

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: December 6, 2010

TO : Martha Kinard, Regional Director  
Region 16

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: StarTran, Inc.  
Case 16-CA-27472

177-1683-5000

The Region submitted this case for advice as to whether StarTran is an employer under Section 2(2) of the Act, or whether it is an exempt political subdivision, as recently found by the Fifth Circuit in an Occupational Safety and Health Act (OSHA) case.<sup>1</sup> We conclude that, on the current record, the Employer is not an exempt political subdivision because it is neither (1) created directly by the State, so as to constitute a governmental department or administrative arm, nor (2) administered by individuals who are responsible to public officials or the general electorate.

### **BACKGROUND**

StarTran, Inc. (the "Employer") is a Texas nonprofit that provides regional transit services in Austin, Texas under a contract with the Capital Metropolitan Transit Authority ("Capital Metro"). The Employer holds no other business relationships outside of its contract with Capital Metro. Capital Metro is a regional area public transit authority and is a political subdivision itself.<sup>2</sup> Capital Metro created the Employer by board resolution in 1991 pursuant to a state statute authorizing such action.<sup>3</sup> Prior

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<sup>1</sup> The merits of the underlying allegations of the charge are not before Advice.

<sup>2</sup> See Tex. Transp. Code Ann. § 451.052 (Vernon 2007) (establishing that a transit authority is a "public political entity"). In addition, Capital Metro's board is comprised entirely of public officials, which almost certainly would trigger treatment as a political subdivision under the NLRA as well.

<sup>3</sup> The Texas code as it existed in 1991 provided that, "[t]he [transit] authority may make contracts, leases and agreements with, and accept grants and loans from, the United States of America, its departments and agencies, the State of Texas, its agencies, counties, municipalities and political subdivisions, public or private corporations, including a nonprofit corporation created under a resolution of the board, and other persons, and may generally perform

to StarTran's creation, Capital Metro used private, unionized contractors to supply transit services, and it continues to use unaffiliated, private contractors for some services.

Capital Metro created the Employer in order to receive federal funding while still complying with a state law prohibition on bargaining for public employees. Local governments may receive federal funding when they acquire failing private operators and establish their own transit authorities to provide mass transit.<sup>4</sup> In order to qualify for such funding, however, the local government must take measures to ensure that collective-bargaining agreements covering transit employees continue to be honored, and the Department of Labor must certify those measures.<sup>5</sup> Since Texas law prohibits political subdivisions from engaging in collective bargaining,<sup>6</sup> Capital Metro needed to create an independent entity tasked with supplying transit services, supervising personnel, and bargaining with employees in order to comply with both federal funding requirements and state law. The services agreement between Capital Metro and the Employer tasks StarTran with those very responsibilities.

In several earlier cases, the parties have agreed that the Employer is subject to the Board's jurisdiction, and the Region has asserted jurisdiction. Neither the Employer nor the Amalgamated Transit Union, Local 1091 (the "Union") presently contests the Board's jurisdiction.

#### **LEGAL FRAMEWORK**

Section 2(2) of the Act provides that an employer "shall include . . . any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . ." Under the Board's test as described in NLRB v. Natural Gas Utility District of Hawkins County,<sup>7</sup> the political subdivision exemption applies only to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2)

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all acts necessary for the full exercise of the powers vested in it." Tex. Civ. Stat. Art. 1118x § 6(1) (Vernon 1991).

<sup>4</sup> See Jackson Transit Authority v. Amalgamated Transit Union Local 1285, 457 U.S. 15, 17 (1982).

<sup>5</sup> See id. at 17-18; 49 U.S.C. § 5333(b).

<sup>6</sup> Tex. Gov't Code Ann. § 617.002 (Vernon 2004).

<sup>7</sup> 402 U.S. 600, 604-05 (1971).

administered by individuals who are responsible to public officials or to the general electorate.

First Prong of Hawkins County

The key inquiries to determine if an entity is a political subdivision under the first prong of Hawkins County are whether the entity was empowered pursuant to a state-level authority and whether the purpose was to create an arm of government.

The requirement of state-level empowerment is satisfied when an entity is created by a special act of the state,<sup>8</sup> such as a legislative act, an act of a state-level department, or an act of the state supreme court.<sup>9</sup> It can also be satisfied where a local government entity creates the employer pursuant to a state enabling statute.<sup>10</sup>

In addition to the state-level creation inquiry, the Board scrutinizes the purpose of the creation. It inspects both the statutory language as well as extrinsic evidence to determine intent. Where a statute explicitly recognizes an entity as an instrument of the state, the Board has found the employer to be an exempt political subdivision.<sup>11</sup> Where the purpose of an entity's creation is to carry out the state's perceived statutory or constitutional obligation to provide services, the Board has also found the employer to be exempt.<sup>12</sup> Importantly, where a public entity is involved

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<sup>8</sup> See, e.g., State Bar of New Mexico, 346 NLRB 674, 678 (2006).

