No. 06-61032

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STARTRAN INC,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION;
ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR,
Respondents.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor believes that oral argument would help the court decide this case by clarifying the interrelationships among the four state and federal statutes at issue. Oral argument would also be beneficial because it would shed light on how Capital Metro's decision to comply with some of these statutes by creating StarTran made StarTran ineligible for the OSH Act political subdivision exemption. Accordingly, the Secretary requests that oral argument be held.

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STATEMENT OF JURISDICTION

This petition for review concerns a final order of the Occupational Safety and Health Review Commission ("OSHRC" or "the Commission") under the Occupational Safety and Health Act of 1970 ("OSH Act" or "the Act"), 29 U.S.C. §§ 651-678. On May 9, 2002, when Respondent Secretary of Labor inspected Petitioner StarTran Inc.'s Austin, Texas worksite in response to a safety complaint, and subsequently issued a citation.[1] Record Volume 4 at 1-2.[2] The Commission acquired subject-matter jurisdiction over this matter on July 9, 2002, when StarTran timely contested these citations. *See* Rec. Vol. 6, Doc. 2; OSH Act, § 10(a) & (c), 29 U.S.C. § 659(a) & (c).

A Commission administrative law judge ("ALJ") conducted a hearing pursuant to section 12(j) of the OSH Act, 29 U.S.C. § 661(j), and thereafter issued a decision affirming

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[1] The Secretary has delegated her responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. The terms "Secretary" and "OSHA" are used interchangeably here.

[2] Record references are to the Commission's December 18, 2006 certified list of relevant docket entries in the proceeding below.

the citation and proposed penalty. Rec. Vol. 8, Doc. 37. The Commission directed the case for review, pursuant to section 12(j) of the OSH Act, 29 U.S.C. § 661(j), and on September 27, 2006, affirmed the ALJ's decision and disposed of all the parties' claims. Rec. Vol. 9, Doc. 48.[3] On November 9, 2006,

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[3] The case was directed for review on August 29, 2003, Rec. Vol. 9, Doc. 40, one day late, because a Commission clerk informed the Commissioners that the petition had been docketed thirty days earlier, on July 30, when in fact it was docketed thirty-one days earlier, on July 29, 2003, Rec. Vol. 8, Doc. 38. Rec. Vol. 9, Doc. 48 at 2-3 n.1. This clerical error regarding the date of docketing appears not to have been discovered by the Commission or the parties until after the time for appealing the ALJ's decision (assuming it had become a final order) would have expired. The Secretary agrees with the Commission majority and StarTran that the Commission had authority to direct this case for review despite the clerical error that resulted in such direction after the statutory 30-day period had ended. Rec. Vol. 9, Doc. 48 at 2-3 n.1; Brief of Petitioner ("StarTran's Br.") at 2 n.2.

The alternative to accepting the Commission's view of its own jurisdiction would be to dismiss the appeal for lack of subject-matter jurisdiction, as Commissioner Rogers would have done, an action which, under the circumstances, appears unduly harsh. Commissioner Rogers' dissent maintains that the Commission lacked authority to consider this case once the statutory thirty-day review period had expired and the ALJ's decision had become a final Commission order, Rec. Vol. 9, Doc. 48 at 10 (citing *Brennan v. OSHRC* ("Otinger"), 502 F.2d 30 (5th Cir. 1974)). *Otinger* concerned the Commission's power to set aside a final judgment based on the *petitioner's* alleged excusable neglect, and did not address the

StarTran filed a petition for review. This court has jurisdiction over this appeal pursuant to section 11(a) of the OSH Act, 29 U.S.C. § 660(a), because the alleged violation occurred in this circuit and because the petition was filed within sixty days of the date of the Commission's final order.

STATEMENT OF THE ISSUES

Capital Metropolitan Transit Authority ("Capital Metro" or "the transit authority"), a Texas state political subdivision, created StarTran, an independent nonprofit corporation, to provide transit service and recognize the collective bargaining

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Commission's power to correct its own clerical error. Moreover, this circuit's subsequent decision in *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5th Cir. 1975), treated the Act's parallel 15-day period for a notice of contest as non-jurisdictional, thus leaving open the possibility that *Otinger* is not to be extended beyond its facts.

