



United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW  
COMMISSION  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

STARTRAN, INC.,

Respondent,

OSHRC Docket No. 02-1140

AMALGAMATED TRANSIT UNION,  
LOCAL 1091,

Authorized Employee  
Representative.

APPEARANCES:

Howard M. Radzely, Solicitor; M. Woodward, Associate Solicitor; Alexander Fernández, Deputy Associate Solicitor; Daniel J. Mick, Counsel for Regional Trial Litigation; Mark J. Lerner, Attorney; U.S. Department of Labor, Washington, DC  
For the Complainant

John J. Franco Jr., Esq.; Jeffrey C. Londa, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., San Antonio, TX  
For the Respondent

Dr. William J. Kweder, Union Secretary; Joneth Wyatt, President; Amalgamated Transit Union, Local 1091, Austin, TX  
For Authorized Employee Representative

**DECISION**

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY RAILTON, Chairman:

Before the Commission is a decision by Administrative Law Judge Benjamin Loye that upheld a violation of 29 C.F.R. § 1904.40 by concluding that StarTran, Inc. (“StarTran”) is an employer, as defined in 29 U.S.C. § 652(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 29 U.S.C. § 651 *et seq.* (“OSH Act”), and not a political subdivision of the State of Texas exempt from coverage under 29 C.F.R. §

1975.5(b). Former Commissioner James Stephens, acting under section 12(j) of the OSH Act, 29 U.S.C. § 661(j), granted StarTran's petition for review.<sup>1</sup> For the reasons that

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<sup>1</sup> Due to a clerical error, documents circulated to members of the Commission incorrectly stated that the judge's decision in this case was docketed on July 30, 2003 and, therefore, would become a final order of the Commission on August 29, 2003. *See* 29 U.S.C. § 661(j) (administrative law judge's report shall become final order within thirty days unless a member of Commission has directed it for review within that period). However, the judge's decision was actually docketed one day earlier on July 29, 2003. Relying on these erroneous documents, and therefore believing that he was acting within the thirty-day review period under § 12(j) of the OSH Act, former Commissioner Stephens directed this case for review on a date that was actually thirty-one days after the judge's decision was docketed with the Commission.

Federal Rule of Civil Procedure 60(a) provides, in pertinent part, that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative . . . ." *See* 29 U.S.C. § 661(g); Commission Rule 2(b), 29 C.F.R. § 2200.2(b) (where Commission lacks its own rule it will adopt Federal Rules of Civil Procedure). Rule 60(a) has been interpreted to cover "such things as misprisions, oversights and omissions, unintended acts or failures to act." 6A James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.06[1], at pp. 4054-55 (2d ed. 1974). *See Am. Trucking Ass'n v. Frisco Transport. Co.*, 358 U.S. 133, 145 (1958); *Patiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968).

Chairman Railton and Commissioner Thompson believe the Fifth Circuit's decision in *Brennan v. OSHRC* ("*Otinger*"), 502 F.2d 30 (5th Cir. 1974) is not an impenetrable barrier to the Commission's use of Rule 60(a) in this case. *Otinger* involved Rule 60(b), which is far narrower in scope than Rule 60(a). *Compare* Fed. R. Civ. P. 60(a) (tribunal may correct clerical errors *sua sponte* at any time), *with* Fed. R. Civ. P. 60(b) (relief granted only on motion of party, within one year of mistake, and in six delineated situations). Moreover, *Otinger* is factually distinguishable. In *Otinger*, the court held that where the Commission knowingly allowed a judge's decision to become a final order, the Commission could not later use Rule 60(b) to revisit that decision based upon the receipt of new information from a party. *Otinger*, 502 F.2d at 30-31. This case, in contrast, involves a decision that mistakenly became a final order due to a clerical error made by a clerk.

Notably, the Fifth Circuit has never held that the Commission is powerless to correct its own clerical errors where neither party is at fault. *Cf. Macktal v. Chao*, 286 F.3d 822 (5th Cir. 2002) (citing *Otinger* in comparing Energy Reorganization Act, which contains no statutory limitations to revisiting a final order, to OSH Act, under which judge's report becomes final unless directed for review within thirty days). In fact, one year after *Otinger* was decided, the Fifth Circuit directed the Commission to consider granting equitable relief to a party by revisiting an order that had become final due to the Secretary's failure to follow proper procedures. *Atl. Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5th Cir. 1975) (per curiam).

follow in this and Commissioner Rogers's concurring opinion, we affirm the judge's decision.

### **Background**

StarTran, a Texas non-profit corporation that provides bus transportation services for the City of Austin, was created by authorization of Capital Metropolitan Transportation Authority ("Capital Metro"), a governmental transit entity established under Texas law that operates under the provisions of the Texas Transportation Code. Capital Metro created StarTran to harmonize federal law requiring Capital Metro to continue collective bargaining, *see* Fed. Transit Act, 49 U.S.C. § 5300 *et seq.*, with Texas law that prohibits governmental entities from entering collective bargaining agreements, *see* Tex. Code Ann. § 617.003 (Vernon 2004). Capital Metro, which has provided public transportation services in the Austin area since 1985, contracts out transportation services to various management companies, including StarTran.

