Decision file

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO, Petitioner, and FRANK F. FASI, Mayor of the City and County of Honolulu, Employer.	Case Nos. RA-02-15 RA-03-16 RA-04-17 RA-13-18
In the Matter of HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO, Petitioner, and FRANK F. FASI, Mayor of the City and County of Honolulu, and UNITED PUBLIC WORKERS, LOCAL 646, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, and GEORGE KAISAN and ARTHUR OHELO, and MTL, INC., Intervenors.	Case Nos. DR-02-12 DR-03-13 DR-04-14 DR-13-15 Decision No. 85

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECLARATORY RULINGS AND ORDERS

The petition in the RA (unit clarification) portion of the instant consolidated cases was filed with this Board on April 3, 1975.

The petitions for declaratory ruling were filed on May 15, 1975. Thereafter, proceedings commenced on the declaratory ruling petitions only and continued until July 28, 1975, when the matter was continued pending a hearing by the National Labor Relations Board (hereafter NLRB) on a Representational Petition filed by the Hawaii Teamsters & Allied Workers, Local 996 (hereafter Teamsters or Local 996). Case 37-RC-2114. The NLRB issued a Decision and Order on April 26, 1976, dismissing said case. MTL, Inc. and Hawaii Teamsters & Allied Workers, Local 996, 223 NLRB No. 157, 92 LRRM 1029 (1976).

Thereafter, this Board reactivated and consolidated the subject cases. Hearings were held with all parties being afforded the opportunity to present evidence, arguments and briefs. The briefs were received by this Board on May 10, 1977.

The primary issue in this case is whether the employees of MTL, Inc., are "public employees" of the Mayor of City and County of Honolulu within the meaning of Subsection 89-2(7),* Hawaii Revised Statutes (hereafter HRS).

The Hawaii Government Employees' Association (hereafter HGEA) and the United Public Workers (hereafter UPW) take the position that they are public employees by reason of the language of Chapter 89, HRS, and the ruling of the NLRB, supra.

The Mayor (also referred to herein as the public employer, the City, or the employer), the Teamsters, MTL, Inc., and Mr. Ohelo and Mr. Kaisan take the position that the employees of MTL, Inc., are not employees of the City.

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*Subsection 89-2(7), HRS, states:

"Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6(c).

Based upon the entire record herein, the Board makes the following findings of fact, conclusions of law, rulings and orders.

FINDINGS OF FACT

Mayor Fasi is the Mayor of the City and County of Honolulu and is the public employer, within the meaning of Subsection 89-2(9), HRS, of employees of the City and County of Honolulu who are in collective bargaining units 1, 2, 3, 4, and 13.

Petitioner HGEA is the exclusive representative under Chapter 89, HRS, of all employees in collective bargaining units 2, 3, 4, and 13.

Intervenor UPW is the exclusive representative of employees in collective bargaining unit 1.

Intervenor Local 996 represents most nonsupervisory employees of MTL, Inc., for collective bargaining purposes. It is a party to collective bargaining agreements covering these employees. It also previously represented them when they were employed by Honolulu Rapid Transit, Ltd.

Local 996 (along with MTL, Inc., and the City), is a party to a Section 13(c) agreement entered into under the Urban Mass Transit Act. 49 U.S.C.A. §1609 et seq. Said agreement covers the employees of MTL, Inc.

Intervenors Ohelo and Kaisan are members of Local 996 and are employed by MTL, Inc.

MTL, Inc., is a Hawaii corporation whose Articles of Association were executed in September, 1970. It was capitalized at $1,000. This amount of capitalization has never been increased or decreased. Although MTL, Inc., has paid

a gross excise tax on reimbursements it receives from the City to cover its operating expenses, the corporation has never shown a profit or paid a dividend.