Furthermore, the U.S. Supreme Court has long recognized the authority of administrative tribunals to correct inadvertent ministerial errors in the interests of justice. *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958). Neither party was prejudiced by the grant of the petition for discretionary review, and both parties had a full and fair opportunity to litigate the case on the merits before the Commission, whose decision is now on appeal. The Secretary believes that, in the unique circumstances of this case, the Commission here properly exercised its inherent authority to correct the consequences of a clerical error.

rights of transit employees in the City of Austin, Texas. Rec. Vol. 3, Exhibit ("Ex.") C-1 at ST. 05. The question presented is whether StarTran is a covered employer under section 3(5) of the OSH Act, 29 U.S.C. § 652(5), and not an exempt political subdivision. More particularly, the issues are:

(1) Whether the Commission reasonably concluded that StarTran is not an exempt political subdivision, where (a) StarTran was created as an independent corporation with recognized collective bargaining rights for its employees so that Capital Metro could avoid violating Texas's ban on collective bargaining by public employees and remain eligible for federal transit funds; and (b) StarTran furthermore concedes that it is not exempt from coverage under the similarly worded political subdivision exemption of the National Labor Relations Act.

(2) Whether the Commission reasonably concluded that StarTran's control over the employment conditions of its employees and its implementation of the collective bargaining agreements show that StarTran is not administered or

controlled by Capital Metro and thus is not an exempt political subdivision.

(3) Whether the Commission reasonably concluded that StarTran is also not an exempt political subdivision based on substantial evidence showing that StarTran had primary responsibility for administering its safety program; and that, therefore, StarTran was not subject to Capital Metro's administration and control in the critical area of safety.

(4) Whether the Commission reasonably concluded that StarTran has the burden of proving that it is an exempt political subdivision.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

This case is an enforcement action under section 10 of the OSH Act, 29 U.S.C. § 659. After StarTran refused to give OSHA requested workplace injury and illness records required by 29 C.F.R. § 1904.40, OSHA cited StarTran for an other-than-serious violation of this regulation and proposed a penalty of $500. Rec. Vol. 4 at 2. StarTran contested the

citation on the basis of the political subdivision exemption, but the ALJ affirmed the violation and the proposed penalty. Rec. Vol. 8, Doc. 37. In a 2-1 decision, the Commission upheld the ALJ's decision, rejecting StarTran's claimed exemption on the basis of Capital Metro's lack of control over the corporation, StarTran's responsibility for its safety and health program, and the corporation's claim to be independent under other laws. Rec. Vol. 9, Doc. 48.

B. Statutory and Regulatory Background

1. *The OSH Act*

The goal of the OSH Act is "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." OSH Act, § 2(b), 29 U.S.C. § 651(b). To achieve this goal, the Act imposes on each "employer" a duty to provide "a workplace free from recognized hazards that are likely to cause death or serious physical harm" and to comply with "occupational safety and health standards promulgated" under

the Act by the Secretary of Labor. OSH Act, § 5(b), 29 U.S.C. § 654(b).[4]

The OSH Act defines "employer" to mean "a person engaged in a business affecting commerce who has employees, but does not include the United States . . . or any State or political subdivision of a State." OSH Act § 3(5), 29 U.S.C. § 652(5). The Act thus exempts "political subdivision[s]" from the definition of "employer," but that term is not separately defined, and neither the Act nor its legislative history explains the exemption's meaning or purpose. The Seventh Circuit, however, has interpreted the exemption as representing "an accommodation between the Act's general purpose of ensuring a safe workplace and the states' interest in preserving autonomy in their role as employers." *Brock v. Chicago*

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[4] The Act separates rule-making and enforcement powers from adjudicative powers: the Secretary is charged with promulgating and enforcing workplace health and safety standards; and the Commission is responsible for carrying out the Act's adjudicatory functions. *Martin v. OSHRC ("CF&I ")*, 499 U.S. 144, 147, 151 (1991). The Secretary prosecutes violations of the Act and its standards by issuing citations requiring abatement of violations and assessing monetary penalties. See OSH Act, §§ 9-10, 17, 29 U.S.C. §§ 658-59, 666.

Zoological Soc'y ("*Chicago Zoo*"), 820 F.2d 909, 913 (7th Cir. 1987).

2. *The Political Subdivision Exemption Regulation*

The Secretary has promulgated a regulation providing interpretive guidance on the exemption. 29 C.F.R. § 1975.5. The regulation sets out the following two tests for a state political subdivision, which ask whether the entity "has been (1) created directly by the State so as to constitute a department or administrative arm of the state government; or (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate." 29 C.F.R. § 1975.5(b).

