



**Board of Labor Relations**

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June 13, 2013

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**RE: Newtown Board of Education  
-and-  
Newtown Owner/Operators**

**Case No. MPP-29,243  
Decision No. 4668**

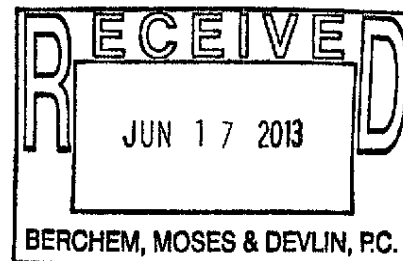
Dear Counsel:

Enclosed please find the **Decision and Dismissal of Complaint** rendered by the Connecticut State Board of Labor Relations in the above-captioned matter.

Sincerely,

  
Harry B. Elliott, Jr.  
General Counsel

HBE:kb  
Enclosure



STATE OF CONNECTICUT  
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

NEWTOWN BOARD OF EDUCATION

DECISION NO. 4668

-AND-

June 13, 2013

NEWTOWN OWNER/OPERATORS

Case No. MPP-29,243

A P P E A R A N C E S:

Attorney Floyd J. Dugas  
for the School Board

Attorney Henry F. Murray  
for the Newton Owner/Operators

**DECISION AND DISMISSAL OF COMPLAINT**

On June 9, 2011 an entity describing itself as Newtown Owner/Operators (the Complainant) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Newtown Board of Education (the School Board) had committed practices prohibited by the Municipal Employee Relations Act (MERA or the Act) when it failed to bargain over its decision to subcontract school bus driving work.

After the requisite preliminary steps had been taken, the parties entered into a partial stipulation of facts and exhibits and the matter came before the Labor Board for hearings on December 29, 2011, March 3, 2012, March 30, 2012, and May 9, 2012. Both parties appeared, were represented and were allowed to introduce evidence, examine and cross-examine witnesses and make argument. Both parties filed post-hearing briefs which were received on July 20, 2012. Based on the entire record before us, we make the following findings of fact and conclusions of law and we dismiss the complaint.

## FINDINGS OF FACT

1. The School Board is an employer within the meaning of the Act.
2. Petitioner is an association of natural persons (Owner/Operators) that, either individually or through limited liability companies, own or operate school buses used to transport students enrolled in schools operated by the School Board.
3. For approximately seventy-five years the School Board has provided home-to-school<sup>1</sup> student transportation by entering into contracts with Owner/Operators, the terms of which are largely<sup>2</sup> identical. The duration of the contracts are typically five years and the terms are negotiated in the form of a “master contract” by School Board representatives and a Contract Committee<sup>3</sup> consisting of persons elected by the Owner/Operators.
4. The contracts<sup>4</sup> (Exs. 4, 5) between the School Board and the Owner/Operators with effective dates through June 30, 2012 state, in relevant part:

### **NEWTOWN BOARD OF EDUCATION OWNER/OPERATOR SCHOOL BUS CONTRACT**

The BOARD OF EDUCATION of the Town of Newtown, Connecticut (hereinafter referred to as the “Board”) and \_\_\_\_\_, Owner/Operator of \_\_\_\_\_, Newtown, CT 06470 (hereinafter referred to as the “contractor”), hereby agrees as follows:

...

This contract is based upon independent contractors providing designated services to the Board as described herein and consistent with Board policies. Nothing in this contract, including but not limited to payment methods or eligibility for Board supplied insurance, should be construed to establish or create an employer-employee relationship between the Board and the contractor. Acceptance of this contract by the contractor acknowledges his understanding and agreement to this stipulation.

...

1. The contractor will purchase or lease a new 71 passenger Board approved school bus, and will use the vehicle for the transportation of school pupils of the Town of Newtown over such routes, at such times, and making such stops for the pickup and discharge of pupils as designated by the superintendent of schools, or his designee, on behalf of the Board.

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<sup>1</sup> Home-to-school transportation is to be distinguished from student transportation involved in other school activities (e.g. sporting events, field trips, etc.)

<sup>2</sup> Thirty-three Owner/Operator contracts expired on June 30, 2012. Three Owner/Operator contracts will expire on June 30, 2013.

<sup>3</sup> The Contract Committee was known as the Harmony Committee in previous years.

