mailed to the below listed, postage paid and addressed as follows:

Emilie Loring
Hilley and Loring
500 Daly
Missoula, Mt. 59801

Robert P. Goff
Church, Harris, Johnson and Williams
P.O. Box 1645
Great Falls, Mt. 59403



STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 6-84:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,)	
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF)	
AMERICA, LOCAL 45,)	
)	
Petitioner,)	FINAL ORDER
)	
GREAT FALLS TRANSIT DISTRICT,)	
)	
Respondent.)	

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Linda Skaar on January 30, 1985.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Robert P. Goff, attorney for Respondent, on February 19, 1985.

Oral argument was scheduled before the Board of Personnel Appeals but was waived upon stipulation of the parties to presentation of this case on briefs. After reviewing the record and considering the briefs, the Board Orders as follows:

1. IT IS ORDERED that the Respondent's Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Linda Skaar as the Final Order of this Board.

DATED this 14 day of August, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was sent the following on the 15 day of August, 1985:

Emilie Loring
HILLEY & LORING, P.C.
121 4th Street North - Suite 2G
Great Falls, MT 59403

Robert P. Goff
CHURCH, HARRIS, JOHNSON & WILLIAMS
P.O. Box 1645
Great Falls, MT 59403

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS,)	
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF)	FINDINGS OF FACT;
AMERICA, LOCAL 45)	CONCLUSIONS OF LAW;
)	RECOMMENDED ORDER
Petitioner,)	
)	
GREAT FALLS TRANSIT DISTRICT)	
)	
Respondent)	

* * * * *

A petition for new unit determination and election was filed on March 7, 1984, by Petitioner, proposing a unit comprised of all full and part time drivers, mechanics and maintenance employees of the employer at its Great Falls, Montana facility. Respondent filed a counter petition on May 17, 1984, claiming that it is not the employer, that all employees are actually employees of Transit Management of Great Falls which is a separate entity from the Transit District. The District claims that there is no appropriate unit.

A hearing in this matter was held on August 2, 1984 in Great Falls, Montana. Petitioner, Teamsters Local No. 45 was represented by Emilie Loring and respondent, Great Falls Transit District was represented by Robert P. Goff.

At the hearing, the parties stipulated that the described employees would constitute an appropriate unit for purposes of collective bargaining and that Great Falls Transit District is a public employer. These stipulations left as the only issue to be determined the question of the identity of the employer of the above mentioned employees. Specifically, is the employer the Great Falls Transit District or is the employer Transit Management of Great Falls?

FINDINGS OF FACT

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2 1. On August 9, 1982, Teamsters Local 45, filed a
3 certification petition for this same unit with the National
4 Labor Relations Board. That petition listed Transit Manage-
5 ment of Great Falls as the employer. The identity of the
6 employer was not in question. The NLRB subsequently deter-
7 mined that TMGF did not meet the Board's jurisdictional
8 standards for transit systems (\$250,000 gross revenue).
9 This was the only issue addressed by the NLRB.

10 2. The Great Falls Transit District (GFTD) is empowered
11 to provide public transit services in the Great Falls,
12 Montana, transit district. Although the Great Falls Transit
13 District is a public employer it has contracted with ATE
14 Management and Service Company, Inc. to manage the transit
15 system. The original agreement extended from July 1, 1981
16 through June 30, 1983. The successor agreement was effective
17 July 1, 1983 and extends through June 30, 1986.

18 3. ATE is based in Ohio, but under the contract has
19 agreed to keep in existence a Montana Corporation known as
20 Transit Management of Great Falls (TMGF) which performs all
21 services and assumes all obligations and rights which were
22 extended to ATE under the agreement (Article XI). ATE
23 furnishes a full time general manager for TMGF. While GFTD
24 has the right to approve or disapprove the general manager
25 and may cause his removal with 30 days notice, the general
26 manager is an employee of ATE. The general manager provides
27 the active management and direction of TMGF and the transit
28 system. This includes transportation operations, equipment
29 and building maintenance, schedule operations, labor relations
30 and labor contract negotiations, equipment purchasing,
31 accounting and employee selection and training (Article V).
32 TMGF is designated as the employer of all employees necessary

1 for the operation of the transit system and retains the
2 right to exercise full control and supervision over its
3 employees, their compensation and discharge. It directs
4 employees, transfers, hires, fires, suspends, lays-off and
5 recalls employees. To date, GFTD has not tried to exert
6 control over employees.

7 4. GFTD pays ATE a management fee which ranges from
8 \$81,500 to \$89,000 annually. In addition, it provides ATE
9 with all work funds and operating expenses "under procedures
10 and controls adopted by GFTD." GFTD also furnishes all real
11 estate, buildings, equipment, buses, motor vehicles, materials
12 and supplies necessary for the operation of the transit
13 system. This equipment remains the property of GFTD (Article
14 XIII).

15 5. The agreement between GFTD and ATE may be terminated
16 for cause in the case of default by either party. If the
17 defaulting party does not act to remedy the problem within
18 30 days, the non-defaulting party has the right to terminate
19 the agreement. Other than default, the only cause for
20 termination is bankruptcy, receivership, attachment of
21 property or inability to pay debts within 60 days. The
22 current agreement expires on June 30, 1986. If the contract
23 expires or is terminated, GFTD will immediately become the
24 employer of all persons who are employees of the transit
25 system immediately prior to expiration or termination.

26 6. The agreement provides that ATE will manage the
27 transit system under GFTD policies (Article II).

28 7. The revenue from the operation of the transit
29 system is the absolute property of GFTD (Article XII).

30 8. Any labor agreement negotiated by ATE will require
31 the prior approval of GFTD (Article XX).