The regulation also lists several examples of the factors to be considered in determining whether an entity meets these tests. 29 C.F.R. § 1975.5(c). The list of factors, however, is not exhaustive, and whether a single factor will be decisive, or the factors must be viewed in relationship to each other as part of a sum total, depends on the merits of each case. § 1975.5(d).

The listed factors are as follows:

> Are the individuals who administer the entity appointed by a public official or elected by the general electorate? What are the terms and conditions of the appointment? Who may dismiss such individuals and under what procedures? What is the financial source of the salary of these individuals? Does the entity earn a profit? Are such profits treated as revenue? How are the entity's functions financed? What are the powers of the entity and are they usually characteristic of a government . . . like the power of eminent domain? How is the entity regarded under State and local law as well as under other Federal laws? Is the entity exempted from State and local tax laws? Are the entity's bonds, if any, tax exempt? [Are] . . . the entity's employees . . . regarded like employees of other State and political subdivisions? What is the financial source of the employee-payroll? How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

29 C.F.R. § 1975.5(c).[5] The regulation adds that, in evaluating these factors, due regard will be given to whether the entity has an occupational safety and health program for employees. *Ibid.*

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[5] The Commission, which applies these regulatory factors in political subdivision exemption cases, has noted that the factors are an adoption of the NLRB test set forth in *NLRB v. Natural Gas Util. Dis. of Hawkins County, Tenn.* ("*Hawkins County*"), 402 U.S. 600, 604-05 (1971). *Secretary of Labor v. University of Pittsburgh*, 7 O.S.H. Cas. (BNA) 2211, 2218 (Rev. Comm'n 1980).

The regulation also gives examples of the types of entities that would probably be covered and those that would normally be excluded under the political subdivision exemption. Entities normally regarded as exempt include state highway and motor vehicle departments, as well as state, county, and municipal enforcement agencies; whereas business entities that perform certain functions for the State under agreement, such as gasoline stations conducting state and county car inspections, "would normally not be regarded as political subdivisions." 29 C.F.R. § 1975.5(e)(1), (3). Without explanation, the regulation further indicates that "municipal transit agencies" would "probably be excluded as employers," depending on the particular facts of the situation. *Id.* § 1975.5(e)(2).

3. *The Federal Transit Law*

The Federal Transit law ("FT law" or "transit law") provides federal assistance to local governments to acquire failing private transit companies and create public transit authorities. *Jackson Transit Auth. v. Local Div. 1285,*

Amalgamated Transit Union, 457 U.S. 15, 17 (1982).[6] Section 13(c) of the Federal Transit law, 49 U.S.C. § 5333(b), which is administered by the Department of Labor ("DOL"), requires a state or local government to make protective arrangements, including the continuation of transit workers' existing collective bargaining rights, as a condition for federal financial assistance. *Ibid*; *Jackson Transit*, 457 U.S. at 16. After DOL certifies that the agreements are "fair and equitable," the Department of Transportation's Federal Transit Administration can release funds to grantees. 49 U.S.C. § 5333(b)(1); Dep't of Labor, Final Guidelines for 49 U.S.C. § 5333(b), 60 Fed. Reg. 62,964, 62,964 (1995).

When considering section 13(c), Congress realized that if state law prohibited collective bargaining by public employees, unionized transit workers might lose their collective bargaining rights when a local government acquired a private company.

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[6] The Federal Transit law was originally enacted as the Urban Mass Transportation Act of 1964 ("UMTA"), 49 U.S.C. App. 1601-1621, and redesignated as the Federal Transit Act in 1991. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 3003(a), 105 Stat. 1914, 2087 (1991).

Jackson Transit, 457 U.S. at 17.[7] Congress adopted section 13(c) to prevent federal funds from being used to destroy the collective bargaining rights of organized workers. *Ibid.*; H. Rep. No. 88-204, at 15-16 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2569, 2583-84. Accordingly, the implementing regulation provides that "where states or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law." 29 C.F.R. § 215.3(a)(2).