<sup>4</sup> Attached to the contracts are Appendices A, B, and C which address, respectively, School Board policies, a drug testing program, and a school bus video surveillance system. (Ex. 4b).

2. The Board will pay for such transportation according to the rates shown at the end of this section. . . .

Initial routes are to be provided to the contractor by approximately August 15. . . .

<u>Full Size Buses</u>	<u>Effective Year</u>	<u>Daily Rates</u>	<u>Hourly Rates</u>	<u>Less Than Full Days 64%</u>
First Year	7/1/07	\$359.82	\$57.59	\$230.35

. . .

4. The Board will supply the required fuel for this contract. . .

5. The Board will provide liability and uninsured motorists coverage . . . for school buses that (1) are owned or not owned by the Town of Newtown or the Board, and (2) are used for the Town of Newtown or the Board activities specified below. . . .

The insurance coverage carried by the Board does not provide collision coverage, comprehensive coverage or medical payments coverage for any school bus not owned by the Board or the Town of Newtown. Each contractor must obtain these coverage's . . . . The contractor must provide a certificate of insurance to the Board's transportation director . . .

Further, no insurance policy carried by . . . the Board provides workers' compensation, short-term disability, long-term disability, health insurance or life insurance coverage for any contractor.

. . .

11. . . . If the conduct of the contractor is found by the Board to be unsatisfactory while performing the service required by this contract, or if the contractor fails to comply with the laws, rules and regulations of the Federal Government, the State of Connecticut, Department of Motor Vehicles, State Board of Education, the Town of Newtown, and either the State or Town Police Departments, his-contract [sic] is subject to termination after a Board hearing. The contractor recognizes that he is responsible for the conduct of any substitute drivers employed by him while performing the duties under this contract.

. . .

The contractor and/or drivers are prohibited from changing any routes without transportation department approval. . .

. . .

12. By accepting this contract, the contractor agrees to drive his bus at least 67% of the school year, except in the case of serious illness or for other good and acceptable cause approved by the Board or its designee. The contractor further agrees to provide the names of all substitute drivers to the director of transportation. . . .

. . .

All new driver applicants must be interviewed by the transportation director prior to being hired. A driver must be investigated through the State of Connecticut, Department of Motor Vehicles and the local police department previous to hire.

. . .

It shall be the responsibility of the contractor to utilize qualified substitute drivers.

...

20. It is mutually understood and agreed that the contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the contract of its rights, title, or interest herein, or its power to execute such contract, or any part thereof, to any person, company or corporation, without the previous written consent of the Board. In the event of the demise of the contractor, the spouse or a descendent of the contractor may assume the balance of the existing contract subject to the prior approval of the Board.

...

NEWTOWN BOARD OF EDUCATION

By:

\_\_\_\_\_  
Ronald J. Bienkowski, Director of Business

\_\_\_\_\_  
Date

\_\_\_\_\_  
Owner/Operator

\_\_\_\_\_  
Date

Vehicle Year/Make/Model \_\_\_\_\_ Vehicle ID Number \_\_\_\_\_

5. Unlike the general public, the School Board and the Town of Newtown (the Town) are not subject to certain taxes and fees associated with the purchase of motor vehicle fuel. The Town and the School Board maintain a fleet motor vehicle liability policy which costs less than individual policies for the same number of vehicles.

6. The language of the third paragraph of the 2012 Owner/Operator contracts ("This contract is based upon independent contractors. . .") originated from a School Board proposal in negotiations for the 2002-2007 contracts. During such negotiations School Board Business Director Ronald Bienkowski (Bienkowski) suggested to the Contract Committee that Owner/Operators form limited liability companies for their own protection.

7. Twenty-three of the Owner/Operators are individuals and ten Owner/Operators operate through limited liability companies.

8. Each Owner/Operator sends the School Board a monthly invoice for services rendered and is paid a single flat rate which includes bus and driver. The School Board does not withhold state and federal taxes and reports annual compensation paid each Owner/Operator through Internal Revenue Service Form 1099. Owner/Operators do not participate in any pension system maintained by the School Board or the Town of Newtown (the Town). Owner/Operators were allowed to purchase health insurance through the School Board at group rates but the practice was discontinued by the School Board's insurance carrier effective June 30, 2010. Owner/Operators were subsequently allowed to purchase health insurance at group rates from the Town's (self-insured) health insurance plan.

