

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 90-018

In the Matter of
Amalgamated Transit Union, Local No. 738,
Employee Organization,
and
City of Hamilton
and Transit Management of Hamilton/ATE,
Employer.

CASE NUMBER: 88-REP-10-0222

CERTIFICATION PURSUANT TO REQUEST FOR RECOGNITION
(Opinions attached.)

Before Chairman Sheehan and Board Member Latané: May 3, 1990.

On October 18, 1988, the Amalgamated Transit Union, Local 738 (Employee Organization) filed a request for recognition seeking to represent certain employees of the City of Hamilton and Transit Management of Hamilton/ATE (Employer). The Board directed the case to hearing.

The Board has reviewed the record, the hearing officer's recommended determination, exceptions and response. The Board amends Conclusion of Law No. 3 to read: "The City of Hamilton is the employer of the bus drivers and mechanics at issue."; amends Conclusion of Law No. 4 to read: "The request for recognition as filed is valid."; deletes Conclusion of Law No. 6; amends Conclusion of Law No. 7 to read: "The employees at issue are public employees within the meaning of O.R.C. §4117.01(C)."; amends Recommendation No. 2 to read: "The Board certifies the Amalgamated Transit Union, Local No. 738 as the exclusive representative for all employees in the bargaining unit."

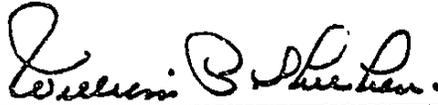
The Board adopts the hearing officer's Stipulations, Findings of Fact, the Conclusions of Law as amended and the Recommendations as amended and certifies the employee organization as the exclusive representative of all employees in the following appropriate unit:

Included: Bus drivers and mechanics.

Excluded: Supervisors, office and clerical employees.

It is so directed.

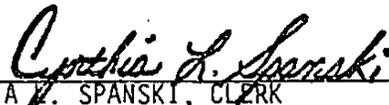
SHEEHAN, Chairman, and LATANE, Board Member, concur.



WILLIAM P. SHEEHAN, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas Court within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 12TH day of October, 1990.



CYNTHIA J. SPANSKI, CLERK

0510B:j1b

21

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Amalgamated Transit Union, Local No. 738,
Employee Organization,

v.

City of Hamilton
and Transit Management of Hamilton/ATE,
Employer.

CASE NUMBER: 88-REP-10-0222

OPINION

Latané, Board Member:

I.

This case involves an employee organization, Amalgamated Transit Union, Local 738 (Union), which filed a Request for Recognition with the State Employment Relations Board seeking representation of approximately twenty-three bus drivers and mechanics. The request named the City of Hamilton (City) as the employer. The City objected to being named as such, pointing out that it had contracted out management of its mass transit service to ATE Management and Service Company, Inc. (ATE). In turn, ATE, pursuant to the management agreement with the City, assigned its duties to a subsidiary corporation, Transit Management of Hamilton, Inc. (TMH). The City contends that the bus drivers and mechanics in question are employees of TMH.

On June 22, 1989, the Board directed this matter to hearing for determination of all relevant issues. This case was assigned to a Board Hearing Officer. On August 31, 1989, TMH filed a Motion to Intervene on the grounds that it was the employer of the bus drivers and mechanics. The Hearing Officer granted this motion and an evidentiary hearing was conducted on October 4, 1989.

II.

The issue in this case is:

Whether the City of Hamilton is the public employer of the bus drivers and mechanics employed in the public transit system, thus giving SERB jurisdiction to entertain the request for recognition.

III.

