KENNETH HUDSON, INC., d/b/a HUDSON BUS LINES AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 841, CR-3553 (12/21/77)

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45.1 limitations - contract bar

Commissioners participating: James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

Appearances:

Jerome Weinstein, Esq.)
Andrew Eisenberg, Esq.) - For the Employer
Susan Lennox, Esq.)

Barry Wilson, Esq.)
James Hall, Esq.)
Martin Foley) - For the Petitioner
Edward Galuszka)

Mark Kaplan, Esq - For the Intervenor

Jay Jason, Esq.)
Michael Betcher, Esq.) - For the City of Boston

DECISION AND DIRECTION OF ELECTION

Statement of the Case

On November 14, 1977 the United Steelworkers of America, AFL-CIO, CLC (Steelworkers or Petitioner) filed a petition with the Labor Relations Commission (Commission) pursuant to the provisions of Chapter 150A of the General Laws (Law) seeking certification as the exclusive representative of certain employees of Kenneth Hudson, Inc., d/b/a Hudson Bus Lines (Hudson). The Commission investigated the petition pursuant to its authority under Section 5 of the Law, and ordered that a hearing be held on November 22, 1977.[1] Prior to that date, the Commission was

[1] A hearing had originally been scheduled for December 28, 1977, pursuant to the Commission's normal procedures. Upon the request of the Employer, and because of a strike threat by the drivers, the hearing date was moved forward.

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informed that Local 841, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 841) had an interest in the employees sought by the petition. The Hearing was rescheduled for November 28, 1977 in order to permit Local 841 to be represented. Notice of that Hearing was given in accordance with the Commission's rules and regulations by delivering a copy of the Notice of Hearing and Petition to the business address of Local 841 on Wednesday, November 23, 1977. On November 28, a Hearing was held before Garry J. Wooters, Commissioner, and continued on November 29 and 30, 1977. The City of Boston, through counsel, requested and was granted permission to participate in the Hearing on a limited basis.

All parties were afforded full and fair opportunity to be heard,[2] to examine and cross examine witnesses and to introduce testimony. All parties filed briefs, which have been considered.

Upon all of the evidence and the entire record in this matter, we make the following findings of fact and render the following opinion.

Jurisdictional Issues

The petition in this case seeks employees of Hudson Bus Lines who are engaged in the business of transporting school children under contract to the City of Boston.

In addition to its contract with the City of Boston, Hudson has contracts with other municipalities (the City of Melrose) as well as with the Commonwealth of Massachusetts (Massachusetts Port Authority and the University of Massachusetts). Hudson also holds certificates of public convenience and necessity from the Department of Public Utilities and the appropriate permits from the Interstate Commerce Commission permitting it to operate regular bus service along certain routes (franchise or line operations). Hudson is also in the business of chartering busses and drivers to private individuals and organizations for profit. Revenues derived from sources other than the Commonwealth and its political subdivisions are in excess of $250,000 annually.

For a number of years, Hudson has bargained collectively with Local 84, and executed contracts applicable to charter and line operators. Hudson and Local

[2] Counsel for Local 841 appeared "specially" contesting, inter alia, the sufficiency of notice to his client. The record indicates that Notice of the November 28 Hearing was received by Local 841 on November 23. Under the circumstances of this case, we consider that Notice was adequate. Local 841 further requested that the Hearing be continued until some time after December 8, 1977 to permit Daniel Zenga, the Business Agent for Local 841, to return from vacation. The Hearing Officer denied the continuance. We affirm that decision. Mr Zenga is a principal in the case. If he chooses to remain on vacation rather than appear, he does so at his own risk, and counsel may not claim prejudice by his absence.

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841 argue that the current contract also covers the school bus drivers sought by the instant petition.

Drivers who are hired to drive for Hudson are hired as either charter and line drivers or as school bus drivers. Although a charter driver may, on occasions, make a school run, it is not a frequent occurrence for any given driver. Conversely, school bus drivers make only infrequent charter or line runs. Certain of the equipment may be used for either school or non-school purposes.