On May 9, 2002, the Occupational Safety and Health Administration ("OSHA") inspected StarTran's Austin worksite. As a result of that inspection, OSHA issued StarTran a citation alleging a violation of 29 C.F.R. § 1904.40 for its failure to provide

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The Commission has previously used Rule 60(a) to correct its own clerical errors in circumstances similar to those present here. In *Voegele Co., Inc.*, 7 BNA OSHC 1713 (No. 76-2199, 1979), the Commission determined that "the 30-day finality provision of section 12(j) was not an impenetrable barrier to review by the Commission and did not preclude relief from a final order." *Id.* at 1714 n.2 (quoting *Monroe & Sons, Inc.*, 4 BNA OSHC 2016 (No. 6031, 1977), *aff'd*, 615 F.2d 1156 [8 BNA OSHC 1034] (6th Cir. 1980)). There, relying on a clerical error, a Commissioner had similarly directed a case for review thirty-one days after the judge's decision was docketed. Because the Commissioner's late direction for review was the result of a clerical error and nothing indicated that the parties would be prejudiced by Commission review, the Commission applied Rule 60(a) and exercised jurisdiction over the case. *Voegele*, 7 BNA OSHC at 1714 n.2. For reasons similar to those expressed in *Voegele*, Chairman Railton and Commissioner Thompson apply Rule 60(a) in this matter and conclude that the Commission has jurisdiction to review the case.

Former Commissioner Stephens's clear intent was to direct the case for review within the statutory time limit. His direction would have been timely, but for erroneous information he received from the Commission's clerk regarding the case's final order date. Unlike the situation in *Otinger*, this case involves a pure clerical error; one that could have been corrected by a clerk. Moreover, there is no indication that any party would be prejudiced by Commission review. Chairman Railton and Commissioner Thompson find, therefore, that the application of Rule 60(a) is appropriate under the circumstances. Accordingly, this case is properly before the Commission on review.

records to an authorized government representative. Before the judge, StarTran stipulated to the facts alleged in the citation, arguing only that it is a political subdivision of the State of Texas exempt from the OSH Act under 29 C.F.R. § 1975.5(b).<sup>2</sup> StarTran agreed that, if it is not exempt, the citation should be affirmed. The issue before the Commission is whether StarTran is a political subdivision entitled to be exempt from coverage under 29 C.F.R. § 1975.5(b).

### **Discussion**

The threshold matter in this case is whether StarTran bears the burden of proving it falls under the political subdivision exception to the definition of employer under the OSH Act. StarTran argues on review that the Secretary bore the burden of proving that OSHA had jurisdiction over StarTran. The Secretary contends, however, that whether an entity is an employer under the OSH Act is not a question of jurisdiction, but of coverage, and therefore StarTran bore the burden of proof. I agree with the Secretary that whether StarTran is an employer within the meaning of the OSH Act is an issue of coverage, not jurisdiction. *See Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1244 (2006) (definitional issues are issues of coverage, not jurisdiction; Title VII employee-numerosity requirement is issue of coverage, not jurisdiction). Consequently, the burden of proof rests with StarTran to show that it falls within the exception to the definition of employer under the OSH Act. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (burden of proving applicability of exemption falls on party claiming exemption). In assessing StarTran's showing, the Commission takes the evidence StarTran introduced at face value and will look only at the testimony given and within the four corners of the documents introduced. *See C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756, 1996 CCH OSHD ¶ 31,129, p. 43,476 (No. 93-3177, 1996) (party seeking "the benefit of an

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<sup>2</sup> That section provides that an exempt state or political subdivision is an entity that is:

- (1) created directly by the State, so as to constitute a department or administrative arm of the government; or
- (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate.

29 C.F.R. § 1975.5(b).

exception to a legal requirement has the burden of proof to show that it qualifies for the exception.”).

### ***Definition of Employer***

Section 3(5) of the OSH Act, 29 U.S.C. § 652(5), exempts “any State or political subdivision of a State” from the definition of the term “employer” and therefore from the coverage of the Act. The Secretary promulgated a series of regulations under this provision setting forth a two-part test for determining whether an entity is a state or political subdivision. Under this test, any entity that is (1) “created directly by the State . . .” or (2) “administered by individuals who are controlled by public officials and responsible to such officials or to the general public” will be deemed to be an exempt state or political subdivision under section 652(5) of the OSH Act. *See* 29 C.F.R. § 1975.5(b). This test is identical to the formula the National Labor Relations Board (“NLRB”) has long used to determine whether an entity is a political subdivision exempt from the Board’s jurisdiction under 29 U.S.C. § 152(2) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“NLRA”).

Because StarTran was not created by the State of Texas, it is undisputed that the first part of the political subdivision test does not apply here. Thus, the question before us is whether StarTran has established that it is “administered by individuals who are controlled by public officials.” As the judge noted, the regulation contains a non-exhaustive list of factors to be considered in determining whether an entity is exempt under this test. *See* 29 C.F.R. § 1975.5(c). The regulations prescribe that the weight of any factor, and whether a single factor or multiple factors will be decisive, must be decided based on the merits of each case. *See* 29 C.F.R. § 1975.5(d). In the present matter, I find three factors to be particularly significant: the lack of public control over StarTran; StarTran’s responsibilities for safety and health; and the fact that StarTran seeks to be viewed as an independent entity in other contexts.<sup>3</sup> *See Brock v. Chicago Zoological Soc’y*, 820 F.2d 909, 913 (7th Cir. 1987) (considering three factors to be “decisive”: “the [entity’s] corporate structure, its resulting independence from direct

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<sup>3</sup> I have considered the other factors specified at 29 C.F.R. § 1975.5(c), and I am of the view that StarTran has not met its burden of proving the political subdivision exemption.

[governmental] control over operations and maintenance, and the indisputably private nature of its employment relationships.”).

Although the facts here present a close case, I conclude that StarTran failed to carry its burden of proving it is exempt from coverage under the OSH Act.