The City of Hamilton has historically entered into management contracts with various corporations to operate the City's public transit system. In late 1987, the City awarded a management contract to ATE. ATE assigned certain rights and obligations under the management contract to TMH, which currently operates the system. A general manager, Mr. David Braun, hired by ATE, but serving with the approval of the City, is responsible for the day to day operation of the transit system.¹

The City receives federal and state funds for the operation of the transit system.² The City owns all the buses used in its operation and designates the bus routes. The City leases a garage from a private entity and makes it available to TMH for housing the buses and the TMH office.³ The City determines the amount of fare to be charged customers, and the fare box monies are deposited directly into a City revenue account.⁴ The City has no direct contact with the bus drivers or mechanics, however, the general manager does maintain informal daily contact with a City representative.⁵ Mr. Braun is responsible for managing personnel matters on a daily basis and assigning the drivers to the routes.⁶ With the help of an independent bookkeeper, Mr. Braun also regulates the daily financial operation of TMH.⁷

The management agreement between ATE and the City provides, among other things, that if the agreement expires or is terminated, the City will become the employer of the transit system employees, and that the City will assume responsibility for the payment and performance of all obligations arising out of the employment relationship.⁸

In determining whether the private entity (TMH) or the public entity (City of Hamilton) was the correct employer, the Hearing Officer applied the common law right of control test. That test states that:

¹Finding of Fact (F.F.) 1.

²F.F. 3.

³Stipulation 17 and F.F. 7.

⁴F.F. 5.

⁵F.F. 17 and 18.

⁶F.F. 11

⁷F.F. 14

⁸F.F. 25

If the recipient of the services in question has a right to control not only the end to be achieved but also the means to be used in reaching such result, an employer relationship exists as a matter of law; otherwise there exists an independent contractor relationship.⁹

Application of this test led the Hearing Officer to conclude that TMH is an independent contractor which employed the bus drivers and mechanics at issue.

The Board disagrees. In the instant case, the recipient of the services is the City of Hamilton and the management agreement between ATE/TMH and the City leaves little doubt that the latter not only has a right to control the end to be achieved but also the means to be used in reaching such. For the following reasons the application of the right of control test to the facts of this case lead this Board to the conclusion that TMH is an agent of the City, not an independent contractor.

TMH does not control the means of operating the transit system. The City owns, controls and sets policy for the transit system. The contract between ATE and the City specifically delineates operating expenses and states that such shall be an obligation of and paid by the City. The City owns all the buses used in providing the transit service, designates the bus routes and determines the amount of fare. The only role that TMH plays in operating the transit system is assigning drivers to their routes.

The City contracted out the day to day personnel operations of the transit system, but retained ultimate control over the employees through its authority over the manager. The Hearing Officer dismisses the fact that the general manager, who is responsible for this task, was selected with the approval of the City to provide daily management (which includes hiring, firing, supervising and disciplining the employees at issue) "for and on behalf of the City".¹⁰

The general manager serves only with the City's approval and carries out the policies of the transit system for and on behalf of the City. The Board cannot find that Mr. Braun is exercising the independent judgment required of an independent contractor, but instead finds that he serves primarily as an agent of the City, administering public funds and personnel for a public transit system.

TMH and ATU are parties to a labor agreement which covers the employees at issue and the City is not a signatory to that agreement. While it is true that the City did not sign the labor agreement, the Board cannot agree

⁹National Freight, Inc., 55 LRRM 1259, 1260 (1964).

¹⁰ATE and City of Hamilton Management Agreement, Section 5.

24

with the Hearing Officer that it had no involvement in it. Here again the argument can be made that while the City had no direct involvement, its interest was protected through the general manager in his capacity as the agent of the city.

As a factual matter, paychecks to the bus drivers and mechanics are drawn on a payroll account in TMH's name and signed by its general manager. Additionally, TMH makes deductions for union dues, federal, state and local taxes, and savings and IRA accounts.¹¹ The Board is not persuaded however, that these are indicia of independent contractor status.

While the city may play a less visible or more indirect role in establishing the wages of the bus drivers and mechanics, it is directly involved in the payment of such wages. Pursuant to the management agreement between ATE and the City, the latter is responsible for the payment of "operating expenses" for the transit system. The agreement specifically states that this term includes all wages and compensation of all personnel, (excluding the general manager who is paid by ATE), all payroll, social security, property and all other taxes pertaining to the operation of the transit system. The agreement states that operating expenses shall be an obligation of and paid by the City.¹² Additionally, the agreement states that:

... revenue derived from the operation of the transit system, whether from passengers or from other sources, shall be and remain from the initial receipt thereof, the absolute property of the City and the treatment of such revenue, including the banking thereof, and the accounting therefore, shall be as directed by the City.¹³

It is unnecessary to look any further than the four corners of the contract to conclude that the City, and not TMH, is responsible for the payment of the employees' wages and that the functions provided by TMH in carrying out such are only ministerial in nature. The conclusion that TMH is the employer in this case because it does the paperwork for deducting taxes and issues paychecks from an account bearing its name (one established with City revenue) is in parity with an argument that because a secretary or payroll clerk performs these same tasks, that person is thereby the employer.