The City of Boston has been committed to a major busing program by the decision of the United States District Court for the District of Massachusetts in Morgan v. McDonough, 379 F. Supp. 410 (D. Mass. 1974). Pursuant to the orders of that Court, the City has entered into contracts with bus companies, including Hudson, to provide daily home to school and school to home bus services, as well as other transportation of school children. Hudson has been providing such services for the School Committee for approximately three years. The contract for the 1977-78 school year, effective from September 1, 1977 through August 31, 1978, was not awarded to Hudson until approximately one week prior to the opening of schools. Under its contract with Hudson, the City of Boston reserves substantial areas of control over Hudson's operations. The City of School Committee determines routes, pick-up times and travel times, thus effectively determining the number of drivers and buses which must be employed. Monitors, employed by the School Committee, ride each vehicle and report late arrival and departures, improper operation of the vehicles, discipline problems and equipment deficienci These reports are forwarded to the safety and transportation departments and may result in a request to Hudson to take corrective action. The School Committee has recommended that drivers be transferred to other routes or removed from school busing work. Such requests are investigated and corrective action may be taken by Hudson. Route and schedule changes may occur on a daily basis, requiring Hudson to adjust coverages and schedules. These decisions are within the discretion of the School Committee. The contract with the School Committee also sets minimum standards for drivers and equipment more stringent than those which Hudson might require in other parts of its operations. The School Committee is notified of the names and addresses of drivers hired to perform services under the contract and requires that drivers submit answers to questions relating to criminal records. The Committee may also require a physical examination of any driver. If the Committee concludes that a driver is unfit, it may require that the driver be removed from all contract runs. The contract with the School Committee defines a prevailing wage for bus drivers which is set by the Department of Labor and Industries. This hourly rate of $5.39 constitutes a minimum wage for drivers hired to perform services under the contract.

Section 10.1 of the contact between the School Committee and Hudson provides:

> The contractor [Hudson] is retained solely for the purposes and to the extent set forth in this contract. During the term of this contract, contractor's relationship to the City shall be that of an independent contractor. Contractor shall have no

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> capacity to involve the City in any contract nor to incur any liability on the part of the City. Neither the contractor nor its agents or employees shall be considered as having the status or any pension rights of a City employee...

The employer contends that the Commission has jurisdiction over the school transportation part of its business, but argues that jurisdiction is properly asserted under G.L. c.150E, the public employee bargaining law. The petitioner also concedes Commission jurisdiction, but argues that the school bus drivers are properly sought by a petition pursuant to G.L. c.150A. At hearing, Local 841 indicated that it questioned whether the Commission had jurisdiction under either statute, indicating that the National Labor Relations Board might be the correct forum. Local 841 agreed with the petitioner that the school bus drivers were not covered by G.L. c.150E. In its brief, Local 841 indicates that it "waives" the argument that the Commission lacks jurisdiction, and "agrees to submit the remaining issues in dispute to the Commission for resolution." Brief for Local 841 at 2. As we doubt that subject matter jurisdiction may be either stipulated or waived, we think it appropriate to state the basic principles on which our jurisdiction rests.

The jurisdictions of the Labor Relations Commission and the National Labor Relations Board are mutually exclusive. If the Board has jurisdiction, the Commission lacks power to act, even with the consent of the parties.

The Board may assert jurisdiction over any enterprise affecting commerce, excepting states and their political subdivisions, and other exemptions not here relevant. 29 U.S.C. 151,152(2), (LRMA). The National Labor Relations Board (NLRB) is not required to exercise its entire potential jurisdiction, however. Pursuant to a 1959 amendment to the LMRA, the Board may determine its own jurisdiction over any enterprise over which it would have asserted jurisdiction on August 1, 1959. LMRA Sec. 14(c)(1). Under the authority of this section, the Board has by regulation and case decision established jurisdictional standards for certain kinds of industries. For enterprises engaged in the transportation business, the Board has announced that it will assert jurisdiction over companies doing more than $250,000 gross annual business. Charleston Transit Company, 123 NLRB 1296, 44 LRRM 1123 (1959). The Board has read this jurisdictional standard in conjunction with that part of the LMRA which exempts states and their political subdivisions from coverage of the act. LMRA Sec. 2(2). The result has been to create an "exemption" for that part of a transportation enterprise engaged in transporting school children for any political subdivision of a state. Roesch Lines, Inc, 224 NLRB No. 16, 92 LRRM 1313 (1976); Columbia Transit Corp., 226 NLRB No. 115, 93 LRRM 1396 (1976); Embree Buses, Inc., 226 NLRB No. 116, 93 LRRM 1372 (1976). Although the Board has recently altered the application of this standard as it applies to the non-school aspects of a mixed enterprise doing both exempt and