9. Owner/Operators compensate substitute drivers directly and at privately determined rates. Some Owner/Operators withhold state and federal taxes from substitute drivers and report such income on Internal Revenue Service Form W-2 while other Owner/Operators do not withhold taxes and report substitute driver income on Internal Revenue Service Form 1099.

10. Owner/Operators pay property taxes on their buses and report all expenses related to bus ownership and operation, including compensation paid substitute drivers, as deductible business expenses on their annual tax returns.

11. The School Board provides Owner/Operators and approved substitute drivers with periodic training and testing<sup>5</sup> necessary to meet state and federal requirements for school bus drivers either through School Board employees or by contract through third parties, including certain Owner/Operators. The School Board routinely maintained records which reflect the training status and certification status of each Owner/Operator and substitute driver.

12. Most Owner/Operators were initially substitute drivers. In the past the School Board offered Owner/Operator contracts to substitute drivers in order of their length of service (*e.g.* seniority.) The School Board's application process for the position of substitute driver and Owner/Operator included a background check, interview, and submission of a financial statement to establish ability to purchase and maintain a school bus.

13. In the past the School Board has fined, suspended, and terminated Owner/Operators for alleged breach of the contracts. In the past the School Board has withdrawn its approval of substitute drivers due to alleged misconduct and notified Owner/Operators that such drivers may not be used to transport students.

14. Fran McCutchan (McCutchan) is the principal of McCutchan Transportation LLC and owns and operates eight school buses. McCutchan parks one bus at her home and pays rent to park three buses at a private lot. The School Board pays the rent for parking the other four buses at the lot. McCutchan is personally a party to three Owner/Operator contracts with the School Board. McCutchan regularly drives a home-to-school route herself. In 2009 another Owner/Operator left the area and McCutchan reached an agreement with then School Board Transportation Director Tony Delonardo to take over that contract at a reduced rate with the understanding that she would be using a substitute driver for that route. McCutchan also uses her buses to transport students for clients other than the School Board.

15. Philip Carroll (Carroll) is an Owner/Operator doing business as Carroll Transportation, LLC and has served on the Contract Committee since 1995. Carroll does not withhold state or federal taxes when he pays substitute drivers and he does not report their income to the Internal Revenue Service. In addition to transporting students, Carroll, in conjunction with another Owner/Operator, conducts the safety training necessary to maintain state certification for all Owner/Operators and substitute drivers. The School Board pays Carroll a per diem fee for conducting such training pursuant to a separate agreement Carroll negotiated with Delonardo. Carroll periodically sends the School Board invoices for his training services and taxes are not withheld when payment is issued.

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<sup>5</sup> Certain testing is conducted by state officials.

16. Michael Voight (Voight) is an Owner/Operator doing business as American Contracting LLC. Voight regularly utilizes his spouse as a substitute driver and does not pay her for these services. Voight also operates a landscaping business through American Contracting LLC which is unrelated to his work for the School Board.

17. MTM Transportation, Inc. (MTM) is a corporation owned by three Owner/Operators, including Thomas Adams (Adams), who is also a mechanic. MTM owns and operates 45 buses, some of which accommodate 71 passengers as required under the Owner/Operator contracts while the remainder accommodate 47 passengers. MTM contracts with the School Board to provide home-to-school transportation and uses four to six buses daily to perform that function. Approximately eight years ago MTM bid for and was awarded a contract with the School Board to provide all bus transportation for special education students. MTM also maintains a bus repair garage operated by Adams.

18. Adams has been an Owner/Operator since 1986 and has never served on the Contract Committee. Although Adams has an Owner/Operator contract with the School Board to provide home-to-school transportation he personally drives less than two percent<sup>6</sup> on an annual basis pursuant to a special arrangement he has with the School Board, the terms of which are set forth in a letter (Ex. 53) dated September 1, 2010<sup>7</sup> and signed by Adams and School Board Superintendent Janet Robinson (Robinson):

As per our agreement:

I, Thomas Adams agree to be the emergency contact for all Newtown busses. In the event a bus breaks down or is in an accident, I will immediately repair or replace the bus with an MTM vehicle and provide whatever help is necessary to keep the busses running and on schedule.