<sup>9</sup> See ibid. (special rules of state supreme court); University of Vermont, 297 NLRB 291, 295 (1989) (special legislative act); Northampton Center for Children & Families, 257 NLRB 870, 872 (1981) (state department of mental health).

<sup>10</sup> See, e.g., Hinds County Human Resource Agency, 331 NLRB 1404, 1406 (2000). But see Prairie Home Cemetery, 266 NLRB 678 (1983) (employer exempt where city created its board, apparently in the absence of any state enabling statute, but where administrator was considered a city "department head").

<sup>11</sup> See, e.g., University of Vermont, 297 NLRB at 291-92, 295 (statute labeled entity "an instrumentality of the state").

<sup>12</sup> See, e.g., New York Institute for the Education of the Blind, 254 NLRB 664, 666 (1981) (state legislature "consciously and specifically denominated the [employer] as its agent" in carrying out the statutory or constitutional mandate to provide residents with an education).

in creating an employer merely for the purpose of securing financial advantages, such as federal funding, typically those entities are not exempt political subdivisions.<sup>13</sup> Finally, where the creator is a local government entity rather than a state-level entity, the Board appears to require a strong showing of purpose, such as a statutory directive that the local government exert control over the created entity,<sup>14</sup> a statutory duty that the entity is required to carry out,<sup>15</sup> or statutory authorization for the local government to create and operate the entity itself.<sup>16</sup>

In addition to the key inquiries above, the Board also weighs a host of factors that reflect whether an entity exhibits a public character.<sup>17</sup> Typically these factors include:<sup>18</sup>

- whether government controls the employees and daily operations,<sup>19</sup>
- whether government controls the employer's labor relations,<sup>20</sup>

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<sup>13</sup> See, e.g., Truman Medical Center v. NLRB, 641 F.2d 570, 572 (8th Cir. 1981) (employer non-exempt where city transferred services from a city department to a city-created nonprofit in order to structure hospital services to secure federal funding and private grants).

<sup>14</sup> See Hinds County, 331 NLRB at 1406.

<sup>15</sup> See, e.g., Madison County Mental Health Center, 253 NLRB 258, 259 (1980).

<sup>16</sup> See Camden-Clark Memorial Hospital, 221 NLRB 945, 947 (1975).

<sup>17</sup> Some of these factors also inform whether the entity's purpose was to serve as an administrative arm of the government.

<sup>18</sup> Since the factors are essentially the same for both prongs of Hawkins County, we include references to cases from both lines of authority here.

<sup>19</sup> See, e.g., Research Foundation of the City Univ. of NY, 337 NLRB 965, 969-70 (2002) (employer's independent control over daily operations supports non-exempt status). But see State Bar, 346 NLRB at 679 (focus on who sets terms and conditions of work "misplaced").

<sup>20</sup> Compare, e.g., St. Paul Ramsey Medical Center, 291 NLRB 755, 757 (1988) (especially significant that state statute explicitly exempts entity employees from state labor relations law), with State Bar, 346 NLRB at 679 (citing authority standing for the proposition that government

- whether employee benefits and human resources policies are consistent with those of public employees,<sup>21</sup>
- whether the factors pointing to political subdivision status are shared by private entities performing the same kind of service,<sup>22</sup>
- whether the employer uses government-owned facilities and equipment,<sup>23</sup>
- the extent to which the employer receives public funding,<sup>24</sup>
- the degree of government oversight over the employer's budget and finances,<sup>25</sup>
- whether service prices are approved or prescribed by the government,<sup>26</sup> and
- whether the employer receives administrative services from the government such as purchasing and payroll.<sup>27</sup>

These factors are balanced, and that balance is almost always used to simply bolster the outcome already suggested by the key inquiries.

#### Second Prong of Hawkins County

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control over labor relations not necessary to find exemption under prong one of Hawkins County).

<sup>21</sup> Compare, e.g., St. Paul Ramsey, 291 NLRB at 757 (especially significant that statute explicitly excluded entity from state retirement plan), with State Bar, 346 NLRB at 675 (employer found to be political subdivision even though treated as private entity for retirement benefits).