### ***Public Control***

First, the record lacks sufficient evidence to show that StarTran met the political subdivision exemption because it was “administered by individuals who are controlled by public officials and responsible to such officials or to the general public.” *See Chicago Zoological Soc’y*, 820 F.2d at 913 (“Exempting an entity that does not treat its employees as public employees would obstruct the [OSH] Act’s basic purpose without advancing the interests served by the exemption.”). It is undisputed that StarTran’s board is not directly responsible to the general electorate. Although all five of StarTran’s board members are appointed by the chief executive officer of Capital Metro, an entity the majority of whose board is directly responsible to the general electorate, the evidence fails to support StarTran’s claim that the individuals administering the company were controlled by Capital Metro. On the contrary, I agree with the judge that StarTran was controlled by its own board, as well as by the terms of StarTran’s collective bargaining agreement with Amalgamated Transit Union Local 1091 (“the union”). *See Tricil Res., Inc. v. Brock*, 842 F.2d 141, 143-44 (6th Cir. 1988); *Chicago Zoological Soc’y*, 820 F.2d at 912 (both finding employer was non-exempt independent entity where, *inter alia*, employer controlled and established terms and conditions of employment for its employees).

Of particular significance here is StarTran and Capital Metro’s “Agreement for the Provision of Employee Services” (hereinafter “Employee-support Agreement”), the document that created StarTran as an independent entity. The Employee-support Agreement states that the services provided by Capital Metro are to be ministerial only, and StarTran is to “retain absolute and real day-to-day control over all matters relating to the terms and conditions of employment.” *See* Employee-support Agreement at ST.08. Under both this agreement and StarTran’s collective bargaining agreement with the union, StarTran has the authority to hire, fire, promote, supervise, and direct employees and to handle discipline and grievance procedures.

Indeed, the testimony of William Kweder, a StarTran bus driver, confirms that it is StarTran alone that supervises, pays, and disciplines its employees. StarTran's manager of labor and human relations also testified that day-to-day administration of the collective bargaining agreement is handled solely by StarTran. Further, Mr. Kweder testified that he would raise day-to-day job-related concerns only with his StarTran supervisor, and could think of no situation in which he would contact Capital Metro regarding day-to-day work concerns.

Perhaps, had StarTran introduced its by-laws or other evidence regarding its corporate structure that could indicate it was subject to external control, StarTran may have been able to establish that it was "administered by individuals who are controlled by public officials and responsible to such officials or to the general public." *See Chicago Zoological Soc'y*, 820 F.2d at 912 (analyzing, *inter alia*, entity's corporate structure in denying exemption). Indeed, in NLRB cases involving the political subdivision exemption under the NLRA, courts in determining the exemption have found decisive the fact that an entity's by-laws subject it to outside control. *See NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174, 175 (4th Cir. 1991) (hospital exempt where bylaws of hospital provided that the affairs of the corporation were managed by its Board of Directors, whose members were subject to ratification and removal by the Princeton Municipal Council); *Jefferson County Cmty. Ctr. for Devtl. Disabilities, Inc. v. NLRB*, 732 F.2d 122, 125-26 (10th Cir. 1984) (no exemption where by-laws indicate majority of board is neither appointed by nor subject to removal by public officials). StarTran's failure to provide any such evidence here further weakens its claims of control by Capital Metro.

### ***Safety & Health Responsibilities***

Second, I find the fact that StarTran was responsible on a day-to-day basis for the safety and health of its employees to be of considerable significance, as ensuring occupational safety and health is the very purpose of the OSH Act under which this case arises. *See Tricil Resources, Inc.*, 842 F.2d 141; *Brock v. Chicago Zoological Soc'y*, 820 F.2d at 913 (both finding persuasive fact that entity claiming political subdivision status was solely responsible for safety of its employees). Capital Metro's safety manager developed the safety program used by both Capital Metro and StarTran, but the record shows that StarTran was chiefly responsible for enforcing its program. While the original

agreement states that Capital Metro is to provide safety and other training, “Amendment One” expressly turns these duties over to StarTran. *See* Employee-support Agreement at ST.03-04, 07. StarTran’s collective bargaining agreement contained an article relating to safety, which provided generally that StarTran would provide employees with protective gear and could require employees to attend safety meetings. *Id.* at ST.089. Mr. Kweder testified that under the collective bargaining agreement only StarTran could discipline him, and Capital Metro’s safety manager confirmed that he was not at all involved in discipline. Mr. Kweder also testified that he would raise job-related safety or health concerns with his StarTran supervisor. Under these circumstances, I am simply not persuaded by StarTran’s claims that its safety program was controlled by Capital Metro.

#### ***Treatment Under Other Federal and State Law***

The third significant factor in my determination that StarTran has failed to establish it is an independent entity centers upon how StarTran is regarded under State and Federal laws. *See* 29 C.F.R. § 1975.5(c). StarTran seeks to be considered an independent entity under Texas law. In fact, it is undisputed that Capital Metro created StarTran to harmonize federal law requiring Capital Metro to continue collective bargaining, *see* Fed. Transit Act, 49 U.S.C. § 5300 *et seq.*, with Texas law that prohibits governmental entities from entering collective bargaining agreements, *see* Tex. Code Ann. § 617.003 (Vernon 2004). The Employee-support Agreement states in its introduction that “to ensure compliance with state and federal law, it is necessary for Capital Metro to obtain certain services from an independent entity [StarTran] which can recognize the collective bargaining rights of those persons who provide Mass Transit Services for Capital Metro.” *See* Employee-support Agreement at ST.05. Although no official determination has been made on the issue, StarTran states that it would be subject to the NLRA, which guarantees the right of private-sector employees to bargain collectively.