There are several acceptable ways that states and local governments can comply with conflicting state and federal collective bargaining requirements and qualify for federal transit funds. *City of Macon v. Marshall*, 439 F. Supp. 1209, 1214-15 (M.D. Ga. 1977) (quoting the Assistant Secretary's letters). For example, the public entity could create a private

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[7] Currently, eight states, including Texas, prohibit collective bargaining by public employees. Herbert H. Oestreich & George L. Whaley, *Transit Labor Relations Guide* 51-52 (2001) (excerpts attached as "Appendix ("App.") A).

managerial company and contract with it to operate the public transit system, handle labor relations, and engage in collective bargaining with the transit employees. Such an arrangement is an example of the "Memphis formula." UMTA legislative history, 109 Cong. Rec. 5684 (1963) (Sen. Morse).[8] As used by DOL, the term “Memphis formula” also includes hiring a private contractor to provide transit services, and this alternative use of the formula is also acceptable as a means of complying with federal transit and state law. S*ee Macon*, 439 F. Supp. at 1215.

Another acceptable way to meet the collective bargaining requirement for federal transit assistance without violating a conflicting state law involves jointly developing mutually acceptable protective terms and conditions, which may then

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[8] The name “Memphis formula” comes from the city of Memphis, Tennessee’s use of the formula in 1960. Oestreich & Whaley, *Transit Labor* 43-46, App. A. DOL has also recognized the creation of independent public benefit (or trust) corporations to run transit services, an apparent variant of the Memphis formula, as a special procedure that may comply with section 13(c) of the Federal Transit law without violating state law. *Macon*, 439 F. Supp. at 1215; Okla. Stat. tit. 60, §§ 176-180.4 (Oklahoma Public Trust Act).

be adopted by a resolution of the appropriate government body. 29 C.F.R. § 215.3(a)(2); Preamble to 29 C.F.R. pt. 215, 43 Fed. Reg. 13,558, 13,558 (1978).[9]

Alternatively, a transit authority could ask the state legislature to modify the conflicting state law to permit public employees to engage in collective bargaining, or, at least, carve out an exception for public transit employees. The state of Utah, for example, changed its law in 1969 to give public transit employees collective bargaining rights and allow local transit authorities to qualify for federal transit assistance. *Burke v. Utah Transit Authority*, 462 F.3d 1253, 1258-59 (10th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3404 (U.S. Jan. 25, 2007) (No. 06-1050) (citing Utah Code Ann. §§ 17-A-2-1030-1031).

If, however, the state legislature and the transit authority decide that they do not wish to conform to the Federal Transit law's collective bargaining requirement, the authority always

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[9] The hearing testimony suggests that some Texas cities may be using this procedure to qualify for federal transit assistance. *See* Rec. Vol. 1 at 43-45, 66.

has the option of simply declining to apply for a federal transit grant. *Amalgamated Transit Union ("ATU") v. Donovan*, 767 F.2d 939, 947 (D.C. Cir. 1985) (states free to forego transit assistance and adopt any collective bargaining scheme they want).

C. Statement of Facts

1. StarTran is a Texas nonprofit corporation that provides transportation services for the City of Austin, Texas. Rec. Vol. 1 at 21. Capital Metro is the Austin regional area public transit authority. Rec. Vol. 1 at 22-23; Rec. Vol. 3, Ex. C-1 at ST.05.[10] To comply with the requirements for federal

[10] Capital Metro was created in 1985, Rec. Vol. 1 at 23, pursuant to Texas state enabling legislation, with, among other powers, authority to receive federal grants and create and contract with independent nonprofit corporations. Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(l), recodified as Tex. Transp. Code Ann. § 451.055. Before creating StarTran, Capital Metro contracted with Management Labor Services ("MLS"), an outside contractor, to manage and operate the Austin area regional transit system. Rec. Vol. 3, Ex. C-5. The Secretary certified the original July 23, 1975 section 13(c) agreement of the predecessors of MLS and its union, as supplemented by MLS' October 26, 1989 section 13(c) agreement and various side letters of assurances. Rec. Vol. 2, Exs. R-4, R-6; Rec. Vol. 3, Exs. C-6, C-8, C-9. As MLS' successor, StarTran agreed to be bound by MLS' certified section 13(c) agreement. Rec. Vol. 3, Ex. C-5.

transit assistance without violating a conflicting state law, Capital Metro created StarTran as an independent "Memphis formula" corporation in December 1991. Rec. Vol. 1 at 160-63; Rec. Vol. 3, Ex. C-1 at ST.O1, ST.05-.06.[11] In so doing, Capital Metro followed the example of dozens of cities and metropolitan areas that have used the Memphis formula to qualify for federal transit funds without violating state or municipal bans on public sector collective bargaining. Oestreich & Whaley, *Transit Labor Guide* 48 (App. A).[12]