I will not be required to drive my 67% driving time as stated in my contract in order to provide this service.

19. In 2009 the Contract Committee and School Board representatives met at the School Board's request and discussed existing School Budget concerns. As a result, the Owner/Operators agreed to forgo the rate increase scheduled in the contracts for July 1, 2009.

20. In February, 2010 the School Board again contacted the Contract Committee and requested meetings to discuss School Board budget concerns and modification of the Owner/Operator contracts. Meetings were conducted, proposals were exchanged, and no agreement was reached.

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<sup>6</sup> Section 12 of the Owner/Operator contracts requires the Owner/Operator "to drive his bus at least 67% of the school year, except in the case of serious illness or for other good and acceptable cause." (Ex. 4).

<sup>7</sup> Notwithstanding the absence of a written agreement prior to September 1, 2010, this business arrangement between Adams and the School Board has existed since 1986.

21. During the negotiations in 2007, 2009, and 2010 School Board representatives and the Contract Committee discussed the possibility that absent an agreement the School Board would issue a public request for bids for student transportation services.
22. In May of 2011 the School Board issued a public request for proposals (RFP) for home-to-school student transportation establishing June 23, 2011 as the deadline for bids. Bienkowski notified several student transportation providers, including the Owner/Operators, of the request and encouraged bid submissions. The School Board interviewed the top four bidders, including the Owner/Operators,<sup>8</sup> and on September 6, 2011 the School Board awarded the work to the lowest bidder, All-Star (All-Star) Transportation.<sup>9</sup>
23. On October 4, 2011 the School Board and All-Star entered into a Contract For Transportation Services with effective dates of July 1, 2012 through June 30, 2017 which incorporates by reference the RFP and All-Star's bid. Under the contract All-Star agrees to provide drivers, buses, all required training/testing, and liability and other insurance coverage.
24. All-Star intends to seek the School Board's permission to assume responsibility for establishing all home-to-school bus routes.<sup>10</sup>
25. The School Board did not negotiate its decision, or the impact of that decision, to put home-to-school transportation out to public bid with the Contract Committee or the Owner/Operators.
26. At no time prior to the filing of the complaint were the terms "union", "labor organization", or "employees" used by the School Board, the Contract Committee, or the Owner/Operators to refer to the Contract Committee or the Owner/Operators. At no time did the Owner/Operators or the Contract Committee petition for recognition or certification under the Act.

### CONCLUSIONS OF LAW

1. Absent an adequate defense, an employer commits an unlawful refusal to bargain and a prohibited practice when it unilaterally subcontracts or transfers bargaining unit work to non-bargaining unit personnel.
2. Individuals are employees under the Act if their employment relationship is a dependent, subservient relationship characterized by inequality of bargaining power in controversies over wages, hours, and working conditions.
3. The School Board did not commit a prohibited practice in violation of the Act when it assigned certain work formerly performed by Newtown Owner/Operators to All-Star Transportation.

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<sup>8</sup> The Owner/Operators submitted a bid prior to filing the instant complaint on June 9, 2011.

<sup>9</sup> Several years ago All-Star unsuccessfully bid for a special education transportation contract that the School Board ultimately awarded to MTM.

<sup>10</sup> At present and in the past the School Board has established all bus routes.



## DISCUSSION

In this case the Complainant claims that the School Board violated the Act by soliciting bids for student transportation and by awarding such work to All Star. Specifically, Complainant contends that it is a de facto labor organization and its members are School Board employees, that the School Board has long recognized Complainant as the exclusive collective bargaining representative of its members, and that by failing to bargain over the transfer of busing services the School Board violated the Act. The School Board responds that Complainant's individual members are independent contractors rather than employees within the scope of the Act. The School Board also contends that since Complainant has not acted as the exclusive collective bargaining representative of its members, or been recognized or certified to serve in such capacity, Complainant is not an employee organization within the meaning of the Act and as such is without standing to pursue the instant complaint. Lastly, the School Board contends that the Complainant waived whatever rights it had to bargain over the transfer at issue. Based on the record before us we agree with the School Board that Complainant and its members fall outside the scope of the Act and therefore dismiss the complaint.