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non-exempt business,[3] the exemption for that part of any business engaged in the transportation of school children has remained unchanged. The Commission has asserted jurisdiction over such cases in the past[4] without challenge from the parties or the National Labor Relations Board.

Where the Board would decline to assert jurisdiction over a class of cases, the Commission may assert jurisdiction. LMRA, Sec. 14(c); Foley, Hoag & Elliot, 2 MLC 1302 (1976); G.L. c.150A, Sec. 10(b). The interchange of drivers and equipment between the school and non-school aspects of Hudson's business is not so substantial that our assertion of jurisdiction over one part of the enterprise will not be effective. Remaining for consideration is the issue of whether the Commission ought to assert jurisdiction under G.L. c.150A or the provisions of G.L. c.150E. We believe that the petition was properly filed under G.L. c.150A.

The employer's argument for application of G.L. c.150E rests upon its view that the City of Boston exercises such substantial control over the school transportation work that the employees engaged in that function ought to be considered to be employees of the City of Boston or its School Committee.[5]

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[3] In Camptown Bus Lines, 226 NLRB No. 3, 93 LRRM 1140 (1976) a Board panel (Chairman Murphy, members Walther and Jenkins) indicated that in deciding whether to assert jurisdiction over the non-exempt part of a mixed enterprise, revenues from both exempt and non-exempt business would be considered. In other cases, the majority or plurality of the Board has indicated that it would look only to the non-exempt revenues in determining jurisdiction over the non-exempt aspects of the business. Such variations in policy do not affect our jurisdiction over the exempt portion of Hudson's business, but only our potential jurisdiction over the charter and line work. As there is no question that Hudson does more than $250,000 in business from non-exempt sources, the clear result of the application of the Board cases is that the Commission has jurisdiction over the school bus drivers, while the NLRB regulates the labor relations of charter and line drivers. The variations in Board practice might, in another case, give rise to substantial confusion over which agency ought to exercise jurisdiction.

[4] See, e.g. Lexington Taxi Corp./Transportation Management Corp., 3 MLC 1696 (1977); William S. Carroll, Inc., 3 MLC 1627 (1977). The Commission docket indicates at least a dozen other pending cases involving school bus drivers.

[5] We do not believe the record substantiates the claim of control by the employer. This issue is discussed at pp. 9-11, infra. It is appropriate to note, however, that this claim is in substantial conflict with the argument that a contract bar exists. If the employees are to be considered employees of the City of Boston or the School Committee, we fail to see how a contract between Hudson and Local 841 could bar this petition. See pp. 11-20, infra.

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The cases cited by the employer support the proposition that, at common law, the test of the employer/employee relationship was one of control.[6] However, G.L. c.150E is a statute of limited applicability. Its scope is determined by the definitions contained in Section1. "Public employee" is defined as "any person employed by a public employer..." "Public employer" means "the Commonwealth, acting through the Commissioner of Administration, or any county, city, town, or district acting through its chief executive officer..." The definitional language is not to be given unrestricted scope. Thus, although probation officers were clearly "public employees" for certain purposes, the Supreme Judicial Court has held that G.L. c.150E could not be applied to such employees since as employees of the judiciary, they were not employees of a "public employer" within the language of the statute.[7] Mass. Probation Association v. Commissioner of Probation, Mass. Adv. Sh. (1976) 1814. "However, 'public employee' is not defined in c.150E, Sec. 1 to include all public employees in the Commonwealth, but rather only those employees who are employed by a public employer." Id.at 1825. It is clear that Kenneth Hudson, Inc., d/b/a Hudson Bus Lines, is not a public employer within the meaning of Section 1. Thus, for G.L. c.150E to apply, we would have to conclude not only that the City or School Committee exercised substantial control over the school bus drivers, but that these individuals were actually employees of the City or School Committee. The record will not sustain such a conclusion.