StarTran's duties under its service contract with Capital Metro are to employ those workers necessary for the provision of mass transit service, including drivers, mechanics,

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[11] Section 13(c) of the Federal Transit law requires that grantees that acquire, improve or operate a transit system with federal funds must, among other things, preserve the collective bargaining rights of the transit employees, FT law, § 13(c), 49 U.S.C. § 5333(b). Texas state law prohibits collective bargaining by public employees, Tex. Gov't Code Ann. § 617.002 (West)

[12] While Austin, as well as Beaumont, Texas, has instituted collective bargaining through a Memphis formula contractor, other Texas cities with public transit employees have provided for the right to meet and confer with public employers and develop working conditions instead of using the Memphis formula. Rec. Vol. 1 at 43-45, 66.

supervisors and managers, and to negotiate collective bargaining agreements with the employees' unions. Rec. Vol. 3, Ex. C-1 at ST.06-07. Capital Metro's original contract with StarTran provided that the latter organization "shall in no way be deemed to be . . . under . . . [Capital Metro's] control . . . ." Rec. Vol. 3, Ex. C-1 at ST.06. The contract was subsequently amended to preface this provision with the limitation "for purposes of Collective Bargaining." Rec. Vol. 1 at 172-73; Rec. Vol. 2, Ex. R-1 at ST.01. According to the agreement, Capital Metro's required services are "ministerial only," and StarTran "retain[s] absolute and real day-to-day control over all matters relating to the terms and condition of employment, supervision and control of its employees." Rec. Vol. 3, Ex. C-1 at ST.07-.08; *accord* Rec. Vol. 1 at 191-93; Rec. Vol. 2, Ex. R-1 at ST.01.[13]

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[13] Capital Metro continues to purchase transportation services from outside contractors in addition to the services that StarTran provides. Rec. Vol. 1 at 23, 177, 222-23; *see also* Rec. Vol. 1 at 22, 46; Rec. Vol. 3, Ex. C-6 at 1-2 (recounting Capital Metro's pre-StarTran agreements with outside contractors to manage transportation services).

2. StarTran's board of directors is composed of five members, all appointed and removable by the chief executive officer of Capital Metro, five of whose seven board members are publicly elected. Rec. Vol. 1 at 49, 161, 173-177. Capital Metro pays the salaries of StarTran's board of directors and also processes the pay checks of StarTran employees. Rec. Vol. 1 at 218. StarTran's sole asset is its employees. Rec. Vol. 1 at 208.

Capital Metro is StarTran's only customer and sole source of revenue, and retains control over StarTran's budget, fiscal affairs and property. Rec. Vol. 1 at 165-66, 168-69, 171, 178-79, 232; Rec. Vol. 2, Ex. R-1 at ST.08, ST.10.

StarTran has exclusive authority to hire, fire, pay, promote, supervise and direct employees, and to handle discipline and grievance procedures. Rec. Vol. 2, Exs. R-1 at ST.01, ST.07, R-10 at 4, 17-18, 21-22, R-11; Rec. Vol. 1 at 77-79. StarTran also solely administers the collective bargaining agreement with the Amalgamated Transit Union ("ATU"). Rec. Vol. 1 at 191. Employees raise day-to-day work concerns only with StarTran. Rec. Vol. 1 at 80. Capital Metro has no

authority to administer any collective bargaining agreement with StarTran employees, or to ask StarTran to depart from the terms and conditions of any such agreement. Rec. Vol. 2, Ex. R-1 at ST.01; Rec. Vol. 8, Doc. 37 at 6.

StarTran employees are treated as private employees. Rec. Vol. 1 at 23. They do not receive the same benefits as state employees, including Capital Metro employees, do not have the same paid holidays, or retirement plan, and have no civil service job protection. Rec. Vol. 1 at 24-25, 31, 209; Rec. Vol. 2, Exs. R-10 at 28, 34, R-11 at 29. The collective bargaining agreement, negotiated by StarTran and the ATU, governs employment conditions, including employees' wages, benefits, and disciplinary and grievance procedures. Rec. Vol. 3, Ex. C-2; Rec. Vol. 1 at 27-28. Capital Metro was not involved in these negotiations, and does not negotiate with the union, but the transit authority's approval of collective bargaining agreements is required. Rec. Vol. 1 at 28, 73. Capital Metro has never refused to grant such approval since being formed in 1985. Rec. Vol. 1 at 21-23, 28.