Pursuant to Chapter 51, HRS, the City entered into an arrangement, then known as an Interim Agreement, with MTL, Inc., on February 25, 1971, to provide public bus service for the City and County of Honolulu. With slight modifications, this agreement has been renewed up to and including the present. Initially, the agreement was regarded as a temporary one to take care of the cessation of bus service created by a Local 996 strike against a private bus company known as Honolulu Rapid Transit, Ltd. (HRT). The Agreement was to cover the period until the HRT strike was over or until the City acquired the assets of HRT.

The City has acquired all of the assets of HRT.

The Interim Agreement and its successor agreements (hereafter Agreement) call for MTL, Inc., to manage and operate all of the buses which are owned or leased by the City. Said operations are to be primarily "over the principal trunk routes over which service is presently maintained, or parts thereof, according to service specifications developed by the City's Mass Transit Division insofar as the available equipment shall allow during the term of" the Agreement.

MTL is to prepare routes and schedules from the service specifications.

The City provides free of charge to MTL, Inc., real and personal property, under said Agreement, including all of the property and facilities of the City's public transit system such as buses, furniture, office equipment and facilities, shop and repair facilities, tools and machinery, land and buildings, gasoline, fuels, lubricants, tires and tubes, parts

and "materials as required for the operation of the public transit system."

The City pays MTL, Inc., as full compensation for the services performed under the Agreement a monthly fee equal to the monthly operating and maintenance expenses incurred by MTL, Inc.

The City, by Ordinance, prescribes the fares to be charged for riding on its buses.

All revenues from bus fares, car card advertising and revenue derived from the rental or use of or investment of the City owned property used in providing public transportation are and remain the property of the City from the time of their receipt.

The amount of City funds, including about two to three million dollars received from the federal government, which was included in the City's operating budget for MTL for the period 1970-1975 was $12,245,936.

The Agreement contains, in relevant part, the following requirements as to the operation by MTL, Inc., of the public transit system:

> B. The Company shall in connection with its operation under this contract:
>
> 1. Management and Operation. Manage, supervise and operate the City's public transit system as herein provided in an efficient and economical manner to the end that there will be a continuation of public transportation service. The public transit system initially shall be operated over routes existing as of February 29, 1976, at a rate of fare prescribed by the City, and thereafter on service specifications provided by the City's officer-in-charge, which may include changes in routes, schedules, and service and on routes and schedules consistent with passenger traffic demands as approved by the City through its officer-in-charge, and as may hereafter be amended subject to the availability of equipment. The Company shall

as directed by the City further utilize the equipment furnished by the City to provide additional services which are related to mass transit such as car card advertising and bus rental, provided that such utilization does not adversely affect the routes, schedules and rates of fare serving the general public.

The Company shall prepare operating budgets for the public transit system for approval by the City and shall from time to time make recommendations to the City as to the rates of fare necessary to be charged. (Emphasis added)

With respect to personnel matters, the Agreement contains the following provisions:

The Company shall furnish for the active management of the system the services of all of its executive officers, to provide expertise in the areas of management, finance and accounting, operations and transportation, maintenance and purchasing, research and schedules and such other fields as may be necessary for the efficient operation of the Company. The fee covering the salaries of the principal executive officers of the Company initially shall not exceed $8,368.33 per month; provided, however, that in the event salary increases are granted to department heads, first deputies and SR 31, L. 4 of the City, the fee covering the salaries of the principal executive officers of the Company shall be automatically increased in an amount which will provide the salaries of the principal executive officers of the Company to be equal to the corresponding salaries of a department head, first deputy and SR 31, L. 4; and, provided, further, that the salaries shall be subject to amendment as provide herein.

