



**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,

AMALGAMATED TRANSIT UNION, LOCAL  
1091,

Authorized Employee  
Representative.

OSHRC Docket No. 02-1140

**APPEARANCES:**

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U.S. Department of Labor  
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For the Complainant

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For the Employer

Dr. William J. Kweder, Union Secretary  
Amalgamated Transit Union, Local 1091  
P.O. Box 6020  
Austin, Texas 78762  
Authorized Employee Representative

BEFORE: Irving Sommer  
Chief Judge

**DECISION ON REMAND**

\_\_\_\_\_ This matter has been remanded to me by the Commission pursuant to a remand to the Commission from the United States Court of Appeals for the Fifth Circuit. *StarTran, Inc. v. OSHRC*, No. 06-61032 (August 11, 2008)(unpublished).

Respondent, StarTran, Inc., is a non-profit corporation that provides bus transportation services for the City of Austin, Texas. It was created by Capital Metropolitan (“Capital Metro”), a governmental transit entity established under Texas law, to harmonize federal law requiring Capital Metro to continue collective bargaining as a condition to receiving federal funding, *see* Fed. Transit Act, 49 U.S.C. §5300 *et seq.*, with Texas law which prohibits state entities from engaging in collective bargaining, *see* Tex. Code Ann. §617.003 (Vernon 2004).

StarTran was issued an other than serious citation for violating 29 C.F.R. §1904.40 for failure to provide records kept under Part 1904, within four hours of a request, to an authorized government representative. A penalty of \$500 was proposed for the violation. The sole issue before the Commission is whether StarTran, Inc. 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. §651 *et seq.* (“the Act”), or a political subdivision of the State of Texas and, therefore, exempt from coverage under the Act. Administrative Law Judge Benjamin Loye<sup>1</sup> found that StarTran was an employer under the Act, and not a political subdivision of the State of Texas. On review, the Commission, by a 2-1 vote, affirmed Judge Loye’s decision. The Fifth Circuit remanded the case to the Commission to reconsider the matter in light of all the evidence of record.

In his decision, Judge Loye held that although Capital Metro had the authority to both appoint and remove members of StarTran’s board of directors, StarTran was not a political subdivision of the State of Texas. Critical to Judge Loye’s finding was evidence establishing that, although Capital Metro provided StarTran’s safety program, that program was administered by StarTran personnel. Judge Loye noted that under Article II of Amendment I to Capital Metro’s agreement with StarTran, StarTran was responsible for the safety and health of its employees. He found that Capital Metro provided no oversight of StarTran’s enforcement of the safety plan and that it was outside of Capital Metro’s authority to interfere with StarTran’s disciplinary procedures in any area, including safety and health.

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<sup>1</sup>Judge Loye is currently on extended leave from the Commission.

Affirming the Judge, the Commission found that, because StarTran failed to introduce its bylaws into evidence which could establish that the members of StarTran's board could be removed by Capital Metro, it could not determine if StarTran's board was subject to the external control of Capital Metro. The Commission stated that if StarTran introduced such evidence, it might 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 Brock v. Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7<sup>th</sup> Cir. 1987). However, the Commission also found it to be of considerable significance that StarTran was responsible on a day-to-day basis for the safety and health of its employees, and that StarTran was created by Capital Metro to harmonize federal law requiring Capital Metro to continue collective bargaining with Texas law that prohibits governmental entities from entering collective bargaining agreements. The Commission observed that StarTran was asking the Commission to ignore the private status it claims with respect to the State of Texas and the NLRA and instead find that, for purposes of the OSH Act alone, it is a political subdivision exempt from OSHA coverage.

On appeal, the Fifth Circuit affirmed the Commission's holding that the burden was on StarTran to establish that it is exempt from the Act as a political subdivision. However, the court also found that, contrary to the Commission's finding, the evidence was undisputed that Capital Metro had the authority to remove members of StarTran's board. Noting that the Commission suggested that it might have reached a different conclusion if it had acknowledged evidence regarding control of StarTran's board, the court remanded the matter to the Commission to reconsider the matter in light StarTran's corporate structure as reflected by the undisputed and unchallenged evidence. However, the court noted that the Commission and the Secretary have different interpretations of 29 C.F.R. §1975.5<sup>2</sup> in that the Secretary does not appear to find the

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<sup>2</sup>This regulation sets forth the criteria to be considered when determining whether an employer qualifies as a political subdivision of a state. Section 1975.5(b) provides two "tests" for determining whether an entity qualifies as a political subdivision. Under the tests, an entity is a "State or political subdivision thereof" if it has been (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."