<sup>22</sup> See Concordia Electric Cooperative, 315 NLRB 752, 756 (1994) (when factors pointing to political subdivision status are shared by private entities, these factors "tend to negate" finding exemption).

<sup>23</sup> See, e.g., Northampton Center, 257 NLRB at 872.

<sup>24</sup> Compare, e.g., Hinds County, 331 NLRB at 1406 (employer exempt, in part, because it receives virtually all of its funding from governmental sources), with State Bar, 346 NLRB at 674 (employer exempt even though most of revenue is not from state).

<sup>25</sup> See, e.g., State Bar, 346 NLRB at 675, 678 (submission of financial records and audit); Hinds County, 331 NLRB at 1406 (use of funding controlled by government contract).

<sup>26</sup> See, e.g., University of Vermont, 297 NLRB at 292, 295.

<sup>27</sup> See, e.g., Cape Girardeau Care Center, 278 NLRB 1018, 1019 n.5 (1986).

The key inquiry to determine if an entity is administered by individuals responsible to public officials is whether those individuals have "direct personal accountability" to public officials.<sup>28</sup> Accountability is usually established by showing that members of the board of directors, or other administrators, are appointed by and subject to removal by public officials.<sup>29</sup> In order to show public control over the board, a majority of directors must be responsible to public officials.<sup>30</sup> While the Board usually assesses both appointment and removal, appointment alone can be sufficient to demonstrate control.<sup>31</sup> But where public control over the board's appointment or removal is not mandated by law, but rather is voluntarily established by the entity itself in its by-laws or other corporate documents, such public control has been insufficient to satisfy an exemption under the second prong of Hawkins County.<sup>32</sup> The rationale behind this distinction is that ultimate control rests in the hands of the employer, not the government, because the employer can change the procedures

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<sup>28</sup> Cape Girardeau, 278 NLRB at 1019.

<sup>29</sup> See, e.g., Research Foundation, 337 NLRB at 969. But see Rosenberg Library Assn., 269 NLRB 1173 (1984) (finding political subdivision under prong two without analyzing appointment and removal, but where the board of directors doubled as the county library board and the CEO doubled as the city and county librarian).

<sup>30</sup> See, e.g., FiveCAP, 331 NLRB 1165, 1165 (2000), enf'd in rel. part sub nom. FiveCAP, Inc. v. NLRB, 294 F.3d 768 (6th Cir. 2002).

<sup>31</sup> See Economic Security Corp., 299 NLRB 562, 565 (1990), overruled on other grounds, Enrichment Services Program, Inc., 325 NLRB 818 (1998) (public control over removal unnecessary if appointment is so controlled; removal is a factor, but not a "critical factor"); University of Vermont, 297 NLRB at 295, n.23 (exemption can be found even if evidence of removal is inconclusive or absent).

<sup>32</sup> See, e.g., Research Foundation, 337 NLRB at 969. See also Jefferson County Community Center v. NLRB, 732 F.2d 122, 125 n.3 (10th Cir. 1984), overruled on other grounds, Aramark Corp. v. NLRB, 179 F.3d 872 (10th Cir. 1999); Crestline Memorial Hospital Assn. v. NLRB, 668 F.2d 243, 245 (6th Cir. 1982). But see NLRB v. Princeton Health Care Center, 939 F.2d 174, 178 (4th Cir. 1991) (rejecting the "distinction between responsibility imposed externally by force of law and responsibility that may arise due to internal decision").

for selection and removal.<sup>33</sup> Finally, in addition to scrutinizing the board's accountability, the Board weighs the same multitude of factors indicating public character as it does under the first prong of Hawkins County. Again, these factors are balanced, and that balance is typically used to bolster the outcome already suggested by the accountability inquiry.

### **ANALYSIS**

We conclude that the Employer is not a political subdivision exempt from the Board's jurisdiction under Section 2(2) of the Act. The Employer was not created by a governmental entity for the purpose of establishing an arm of the government. Nor is it administered by individuals who are responsible to public officials or the general electorate. Rather, Capital Metro no longer controls StarTran's board of directors for purposes of removal or future appointments, and in any event, its influence is not mandated by law.