The Company shall employ to the maximum extent possible the former supervisory, technical, clerical, operating and maintenance employees of HRT, LTD. and to the extent deemed necessary by the Company, continue the employment of the present employees of MTL, INC., granting said employees full protection under the terms of the Urban Mass Transportation Act of 1964, as amended, and that certain Section 13(c) Agreement dated the 20th day of December, 1970, by and between the City, Company, and the Hawaii Teamsters and Allied

Workers, Local 996, a copy of which is attached hereto as Exhibit A, and the terms of which are expressly made a part of this contract and incorporated herein by reference, and that certain Section 13(c) Agreement dated the 15th day of March, 1974, by and between the City, Company and the Hawaii Teamsters and Allied Workers, Local 996, a copy of which is attached hereto as Exhibit B, and the terms of which are expressly made a part of this contract and incorporated herein by reference. All employees, including the principal executive officers of the Company and all non-bargaining unit employees, shall be deemed, for purposes of this Agreement, to be affected employees under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended. All employees shall be competent and qualified and shall be actively engaged in the performance of their duties on behalf of the City's public transit system. (Emphasis added)

The Agreement also states:

> If, at any time during the term of this Agreement, the Company is prevented from performing its obligations under this Agreement by any law, or judicial or administrative agency decision which substantially alters its ability to perform, this Agreement shall be terminable upon written notice given by either party. Such a termination shall not be deemed a default by the Company, and both parties shall be excused from further performance under this Agreement; provided, however, the City shall not be excused from performing the terms and conditions of the Collective Bargaining Agreement presently in effect between the Company and Local 996 of the Hawaii Teamsters and Allied Workers, and the 13(c) Agreements attached hereto as Exhibits "A" and "B." (Emphasis added)

As to termination and amendment of the Agreement, the Agreement states:

> 5. Termination. All the terms and conditions of this Agreement are considered material and, in the event the Company defaults in the performance of any of the covenants or agreements to be kept, done or performed by it under the terms of said contract, or otherwise acts in a manner which manifests bad faith, the City shall give the Company ten (10) days' written

notice either by mail or by personal service, setting forth the default, and if the Company fails, neglects or refuses for a period of more than ten (10) days thereafter to make good or perform the default, then the City, without further notice and without suit or other proceeding, may cancel this Agreement. In the event of termination of this Agreement for breach or default by the Company as hereinabove specified of any of the provisions of this Agreement, except for the provisions of Section 9, Maintenance, the City shall have the right forthwith to take possession of all equipment and facilities provided to the Company under the provisions of Section 6 of this Agreement, and all funds due the City, and all payments otherwise required to be made to the Company shall cease forthwith. In addition, the performance bond provided for in Paragraph B 5(c), Insurance, shall be forfeited to the City as liquidated damages.

In the event of breach of the provisions of Section 9, Maintenance, and upon refusal of the Company to remedy such breach after ten (10) days' written notice thereof, the City reserves the right to remedy the maintenance deficiencies and to deduct the cost thereof from any payments due the Company under the provisions of Paragraph A 3, Payment. The Company shall not be deemed in default of any of the provisions of this Agreement in the event of interruption or diminution of service, if said condition is the result of causes beyond the control of the Company, as provided in Paragraph B 4, Excuse of Performance.

If, at any time during the term of this Agreement, the Company is prevented from performing its obligations under this Agreement by any law, or judicial or administrative agency decision which substantially alters its ability to perform, this Agreement shall be terminable upon written notice given by either party. Such a termination shall not be deemed a default by the Company, and both parties shall be excused from further performance under this Agreement; provided, however, the City shall not be excused from performing the terms and conditions of the Collective Bargaining Agreement presently in effect between the Company and Local 996 of the Hawaii Teamsters and Allied Workers, and the 13(c) Agreements attached hereto as Exhibits "A" and "B."

> In addition, the City reserves the right to terminate this Agreement upon thirty (30) days' written notice, if sufficient funds are not made available by means of appropriation, to fulfill its obligations under this Agreement. In this event, the City agrees to be bound by the collective bargaining agreement presently in effect between the Company and Local 996 of the Hawaii Teamsters and Allied Workers, and the Company shall assign to the City its rights and obligations under that collective bargaining agreement, and the City shall indemnify and hold Company harmless from any and all claims, liability, loss, or damage in connection with said collective bargaining agreement.
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> 6. Amendment. The City retains the right to amend this contract by subsequent written agreement by increasing the services of the Company as additional bus companies are acquired or existing lines are extended, or by decreasing the amount of services required by the Company as passenger loads and other circumstances require. In either case, the compensation to be paid the Company shall be adjusted as provided in Paragraph A 3, Payment. (Emphasis added)

Under the Agreement, MTL is to obtain a liability insurance policy from an insurer approved by the City. The policy is to insure the City and its officers, agents and employees, as well as MTL, against any liability or loss arising out of operation of the bus system. MTL also is required by the Agreement to obtain fire and vandalism insurance in the joint names of MTL and the City "with loss payable to the City" and Workmen's Compensation insurance covering MTL, "with the City as additional insured, against all claims of the Company's employees, working in any capacity, whose duties require their presence on the premises."