Commission's public-control factor significant or determinative. Rather, the Secretary looks more to the factors set forth in section 1975.5(c) than the actual test set forth in §1975.5(b) and emphasizes an entities day-to-day control of its employees instead of public control of the entities board of directors.

Remanding this matter to the Commission, the court directed that, pursuant to *Martin v. OSHRC* (“*CF&I*”), 111 S.Ct. 1171, 1176 (1991), the Commission defer to the Secretary's interpretation of 29 C.F.R. §1975.5, to the extent reasonable, when making its decision regarding whether, after considering all the evidence, the record reflects that StarTran is a political subdivision of Texas. The Commission, in turn, remanded the case to the Chief Judge to reconsider the case in light of the direction of the Fifth Circuit.

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Under §1975.5(c) the regulation goes on to provide “factors for meeting the tests,” stating:

Various factors will be taken into consideration in determining whether an entity meets the test discussed above. Some examples of these factors are: 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 instrumentality like the power of eminent domain? 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?

Finally, at §1975.5(d), the regulation provides that:

The above list of factors is not exhaustive and no factor, isolated from the particular facts of a case, is assigned any particular weight for the purpose of a determination by the Secretary of Labor as to whether a given entity is a “State or political subdivision of a State” and, as such, not subject to the Act as an “employer” Each case must be viewed on its merits; and whether a single factor will be decisive, or whether the factors must be viewed in their relationship to each other as part of a sum total, also depends on the merits of each case.

The Commission recognized that Capital Metro had the authority to appoint StarTran's board members. That the evidence also establishes that that Capital Metro could remove StarTran board members suggests that StarTran's board is subject to the external control of public officials. In its decision, the Commission cited *NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174 (4<sup>th</sup> Cir. 1991) to suggest that such control could prove decisive in determining whether the entity in question is a political subdivision. While the *Princeton* court found the status of the hospital's board to be significant, it also found a critical factor to be that "the day to day administration of the Center is now directly tied to the City..." 939 F.2d at 179<sup>3</sup> This is consistent with the Secretary's interpretation of 29 C.F.R. §1975.5 which places a heavier emphasis on the day to day control of StarTran's employees rather than who controls the company's board of directors<sup>4</sup>.

Here, the evidence demonstrates that Capital Metro does not control the day-to-day administration of StarTran. For example, Article II of Amendment I to the agreement between StarTran and Capital Metro places the responsibility for safety and other training on StarTran; and Article III of Amendment I 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) (emphasis added) Kent McCulloch, StarTran's president and manager of labor relations was hired by StarTran, and his current boss is the CEO of Capital Metro, who has the power to fire him at will. (Tr. 157) McCulloch testified that the services provided by Capital Metro were more than

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<sup>3</sup>I would also note that, in *Princeton*, the Center was arguing that it was a political subdivision and, therefore, exempt from the jurisdiction of the NLRB. Here, in contrast, StarTran was created for the specific purpose of falling under the jurisdiction of the Board by not being a political subdivision.

<sup>4</sup>The Commission also cited *Jefferson County Community Center v. N.L.R.B.*, 732 F.2d 122 (10<sup>th</sup> Cir. 1984) for the proposition that control of the company's board may be determinative of whether a company is a political subdivision. In *Jefferson*, however, the court found that the Center was not a political subdivision because the government did not control its board. Having so found, the court noted that other factors that are attributes of a political subdivision (ie. power of taxation, subpoena, and eminent domain) that the Center lacked supported its conclusion that the Center was not a political subdivision.

ministerial. He testified that, Capital Metro provided safety training, accounting, purchasing and personnel services for StarTran. (Tr. 166-67, 210-11) McCulloch further testified, however, that in the area of labor relations, he deals with the day-to-day administration of the labor contract and has the authority to dispose of employee questions or complaints. (Tr. 191-193) Capital Metro would not be involved in the regular conduct of business. (Tr. 192-93).