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DISCUSSION

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2 In analyzing the facts in this case we must determine
3 whether the employer is Transit Management of Great Falls
4 (TMGF), a private corporation, or Great Falls Transit
5 District (GFTD) a public employer. GFTD contends that TMGF
6 is the employer for purposes of collective bargaining. They
7 argue, further, that the NLRB made this determination and
8 Teamsters Local 45, is collaterally estopped from alleging a
9 different employer. As noted in the findings, the identity
10 of the employer was not litigated in the NLRB proceeding and
11 the Board of Personal Appeals is not estopped from deter-
12 mining the identity of the employer in this proceeding.

13 In 1979, in deciding whether to assert jurisdiction
14 over a company with close ties to an exempt governmental
15 entity, the NLRB abandoned the previous standard and adopted
16 a new "right to control" standard, National Transportation -
17 Service, Inc. and Teamsters Local 728, 241 NLRB No. 64, 100
18 LRRM 1263 (1979). Under this standard, after determining
19 whether a company meets the definition of employer, the NLRB
20 goes on to determine whether it has sufficient control over
21 the employment conditions of its employees to enable it to
22 bargain with a labor organization. The NLRB had long applie
23 d this same "right to control" standard in determining joint
24 employer status. S. S. Kresge & Co. v. NLRB, 416 F.2d 1225
25 (6th Circ. 1969) 72 LRRM 2486. The right to control standard
26 is logical and will be used in analyzing the facts in this
27 case.

28 Transit Management of Great Falls (TMGF) is paid a
29 substantial sum to operate the transit system owned by the
30 Great Falls Transit District (GFTD). The contract which
31 empowers TMGF to operate the transit system specifically
32 gives TMGF control over labor relations and labor contract

1 negotiations. In day to day operation, TMGF directs, hires,
2 fires, transfers, suspends, lays-off and recalls employees.
3 To date, GFTD has not attempted to interfere in any of these
4 matters. Based on these facts alone, we would determine
5 that TMGF is the employer. However, examination of additional
6 facts shows that Great Falls Transit District owns all the
7 property and equipment used by TMGF. By contract, GFTD is
8 required to furnish all property and equipment and supply
9 all the capital needed for operation of the transit district.
10 The contract also provides that the district will be operated
11 under policies established by the GFTD and they must approve
12 any labor agreements negotiated by TMGF. Since we find
13 conflicting indications of who the employer actually is, we
14 must analyze who has the right to control the employment
15 conditions of the employees and can thus carry on meaningful
16 collective bargaining. The contract provides that GFTD owns
17 the property and equipment and GFTD receives all revenue.
18 If profits are down GFTD suffers not TMGF. Thus we can see,
19 the GFTD has financial reason for wanting to control employee
20 wages, hours and working conditions. By retaining the right
21 to approve labor agreements they can effectively do so.
22 TMGF will not be able to enter into binding collective
23 bargaining agreements without the approval of GFTD. The
24 contract between GFTD and TMGF has given both parties control
25 over employees in the transit district. Applying the "right
26 to control" standard adopted by the NLRB we can only conclude
27 that GFTD and TMGF are joint employers. Because the Great
28 Falls Transit District is an employer within the meaning of
29 39-31-103 MCA this Board will exert jurisdiction. In making
30 this determination, we are not unmindful of the factual
31 situation in Baystate Bus 240 NLRB No. 112, 100 LRRM 1376
32 (1979). With one notable exception, the facts in that case

1 were very similar to those we have reviewed here. The case
2 involved a public transit district which contracted with a
3 management firm for the operation of the district. In
4 Baystate the transit district "neither required that a copy
5 of the negotiated contract be submitted for its approval nor
6 restricted Baystate's authority to enter into an agreement
7 with the union in any manner." In the case before us the
8 GFTD must approve the collective bargaining agreement. This
9 fact is the turning point which distinguishes the two cases.

10 CONCLUSIONS OF LAW

11 1. The Great Falls Transit District and Transit Manage-
12 ment of Great Falls are joint employers of employees working
13 in the Great Falls Transit District.

14 2. The Great Falls Transit District is a public employer
15 within the meaning of 39-31-103(1) MCA. Because Great Falls
16 Transit District and Transit Management of Great Falls are
17 joint employers this Board will assert jurisdiction over the
18 joint employers for purposes of collective bargaining.

19 3. For the purposes of collective bargaining, the
20 appropriate unit in this matter is one comprised of all full
21 and part time drivers, mechanics and maintenance employees
22 of the employer at its Great Falls, Montana, facility.

23 RECOMMENDED ORDER

24 Under the authority of Section 39-31-208 MCA it is
25 hereby ordered that an election by secret ballot be conducted
26 among the members of the bargaining unit defined above in
27 accordance with ARM 24.26.55 et. seq.

28 NOTICE

29 Written exceptions to these Findings of Fact, Conclusion
30 of Law and Recommended Order may be filed within twenty
31 days. If no exceptions are filed with the Board of Personnel
32 Appeals within that time, the Recommended Order shall become

1 the Order of the Board. Exceptions shall be addressed to
2 the Board of Personnel Appeals, Capitol Station, Helena, MT
3 59620

4 Dated this 30th day of January, 1985.

7 BOARD OF PERSONNEL APPEALS

8 By Linda Skaar
9 LINDA SKAAR
10 Hearing Examiner

11 * * * * *

13 CERTIFICATE OF MAILING

14
15 I Linda Skaar, do certify that a true
16 and correct copy of this document was mailed to the following
on the 31st day of January, 1985.

17 Emilie Loring
18 Hilley & Loring
19 121 4th Street North, Suite 2 G
Great Falls, MT 59401

20 Robert P. Goff
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Great Falls, MT 59403

23 BPA5:Oda
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