The Hearing Officer found that even though the transit system's funds were primarily public, the City had no involvement in how the funds were

¹¹Hearing Officer's Recommended Determination, p. 12.

¹²Management Agreement, Section 9.

¹³Management Agreement, Section 12.

25

spent or apportioned, save ensuring that TMH did not exceed the level of grant money allocated for the transit system. For the following reasons the Board finds this determination in error.

Perusal of the management agreement between ATE and the City readily evinces that the City is directly involved in how transit system funds are spent and allocated. First of all, the contract calls for ATE to deposit all revenue to the accounts of the City from which the City furnishes ATE with funds to pay all the operating expenses. The month to month advance is equal to the estimated cash requirements for the succeeding month. The City, without cost to ATE, furnishes reasonable business expenses incurred by ATE, such as utilities, supplies, communication services, postage, etc.¹⁴

ATE is required, pursuant to contract, to keep and maintain the books and records reflecting the operation of the transit system in conformity with the requirements of the City and at the direction of the City. ATE must also render and certify to the City full and complete monthly or other operating reports and financial statements as the City requires.¹⁵ Lastly, ATE must permit an authorized representative of the City to inspect and audit all data records of ATE relating to its performance.¹⁶

The facts in this case clearly indicate that TMH lacks both the independence and decision making authority to carry out operation of the transit system on its own. TMH is a management business. It does not have its own resources (money, equipment or manpower) to run the transit system. Instead, for a fee, it performs essential managerial functions that are necessary for daily operation of the system. The City has the authority and resources to operate the transit system and TMH is obliged under the management agreement to adhere to the City's rules and regulations for doing so. The fact that the City, through an agreement, has delegated its management responsibilities to TMH does not in this case establish the latter as an independent contractor.

TMH is not the employer of the bus drivers and mechanics at issue here, but is instead an agent of the City of Hamilton.

Since the City of Hamilton is a public employer and is the employer of the employees in question, it is clearly in SERB's jurisdiction to entertain the request for voluntary recognition.

¹⁴ Management Agreement, Section 10.

¹⁵ Management Agreement, Section 12.

¹⁶ Management Agreement, Section 15.

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 90-018

In the Matter of
Amalgamated Transit Union, Local No. 738,
Employee Organization.

and

City of Hamilton
and Transit Management of Hamilton/ATE,
Employer.

CASE NUMBER: 88-REP-10-0222

OPINION

Sheehan, Chairman:

The question at issue in this case is "who is the employer of the bus drivers and mechanics employed in the public transit system of Hamilton?" Is it the City of Hamilton (City) or is it the Transit Management of Hamilton, Inc. (TMH), which is a private entity?

The Board finds that the Employer in question is the City of Hamilton.

The facts in this case show that the City is the Employer of the bus drivers and mechanics employed in the transit system of the City of Hamilton and that TMH is only a management agent paid to perform essential management services for the City by running the day-by-day operation of the transit system. TMH neither has its own money or equipment to run the transit system, nor the authority to set policy for the transit system. It is the City of Hamilton that owns all the buses used by the transit system, and it is the City of Hamilton that designates the bus routes and fixes the bus fares. Moreover, the general manager who manages the daily operation of the transit system and has the authority to hire, fire and generally to

supervise the employees in question, serves with the approval of the City and maintains daily contact with a City representative.

In short, TMH's function is not one of an employer but one of a supplier of management services.

Since the City of Hamilton is a "public employer" pursuant to O.R.C. §4117.01(B) and is the employer of the bus drivers and mechanics employed in the public transit system of the City, SERB has jurisdiction to entertain the request for recognition.

The Amalgamated Transit Union, Local 738, is certified as the exclusive representative for all employees in the bargaining unit.