

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
TEAMSTERS UNION, LOCAL 599) CASE 7413-E-88-1268
Involving certain employees of:) DECISION 3314-A - PECB
TACOMA SCHOOL DISTRICT) DECISION OF COMMISSION
_____)

Hafer, Price, Rinehart and Schwerin, by Lawrence Schwerin, Attorney at Law, appeared for the union. Kathleen Phair Barnard, Attorney at Law, of the same firm, joined on the brief.

Kane, Vandenberg, Hartinger & Walker, by William A. Coats, Attorney at Law, appeared for the Tacoma School District. Clifford D. Foster, Attorney at Law, of the same firm, joined on the brief.

This case comes before the Commission on a question of jurisdiction raised by the Tacoma School District under WAC 391-25-390(1). Executive Director Marvin L. Schurke issued an order on October 16, 1989,¹ concluding that the Commission has jurisdiction in the matter and remanding the case for further hearing.

BACKGROUND

The Tacoma School District (Tacoma) operates educational programs in and around Tacoma, Washington. Some of its students require bus transportation.

Tacoma owns some 53 buses, and it operates 42 routes for special education students, as well as 3 routes for students in northeast

¹ Tacoma School District, Decision 3314 (PECB, 1989).

Tacoma. Those routes serve approximately 2000 students, about one-sixth of the Tacoma students requiring bus transport. Tacoma has recognized International Union of Operating Engineers (IUOE), Local 286, as the exclusive bargaining representative of the bus drivers employed in those operations.

Some 4000 Tacoma students (about one-third of the students using buses) use Pierce Transit and pay regular fares.

The remaining half of the Tacoma students who ride buses to and from school use buses operated under contract between the Tacoma School District and private firms.

The Laidlaw Contract

From 1984 to June of 1988, Tacoma contracted for bus services with Laidlaw Transit. While Laidlaw was providing school bus transportation for Tacoma students, the exclusive bargaining representative of Laidlaw employees was Teamsters Local 461 initially, and then Teamsters Local 599 after a merger of Local 461 into Local 599. Aspects of the contract between Tacoma and Laidlaw, as well as of the collective bargaining agreement between Laidlaw and Local 599, have been described in the Executive Director's order and need not be repeated herein.

The Mayflower Contract

During February of 1988, Tacoma invited bids for pupil transportation services for a five-year period commencing September 1, 1988. The bid specifications contained a number of provisions relevant to this case that became part of the contract between Tacoma and the successful bidder.

One of the bid specification provisions, titled "Independent Contractor", read as follows:

15. INDEPENDENT CONTRACTOR: The parties to any resulting Contract agree that the Contractor is an independent Contractor responsible to furnish transportation services pursuant to the Contract and neither Contractor nor any agent, officer, or employee of the Contractor shall be held or deemed to be in any way an employee, agent, officer, official, or servant of the District. None of the benefits provided by the District to its employees are available from the District to the employees, agents, or servants of the Contractor. The Contractor will be solely and entirely responsible for his/her acts and for the acts of his/her agents, officers, employees, servants, and subcontractors during the performance of that Contract.

There was a bid specification provision stating:

7. BUS DRIVERS
 - e. In order to provide continuity of service, it is desirable that the Contractor employ a significant percentage of drivers who have driven District #10 students the previous year. ...

There were also bid specification provisions affecting the transfer of drivers during a semester:

7. BUS DRIVERS
 - a. It is the intent of these specifications that the same driver and vehicle shall be assigned to each route for each semester. If a vacancy occurs during the semester, a new driver will be assigned the vehicle and route as no reassignment of drivers or vehicle should occur during the semester. The District retains the right to require drivers to be transferred between routes whenever the best interest of the

District students or driver may be served.

- ...
- g. Recognizing that stability within any work force is paramount to maintaining quality service, the District reserves the right to assign or if necessary re-assign route work to/from a route in order to increase any route with minimum hours.

The apparent purpose of these bid specifications was for Tacoma to retain some control over student discipline issues arising from the interaction between the drivers and the students. Tacoma retained the contractual right to insist upon route transfers, which indirectly impacts upon the working conditions of the drivers.