It is undisputed that a municipal employer is only obligated to bargain with the designated representative of *employees* under the Act and that to the extent independent contractors are involved, no violation has occurred. *City of New London*, Decision No. 2252 (1983); see Conn. Gen. Stat. §§ 7-467(2); 7-469; 7-470(a)(4).<sup>11</sup> The parties dispute the proper standard for differentiating employees from independent contractors, the Complainant relying on the "economic realities" test we used in *Simsbury Light Opera*, Decision No. 4369 (2009) and *Waterbury Symphony Orchestra*, Decision No. 4095 (2005) applying the Connecticut State Labor Relations Act (CSLRA) while the Town relies on the common law "right to control" test we used in *City of New London*, *supra*, when last faced with this issue under MERA. On the basis of our review of the relevant case law, we agree with Complainant that the economic realities test is the appropriate standard for differentiating employees and independent contractors under MERA.

"MERA is closely patterned after the National Labor Relations Act and, therefore, the judicial interpretation frequently accorded the federal act is of great assistance and persuasive force in the interpretation of our own act." *City of New Haven v. New Haven Police Union Local 530*, 210 Conn. 597, 616 n. 1 (1989)(internal quotation marks and citations omitted). Prior to the amendments of the National Labor Relations Act (NLRA) by the Taft-Hartley Act of 1947, the NLRB used an "economic realities" test for differentiating employees from independent contractors. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). By

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<sup>11</sup> Conn. Gen. Stat. § 7-467(2) states, in relevant part:

"Employee" means any employee of a municipal employer . . .

Conn. Gen. Stat. § 7-469 states, in relevant part:

The municipal employer and such organization as has been designated as exclusive representative of employees . . . shall have the duty to bargain collectively . . .

Conn. Gen. Stat. § 7-470(a)(4) states, in relevant part:

Municipal employers . . . are prohibited from . . . refusing to bargain collectively . . . with an employee organization . . . designated . . . as the exclusive representative of employees . . .

amending the NLRA so as to specifically exclude independent contractors from coverage, Congress rejected the Supreme Court's endorsement of the test in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) with "[t]he obvious purpose of . . . hav[ing] the Board and the courts apply general agency principles in distinguishing employees and independent contractors under the Act." *Id.* The NLRB continues to apply such principles through the common law "right to control" test. See *OS Transport LLC*, 358 NLRB No. 117 (2012). Since MERA also "models the language of the original NLRA and does not specifically exclude independent contractors, the appropriate standard to employ in determining employee status is the original approach of the NLRB or pre-Taft-Hartley approach, known as the economic realities test." *Waterbury Symphony Orchestra*, *supra* at p. 5 (citation omitted).<sup>12</sup>

The economic realities test implements the legislature's recognition in collective bargaining statutes "that . . . particular workers . . . are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation." *NLRB v. Hearst*, *supra*, 322 U.S. at 127.

A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ, and to resist arbitrary and unfair treatment.

*American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 (1921). "The economic realities test determines individuals are employees under the Act if their employment relationship is a dependent, subservient relationship characterized by inequality of bargaining power in controversies over wages, and working conditions." *Simsbury Light Opera Company*, *supra* at p. 11. *Waterbury Symphony Orchestra*, *supra* at p. 5. In applying this test we note that the School Board bears the burden of showing that the owner operators are independent contractors. *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011).

The Act was designed to encompass individuals who perform the labor for which they are compensated and the owner operators do not fit properly within this category of workers. While most personally drive their own buses, many use substitute drivers who are compensated by the owner operator at privately agreed upon rates. While most owner operators operate a single bus, several own multiple buses and provide the School Board with a variety of busing services, either personally or through substitute drivers. While most owner operators are natural persons, the work at issue is also performed by a corporate entity owned and operated by multiple persons. In short, because the owner operators need not (and to a substantial extent do not) personally perform the services for which they are compensated we find that their relationship is not sufficiently "dependent, subservient . . . [and] . . . characterized by inequality of bargaining power in controversies over wages, and working conditions" to merit employee status under the Act.