Also, MTL must furnish a performance bond in the amount of $12,000 to assure its full and faithful performance of the contract.

The Agreement declares that MTL, Inc., is an independent contractor:

> Independent Contractor. Unless otherwise provided herein, the Company, at all times and in all operations herein agreed to be performed by the Company, shall be deemed to be an independent contractor and the Company shall at all times have exclusive control of the work and services to be furnished under this Agreement, and shall have the exclusive right to hire and discharge all persons supplying services hereunder, and said Company shall in no event be deemed to be an agent or partner of the City, and the City shall not have any right of control as to the mode of doing the work contracted for herein. The Company shall not represent itself to the public as a partner or agent of the City in performing the terms of this Agreement.

MTL has never paid State or federal income taxes because its total deductions have always equalled its gross receipts leaving it with no taxable income. On most of its tax returns, the following explanation is included:

> Nature of Operation: MTL, Inc., was retained by the City and County to operate the City's Bus System. The Agreement provides that the City furnish necessary properties, facilities, buses, supplies and equipment used in the system. MTL, Inc., receives as compensation for services rendered an amount equal to the operating expenses incurred for the system's operation.

Out of funds made available by the City in the form of reimbursements, MTL, Inc., pays State and federal unemployment and FICA taxes for its employees. It also pays, with the same sort of City funding, a State general excise tax on its gross receipts although said receipts belong to the City as soon as they are received.

MTL's accounting firm received a letter from Ralph Kondo, former Director of Taxation, State of Hawaii, dated February 15, 1972, which states that MTL, Inc., is a public service company subject to the general excise tax under Chapter 239, HRS, and is not, based upon the information provided by MTL's accounting firm, an agency of the City.

The City's Department of Transportation has full control over what routes MTL is to run the buses on. The scheduling of the buses is left to MTL. The City determines whether there will be new bus routes.

When MTL experienced difficulty in renewing its agreement with the City, it sent out a notice to its employees saying that if MTL did not get a contract with City, it would terminate them.

The supervisory and management employees of MTL, Inc., have formed a union for themselves called the Association of Management Workers of MTL, Inc. Its president is Albert Moniz, who also is the president and general manager of MTL, Inc. The stated purpose of this management union is to work out all differences arising between the union or its members and any employer with whom the union holds a contract. Mr. Moniz stated that the management union intends to negotiate with the City.

There exists a document entitled Agreement Pursuant to Section 13(c) of the Urban Mass Transit Act, as Amended (also hereafter 13(c) contract). The parties to this contract are the City and County of Honolulu; Hawaii Teamsters & Allied Workers, Local 996; and MTL, Inc.

Under this 13(c) contract, both the City and MTL, Inc., agree to be bound by the terms of the collective bargaining agreement between MTL, Inc., and Local 996. The 13(c) contract also provides that any person or entity, whether public or private, which undertakes the management or operation of the City's transit system shall be bound by the terms of the collective bargaining agreement.

The 13(c) contract was approved by the Secretary of Labor of the United States and the City received Urban Mass

Transit Act (hereafter UMTA) funds to help operate the bus system.

The City, through a reimbursement system, pays all salaries and fringe benefits of MTL, Inc., employees in the following manner: MTL certifies its payroll to the City; the City deposits funds in a bank to cover the payroll and then MTL, Inc. checks are drawn on the account.