Regarding the discipline or discharge of personnel, the 1988 bid specifications included the following provision:

8. PERSONNEL: ... The responsibility for hiring and discharging personnel in respect to all of the foregoing shall rest entirely upon the Contractor, and the Contractor agrees that it shall enter into no agreement or arrangement with any employee, person, group or organization which will, in any way, interfere with the Contractor's responsibility to comply with this requirement. The Contractor further agrees that the Superintendent and his/her Designated Representative shall have the right to require dismissal from the District service any person or driver who, in the opinion of the Superintendent or his/her Designated Representative, is not qualified to operate or aid in the driving of a school bus as set forth in this paragraph or paragraph 7 herein.

The quoted language does not appear to require discharge from employment with the successful bidder, but could cause the removal of a driver from service under the contract.²

The bid specifications require the contractor to pay at least \$6.45 per hour, and require a certain level of medical insurance benefits. The fringe benefit package must equal at least 14% of gross pay and include medical and dental coverage. Also, the contractor is required to pay the majority of the premium, with the employee paying less than 50%.

The bid was awarded to Mayflower Contract Services, Inc. during March of 1988, and the bid specifications became the contract between Tacoma and Mayflower.

Upon being awarded the bid, Mayflower leased a facility in Tacoma, separate from Tacoma School District property. Oregon-based Mayflower official Albert Koons became its area manager for operations.³ Frank Roberts was hired to be Mayflower's on-site contract manager in Tacoma. Also based there are Assistant Manager Robert Joyce, Dispatcher James Southern and a clerk, Becky Marcan. It is undisputed that all of those people are employed by Mayflower.

² Under various statutes, school districts are given a responsibility to ensure that bus drivers meet diverse "fitness" standards, because of the unique population (children) that they serve. For example, Chapter 320 of the 1989 Session Laws requires school boards to include in such contracts provisions that would prohibit the contractor from using convicted felons in performing the contracted services.

³ Koons is responsible for compliance with eight Mayflower contracts with school districts in the state of Washington. The employees at four of those locations are represented by unions; the employees at the other locations are not union-represented.

The Hiring of Drivers

In the spring of 1988, when it became clear that Laidlaw would no longer be the contractor for the school bus operations, Tacoma became concerned that Laidlaw drivers were seeking other employment because of uncertainty as to whether they would have a position with the new contractor. Tacoma believed that it would be difficult, if not impossible, to hire drivers for the month or two remaining in the 1987-88 school year, without a secure position. Consequently, Tacoma's director of transportation services, Paul Plumis, sent each Laidlaw driver a letter which read as follows:

Attached please find a copy of a letter to all of you regarding an information meetings to be held on Thursday, April 28, 1988.[sic] Please plan to attend one of the meetings so that you may better understand the policies and proposals of Dorsey/Mayflower.

As indicated every one [sic] will be considered for employment. In my conversations with the Dorsey/Mayflower management, we agree that it is to everyone's mutual advantage to consider for hiring, all those individuals who have demonstrated skills as driver, mechanics and office staff. Obviously what is necessary in an employee is a positive work attitude and a good attendance record, that is low absentee and tardy rates, other requirements and conditions will be discussed at the meeting. Again, plan to attend and bring your questions with you.

Attached to that memorandum was a copy of an April 15, 1988 letter on "Dorsey Bus Inc./Mayflower Contract Services" letterhead, signed by Koons and addressed "To all Laidlaw/Tacoma employees", wherein the employees were invited to attend one of two meetings scheduled for April 28, 1989.

The April 28 meeting between Mayflower and the Laidlaw drivers was held on Tacoma School District property. Mayflower's employment

policies, benefits and wage structure were discussed. The Laidlaw drivers were told that everyone would be considered for employment, and that no one's wages would be cut. They were also told that the health and dental package provided for them would comply with the minimum bid specifications.

In May, 1988, Mayflower interviewed applicants at a private facility. Koons, Roberts and a person from the Mayflower office in Corvallis, Oregon, conducted the interviews. Approximately 56 drivers were interviewed. Roberts determined that 43 drivers should be offered employment with Mayflower, and those persons were guaranteed the same route to drive as they had with Laidlaw. Each applicant submitted his/her date of hire with Laidlaw and current salary, and Koons' superiors at Mayflower then assigned the applicant a wage rate.