The most compelling evidence of the status of the school bus drivers is the contract between Hudson and the School Committee which created the relationship in question. That agreement clearly indicates that Hudson is an independent contractor, and that its employees are not to be considered employees of the City. Employer Exhibit 2, Sec. 10.1. There is other persuasive evidence that Hudson Bus Lines is the real or true employer of the drivers in question. The City may not direct them in the hiring process except to the extent of reserving a "veto" over employees who do not meet the qualification set forth in the contract. Hudson may also discipline, transfer or discharge any driver without consultation with the City. Although the contract provides for a minimum "prevailing rate" for bus drivers, as set by the Department of Labor and Industries, Hudson could pay its drivers more for regular daily trips if it so desired. Hudson determines which drivers will be assigned to particular routes. The drivers are paid by Hudson, not by the City of Boston. Hudson deducts social security, unemployment, federal and state taxes from drivers' wages. On these facts, Hudson is clearly the employer of the school bus drivers.

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6 Marino v. Trawler Emil C., Inc., 350 Mass. 88 (1966) cited by the employer, does not deal with the common law concept of "employer" at all, but rather with the Federal Jones Act definition of "member of the crew," and with the common law doctrine of master/servant, used to determine vicarious liability for the torts of another. Application of such doctrines to this case must be considered marginal, as we deal with a statutory definition of "public employer" and "public employee."

7 The legislature subsequently enacted Ch. 278 Acts of 1977 which amended the definitions of "public employee" and "public employer" to include employees of the judiciary.

This conclusion is not altered by the fact that, in order to obtain the contract with the City, Hudson has foregone certain of the normal prerogatives of management. The right of the School Committee, acting through the department of transportation, to determine routes and pick up times and recommend discipline or transfer of drivers, was granted by the contract. When the contract expires, the City will have no further control over any aspect of Hudson's business. Although the control exercised by the School Committee in some areas of operations is substantial, it does not make the City the employer.[8] In fact, although carried out on a larger scale, this control does not differ significantly from that exercised by other entities with whom Hudson does business.[9] A party who charters Hudson equipment may request a particular driver, and that request will be honored. Hudson investigates complaints made against its charter and line operators in much the same fashion as it looks into complaints made by the school Committee or its employees against school bus drivers. The employer in this case is Hudson. Hudson affects industry or trade within the meaning of G.L. c.150A, and is an employer within the meaning of Section 2(2) of the Law. The school bus drivers are employees of an employer within the meaning of Section 2(3) of the Law. Jurisdiction is, then, properly asserted under G.L. c.150A of the General Laws.

The Contract Bar Issue

For more than ten years Hudson Bus Lines has had a contract with Local 841 which covers the line and charter drivers. Hudson and Local 841 argue that their current agreement covers the school bus drivers and should operate as a bar to the instant petition.

The current agreement between Hudson and Local 841 runs from March of 1977 through March of 1980. When it was executed in March of 1977 Hudson was completing services under a contract with the City of Boston to provide services for the school year 1976-77. It had no contract for the succeeding school year. In the late summer of 1977, another company which had been awarded a contract for desegregation-related busing defaulted on its contract, which was then awarded to Hudson. Pursuant to its obligations under the contract, Hudson recruited

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8 Such cases as Columbia Transit, supra; Rural Fire Protection, 216 NLRB 584, 88 LRRM 1305 (1975); or William S. Carroll, supra, are not to the contrary. In Columbia and Rural Fire the Board did not find that the company providing an essential service was the municipality, but merely that it shared the section 2(2) exemption with the municipality. In William S. Carroll the Commission asserted jurisdiction under 150A, not 150E.