Although there was ambiguity in the testimony on collective negotiations between MTL, Inc., and Local 996, it appears that no City official sits in on the bargaining sessions but MTL must obtain City approval of its counterproposals (at least as to cost items) from the Mayor, Corporation Counsel and Managing Director of the City. The cost package must be approved by the Mayor before the collective bargaining agreement is signed.

MTL, Inc., is engaged in no business other than operating the City's bus system under the above frequently quoted agreement which is a non-assignable, personal services contract under which the City pays for every cost of any kind incurred by MTL, Inc., including all salaries, fringe benefits, and other compensation of all employees of MTL, Inc., from its top management down.

MTL, Inc., has a total of 988 employees. None of them occupies a position in the Civil Service of the City and County created by Section 6-303 of the Charter of the City and County of Honolulu (hereafter Charter). None of them is considered at this time to be public employees for the purposes of Chapters 77 through 88, HRS.

By virtue of the agreements between Local 996 and MTL, Inc., they enjoy health, dental and retirement benefits different from those enjoyed by employees presently subject to the Chapters of Title 7, HRS.

As a result of the decision in the case of MTL, Inc., and Hawaii Teamsters & Allied Workers, Local 996, 223 NLRB No. 157, 92 LRRM 1029 (1976), said employees no longer enjoy coverage under the National Labor Relations Act because the NLRB in said case found that MTL, Inc., was not an independent contractor but was an instrumentality of the City.

The City as of May 31, 1976, employed a total of 10,000 employees in the following categories: Permanent civil service 6,986; temporary 90; exempt from civil service 998; on leave without pay 94; on personal service contracts 1,832. Individuals on personal service contracts do not occupy positions of the City.

Not every public employee presently in any one of the thirteen collective bargaining units created by Chapter 89, HRS, is in civil service.

Evidence was received as to what units the HGEA believed employees of MTL should be placed in. While some of this evidence provided a good basis for making tentative decisions concerning unit placement, the record is insufficient at this time on the matter of unit placement.

There is no existing classification in the City service for bus drivers.

CONCLUSIONS OF LAW

The primary issue before this Board is whether the employees of MTL, Inc., are public employees as that term is defined in Subsection 89-2(7), HRS: "'Employee' or 'public employee' means any person employed by a public employer. . . ."

Under Subsection 89-2(9), HRS, "'Employer' or 'public employer' means. . .the respective mayors in the case of the

City and County of Honolulu and the counties of Hawaii, Maui and Kauai. . ."

The subject employees, at least nominally, are employees of MTL, Inc., not the City or its Mayor.

However, under either the doctrine of collateral estoppel which this Board previously has refused to apply in this case (Order No. 77, October 18, 1976) or the factual record developed herein, the conclusion is inescapable that MTL, Inc., is an instrumentality of the City and County of Honolulu and, it follows, that its employees are employed by the City.

That MTL, Inc., is an instrumentality of the City, rather than an independent contractor, cannot be gainsaid in view of the facts that the City furnishes MTL, Inc., the equipment and means of performing the agreement to operate the bus system, the company runs no risk of loss and is subject to close scrutiny in the performance of its mission, does not have full independence from the City in terms of whom it hires, must operate according to specifications created by the City and subject to significant City control. MTL, Inc., and Hawaii Teamsters & Allied Workers, Local 996, supra; Dorkin v. American Express Company, 74 Misc. 2d 673, 345 NYS 2d 891 (1973); Standard Company Dairy v. Allen, 108 P. 2d 164 (Okla. 1940); Capital Const. Co. v. Industrial Commission, 146 P. 2d 902 (Ariz. 1944).

The fact that a contract uses the term independent contractor is not determinative of true status. Hargis v. Wabash Railroad Co., 163 F 2d 608 (7th Cir. 1967).

Inasmuch as MTL, Inc., is an instrumentality of the City rather than an independent contractor, it follows that

all of MTL, Inc.'s employees, including those who do its hiring and firing, are employees of the City.