Practices Under the Mayflower Contract

Mayflower commenced operations in Tacoma on or about September 1, 1988. The buses used were registered on "exempt" licenses in the name of Tacoma School District as lessee, with Mayflower as lessor through financing arrangements with a bank.⁴

Mayflower paid at least some of its drivers in excess of the minimum wage rate contained in the bid specification. The record

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These arrangements were necessary to satisfy requirements imposed by the State of Washington concerning the use of the exempt licenses on school buses. Chapter 180-20 WAC. The exempt license limits the use of the buses strictly to Tacoma School District operations and certain other tax exempt uses, (e.g., fire runs during the summertime for the U.S. Forest Services). At the time of the hearing, Mayflower was in the process of applying for charter authority in Washington, which would allow it to operate other revenue services, using buses that were not registered to the Tacoma School District, (e.g., transportation of agricultural workers could provide summertime employment for the drivers).

shows that, when not restricted by the contract, Mayflower pays only \$3.50 to \$3.85 per hour.

Mayflower set the actual fringe benefit levels. The record shows that the medical/dental insurance program provided by Mayflower in Tacoma is different from the plan offered by Mayflower to its other employees.

Primary communication regarding day-to-day operations appears to be between the drivers and the Mayflower dispatcher. The dispatcher adjusts the drivers' hours and routes.⁵ Instructions concerning snow routes and school closures due to weather are promulgated by Mayflower. Accidents are reported first to a Mayflower supervisor and then to Tacoma. Mayflower conducts all driver training, and investigates all complaints.

Tacoma plays an informational role in the investigation of complaints, and is informed of contemplated actions. As of the date of the hearing in this case, Tacoma had not requested the discharge of any driver, but had requested the removal of a driver from a specific route due to his inability to effectively deal with student discipline problems on his bus. The complaint was investigated and Mayflower decided to remove the driver and place him on the substitute bus driver roster.

The record indicates confusion regarding the division and/or exercise of authority between Tacoma and Mayflower with respect to discipline of students. Washington statutes require school districts to have rules concerning student conduct on buses.

⁵ Director of Transportation Paul Plumis reviews bus ridership reports for Tacoma, as part of his responsibility to insure that the transportation system is operating efficiently. Plumis can request the contract manager to combine or eliminate routes to balance rider loads. He has never had a requested route change denied by Mayflower.

Tacoma has, accordingly, issued a set of regulations governing student conduct. Tacoma ordered the drivers to discontinue use of a "Notice of Bus Misconduct" form which Mayflower had instructed them to use for student discipline problems, and replaced that form with one entitled "Tacoma School District #10 School Bus Incident Report." There is also some indication of direct interaction between Tacoma administrators and the petitioned-for bus drivers in the area of driver-student relations.⁶

Mayflower has established personnel policies in a number of areas, including: Leaves of absence; drug and alcohol screening; a 90-day probationary period; a grievance procedure; personnel files; and seniority credit for drivers rehired or transferred from part-time to full-time status. Mayflower instituted a retirement plan for the bus drivers. Tacoma does not get involved in the evaluations of the drivers. Training meetings are, however, conducted by Mayflower on Tacoma property.

The Petition and Proceedings In This Case

Teamsters Local 599 filed a petition for investigation of a question concerning representation with the Commission on May 25, 1988, naming the Tacoma School District as the employer of the bus drivers and mechanics employed in the transportation of Tacoma School District students under the Mayflower contract. Tacoma responded that the petitioned-for employees are actually employed by Mayflower. At the hearing held on March 15 and 16, 1989, the parties stipulated that the issues should be bifurcated, with the identity of the employer being determined first, and other issues being reserved for later hearing.

⁶ For example, when a student complained to a building principal about a bus driver, the principal met with both the driver and the student without any representative of Mayflower present.

Executive Director Marvin L. Schurke entered an Order for Remand on October 16, 1989, concluding that, for the purposes of Chapter 41.56 RCW, the Tacoma School District is a public employer of the involved employees.