9 Plouffe, the Employer's general manager, testified on cross examination that the kinds of control exercised by the School Committee were not substantially different from that exercised by a private party chartering Hudson drivers and equipment. III Tr. 67-71. When asked whether the contract with the City might be considered to be "one great big giant charter", Plouffe replies, "Yes, in effect." III Tr. 71

and hired approximately 165 drivers sought by the Steelworkers' petition. The record indicates that persons recruited to drive school buses were told that they would not do charter or line work. They were also told that there was a union which represented charter and line drivers, but that they were not covered. One driver was told that there was a union for the charter and line drivers but that it would not do him any good to join it.[10]

The contract in question provides that employees must become and remain members of Local 841 as a condition of employment. Employer's Exhibit 1, Art., 1B. None of the school bus drivers has signed dues authorization cards permitting the employer to deduct the dues from wages. There is no evidence that any employees have tendered dues to the Teamsters. On the contnary, all employees who testified indicated that they had never paid any dues to Local 841. None was ever asked to join, and none has been subjected to termination or threat of termination for this failure.

Hudson's general manager testified that he considered school bus drivers to be "spare drivers" covered by the agreement with Local 841. On cross examination he identified numerous articles which did not apply to these drivers, however, including such provisions as wages, vacations, holidays, uniforms and others. There is no evidence that Local 841 has represented school bus drivers in any grievances during the term of the current contract. Under the preceding contract, the steward and business agent for Local 841 was involved in a grievance over the rate to be paid certain employees who regularly drove school buses when they did extra runs during their regular eight-hour day.

During October of 1977, a large number of the school bus drivers from Hudson and Brush Hill, another company involved in school busing, engaged in a strike over the discharge of a driver and disputes over reporting time and safety inspections of equipment.

It is in the context of this dispute that the contention was first raised

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10 Plouffe testified at one point that school bus drivers were told, when hired, that they were represented by Local 841. We discredit this testimony. Plouffe's testimony throughout was evasive and non-responsive. I Tr.15-18; I Tr. 57-59; I Tr. 107-111. It is contradicted by the testimony of each driver who testified. In addition, the record indicates that a Mr. Eagleston did the majority of the hiring interviews. Further, it appears that Plouffe stated to the press, on or about September 28, 1977, that the the school bus employees were not represented by a union. I Tr.17-18. On this record we conclude that the drivers' version of the information conveyed at the pre-hire interviews must be credited.

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that the Local 841 contract covers the school bus drivers.[11] Amidst the confusion of the walkout, Plouffe made statements which caused certain of the drivers to go to the Malden offices of Local 841 to clarify whether or not 841 represented them. The business agent, Daniel Zenga, was not able to see them, and they left without any clarification on the issue. Mr. Zenga was to call them. On October 14 a committee of twelve drivers, six from Hudson and six from Brush Hill, met with a mediator at the offices of the Federal Mediation and Conciliation Service. A telephone call was made to Zenga, who was asked to come to the session. Zenga met with the drivers and their attorney in a caucus room where he told them that he did not want to represent them, and that the company was trying to drag him into the dispute. The attorney for the drivers had prepared a release, which would have waived any claim by Local 841 to represent the school bus drivers. Zenga offered to sign the release if Hudson did. The group later convened with the mediator and representatives of the company.

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[11] The Hudson general manager testified that on September 26, 1977 he posted the following notice at the Bartlet Street garage, among other locations.