Capital Metro's safety manager developed the safety program used by both Capital Metro and StarTran, but StarTran is chiefly responsible for enforcing its program. Rec. Vol. 1 at 127, 146. Although the original contract between Capital Metro and StarTran stated that Capital Metro was to provide safety and other training, Rec. Vol. 3, Ex. C-1 at ST.07, an amendment expressly reassigned these duties to StarTran, *id.* at ST.03. The collective bargaining agreement between StarTran and ATU provides that StarTran will supply employees with protective equipment and can require them to attend safety meetings. Rec. Vol. 3, Ex. C-2 at ST.089. StarTran also has exclusive authority to discipline employees for safety violations. Rec. Vol. 1 at 78. Employees raise workplace health or safety concerns with their StarTran supervisors. Rec. Vol. 1 at 79-80.

3. On May 9, 2002, OSHA inspected StarTran's Austin worksite after receiving a safety complaint. Rec. Vol. 4 at 1. As a result of the inspection, OSHA issued StarTran a citation alleging an other-than-serious violation of 29 C.F.R. § 1904.40 for failure to provide injury and illness records. Rec.

Vol. 4 at 2. The citation also proposed a penalty of $500 for this alleged violation. *Ibid*. StarTran stipulated to the factual allegations of the citation and the reasonableness of the penalty, Rec. Vol. 1 at 9; Rec. Vol. 4 at 2-3; Rec. Vol. 8, Doc. 37 at 2, but argued that it is a state political subdivision exempt from OSH Act requirements, Rec. Vol. 4 at 2, even though StarTran claims private status under Texas law, Rec. Vol. 9, Doc. 48 at 8-9.[14] StarTran has never claimed the identical exemption under the National Labor Relations Act ("NLRA"), NLRA, § 2(2), 29 U.S.C. § 152(2), and the corporation concedes that it is covered by the NLRA, which guarantees the collective bargaining rights of private employees, NLRA, § 7, 29 U.S.C. § 157. Rec. Vol. 1 at 40, 208; Rec. Vol. 9, Doc. 48 at 9.[15]

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[14] Despite its claim to be exempt from OSH Act requirements, StarTran has provided requested employee safety records to OSHA on other occasions. Rec. Vol. 1 at 104-06.

[15] No official determination has been made on whether StarTran is subject to the NLRA. Rec. Vol. 9, Doc. 48 at 9.

D. The ALJ's Decision

Before the ALJ, "[t]he only fact in dispute [was] whether the individuals who actually administer StarTran are controlled by public officials [of Capital Metro]." Rec. Vol. 8, Doc. 37 at 6. To determine that question of control, the ALJ considered the factors set forth under 29 C.F.R. § 1975.5(c). *Ibid*.

The ALJ concluded that StarTran was not an exempt political subdivision under the OSH Act because the corporation's board administered the day-to-day working conditions of its employees, negotiated and enforced the collective bargaining agreement, and answered only indirectly to public officials or the general electorate. Rec. Vol. 8, Doc. 37 at 7. The ALJ determined that the collective bargaining agreement between StarTran and its employees governed the terms and conditions of employment. *Ibid*. Since there was no evidence that Capital Metro had any authority to ask StarTran's management to depart from the collective bargaining agreement, the ALJ found that StarTran was

ultimately controlled by that agreement, and not by Capital Metro. *Ibid.*

The ALJ also found that StarTran administered its workplace safety and health program. Rec. Vol. 8, Doc. 37 at 7. The ALJ determined that, although Capital Metro developed StarTran's safety program and provided safety training, StarTran supervisors actually implemented and enforced the program. *Ibid.* The ALJ further noted that Capital Metro had no authority to interfere with StarTran's disciplinary procedures, and that, under the amended service agreement, StarTran is responsible for its employees' health and safety. *Ibid.*

Accordingly, the ALJ held that "StarTran is not a government entity, and that its workplace is covered by the strictures of the [OSH] Act." Rec. Vol. 8, Doc. 37 at 7. The citation was therefore affirmed.