In the case of Wabash R.R. Co. v. Finnegan, 67 F. Supp. 94 (D.C., E.D. Mo. 1946), appeal dismissed, 160 F 2d 891 (1947), the Court said at page 99:

> In 39 C.J., p. 38, a general rule of law which we consider applicable to the facts in this case is stated: "If, however, the employer retains or assumes control over the means and methods by which the work of a contractor is to be done, the relation of master and servant exists between him and servants of such a contractor, and the mere fact of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ."

To similar effect are Gulf Refining Co. v. Rogers, 57 S.W. 2d 183 (Ct. of Civ. Ap. Tex. 1933), Downs v. Baltimore & Ohio R. Co., 345 Ill. App. 118, 102 N.E. 2d 537 (1951). The fact that MTL, Inc., hires and fires and directly supervises the subject employees does not alter their status as employees of the City under the facts of this case. Cape Shore Fish Co. v. United States, 330 F 2d 961 (Ct. of Claims 1964).

It remains to be determined whether the MTL employees are "public employees" within the meaning of subsection 89-2(7), HRS, which states:

> "Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6(c).*

It would appear, at first blush, that by using the very general language it did in Subsection 89-2(7), the Legislature intended to include within the reach of Chapter 89, HRS,

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*Subsection 89-6(c), HRS, does not expressly exclude the subject employees.

without further consideration, all persons, such as the MTL, Inc., employees who possess enough indicia of common law employees as to be regarded as not being independent contractors. However, this Board is of the opinion that the proper definition to be ascribed to the term "public employee" as it is used in Chapter 89, HRS, must draw its substance from the policies and purposes of the Chapter and the conditions it seeks to remedy.

A careful reading of Chapter 89, HRS, convinces this Board that Chapter 89 was intended to apply only to employees who clearly possess all of the indicia of public employees, are hired and can be fired directly by public authorities, and are directly on the payroll of a public employer without the intervening presence of a nominal employer which is a private corporation.

Section 89-1, HRS, contains a statement of the purposes for enactment of Chapter 89, HRS:

> Statement of findings and policy. The legislature finds that joint-decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, and to maintain a favorable political and social environment.
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> The legislature declares that it is the public policy of the State to promote harmonious and cooperative

> relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other terms and conditions of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a public employment relations board to administer the provisions of this chapter.

Regardless of whether they have done so on a sound legal footing or not, the employees of MTL represented by Local 996 for years have enjoyed collective bargaining rights and privileges outside of Chapter 89, HRS. In their collective bargaining relationship, they do negotiate on subjects upon which negotiations are forbidden in the public sector by Subsection 89-9(d), HRS.

In terms of unit placement under Chapter 89, HRS, Section 89-6 provides that "[a]ll employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

(1) Nonsupervisory employees in blue collar positions;

(2) Supervisory employees in blue collar positions;

(3) Nonsupervisory employees in white collar positions;

(4) Supervisory employees in white collar positions;

(5) Teachers and other personnel of the department of education under the same salary schedule;

(6) Educational officers and other personnel of the department of education under the same salary schedule;

(7) Faculty of the University of Hawaii and the community college system;

(8) Personnel of the University of Hawaii and the community college system, other than faculty;

(9) Registered professional nurses;

(10) Nonprofessional hospital and institutional workers;

(11) Firefighters;

(12) Police Officers; and

(13) Professional and scientific employees, other than registered professional nurses."

This statutory language clearly was intended to fit existing, discernible categories of State and county employees. While the typists at MTL could be slotted into these statutory categories, there is no extant category into which bus drivers clearly fit because there is no bus driver classification in the public service.

Although there presently are some public employees in the above listed units who are exempt from civil service and may additionally be unclassified, it is inescapable that any problems in determining what unit an employee was to fit into were to be resolved by looking at the classifications in effect on the effective date of Chapter 89, HRS. Subsection 89-6(a), HRS, in relevant part provides:

> The compensation plans for blue collar positions pursuant to section 77-5 and for white collar positions pursuant to section 77-13, the salary schedules for teachers pursuant to section 297-33 and for educational officers pursuant to section 297-33.1, and the appointment and classification of faculty pursuant to sections 304-11 and 304-13, existing on [July 1, 1970], shall be the bases for differentiating blue collar from white collar employees, professional from nonprofessional employees, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from non-faculty. In differentiating supervisory

> from nonsupervisory employees, class titles alone shall not be the basis for determination, but, in addition, the nature of the work, including whether or not a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees, shall also be considered.