In so finding we do not rely on the use of limited liability companies by individual owner operators as we view such as prudent under the circumstances but largely irrelevant to the economic reality of the relationship at issue. Nor do we view as determinative, consistent with

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<sup>12</sup> We note, however, that where employee status is established under the narrow and more stringent "right to control" test, we will find coverage under the Act. See e.g., *State of Connecticut Military Department*, Decision No. 3779 (2000); *City of New London*, *supra*.

our federal counterpart, the fact that the contracts define the relationship as one involving an “independent contractor” or the fact that the School Board does not withhold social security or other taxes payable by owner operators. See *National Freight*, 153 NLRB 1536 (1965); *Miller Road Dairy*, 135 NLRB 217 (1962). A dominant employer can readily dictate such terms in an unequal bargaining relationship. We cannot, however, ignore the owner operators’ long standing right to transfer one-third of the work at issue to third parties who are compensated at privately agreed upon rates. While not determinative, we also find significant the owner operators’ right to select vehicles, repair and maintenance providers, and insurance carriers. Exercise of these rights directly impacts owner operator income independent of School Board control and denotes bargaining power in the relationship the owner operators would lack if these rights did not exist. Since the School Board is not the sole marketplace for student transportation, in the event it offers unreasonable compensation or arbitrary and unfair treatment the owner operators have the skills and equipment to provide their services elsewhere.

The case law cited by Complainant is distinguishable. Unlike the newsboys in *NLRB v. Hearst Publications*, *supra*, whose income was wholly controlled by the defendant publishers, owner operators make business decisions which impact profit margins. A miner’s helper was injured in an explosion in *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547 (2d Cir. 1914), *cert. denied*, 235 U.S. 705, and in applying an early worker’s compensation statute Judge Learned Hand held only that the mining company could not avoid liability for its negligence under Pennsylvania law merely because it had exacted independent contractor agreements with miners who were wholly dependant on the company. In *Sheriff’s Department, Fairfield County*, “we conclude[d] . . . that the position of complete economic dependence of the special deputies upon the State and its Sheriff combined with the structure of their ongoing relationship . . . falls within . . . [the State Employee Relations Act] and its provisions for collective bargaining.” *Id* at p. 23. We found economic dependence on the basis of a number of factors including the fact that “Special Deputy Sheriffs perform their duties personally and cannot appoint or designate a non-deputy sheriff to perform their duty.” *Id* at p. 5.

Nor do we find the owner operators to be employees under the common law agency test. In applying this test we found “[t]he determining factor in whether a person performing work for another is an employee or an independent contractor is whether there exists the right to control the means and method of work.” *State of Connecticut, Military Department*, Decision No. 3779 p. 8 (2000) (internal quotation marks and citation omitted); see *City of New London*, *supra* at pp. 3-4. If the work at issue is defined as specific routes<sup>13</sup> for home to school student transportation, the owner operators retain substantial control to the extent they dictate equipment, maintenance, insurance carriers, and to a substantial extent, drivers. The NLRB assesses agency through consideration of nine additional factors “. . . with no one factor being decisive.” *Lancaster Symphony Orchestra*, *supra* at p. 4 (quoting *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968)).

The relevant factors include (1) whether the putative employer has the right to control the manner and means of performance of the job; (2) whether the individual is engaged in a distinct occupation or business; (3) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; (4) whether the employer or the

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<sup>13</sup> We do not view School Board control over route mapping as any more relevant than its control over student pick-up and drop-off times. Both are inherent aspects of the transportation service provided and are dictated largely by school hours and the relative location of student residences and schools. There is nothing in the record before us that suggests that the owner operators were any less free than All Star to seek permission to assume responsibility for route mapping.

individual supplies the instrumentalities, tools, and place of work; (5) the skill required in the particular occupation; (6) whether the parties believe they are creating an employment relationship; (7) whether the work is part of the employer's regular business; (8) whether the employer is "in the business"; (9) the method of payment, whether by time or by the job; and (10) the length of time the individual is employed.