In essence, StarTran is asking the Commission to ignore the private status it claims with respect to the State of Texas and the NLRA and instead find for purposes of the OSH Act alone that it is a political subdivision exempt from coverage. There is simply no basis for such a claim. In fact, I find this claim to be especially brazen in light of the undisputed evidence that StarTran was specifically created and endowed with

indicia of independence to be viewed by the State of Texas as a non-political subdivision. Also, as noted above, the Commission's test for determining political subdivision status is identical to the test used by the NLRB to determine whether an entity is a political subdivision exempt from the NLRA. *See* 29 U.S.C. § 152(2). Yet, StarTran paradoxically asks the Commission to apply an identical test, but reach the opposite result. StarTran is simply not free to shed its private cloak and don the mantle of a political subdivision whenever convenience dictates.

**Order**

For the reasons above, with which Commissioner Rogers joins in her concurring opinion, the Commission affirms the judge's finding that StarTran failed to comply with 29 C.F.R. § 1904.40, and assesses a penalty of \$500.

SO ORDERED.

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*/s/*  
W. Scott Railton  
Chairman

Dated: September 27, 2006

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ROGERS, Commissioner, dissenting in part and concurring in part:

I must respectfully disagree with the view of my colleagues that this case is properly before the Commission. I do so based on my reading of the applicable Fifth Circuit case law.

This case was directed for review one day after the final order date, due to a clerical error in listing that date in a document circulated to the Commission. I agree with my colleagues that under Commission precedent and the precedent of most Circuits, the Commission could grant relief under Rule 60(a) of the Federal Rules of Civil Procedure. *See Voegele Co., Inc.*, 7 BNA OSHC 1713, 1714 n.2 (No. 76-2199, 1979) (correcting clerical error that led to direction for review being issued 31 days after docketing of judge's decision), *aff'd*, 625 F.2d 1075 (3<sup>rd</sup> Cir. 1980).

However, Fifth Circuit precedent, *Brennan v. OSHRC* ("*Otinger*"), 502 F.2d 30 (5<sup>th</sup> Cir. 1974), provides that once the 30 day review period has expired, there is "no provision for further Commission consideration of the merits of the controversy." *Id.* at 32. While in that case the Court rejected the use of Rule 60(b) to reinstate a case, the rationale of the Court's decision would apply equally to the use of Rule 60(a). *See Macktal v. Chao*, 286 F.3<sup>rd</sup> 822, 826 (5<sup>th</sup> Cir. 2002) ("once the thirty-day review period had expired and the order had become final, no further consideration by the Commission was allowed," citing to *Otinger*).

Two Circuits have chosen not to follow the analysis in *Otinger*. *See J. I. Hass Co., Inc. v. OSHRC*, 648 F.2d 190 (3<sup>rd</sup> Cir. 1981); *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1159 n.1 (6<sup>th</sup> Cir. 1980) (suggesting that *Otinger* did not appropriately account for the provision of the Occupational Safety and Health Act which specifically applies the Federal Rules of Civil Procedure to Commission proceedings). *Otinger* is also broader in its scope than *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219 (2<sup>nd</sup> Cir. 2002), which only proscribes the use of Rule 60(b) by the Commission to reinstate a case in the narrower context of a late-filed notice of contest. Nevertheless, *Otinger* is the law of the Circuit.<sup>4</sup>

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<sup>4</sup> The suggestion might be made that *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5<sup>th</sup> Cir. 1975) (*per curiam*) has undercut the force of *Otinger*. Rather, it appears the Court in *Atlantic Marine* wanted to provide a possible alternative option for reconsideration in the most compelling case. Thus the Court noted, in the context of a late-filed notice of

However, the majority has decided that the case is properly before us. “Although I disagree, I will accept the decision of the majority as dictating the law of this case. Having so accepted the law of the case,” I now join the Chairman in the issuance of the order to affirm the judge. *See Massachusetts v. EPA*, 415 F.3d 50, 61 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment), *cert. granted*, 126 S.Ct. 2960 (2006). With that explanation, I join in the Chairman’s analysis on the merits of this case and agree that StarTran failed to carry its burden of proving it is exempt from coverage under the OSH Act.

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Commissioner

Dated: September 27, 2006

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contest, “that a powerful argument can be generated that a petitioner should not be denied review altogether . . . if the Secretary’s deception or failure to follow proper procedures is responsible for the late filing,” effectively suggesting the possible availability of the doctrine of equitable tolling to allow reconsideration. *Id.* at 478.

Unfortunately, it does not appear that equitable tolling would be available here. The doctrine appears to focus on situations where a party has filed in an untimely manner as a result of external factors beyond its control. *See In Re: Wilson*, 442 F.3d 872, 875 (5<sup>th</sup> Cir. 2006). Here, StarTran filed a timely Petition for Discretionary Review. It may be, however, that this case presents the sort of “unique circumstances” that could allow the Circuit Court to consider an appeal even if the Court agrees that this case was not properly before us. *See Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 387 (1964).

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THOMPSON, Commissioner, dissenting in part and concurring in part:

While I concur with Chairman Railton in concluding that this case is properly before the Commission, I must respectfully dissent from my colleagues' decision on the merits. Although I agree that the burden rests with StarTran to prove it is a political subdivision exempt from coverage under the OSH Act, 29 U.S.C. § 652(5) [“§ 2(5)”], I would find, in contrast to my colleagues, that StarTran met its burden on the record before us. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (burden of proving applicability of exemption falls on party claiming exemption); *C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756, 1996 CCH OSHD ¶ 31,129, p. 43,476 (No. 93-3177, 1996) (party seeking “the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for the exception.”). In my view, the evidence clearly establishes that StarTran is “administered by individuals who are controlled by public officials and responsible to such officials or to the general public[.]” *See* 29 C.F.R. § 1975.5(b). Accordingly, I would reverse the judge and find that StarTran is exempt from coverage under the Act.