POSITIONS OF THE PARTIES

In support of its petition for review, Tacoma contends that Mayflower is the employer. Alternatively, Tacoma contends the two entities are joint employers. Tacoma asserts that, if either contention is correct, we lack jurisdiction and must dismiss the petition. It argues that the Executive Director misapplied North Mason School District, Decision 2428-A (PECB, 1986), which holds that the "right to control" test determines whether the alleged public employer is truly the employer. Further, Tacoma contends that the order of remand improperly places the burden of establishing lack of jurisdiction on the school district, instead of placing the burden on the petitioning union to prove jurisdiction.

The union contends that the Executive Director's Order of Remand correctly follows and applies appropriate precedents. Moreover, the union argues that the order is well supported by the record.

DISCUSSION

The Burden of Proof

Since cases of this type are extremely fact-intensive, we find it important to discuss the burden of proof. In this case, the nominal and presumptive employer of the petitioned-for employees would be Mayflower, and this Commission lacks jurisdiction over that private entity. The reverse situation arises in cases before the National Labor Relations Board (NLRB). There, private sector

employers over which the NLRB would normally have jurisdiction sometimes seek to escape NLRB jurisdiction based on their ties to a public entity exempt from the federal statute.⁷ That is not the case here. Instead, the union seeks to have us assert jurisdiction based on the ties of a public entity to the presumptive employer.

Where individuals in a proposed bargaining unit are employed in the traditional sense by an entity over which we lack jurisdiction, the burden is properly placed on the petitioner to prove that a public entity should actually be viewed as the employer for the purposes of Chapter 41.56 RCW, and that jurisdiction should be asserted over that entity. The union therefore bears the burden of proving facts sufficient to make the Tacoma School District, over which we do have jurisdiction, an "employer" of the individuals at issue here.

The "Right to Control" Test

The Commission examined a situation involving a school district contracting with a private company for bus services in North Mason School District, supra. In that case, we essentially followed the "right to control" analysis used by the NLRB in several of its decisions. See, e.g., National Transportation Services, 240 NLRB 565 (1979); Res-Care, Inc., 280 NLRB 670 (1986); and Long Stretch Youth Home, Inc., 280 NLRB 678 (1986).⁸ The Executive Director noted that, when determining the actual employer(s) of particular employees, the Commission and Washington courts have applied

⁷ This latter pattern of facts predated the filing of the petition in North Mason School District, supra.

⁸ In Res-Care and Long Stretch Youth Home, the NLRB reaffirmed and refined principles set forth in National Transportation Service, for determining whether to assert jurisdiction over an employer providing services to or for an exempt entity. The applicable "right of control" test is designed to ensure the entity over which jurisdiction is asserted retains sufficient control to engage in meaningful and effective collective bargaining.

principles similar to the "right of control" test set forth by the National Labor Relations Board in National Transportation Service, 240 NLRB 565 (1979).

As the Executive Director correctly noted, the issue before the Commission in this case is whether those reservations of authority made by the Tacoma School District are in keeping with its role as a purchaser of services, or are an exercise of "control" as an employer of the employees rendering the services. In applying the "right of control" test, however, the Executive Director seems to have adopted the idea that contract specifications restricting the private firm's total control, or having a severe impact on such control, should cause the Commission to invoke its jurisdiction. Such a rule, carried to its logical conclusion, would make the public entity an employer in every "independent contractor" situation in which the contract specifications contained any significant restrictions.

The lodestar of our analysis in North Mason was the concept of "the final say" over core subjects of bargaining.⁹ We did not hold that mere impacts on bargaining or restrictions reserved to the public entity in contract specifications, however dire would be the key factor. It is only such retained control as would be equal to a veto power, or a final say, that would trigger sufficient control to explode the private contractor's independent status and target the public entity as the true employer. As we noted in North

⁹ North Mason was a much easier case than this one. In an earlier NLRB proceeding, the school district's superintendent had stated in an affidavit on behalf of Laidlaw that the school district retained final control over various mandatory bargaining subjects. For obvious reasons, that affidavit "came back to haunt" the school district in North Mason when the NLRB declined to assert jurisdiction over Laidlaw and the union petitioned this Commission. Moreover, the facts strongly showed in that case that the school district had the final say over wages, benefits, hours and all significant aspects of working conditions.