NOTICE

TO ALL BOSTON SCHOOL BUS DRIVERS

HUDSON BUS LINES LABOR CONTRACT IS WITH THE TEAMSTERS UNION LOCAL 841 BECAUSE OF THE TEMPORARY NATURE OF SCHOOL BUS DRIVING, THE UNION HAS NOT REQUIRED MEMBERSHIP OF SCHOOL BUS DRIVERS. HOWEVER, ANYONE WHO WOULD LIKE JOIN THE UNION MAY DO SO BY PAYING A $25.00 INITIATION FEE AND $11.00 MONTHLY DUES TO THE UNION.
IF YOU WISH TO JOIN, PLEASE GET AN APPLICATION FROM YOUR SUPERVISOR.

s/Thomas F. Plouffe
General Manager

The employees who testifies each claim never to have seen the notice. We conclude that the posting was not effective. In any event, the exhibit is clearly self-serving. It is also ambiguous on several important points. It does not indicate that Local 841 agreed not to require membership, in spite of the application of the contract. Rather, the notice could be read to indicate that 841 considered that the contract did not apply to "temporary" employees, and that membership in the union was voluntary. The record does not indicate that the notice was the result of a union/management agreement. Rather, the testimony is that the company attorney prepared the notice. Thus, the notice may represent no more than the company's admission of the fact that the union had not required membership of school bus drivers. Read in this manner, the notice could be evidence that Local 841 did not believe that its contract covered these employees.

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Hudson attorneys advised against signing the release. At this time, Zenga indicated that his attorney had advised him that the collective bargaining agreement between Local 841 and Hudson included the school bus drivers. Zenga was asked to leave by the drivers and the mediation session continued in his absence, with the school bus drivers represented by their own counsel.

Another meeting between the Hudson attorney and a drivers' committee was held on November 10,1977. Several driver grievances were discussed at this meeting. The company representative indicated that he had called Zenga and gotten his permission to meet with the drivers "as individuals."

Under these circumstances we do not believe the contract between Local 841 and Hudson may bar this petition. It is well established that, in order to bar an election, a contract must contain substantial terms and conditions of employment relative to the employees sought. Appalachian Shale Products, Inc. 121 NLRB No. 149, 42 LRRM 1506 (1958); Bethlehem Steel Co., Inc., 95 NLRB 1508, 28 LRRM 1468 (1951); Mass State Lottery Association, 1 MLC 1178 (1975); Board of Trustees, Southeastern Mass. University, 1 MLC 1418 (1975). This contract does not contain any substantial benefits or protections for the school bus drivers. Although the general manager testified that several contract provisions applied to school bus drivers, closer examination demonstrates that any impact of this contract on these employees is insubstantial. It does not govern their wages, nor their hours. It does not cover holidays, vacations or other leave, insurance, or other fringe benefits.

It is impossible to verify whether other articles of the contract would apply to school bus drivers, since there is no evidence on this record of cases where these provisions would have potential application to school bus drivers. Thus, Mr. Plouffe testified to his belief that the following articles applied to school drivers: Article I, Recognition; Article II, Seniority, except for paragraph F; Article VII, Medical Examinations; Article X, over Nine Hour Charters; Article XI, Pullouts; Article XII, Meetings; Article XIII, Payroll Deductions; Article XIV, Picket Lines; ARticle XV, Arbitration; Article XX, Check-Off; and Article XXII, Termination. The record indicates that school bus drivers are assigned to their runs by Hudson, not on any seniority basis. Seniority is not employed to determine overtime or hours, or to determine routes, equipment, starting time or any other condition of employment that can be determined from this record. Rather, that article has application only to "full time" drivers. Plouffe testified that no school bus driver is considered "full time" no matter how many hours he or she may work. Employees were given physical examinations by the company, but were not told whether such physicals were also for I.C.C. licensing purposes. There is no evidence in the record of a school bus driver, doing work under the City of Boston Contract, ever driving a more than nine hour charter, or receiving lay-over pay. There is no evidence of any driver receiving pay for a "pull out", although the record does indicate that school bus drivers doing school charter work would get a minimum ot two hours pay no matter how long the charter run actually took. The arbitration article has never been applied to a school bus driver. In addition, Plouffe testified that the School Committee could insist on the removal of a driver from school work, with or without just cause. III Tr. 15. Under such circumstances the grievance arbitration procedure is of little value to the employee. Other articles cited (Recognition, Management, and Termination) are not employee benefits.