#### ***Public Control***

Of decisive significance in my mind for the purposes of determining StarTran's status as a political subdivision is the record evidence clearly establishing that the chain of command of both controlling entity Capital Metro and operating entity StarTran begins with the electorate.<sup>1</sup> Five of the seven members of the Capital Metro Board of Directors are publicly elected. The Board of Directors hires the Chief Executive Officer (CEO) of Capital Metro, who is a public official by virtue of his role in presiding over a governmental agency. Capital Metro's CEO in turn appoints each member of StarTran's five-member Board of Directors. StarTran's Board of Directors is controlled by and

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<sup>1</sup> The Secretary's regulations contain a non-exhaustive list of fourteen factors to be considered in determining whether an entity is “administered by individuals who are controlled by public officials and responsible to such officials or to the general public” and therefore exempt from coverage under the OSH Act. *See* 29 C.F.R. § 1975.5(b), (c). The first four of those factors are as follows: Are the individuals who administer the entity appointed by a public official or elected by the general electorate? What are the terms and conditions of the appointment? Who may dismiss such individuals and under what procedures? What is the financial source of the salary of these individuals? *See* 29 C.F.R. § 1975.5(c).

responsible to Capital Metro's current CEO, Fred Gilliam, who has the power to appoint and terminate StarTran's board members. Indeed, StarTran's board members consider Mr. Gilliam to be their boss. Moreover, Capital Metro pays the salaries of the entire StarTran Board of Directors.

While I agree with my colleagues that StarTran's corporate structure is an important consideration here, I do not feel it necessary to look beyond the record to find that StarTran established Capital Metro's plenary authority to control the company and that this authority could not be altered by StarTran. *See NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174, 175 (4th Cir. 1991) (hospital exempt where Board of Directors' members were subject to ratification and removal by municipal entity). Clearly, StarTran could not elect to exist independently of Capital Metro. Capital Metro is, in fact, StarTran's sole transportation contract, as well as StarTran's sole source of funding. *See* § 1975.5(c) (relevant factors for determining public control include how the entity's functions are financed and what is the financial source of the employee-payroll). Capital Metro provides StarTran with the following: all office, storage, and bus maintenance facilities; office furniture, equipment, and materials; all fiscal, purchasing, and personnel services; and, financial support sufficient to cover StarTran's costs in meeting its obligations under the employee-support agreement, including providing all the wages and benefits of StarTran employees. Capital Metro even collects StarTran's fares at the end of each day. Capital Metro could also audit StarTran and in fact has done so.

Conversely, StarTran has little control over the integral parts of its own operations. StarTran is required to work with Capital Metro to develop proposed budgets corresponding to Capital Metro's fiscal year and these budgets are subject to Capital Metro's approval. Indeed, StarTran lacks its own accounting department. StarTran is required to notify Capital Metro about the departure of key personnel. Although Capital Metro is not involved in StarTran's actual collective bargaining process, any agreement that StarTran reaches is subject to approval by Capital Metro and StarTran personnel often discuss collective bargaining issues with Capital Metro's CEO and Board of Directors. Furthermore, on those occasions when StarTran employees raised day-to-day concerns with StarTran supervisors who were unable to address those concerns, the matter would be sent up the well-established chain of command to Capital Metro and

then to the public. Under these circumstances, I have little doubt that StarTran is “administered by individuals who are controlled by public officials and responsible to such officials or to the general public.”

### ***Safety & Health Responsibilities***

In contrast to my colleagues, I would find that the evidence regarding Capital Metro and StarTran’s safety and health responsibilities weighs in favor of finding StarTran to be an exempt political entity. *See* 29 C.F.R. § 1975.5(c) (“In evaluating these factors, due regard will be given to whether any occupational safety and health program exists to protect the entity’s employees.”). In previous cases denying the exemption at issue here, courts have found persuasive the fact that the entity claiming political subdivision status was *solely* responsible for the safety of its employees. *See Tricil Res., Inc. v. Brock*, 842 F.2d 141 (6th Cir. 1988); *Brock v. Chicago Zoological Soc’y*, 820 F.2d 909, 913 (7th Cir. 1987). That is not the case here. The evidence clearly shows that Capital Metro bears chief responsibility for safety and health matters at StarTran. Capital Metro is the entity that developed the safety program used by StarTran. Capital Metro is also responsible for enforcing the safety program through training new StarTran employees, holding monthly safety training classes, and requiring all StarTran operators and drivers to attend safety training classes on a quarterly basis. Indeed, StarTran’s president testified that, despite any agreements to the contrary, Capital Metro was responsible for safety. My colleagues attach great significance to the fact that StarTran could discipline employees for safety violations, subject by the nature of their relationship to potential override or reversal by Capital Metro, but this fact alone cannot overcome the overwhelming evidence of Capital Metro’s involvement in, and control of, StarTran’s safety program.

### ***Treatment under Other Federal and State Laws***

Finally, my colleagues make much of the fact that StarTran characterizes itself as an independent entity subject to the National Labor Relations Act [“NLRA”] as a consequence of its statement in its Employee-support Agreement that it is “an independent entity which can recognize the collective bargaining rights of those persons who provide Mass Transit Services for Capital Metro.” Employee Support Agreement at ST.05. In my view, in determining whether the objective facts prove that StarTran is a

political subdivision exempt from coverage under the OSH Act, 29 U.S.C. § 652(5), little weight should be given to such a characterization plainly intended to avoid undermining the agency's eligibility for federal subsidy. My colleagues acknowledge that StarTran's characterization in its Employee-support Agreement of its status as an independent employer is designed to harmonize federal mass transit subsidy authority requiring Capital Metro to engage in collective bargaining, *see* Fed. Transit Act, 49 U.S.C. § 5300 *et seq.*, with Texas law that prohibits governmental entities from entering collective bargaining agreements, *see* Tex. Code Ann. § 617.003 (Vernon 2004). Whatever weight is given in application of § 2(5) to StarTran's characterization of its status under the NLRA, the greater weight should be given to the overwhelming body of objective evidence showing that StarTran serves merely as a puppet of Capital Metro, the Austin municipal transit authority.