*Id.* Analyzed in the context of these factors, the owner operators do not consistently reflect the ordinary characteristics of employees. As noted above, the ability to use substitutes and to make other economic decisions impacting profit margins supports a finding that the owner operators are service providers rather than simple school bus drivers. While passenger vehicle operation is not considered a highly skilled activity, the owner operators provide their own equipment and workplace. We have particular difficulty finding a mutually intended employment relationship given the record before us. While the use of the term "contractor" throughout the individual owner operator contracts is not determinative, it is relevant. In addition, it is impossible to ignore the fact that Complainant never sought express recognition by the School Board (or certification by the Labor Board) or the absence of any evidence that owner operators sought worker's compensation or employer funded health or pension benefits during the past seventy-five years. While the School Board is required by statute<sup>14</sup> to provide home to school transportation, we view this function as ancillary to the primary obligation to "maintain good public and secondary schools . . . [and] . . . implement the educational interests of the state . . ." Conn. Gen. Stat. §10-220(a). While owner operators are paid "daily rates" with pro rata additional compensation for work days exceeding 6 hours and 45 minutes, the parties expressly contemplate that "this typically entails three [home to school] routes". In sum, while owner operators do exhibit certain characteristics of employees, application of the common law agency test tends to support a conclusion that they are independent contractors.

We agree with the School Board that federal decisions concerning owner operators in the trucking industry are highly fact dependant and difficult to reconcile. *See* J. Higgins, *The Developing Labor Law* Ch. 27.III.C.2e(3) (6<sup>th</sup> ed. 2012). We find, however, that our analysis is largely consistent with that of the NLRB as well as the United States Court of Appeals for the District of Columbia Circuit applying the more restrictive "right of control" test. In *Arizona Republic*, 349 NLRB 1040 (2007), the NLRB found the carriers at issue to be independent contractors given that they owned and maintained their own vehicles, hired full-time substitutes and controlled the substitutes' terms and conditions of employment, and were permitted to hold contracts on multiple routes. The District of Columbia Circuit Court shifts "the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (internal quotation marks and citation omitted). Drivers who owned their own trucks, retained rights to hire their own employees and to use their trucks during non-business hours, and were paid by the job were found to be independent contractors. *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995). Drivers who owned their own trucks but were not permitted to employ others to perform the company's work or to use their vehicles for other jobs "lacked all entrepreneurial opportunity and

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<sup>14</sup> Conn. Gen. Stat. § 10-220(a) states, in relevant part:

"Each local or regional board of education . . . shall . . . provide for the transportation of children wherever transportation is reasonable and desirable, and for such purpose may make contracts covering periods of not more than five years . . ."

consequently functioned as employees rather than as independent contractors.” *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

In conclusion, Complainant is not entitled to relief unless we find that the owner operators are “[e]mployee[s]” under Section §7-467(2), that Complainant is an “[e]mployee organization” under Section §7-467(6), that the School Board “recognized” Complainant as a collective bargaining representative within the meaning of Section 7-468(b), and that the School Board engaged in a prohibited practice defined by Section 7-470(a)(4) when it contracted with All Star to provide home to school student transportation. We find, for the reasons set forth above, that the owner operators are independent contractors and that as such, Complainant is not an employee organization<sup>15</sup> within the meaning of the Act. In so finding we do not diminish the laudable role Complainant and its Contract Committee has held for many years. In short, but for our finding that the owner operators are independent contractors, Complainant would otherwise meet the statutory definition of an employee organization since its primary purpose for decades has been the improvement of wages, hours and working conditions of individual owner operators. Since neither the Complainant nor the owner operators are covered under MERA we dismiss the complaint.

### **ORDER**

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is hereby

**ORDERED** that the complaint filed herein be, and the same hereby is, **DISMISSED**.

#### CONNECTICUT STATE BOARD OF LABOR RELATIONS

Patricia V. Low  
Patricia V. Low  
Board Member

Wendella Ault Battey  
Wendella Ault Battey  
Board Member

Barbara J. Collins  
Barbara J. Collins  
Board Member

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<sup>15</sup> Conn. Gen. Stat. § 7-467(6) states:

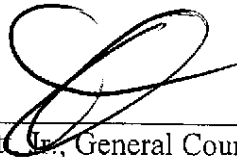
(6) "Employee organization" means any lawful association, labor organization, federation or council having as a primary purpose the improvement of wages, hours and other conditions of employment among *employees* of municipal employers. (emphasis added).

**CERTIFICATION**

I hereby certify that a copy of the foregoing was mailed postage prepaid this 13<sup>th</sup> day of June, 2013 to the following:

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CONNECTICUT STATE BOARD OF LABOR RELATIONS