Mason, the facts in a particular case may show that the public and private entities share control over basic bargaining subjects ("joint" employers), that they divide control with each entity controlling allocated areas of the employment relationship ("dual" employers), or that one entity or the other maintains virtually total control of the basic bargaining subjects.

Application of the "Right to Control" Test

Applying the North Mason rule to these facts, we conclude that the Tacoma School District is not the employer, because it does not have final say with regard to most subjects of bargaining, particularly wages and benefits. Surely there are impacts on wages, hours and working conditions by reason of the contract specifications. Such would be the case in most typical "independent contractor" situations, where there might be a broad spectrum or variety of impacts in a number of bargaining subject areas. The "right to control" or "final say" test, however, requires more than just an impact on bargaining. In this case, we find the "purchaser of services" characterization applies.

The Executive Director's assertion of jurisdiction rested upon control found to exist over certain basic bargaining subjects, i.e., the hiring and transition of employees, driver transfers, employee discipline and discharge, employee benefits, and wages. We have examined each of those areas, and find that sufficient control to exert jurisdiction is lacking.

Hiring/Transition of Employees -

The bid specifications contained a nonbinding guideline that a significant number of former drivers be retained by the successful bidder. We do not view such a proviso as imposing the existing workforce on the new contractor. The bid specifications did not specify that all existing drivers had to be retained, nor did they specify particular individuals who had to be hired. Whether

existing drivers would receive offers of employment was decided solely by Mayflower, which already had a practice of offering employment to those individuals currently working when Mayflower takes over a contract.

We share the Executive Director's belief that the hiring guidelines had a practical effect on Mayflower's selection of its initial workforce. Even assuming there was an impact, though, the more significant consideration is the fact that the bid specification expressing a preference for initial hiring Laidlaw drivers has no application during the remainder of the contract. Thus, the record indicates: (1) No control by Tacoma over the hiring of 23 new drivers that Mayflower employed at the outset of the contract to replace Laidlaw drivers who chose to go elsewhere, and (2) no control over subsequent hires during the term of the contract.

Driver Transfers -

The district has imposed certain restrictions on the reassignment of drivers during the school semester and retains a right to require the transfer of drivers or reassignment of routes under certain circumstances. This is done in the belief that student discipline and safety is dependent to a large degree on the continuity of drivers and their compatibility with students. The contract, however, does not preclude Mayflower from negotiating a seniority bidding method or other collectively bargained approach to changes in routes between school years, and perhaps even between semesters. This is another area in which retained district authority will have an impact on collective bargaining, but is not so restrictive as to preclude Mayflower from engaging in meaningful collective bargaining.

Employee Discipline/Discharge -

As for employee discipline or discharge, the record indicates that Mayflower retains final control over discipline decisions. It also retains final say over whether an individual is discharged from

Mayflower employment. As to both discipline and discharge decisions, Mayflower can fully bargain regarding review of such decisions through grievance arbitration or other procedures.

Tacoma retains the right to require a driver's dismissal from district service, but Mayflower controls and can fully bargain over what that means in terms of continued Mayflower employment. Tacoma's insistence on the right to require removal of a driver judged unqualified is necessitated by the district's special responsibility to supervise the well-being of its students and the safety of transportation provided those students. A school district's right to require the dismissal (or reassignment) of an employee is relevant in applying the degree of control test but does not alone, in our view, require the assertion of jurisdiction. See, Rustman Bus Co., 282 NLRB 152 (1986).

Wage/Benefit Levels -

Tacoma does not retain the discretion to approve specific wage and benefit levels or even renew changes in the benefit package or wage scales. It only set minimum levels for those wages and fringe benefits.¹⁰ We do not view the setting of minimum wage/benefit requirements in a contract between an exempt entity and a public employer as sufficing to assert jurisdiction. See, ARA Services, 283 NLRB 602, 603-604 (1987).

Conclusions -

The case before us falls in the category of Mayflower having sufficient control to engage in meaningful collective bargaining. This case is distinguishable from cases like Res-Care, supra, where the exempt entity retained the right to approve or actually set specific wage and benefit levels. See, also, Board of Trustees of

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The record indicates that many drivers are paid in excess of the contract's minimum rate, and the benefit package differs from the contract's minimum requirements in several respects.