Moreover, as my colleagues note, the National Labor Relations Board ["NLRB "] has made no determination that StarTran is an independent private entity subject to the NLRA. However, even if a determination had been made by the NLRB finding StarTran subject to the NLRA, I would not find that to be dispositive for the purposes of applying § 2(5) of the OSH Act. The OSH Act, not the NLRA, is concerned with regulating the safety and health conditions of private employers and, as discussed above, it is clear on this record that a public entity, Capital Metro, was primarily responsible for the safety and health conditions of StarTran's employees. In my view, the Commission should therefore apply its own test, which is clearly set out under § 1975.5(b) and (c), to determine whether StarTran qualifies as a political subdivision under the OSH Act. Applying this test, I would find that the record overwhelmingly establishes that StarTran is a political subdivision.

For all of these reasons, I respectfully dissent in part from my colleagues' decision.

/s/ \_\_\_\_\_  
Horace A. Thompson, III  
Commissioner

Dated: September 27, 2006



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR,

Complainant,

v.

STARTRAN, INC., and its successors,

Respondent.

-----  
Dr. William J. Kweder, Union Secretary,  
AMALGAMATED TRANSIT UNION  
LOCAL 1091,  
Authorized Employee Representative.

OSHRC DOCKET NO. 02-1140

**APPEARANCES:**

For the Complainant:

Madeleine T. Le, Esq., C. Elizabeth Fahy, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas.

For the Respondent:

John J. Franco, Jr., Esq., Ogletree, Deakins, Nash, Smoak & Stewart., P.C., San Antonio, Texas

For the Authorized Employee Representative:

Dr. William J. Kweder, Joneth Wyatt, Amalgamated Transit Union, Local 1091, Austin, Texas

Before: Administrative Law Judge: Benjamin R. Loye

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, StarTran, Inc., and its successors (StarTran), at all times relevant to this action maintained a place of business at 2910 East 5<sup>th</sup> Street, Austin, Texas, where it was engaged in providing public transportation for the Austin area. On May 9, 2002 the Occupational Safety and Health Administration (OSHA) conducted an inspection of StarTran's Austin work site. As a result of that inspection, on July 1, 2002 StarTran was issued an "other than serious" citation alleging violation of §1904.40 of the Act together with a proposed penalty. By filing a timely notice of contest, StarTran

brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

StarTran maintains that it is an exempt employer under 29 C.F.R. 1975.5 of the Act, and so is not subject to OSHA regulations. On October 29, 2003 StarTran moved for summary judgment dismissing the July 1, 2002 citation. On December 11, 2002 this judge ruled that StarTran was not an exempt entity pursuant to §1975.5. StarTran filed a petition for interlocutory review on December 20, 2002. That petition was denied without prejudice on January 22, 2003. On April 24, 2003 a hearing was held in Austin, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

### **Alleged Violations**

Other than Serious citation 1, item 1 alleges:

29 CFR 1904.40: Copies of records kept under Part 1904 were not provided upon request to an authorized government representative within four (4) business hours:

- a) On or about 05-19-02 the employer did not provide a copies (sic) of injury and illness data for this establishment to the OSHA Compliance Safety and Health Officer, pursuant to the investigation of a complaint. On or about 05-23-02 the employer wrote a letter stating these records would not be produced.

StarTran stipulates to the facts alleged in the citation, and agrees that the proposed penalty of \$500.00 is appropriate should this judge find that the Act is applicable to its place of employment (Tr. 9; Exh. J-1). StarTran, however, continues to maintain that it is exempt from the operation of the Act pursuant to 29 C.F.R. §1975.5. The only issue for this judge's consideration, therefore, is the applicability of §1975.5.

29 C.F.R. §1975.5 provides that an "employer" subject to the Act "means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." Under subparagraph (b) of that section, an entity may be declared exempt from the Act under this provision if it is either:

- (1) created directly by the State, so as to constitute a department or administrative arm of the government, or (2) is administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate.

29 C.F.R. § 1975.5(c) sets forth factors to be considered in determining whether an entity meets the test set forth in subparagraph (b).

Are the individuals who administer the entity appointed by a public official or elected by the general electorate?

What are the terms and conditions of the appointment?

Who may dismiss such individuals and under what procedures?

What is the financial source of the salary of these individuals?

Does the entity earn a profit?

Are such profits treated as revenue?

How are the entity's functions financed?

What are the powers of the entity and are they usually characteristic of a government rather than a private individual?

How is the entity regarded under State and local law as well as under other Federal laws?

Is the entity exempted from State and local tax laws?

Are the entity's bonds, if any, tax-exempt?

As to the entity's employees, are they regarded like employees of other State and political subdivisions?

What is the financial source of the employee-payroll?

How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

In evaluating these factors, due regard will be given to whether any occupational safety and health program exists to protect the entity's employees.

### Facts

StarTran is a Texas non-profit corporation organized pursuant to the Texas Non-Profit Corporation Act, Article 1396–1.01, *et seq.*, Texas Revised Civil Statutes Annotated (Exh. J-1, ¶ 8). StarTran was created by the Capital Metropolitan Transportation Authority (Capital Metro), a governmental entity established under the laws of the State of Texas (Exh. J-1, ¶ 8). StarTran was created to comply with the requirements of the Federal Transportation Act [49 U.S.C. §533(3)], which conditions the receipt of federal funds by a transit authority on the continuation of existing collective bargaining rights of employees, *inter alia* (Tr. 158-165, Exh. C-1, R-1). Texas law prohibits collective bargaining by public employees (Tr. 158-165).