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To hold such a contract a bar would be a patent injustice. The contract has two and one-half years to run. These employees would then be barred for that period from having a representative of their own choosing, or from negotiating a contract which has any relevance to their "wages, hours, or terms or conditions of employment". We are aware of cases such as Levi-Strauss, 89 LRRM 1402, 218 NLRB No. 103 (1975) and Leone Industries, 68 LRRM 1529, 172 NLRB No. 158 (1968), and do not think they require a different conclusion. In Levi-Strauss, the NLRB held that a contract which lacked a wage provision for sewing machine mechanics nevertheless barred a petition seeking those employees, since the contract did provide substantial fringe benefits. Unlike the contract in issue here, the agreement held to be a bar provided for insurance and disability benefits, vacations and holidays, check-off of dues, and regulated hours of employment. In Leone, the contract provided few benefits (seniority and retention for satisfactory performance) for "trainees". Nevertheless, the contract barred a petition seeking these employees as it represented an agreement between the incumbent union and the employer on appropriate terms and conditions of employment for a federally assisted job training program. The distinction between this case and Leone is apparent. The trainees, when their probationary period was over, inherite the full benefits of the contract. The school bus drivers at Hudson would retain the same low level of benefits and protection for the entire three years of the contract.

We believe the facts of this case place it more closely within the reasoning of such Board cases as Silver Lake Nursing Home, 178 NLRB No. 71 72 LRRM 1141 (1969). In that case the employer had, at one time, authorized a multi-employer association to bargain for it. In spite of this authorization, the employer continued to deal with licenced practical nurses on a single employer basis. A number of the provisions of the multi-employer agreement did not apply to Silver Lake's employees, and the employer paid the employees a wage scale different from the contract rate. On these facts the Board held the contract no bar to a petition by an outside union seeking the LPNs. The application of the contract was so vague, that there were so many exceptions to its application, that it would not produce stable labor relations to allow it to operate as a bar. We believe that similar reasoning applies to this case. The application of the Hudson/841 contract to these employees cannot promote stability of labor relations. The contract bar doctrine rests on the public policy favoring stability of labor relations, and it should not be applied so blindly or mechanically that it frustrates those ends.

The actions of both Hudson and Local 841 confirm that the contract was not intended to cover school bus drivers. If Hudson believed that the contract covered such employees, we cannot understand how it could, subsequent to the effective date of the contract, enter into an agreement with the City of Boston which conflicted in material aspects with the collective bargaining agreement. There is not a line of testimony which indicates that Hudson consulted with Local 841 about terms or conditions of employment for school bus drivers following their acquisition of the busing contract. From March of 1977 through the end of the 1976-77 school year, when the current contract with Local 841 was in effect, school bus drivers transporting City of Boston children were paid on a per diem basis. Beginning in September of 1977, the drivers were

compensated on an hourly basis. There is no testimony that either rate was set through consultation with Local 841. Rather, the testimony indicates that school bus drivers were told when hired that they were not covered by the Teamster contract, that they were not represented by Local 841, and ought not join 841 as it could not do anything for them. Likewise, Local 841 has not acted as if the school bus drivers are covered. The failure to enforce the maintenance of membership provision, to collect dues, or to protest the payment of non-contract rates are all inconsistent with a claim to represent the school bus drivers. Also inconsistent is the willingness to sign a waiver of representation rights if the Company also agreed, and the statements to the drivers that it did not with to represent them. Further, Local 841 permitted the company to deal with the employees as a separate group on two occasions, although claiming that the permission was to deal with them as individuals. The disclaimer does not obscure the fact that these employees have been left to fend for themselves. The claim of 841 and Hudson that the prior contract includes these employees is raised too late. The contract is no bar. This conclusion does not require any finding that Local 841 is "defunct" or that a "schism" exists within the Local. These doctrines would permit an election to be conducted in spite of an otherwise valid contract covering the employees in question. We have found that the contract was not intended to cover school bus drivers, or, if intended to cover them, provides such insubstantial coverage that it would not promote stability of labor relations to hold the contract a bar. We do not disagree with the formulation of schism and defunctness doctrines as set forth in the Brief for Local 841 at 12-16. Our findings make discussion of these principles unnecessary.