E. The Commission's Decision

The Commission (Chairman Railton and Commissioner Rogers) affirmed the ALJ's decision holding StarTran to be an employer, not an exempt political subdivision, under the OSH

Act. Rec. Vol. 9, Doc. 48 at 1-2.[16] The majority found that it was undisputed that the first regulatory test for the exemption, 29 C.F.R. § 1975.5(b)(1), was inapplicable because StarTran was not created by the State of Texas. Rec. Vol. 9, Doc. 48 at 6. Recognizing the flexibility inherent in the regulation's "nonexhaustive list of factors" and finding "three factors to be particularly significant," the majority concluded that StarTran did not meet the second test, i.e., being "administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate," § 1975.5(b)(2), under any of these factors. *Ibid.*

First, the majority held that Star Tran is not publicly controlled. The majority found that, despite the fact that all five of StarTran's board members are appointed by Capital

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[16] Relying on Federal Rule of Civil Procedure 60(a) and the lack of prejudice to any party, a different Commission majority (Chairman Railton and Commissioner Thompson) held that the Commission had authority to direct this case for review outside the statutory 30-day period (i.e., on the 31st day). This holding was based on the fact that the late direction of review resulted from a clerical error that misled the Commission into believing that the late direction was timely. Rec. Vol. 9, Doc. 48 at 2-3 n.1; OSH Act, § 12(j), 29 U.S.C. § 661(j). *See supra* pp. 2-3 n. 3.

Metro, StarTran is controlled by its own board and by its collective bargaining agreement with ATU. Rec. Vol. 9, Doc. 48 at 6-7. The majority emphasized that under Capital Metro's service agreement with StarTran, Capital Metro's services are purely ministerial and StarTran retains absolute day-to-day control over all employment matters. *Ibid*.

Second, the majority found that StarTran had primary responsibility for the health and safety of its employees. The majority agreed with the ALJ that although Capital Metro developed StarTran's safety program, StarTran was chiefly responsible for enforcing it. Rec. Vol. 9, Doc. 48 at 8. The majority also noted that the amended service agreement transferred the duty of providing safety and other training to StarTran employees from Capital Metro to StarTran. *Ibid*. In addition, the majority cited the collective bargaining agreement, which obligates StarTran to provide employees with protective equipment and authorizes the corporation to require employees to attend safety meetings. *Ibid*.

Third, the majority concluded that StarTran had represented itself as a private, independent entity under Texas

law and the NLRA. Rec. Vol. 9, Doc. 48 at 8-9. In particular, the majority observed that, although StarTran concedes that it does not qualify as an exempt political subdivision under the NLRA, the corporation "brazen[ly]" claims the same exemption under the identical OSH Act test. *Ibid*.

The dissent (Commissioner Thompson) considered the same three factors as the majority did, but concluded that StarTran "serves merely as a puppet of Capital Metro." Rec. Vol. 9, Doc. 48 at 12-15.[17] The dissent viewed the evidence as showing that the corporation was controlled by Capital Metro and ultimately the electorate, *id*. at 12-13, and that Capital Metro has chief responsibility for safety and health at Star Tran, *ibid*. Unlike the majority, the dissent also gave little weight to StarTran's claim to be an independent entity under Texas law and the NLRA. Rec. Vol. 9, Doc. 48 at 14-15.

[17] Commissioner Rogers dissented from her two colleagues on the jurisdictional issue concerning the Commission's late direction of review, but concurred with Chairman Railton on the merits. Rec. Vol. 9, Doc. 48 at 10-11.

SUMMARY OF THE ARGUMENT

The Memphis formula is a widely used device that enables cities and public transit authorities to qualify for federal transit assistance in states that ban public sector collective bargaining. According to the formula, a public entity creates and contracts with a private managerial company, or alternatively hires an outside private company to operate the public transit system, handle labor relations, and engage in collective bargaining with the transit employees.

Capital Metro used the Memphis formula here to create StarTran and continue to satisfy federal transit assistance requirements without violating the Texas ban on public sector collective bargaining. The courts have ruled, however, that the very conditions of autonomy that Capital Metro contractually granted StarTran to satisfy the requirements of the Federal Transit law and comply with Texas law -- control over employment conditions, including safety programs, and exclusive authority to implement collective bargaining agreements -- ensure that StarTran is ineligible for the OSH Act's political subdivision exemption.