Capital Metro's board of directors consists of five publicly elected officials and two private individuals who are hired by the board. One of the two non-elected members is Chief Executive Officer (CEO) Fred Gilliam (Tr. 161, 174). According to the agreement under which StarTran provides "employee support services" to Capital Metro, StarTran is "an independent corporate entity which shall in no way be deemed to be an affiliate, partner, subsidiary, joint venturer, or otherwise under the control of Capital Metro (Exh. C-1, R-1). Under the agreement, Capital Metro retains its governmental functions, including the right and obligation to determine routes, service and fares for the mass transit system (Exh. C-1, R-1). Capital Metro provides 100 percent of StarTran's financial support, and retains control over its budget, fiscal affairs and property (Tr. 168-69; Exh. C-1, R-1).

StarTran's rights and duties under the agreement are to provide "those services related to and required by employment of the drivers, mechanics, and such other personnel as are necessary to support Capital Metro in the manner mutually agreed by the parties in the provision of Mass Transit service" (Exh.

C-1, R-1). Article II amending the agreement states that StarTran additionally agrees to provide safety and other training; Article III states that though Capital Metro provides fiscal, purchasing and personnel services to support StarTran's operations, "such services shall be ministerial only, and that StarTran shall retain absolute and real day-to-day control over all matters relating to the terms and conditions of employment, supervision, and control of its employees" (Exh. C-1, R-1).

Joneth Wyatt, president of Amalgamated Transit Union (ATU) Local 1091, testified that StarTran employees are not public employees. They do not receive the same benefits as state employees, do not have the same paid holidays, contribute to a different 401(k) plan, and have no civil service job protection (Tr. 23-25, 31; *see also*, testimony of Kent McCulloch, Tr. 209).<sup>1</sup> The employment conditions of the members of ATU Local 1091 are governed by the collective bargaining agreement submitted as Complainant's Exhibit C-2. The agreement covers the employees' wages, benefits, and disciplinary and grievance procedures (Tr. 197; Exh. C-2). The agreement was negotiated by Mr. Wyatt and StarTran's board of directors, which at the time included: StarTran's president, Gerald Reaubichaux, Reaubichaux's secretary, StarTran's director of transportation, its manager of special transit, its labor relations coordinator, and its manager of maintenance (Tr. 27-28, 53). No one from Capital Metro was involved in negotiation of the collective bargaining agreement, though the agreement had to be approved by Capital Metro (Tr. 28).

Wyatt testified that Capital Metro controls the purse strings for StarTran, and that StarTran, therefore, generally follows recommendations made by Fred Gilliam, Capitol Metro's CEO (Tr. 56). Wyatt testified that he met with Gilliam and Capitol Metro's board of directors several times over the last three years to discuss personnel and collective bargaining issues (Tr. 57). According to Wyatt, when the union cannot reach an agreement with StarTran during negotiations, it will bring the issue to Gilliam and the Capitol Metro board before going public with the issue (Tr. 68-69, 71; *see also*, testimony of Kent McCulloch, Tr. 191). Wyatt maintained that ATU did not, however, negotiate with Capital Metro (Tr. 73).

William Kweder, a fixed route bus operator, testified that he receives his paycheck from StarTran and is supervised by a StarTran employee (Tr. 77, 79). Kweder testified that he can only be disciplined by his employer, StarTran (Tr. 78).

Mark Ostertag, Capital Metro's safety manager, testified that he develops and administers both Capital Metro and StarTran's safety program (Tr. 126, 149). Either Ostertag or a safety specialist with his

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<sup>1</sup> Capital Metro did, however, agree to sponsor StarTran's retirement plan when concerns arose that the plan was underfunded (Tr. 29, 59-62, 180).

department conducts new employee orientation for StarTran employees (Tr. 132). According to Ostertag, the orientation includes a 'safety component' (Tr. 132). Training addressing defensive driving skills and safe driving is conducted by the training department, as are quarterly 1 ½ hour safety training courses (Tr. 132). Capital Metro and StarTran's safety program covers hazardous materials, lockout/tagout of electrical equipment, entry into confined spaces and hazards associated with blood-borne pathogens (Tr. 134-35). Ostertag does not participate in the enforcement of the safety program, however (Tr. 146). StarTran is solely responsible for disciplining employees who violate safety rules (Tr. 146).

Kent McCulloch, StarTran's president and manager of labor relations, testified that he was originally hired by StarTran's president, Gerald Reaubichaux, but that his current boss is Fred Gilliam, CEO of Capital Metro (Tr. 156-57). McCulloch stated that he is an at-will employee, whose continued employment and pay depend on evaluations made by Gilliam (Tr. 157). McCulloch testified that all the members of StarTran's board of directors are appointed by Gilliam, based on their job titles, and may be removed at the will of Capital Metro's CEO (Tr. 174, 181-82). McCulloch stated that StarTran's administrative and managerial personnel are, in essence, employees of Capital Metro, although their paychecks are paid out of StarTran's budget (Tr. 182-83). McCulloch further testified that the services provided by Capital Metro are not merely ministerial, as specified in its written agreement with StarTran (Tr. 167-68, 213). In addition to safety training, Capital Metro provides accounting, purchasing, and personnel services for StarTran. According to McCulloch, the provision of these services requires the exercise of judgment and discretion. Capital Metro formulates policy in these areas; those policies are reviewed and approved by Capital Metro management (Tr. 166-67, 210-11).