The disciplining of employees for safety violations is an essential part of an effective safety program. *Propellex Corp.*, 18 BNA OSHC 1677, 1682-83 (No. 96-0265, 1999) Although Mark Ostertag, Capital Metro's safety manager, developed both the StarTran and Capital Metro safety program, Ostertag does not participate in the discipline of StarTran employees for safety violations. (JD at 5). Moreover, William Kweder, a StarTran employee, testified that he is paid and supervised by StarTran and that only StarTran has the authority to discipline him. (Tr. 78-80) Kweder also testified that if he had any safety or health concerns, he would raise them with his immediate supervisor at StarTran (Tr. 79) That Capital Metro might ultimately have the authority to dismiss a member of StarTran's board or its president does not nullify the fact that it is StarTran that controls the day-to-day working conditions of its employees.

The collective bargaining agreement with the Amalgamated Transit Union, Local 1091, which exists because StarTran was created specifically to engage in collective bargaining, specifically states that "The Employer [StarTran] shall use its best efforts to provide employees with a safe and healthy work environment." (Ex. R-10, Article 15A) The agreement goes on to outline StarTran's responsibilities, including the provision of all protective devices, requiring the employee attendance to safety meetings, and discipline. Similarly, its agreement with the IUE-CWA, Local 1129, places the responsibility for employee safety squarely on StarTran. (Ex. R-11, Article 11A) Also, the union or an employee may file grievances about violations of the safety provisions of the collective bargaining agreement. (Tr. 196)

StarTran argues that the responsibility for employee safety has shifted back and forth between itself and Capital Metro, and that it currently resides with Capital Metro. That StarTran may farm out its responsibility to Capital Metro does not alter the fact that, under its collective

bargaining agreements<sup>5</sup>, it is StarTran who bears the ultimate responsibility for employee safety. Moreover, StarTran's employees are private not public employees. As Judge Loye found, StarTran employees enjoy fewer paid holidays, contribute to a different 401(k) plan, do not have the same benefits as state employees, and have no civil service job protection.

StarTran highlights several other criteria which it asserts establishes that it should be considered a political subdivision of Texas. For example, StarTran points out that all its revenue comes from Capital Metro; that the Capital Metro name is written on the side of the buses operated by StarTran; that the fare structure for the buses operated by StarTran are set by Capital Metro; that Capital Metro and StarTran have the same address; and that Capital Metro provides StarTran with a wide array of business services. Yet, despite these factors, StarTran claims to be a nongovernmental entity for purposes of collective bargaining. None of these factors have any connection with either labor relations or occupational safety and health. If, despite these factors, StarTran can claim that it is a nongovernmental entity under the NLRB, but a governmental entity under the OSH Act, it should demonstrate some distinction particularly relevant to the occupational safety and health of its employees. This, StarTran has failed to do.

Finally, StarTran argues that it could be a nonpolitical entity for purposes of NLRB jurisdiction, yet qualify as a political subdivision for purposes of OSHA, even though both the NLRB and OSHA utilize essentially the same criteria when determining the issue. It asks the Commission to conclude that an entity can pick and chose when it wants to be considered a political subdivision of a State, exempt from some federal regulations, and when it wants to be considered a private entity subject to other federal regulations. However, as the *Princeton* case makes clear, control of the board of directors by public officials together with an assessment of the day to day administration of the entity are the critical factors to consider. I find it relevant that control of StarTran's board of directors is the same when considering whether it is a political subdivision for purposes of either the OSH Act or the NLRA, and that StarTran was designed specifically not to be a political subdivision for purposes of the NLRA. Moreover, those factors that relate to the day-to-day control of employees, including employee safety and health

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<sup>5</sup>I note that if StarTran were a political subdivision of Texas, these agreements would be illegal under Texas law.

demonstrate that such controls lies almost exclusively with StarTran. Therefore, for purposes of the Act, StarTran is not a political subdivision of the State of Texas.

Accordingly, on remand, I find that Judge Loye properly weighed all relevant evidence in light of the Secretary's interpretation of 29 C.F.R. §1975.5 to which this Commission must defer and that, based on this evidence, StarTran failed to establish that it was a political subdivision of the State of Texas for the purposes of the Act. That being the only issue before the Commission, the citation for violation of 29 C.F.R. §1904.40 is AFFIRMED and a penalty of \$500 is assessed.

**SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
Irving Sommer  
Chief Judge, OSHRC

Dated: December 29, 2008  
Washington, DC.