Memorial Hospital v. NLRB, 624 F.2d 177 (10th Cir. 1980); Lutheran Welfare Services v. NLRB, 607 F.2d 777 (7th Cir. 1979). We agree with the district that the wage and benefit specifications in this case neither grant the district final say nor preclude meaningful collective bargaining between Mayflower and its employees.

The Executive Director and the union both cited Zylstra v. Piva, 85 Wn.2d 743 (1975), which set forth the principle that Chapter 41.56 RCW should be construed to preserve for public employees as large a sphere of collective bargaining as possible. See, also, Roza Irrigation District v. State, 80 Wn.2d 633 (1972). We share the Executive Director's concern that the Commission not apply the "right of control" test in a way that allows employers to evade a bargaining obligation under both the NLRA and this state's Public Employee's Collective Bargaining Act. In this case, however, we see no gap in coverage.¹¹

The entity that has the final say over wages, benefits and most of the non-economic bargainable subjects is Mayflower. Mayflower, not the school district, is the entity that can effectively bargain over the terms and employment conditions of its employees. The Tacoma School District does not retain sufficient control to be labelled either a dual or joint employer.¹² Therefore, we see no warrant for extending our jurisdiction into the private sector of labor relations, especially to the detriment of the NLRB or private

¹¹ The NLRB has asserted jurisdiction over private bus companies in similar cases, which is why the Commission sees no gap in coverage here. See, e.g., Rustman Bus Co., supra, [NLRB asserted jurisdiction over bus company providing services to the State of Missouri]; and Community Transit, 290 NLRB 154 (1988) [NLRB asserted jurisdiction over private bus company providing public transportation in Yuba City, California].

¹² In light of the foregoing finding, we need not decide whether to assert jurisdiction in a joint employer case where the contractor and public employer are found to share control.

employers. The union's petition belongs before the NLRB; not before this Commission.

For all of the foregoing reasons, the Executive Director's order finding Tacoma the employer of the involved employees is REVERSED.

AMENDED FINDINGS OF FACT

1. Tacoma School District is a school district of the state of Washington, operated pursuant to Title 28A RCW, which provides a number of educational services, including bus transportation to and from school, for students within its boundaries.
2. Mayflower Contract Services is a private entity, headquartered in the state of Kansas, which provides school transportation services under contracts with various school districts.
3. The Tacoma School District has entered into a contractual relationship with Mayflower Contract Services, to provide certain school bus transportation services to its students. The relationship between the school district and Mayflower was established through the terms of a "bid specification" that detailed several areas wherein the Tacoma School District set minimum conditions and/or retained some rights that affect the employment relationship between the contractor and the workforce providing services under the contract. Mayflower, however, retains final authority and control over employee wages, benefits and most significant aspects of collective bargaining.
4. On May 25, 1988, Teamsters Union Local 599 filed a petition with the Public Employment Relations Commission, seeking investigation of a question concerning representation involving the employees providing school transportation services

under the contract between the Tacoma School District and Mayflower.

5. Tacoma School District lacks final authority and control over the core of mandatory subjects of bargaining affecting the petitioned-for employees. Mayflower Contract Services is, and acts as, the employer of those employees.

AMENDED CONCLUSIONS OF LAW

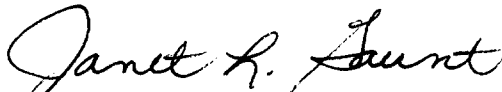
1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. Tacoma School District is not a public employer, within the meaning of RCW 41.56.030(1), of employees providing school transportation services under the contract between Tacoma School District and Mayflower Contract Services.

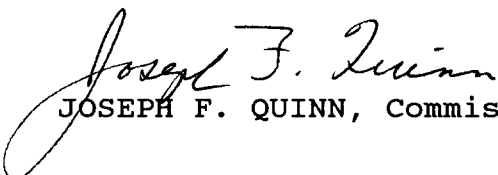
ORDER

The petition for investigation of a question concerning representation filed in this matter is DISMISSED.

Issued at Olympia, Washington, the 2nd day of November, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


JANET L. GAUNT, Chairperson


JOSEPH F. QUINN, Commissioner

Commissioner Mark C. Endresen did not take part in the consideration or decision of this case.