Without regard to the particular facts of this case, we are persuaded that no contract covering a unit of both school and non-school bus drivers could bar an election among school bus drivers given the current curious state of Board law in the area. As we understand these decisions (see pp. 6 to 8 supra) the NLRB would hear no unfair labor practice relating to school bus drivers whether or not the drivers were covered by a common contract with non-school bus drivers. We would be precluded from asserting any jurisdiction over any non-school bus operation which met the NLRB's current dollar volume standard. Thus, neither agency would have effective jurisdiction over a bargaining unit combining school and non-school drivers.[12] Such a situation is incompatible with sound labor relations.

In these circumstances, the contract may not operate as a bar. Commonwealth of Massachusetts, Chief Justice Supreme Judicial Court, SCR-2107, 4MLC (1977).

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[12] The application of this doctrine is illustrated by Waukegan-North Chicago Transit Co., 225 NLRB No. 155, 93 LRRM 1262 (1976). The employer, which did both school and non-school related busing was charged with violations of 8(a)3 and 1 of the LMRA. The administrative law judge, applying then current jurisdictional standards, asserted jurisdiction and found violations involving both school and non-school aspects of the business. On review, applying more recent precedent, the board modified the ALJ's opinion, declining jurisdiction over both (a)3 and (a)1 conduct which applied only to school drivers.

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Thus, where the petition before us seeks only school bus drivers, a contract including both school and non-school employees should not operate as a bar to the election.

Upon all of the evidence and the record as a whole, we find:

1. Kenneth Hudson, Inc., d/b/a Hudson Bus Lines, affects industry of trade, and is an employer within the meaning of Section 2(2) of the Law.

2. School bus drivers performing busing for the Hudson Bus Lines, under contract to the City of Boston, are employees within the meaning of Section 2(3) of the Law.

3. The United Steelworkers of America, AFL-CIO, CLC is a "labor organization" within the meaning of Section 2(5) of the Law

4. A question exists concerning the representation of school bus drivers employed by Kenneth Hudson, Inc., d/b/a Hudson Bus Lines.

5. The unit appropriate for the purposes of collective bargaining shall include all employees of Kenneth Hudson, Inc., d/b/a Hudson Bus Lines, who transport school children for the City of Boston,[13] excluding charter and line drivers, and all other employees.

6. Employees eligible to vote in the election shall be all employees in the unit described in paragraph 5 and who appeared upon the Employer's payroll for the payroll period ending immediately prior to November 14, 1977 and who have not since quit or been discharged for cause.

Direction of Election

By virtue of, and pursuant to the power vested in the Commission by Chapter 150A of the General Laws,

IT IS HEREBY DIRECTED, as part of the investigation authorized by the commissic that an election by secret ballot be conducted under the direction and supervision of representatives of the Commission among the employees in the aforesaid bargaining unit at such time and place and under such conditions as shall be contained in the notice of election issued by the Commission and served upon all parties and posted on the premises of the Employer together with copies of the sample ballot.

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[13] The record in this matter indicates that Hudson also performs school busing for the City of Melrose. The petition, as amended at the hearing, seeks only employees engaged in transporting school children for the City of Boston. The parties introduced no evidence as to the appropriateness of the unit sought. We will, therefore, restrict this unit to employees engaged in school bus operations for the city of Boston.

Kenneth Hudson, Inc., d/b/a Hudson Bus Lines and United Steelworkers of America, AFL-CIO, CLC and Teamsters Local 841, MLC 1630

In order to assure that all ellgible voters shall have the opportunity to be informed of the issues and the exercise of their statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that three (3) copies of an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Executive Secretary of the Commission, Leverett Saltonstall Building, 100 Cambridge Street, Room 164, Boston, Massachusetts, 02202, no later than seven (7) days from the date of this Decision.

The Executive Secretary shall make the list available to all parties to the election. Since failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties, no extension of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS
Labor Relations Commission

James S. Cooper, Chairman

Garry J. Wooters, Commissioner

Joan G. Dolan, Commissioner