The workers at MTL, Inc., have never been classified so as to fit into the classifications upon which unit determinations are to be made under Section 89-6.*

This Board will not hold Chapter 89, HRS, applicable to employees who are nominally employed by another, even if that other is functioning as an instrumentality of the City where said employees have been functioning for years as private sector employees and are ostensibly hired, paid, and regulated independently of the rules and laws which govern public employment.

To hold that MTL workers are not, on the facts of this case, Chapter 89 employees is consonant with the purposes of Chapter 89, HRS. This Board believes that slotting MTL, Inc., employees into the extant units by an administrative decision of this agency would not promote the purposes of Chapter 89. It would more likely than not result in discord and strife rather than industrial peace and harmonious employment relations. Putting MTL, Inc., workers with their current cluster of fringe and other benefits into units of employees with different benefits could cause strife, morale problems and, at best, a patchwork situation in negotiations. It would open a Pandora's box of legal problems costly in

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*On the effective date of Chapter 89, HRS, they were employees of HRT, Ltd. Typically, when the State acquires a private entity, legislation is utilized to convert the employees of that entity into public employees. There has been no such legislation as to MTL workers.

nature and difficult of resolution. Many of these problems properly should be resolved prior to placing the subject employees in units. Said problems include the resolution of the status of the employees' previous retirement contributions to the Teamsters; the fact that they are not members of the State's employees' retirement system or health fund; the problems created by their extant health and dental plans. The proper forum to resolve these issues is the Legislature or, perhaps, the City Council of the City and County of Honolulu. To attempt to apply Chapter 89, HRS, to the MTL workers before matters such as these are worked out does not further the purposes of Chapter 89, HRS; it goes contrary to them.

This Board is mindful that the entire system set up by the City, MTL and the Teamsters may be designed primarily to give to some parties the best of both the public and private sectors---heavy public financing, City control in providing a bus system, and almost unfettered collective bargaining rights with just enough uniqueness in the arrangement to prevent the imposition of Chapter 89 regulation upon the employment relationship. Concerns of this sort, however, do not justify a reckless imposition of Chapter 89 upon a group of employees presently outside of that universe of government workers to whom this Board believes Chapter 89 was intended to apply. The facts which put the MTL workers outside this universe are their unique history as former HRT employees, the failure of government to convert them to full-fledged government employee status when HRT was acquired, the separate and distinct collective bargaining status they have occupied for years, the presence

of the nominal corporate employer, the separate and distinct work regulations under which they function. These workers are hybrids and this Board believes that this hybrid status creates a barrier to their inclusion in that group of employees properly covered by Chapter 89, HRS.

In sum, we are of the opinion that in fact the employees of MTL, Inc., are in an employment relationship with the City. We are further of the opinion that to hold that Chapter 89, HRS, at this time applies to that group of employees would be more than an application of the statute to them; it would be an extension of the statute to them. Such an extension is not supported by the policies underlying the statute nor by its language.

DECLARATORY RULINGS AND ORDERS

Although MTL, Inc., is an instrumentality of the City and County of Honolulu and its employees are, in fact, employed by the City in the operation of its public bus system, said employees are not, at this time, "public employees" within the meaning of Chapter 89, HRS. Only the Legislature or the City Council of the City and County, on the facts in this case, can make them public employees for purposes of Chapter 89.

As this Board indicated during the hearing herein the UMTA issue; i.e., whether federal funds would be jeopardized by a decision of this Board in this case, is properly one for the

Secretary of Labor of the United States to rule upon in the first instance.

The unit determination (RA) cases are dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: November 1, 1977

Honolulu, Hawaii