#### First Prong of *Hawkins County*

Since Capital Metro's intent was to create an independent entity in order to comply with state and federal laws, we find that its purpose in creating StarTran was not to establish an arm of the government. Because the Employer was not created by a state-level branch of government, but rather by a political subdivision pursuant to a generic state enabling statute, the purpose for which it was created is especially critical. Here there is no statutory language suggesting an intent to create an arm of government. The state statute does not instruct transit authorities to exert control over entities they create. Nor does it appear that transit services are statutorily or constitutionally mandated. Instead, StarTran was created to be an independent entity. The services agreement between Capital Metro and the Employer deems StarTran an "independent corporate entity." Although the agreement was amended in 1998 so that StarTran's independence is nominally limited to collective bargaining, the original purpose was to create an independent entity. Moreover, Capital Metro's objective of continuing federal funding depended on the premise that StarTran's employees would not be public employees under Texas law. Thus, StarTran fails to satisfy the key inquiries under the first prong of Hawkins County because it was not created to be an arm of the government.

Furthermore, in examining the other factors under the first prong, StarTran exhibits a private character more than a public character in two important respects.

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<sup>33</sup> See Jefferson County, 732 F.2d at 125 n.3.

First, StarTran controls the day-to-day supervision of operations and employees. The services agreement states that "absolute and real day-to-day control over all matters relating to terms and conditions of employment, supervision, and control of its employees" lies with the Employer and that any assistance from Capital Metro in these areas shall be "ministerial only." There is no evidence that StarTran and Capital Metro are not abiding by this term in their contract. The fact that Capital Metro retains control over high-level operations policies, such as routes, service, and fares, is not surprising since services are provided by multiple contractors and Capital Metro must provide cohesive transit services. Further, the fact that Capital Metro may discipline employees for discrimination-related complaints does not lead to a contrary result since, overall, day-to-day control rests in the hands of StarTran. Thus, this factor suggests a private character.

Second, StarTran largely controls labor relations. Importantly, StarTran has primary and ultimate authority over contract negotiations, not Capital Metro. Capital Metro no longer approves collective-bargaining agreements and never withheld such approval even when it was required. Even though StarTran provided Capital Metro with negotiation updates and consulted with Capital Metro's human resources department during the most recent negotiations in 2007 and 2008, StarTran was clearly in charge of decision-making. The general manager was not bound by Capital Metro's suggestions, and consultations were for information-gathering purposes only. While the Union sometimes bypassed StarTran and sought resolution of certain bargaining issues from Capital Metro, the Union only discussed issues with Capital Metro when StarTran lacked authority to make changes, such as with routes and schedules, or when the Union did so to put pressure on StarTran before going public with an issue. Thus, the fact that the Union may have bypassed StarTran on discrete issues does not detract from StarTran's control of labor relations.

As to benefits, StarTran's employees are sometimes treated like private employees and sometimes like public employees. Importantly, StarTran employees did not have access to a public retirement plan when StarTran was originally created. Capital Metro only accepted responsibility for the Employer's pension plan in 2002 because it was seriously underfunded. But StarTran employees—unlike employees of Capital Metro's other contractors—receive health insurance under a municipal risk pool through Capital Metro, although it is unclear whether employees actually have access to the same insurance plans as public employees. Thus, StarTran's treatment of employees for purposes of fringe benefits does not strongly suggest public subdivision status.

While we recognize that several key factors point toward political subdivision status, they are outweighed by the factors discussed above combined with Capital Metro's deliberate attempt to create an independent entity. Although Capital Metro wholly finances StarTran's operating expenses, the Board has stated that "the receipt of funds and assistance from exempt government entities does not necessarily cause an employer to become a political subdivision of the government."<sup>34</sup> Indeed, any contractor that exclusively does business with a government entity will necessarily be sustained by public funding. The fact that Capital Metro provides assets in the form of office space and transit equipment to StarTran also does not detract from its private nature because Capital Metro supplies these same assets to its other private contractors. The fact that Capital Metro provides fiscal, purchasing, and human resources services more likely reflects efficiency concerns than any desire to control StarTran. And while Capital Metro reserves the right to inspect StarTran's books, conduct performance audits, and approve StarTran's expenses and budget under the services agreement, that is not atypical for publicly-funded entities and does not require a finding of public character.

Moreover, where the Board is convinced that the government intended to create private operations, the existence of significant factors pointing toward public subdivision status does not change the outcome. In St. Paul Ramsey Medical Center, the Board found that the "balance of the relevant statutory provisions" demonstrated no intent to create an arm of the government.<sup>35</sup> It found the employer to be non-exempt despite a number of key factors pointing toward the "opposite conclusion," such as that the employer was created by a special legislative act, was described as a "public corporation" in the statute, was classified as a public entity under various state statutes, and used the county attorney as its legal advisor.<sup>36</sup>

Accordingly, we conclude that the Employer is not a political subdivision under the first prong of Hawkins County.