In the area of labor relations, however, McCulloch deals with the day-to-day administration of the labor contract (Tr. 191). McCulloch has the authority to dispose of employee questions or complaints; Capital Metro would not be involved in the regular conduct of business (Tr. 192-93). Grievances and the arbitration of same are handled by representatives of StarTran (Tr. 197, 208; Exh. C-2).

Dan Peabody, StarTran's current director of transportation for fixed route services, testified that Capital Metro's CEO, Gilliam, is his boss (Tr. 230). In addition to his duties with StarTran, Peabody supervises Capital Metro employees in the Purchased Transportation Division, including employees of the Van Pool Division (Tr. 222). Peabody also oversees Capital Metro's private contracts with ATC Van Com and Greater Austin Transportation Company, which provide a shuttle service and a fixed-route van service, respectively (Tr. 222). Peabody testified that Capital Metro's relationship with private, third parties who contract with them differs from Capital Metro's relationship with StarTran (Tr. 223). According to Peabody, he deals with Capital Metro's CEO on a daily basis in regard to the day-to-day operation of the

fixed route services provided by StarTran (Tr. 225, 232-33), whereas Gilliam's involvement with the private contractors is more limited (Tr. 226). Third-party providers are required to meet performance standards, or to pay liquidated damages unlike StarTran (Tr. 224).

### Discussion

In order to determine whether StarTran is administered by individuals who are controlled by and are responsible to public officials, this judge must consider the factors set forth under 29 C.F.R. § 1975.5(c), as set forth in subparagraph (b), which is cited in its entirety above.

It is undisputed that Capital Metro is a governmental entity, and that the majority of *its* board is responsible to the general electorate. It is also undisputed that StarTran is a non-profit corporation entirely funded by Capital Metro. The Secretary correctly points out that, because StarTran and its employee unions participate in collective bargaining, StarTran's employees are not treated like, or regarded as employees of other State and/or political subdivisions. The only fact in dispute here is whether the individuals who actually administer StarTran are controlled by public officials. Respondent maintains that StarTran's operations are, in fact, administered by Capital Metro, which controls StarTran's purse strings, and therefore, ultimately, its operations. The Secretary argues that StarTran independently exercises real day-to-day control over its employees, and over the terms and conditions of their employment, through its administration of its collective bargaining agreement with the unions to which its employees belong.

The only employee testifying, William Kweder, stated that he is supervised by StarTran employees, is paid by StarTran, and can only be disciplined by StarTran. Kent McCulloch, StarTran's manager of labor relations, though believing that Capital Metro's involvement in StarTran's accounting, purchasing, safety and human resources was more than ministerial, testified that the day-to-day administration of the labor agreement under which StarTran employees work remains within StarTran, whose board is not directly responsible to the general electorate. The StarTran managerial employees testifying, McCulloch, and Peabody, testified that they are at-will employees, appointed, evaluated and retained at the discretion of Fred Gilliam, Capital Metro's CEO. They reported to Gilliam, and considered him their boss. There is no evidence in the record which suggests that Gilliam had any authority to ask StarTran management to depart from the terms of the collective bargaining agreement in matters concerning the terms and conditions of StarTran employees' employment. Although StarTran's board may report to Capital Metro's CEO, it does not follow that Capital Metro administers Respondent StarTran's operations. StarTran's sole asset is its employees (Tr. 208); the terms and conditions of its employees' relationship with StarTran is governed by the collective bargaining agreement negotiated between StarTran and the employee unions.

This judge concludes, therefore, that the individuals administering the entity in question, StarTran, are ultimately controlled by the collective bargaining agreement, and not by the Capital Metro board.

Finally, in evaluating these factors, due regard must be given to the occupational safety and health program in effect at StarTran to protect its employees. In *Brock v. Chicago Zoological Soc.*, 820 F.2d 909 (7<sup>th</sup> Cir. 1987), the Seventh Circuit noted that the Act's political subdivision exemption represents an accommodation between the Act's general purpose of ensuring a safe workplace and the states' interest in preserving autonomy in their role as employers. The Court found that the Act's immediate concern was with the employment relationship, especially in matters involving the employees' safety and health. The Court held that the most important factors for consideration in finding the exemption under the Act, therefore, were those dealing with the determination of the terms and conditions of employment. Section 1927.5(c) itself requires that due regard be given to the entity's safety and health program when evaluating any and all of the other listed factors. The record establishes that Capital Metro provided StarTran with its safety program, and also provided safety training to StarTran employees. However, Capital Metro's safety manager, however, did not actually administer or enforce the safety program, as disciplining StarTran's employees lay outside of his area of authority. In this case, though Capital Metro provided StarTran's safety program, that program was administered by StarTran supervisory personnel. Capital Metro provided no oversight of StarTran's enforcement of the plan. It is clear that it was outside Capital Metro's authority to interfere with StarTran's disciplinary procedures in any area, including the area of safety and health. Under Article II of Amendment I to Capital Metro's agreement with StarTran, StarTran is responsible for the safety and health of its employees.

The record shows that the day-to-day working conditions of its employees, including the safety and health program in place at the work site, is administered by StarTran's board of directors. StarTran's board of directors is responsible for the negotiation and enforcement of the collective bargaining agreement, and answers only indirectly to either public officials or to the general electorate. I find that StarTran is not a governmental entity, and that its workplace is covered by the strictures of the Act.

There being no other issue in this matter, the citation is affirmed.

#### **ORDER**

1. Citation 1, item 1, alleging violation of 29 C.F.R. §1904.40 is AFFIRMED, and a penalty of \$500.00 is ASSESSED.

/s/  
Benjamin R. Loye  
Judge, OSHRC

Dated: July 23, 2003