#### Second Prong of Hawkins County

StarTran is also not a political subdivision under the second prong because it is not administered by individuals

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<sup>34</sup> Morristown-Hamblen Hospital Assn., 226 NLRB 76, 76 (1976).

<sup>35</sup> 291 NLRB at 757.

<sup>36</sup> Ibid.

responsible to public officials. One administrator is presently accountable to Capital Metro, and any influence Capital Metro has over that administrator is voluntary.

Capital Metro's influence over StarTran's administrators is limited. The board of directors, whose members also serve as executive officers, is responsible for daily operations and labor relations and thereby administers the entity. The board currently consists of four members who were selected by Capital Metro and a general manager who was selected by an independent committee, in consultation with Capital Metro.<sup>37</sup> Following structural changes in 2008, the four board members are now removable by StarTran, and vacancies will be filled by StarTran.<sup>38</sup> The general manager is now removable by StarTran's board. The four board members report to, and are evaluated by, the general manager, while the general manager reports to, and is evaluated by, Capital Metro. So Capital Metro retains moderate control over the general manager. But Capital Metro's control over the other four board members, in light of the structural changes, is lessened going forward.

Further supporting jurisdiction is the fact that Capital Metro's historical influence and any lingering influence over StarTran's board is voluntary. The enabling statute does not set forth any selection or removal scheme for an entity created by a transit authority. Any influence over the process by Capital Metro is therefore voluntary and can be changed by StarTran.

In St. Paul Ramsey Medical Center, the employer's initial board was appointed by a panel dominated by members who were selected by public officials.<sup>39</sup> However, future nominating panels were not dominated by public officials, and removal was not publicly controlled at all. The Board

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<sup>37</sup> The general manager recently resigned. We assume for purposes of this memo that the next general manager will also be selected by an independent committee.

<sup>38</sup> It is unclear whether StarTran's general manager or its entire board is responsible for these duties. A member of the board states that the general manager is responsible for terminating officers, but the by-laws state that the board as a whole is responsible. The general manager suggests that she would fill vacancies, pointing to the by-laws and other documents, but again the by-laws give this power to the entire board, and the other documents are silent on this issue. In any event, the investigation did not reflect any involvement by Capital Metro in the four board members' future appointment and removal.

<sup>39</sup> 291 NLRB at 758 n.17.

concluded that the employer was not exempt under the second prong of Hawkins County despite some public control over the board's initial appointment because there was no requirement that the board consist of public officials or be appointed by public officials.<sup>40</sup> These facts are very similar to StarTran's present situation, suggesting that it is not a political subdivision.

While a number of public character factors point to political subdivision status, as discussed under the first Hawkins County prong, we find these factors non-determinative. As discussed above, a significant number of factors point toward private entity status. Moreover, we find it significant that Capital Metro's influence over the board is both voluntary and diminished going forward.

We therefore conclude that the Employer is not a political subdivision under the second Hawkins County prong.

#### The Fifth Circuit's OSHA Decision Is Not Dispositive

Despite the similarity of the core tests under OSHA and the NLRA,<sup>41</sup> the Fifth Circuit's determination that StarTran was a political subdivision under OSHA is not dispositive.<sup>42</sup> First, the accountability of StarTran's board of directors has changed considerably since the record closed in the OSHA case. At that time, the Employer's entire board was appointed and removable by Capital Metro, reported to Capital Metro's CEO, and regarded him as their "boss."<sup>43</sup> As discussed above, the majority of the board is now removable without any involvement by Capital Metro, the board no longer reports to Capital Metro, and future vacancies can be filled without Capital Metro input. These changes significantly reduce Capital Metro's influence over StarTran's board. Second, the court did not consider the voluntary nature of Capital Metro's historical control over the board as required under Board law because this was not a relevant factor under the OSHA standards.<sup>44</sup> Thus, the Fifth Circuit's decision does not necessitate finding that StarTran is a political subdivision under the NLRA.

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<sup>40</sup> Id. at 758.

<sup>41</sup> See 29 C.F.R. § 1975.5(b) (setting forth the Department of Labor's test).

<sup>42</sup> See StarTran, Inc. v. Occupational Safety & Health Review Commission, 608 F.3d 312 (5th Cir. 2010).

<sup>43</sup> Id. at 321.

<sup>44</sup> See 29 C.F.R. § 1975.5(c) (listing factors guiding application of the OSHA test).

**CONCLUSION**

Accordingly, we conclude that the Board has jurisdiction over, and can remedy unfair labor practices by, the Employer.

B.J.K.