StarTran attempts to escape this consequence by arguing that it was created as an independent corporation for state law and National Labor Relation Act purposes only, and that it is a political subdivision for the purpose of being exempt from the OSH Act. The argument is invalid because of the close interplay in our federal system among the OSH Act, the NLRA, the Federal Transit law and the Texas ban on public sector collective bargaining.

The OSH Act and the NLRA are sister federal remedial labor statutes with identical political subdivision exemptions, virtually identical tests for those exemptions, and similar purposes. The NLRA guarantees the collective bargaining rights of private employees. Where employees previously enjoyed collective bargaining rights protected by the NLRA, the Federal Transit law guarantees the continuation of collective bargaining rights for all such employees covered by a section 13(c) certification. Thus, the Texas ban on public sector collective bargaining may specifically affect Capital Metro's qualification for federal transit assistance, and more generally

affects StarTran's eligibility for the OSH Act and NLRA exemptions.

Capital Metro chose to use the Memphis formula to resolve the conflict between Texas state law and the Federal Transit law's conditions for assistance. The necessary consequence of that arrangement is that StarTran is not eligible for the OSH Act political subdivision exemption. To qualify for that exemption, StarTran must act as a public employer, i.e., must employ public employees. But StarTran cannot be a political subdivision under the OSH Act (or the NLRA) and still serve its purpose of allowing Capital Metro to qualify for federal transit assistance because StarTran preserves the collective bargaining rights of Austin's transit workers.

ARGUMENT

A. Standard of Review

This case concerns the Commission's three independent grounds for holding that StarTran is not an exempt political subdivision under the second regulatory test for the exemption, 29 C.F.R. § 1975.5(b)(2). *See supra*, pp. 4-5,

issues (1)-(3).[18] The first two grounds are legal conclusions and the third is a mixed legal and factual determination. *See ibid.* The Commission's legal conclusions are subject to the Administrative Procedure Act ("APA") standard of review and can be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA, 5 U.S.C. § 706(2)(A); *MICA Corp. v. OSHRC*, 295 F.3d 447, 449 (5th Cir. 2002). The Commission's factual findings are conclusive if supported by substantial evidence in the record considered as a whole. OSH Act, § 11(a), 29 U.S.C. § 660(a); *MICA*, 295 F.3d at 449.

This case also involves the legal question whether the Commission correctly assigned the burden of proving the applicability of the political subdivision exemption to StarTran. This court reviews such legal questions de novo. *Regents of Univ. of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007).

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[18] As noted earlier, it is undisputed that StarTran did not pass the first regulatory test, 29 C.F.R. § 1975.5(b)(1), because the corporation was not created by the state of Texas. Rec. Vol. 9, Doc. 48 at 6.

The OSH Act's political subdivision exemption is to be construed narrowly so as not to deny workers the protection of the Act. *See NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174, 177 (4th Cir. 1991) (NLRA's identical political subdivision exemption to be construed narrowly); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (exemptions from NLRA coverage to be construed narrowly to avoid denying protection to intended workers).

B. StarTran's Creation as a Memphis Formula Contractor Shows That the Corporation Is Not Administered or Controlled by Capital Metro.

1. The Commission reasonably found that StarTran's creation as an independent entity showed that the corporation did not intend to be viewed as a political subdivision under Texas law. Rec. Vol. 9, Doc. 48 at 6, 9. Capital Metro set up StarTran as a independent corporation under the Memphis formula to provide transit service and recognize the collective bargaining rights of employees so that Capital Metro could continue receiving federal transit funds without violating the state ban on collective bargaining by public employees. *See supra*, pp. 15-16. This arrangement could not work unless

StarTran was an independent private corporation, not a state agency or political subdivision. If StarTran were a political subdivision, then its transit employees would become public employees who would be forbidden by Texas law to engage in collective bargaining, Tex. Gov't Code Ann. § 617.002 (West).

Furthermore, since the Federal Transit law requires that grantees preserve the collective bargaining rights of the employees covered by the recipients' certification agreements, *see supra*, pp. 10-12, Capital Metro would lose its federal transit grant if StarTran were a political subdivision and no measures were adopted to permit it to engage in collective bargaining. For this very reason, StarTran has recognized the collective bargaining rights of its unionized employees, and maintains that it is covered by the NLRA, which guarantees the collective bargaining rights of private employees, NLRA, § 7, 29 U.S.C. § 157. Rec. Vol. 9, Doc. 48 at 9. Public employees are not covered by the NLRA, and although the NLRA has the same political subdivision exemption as the OSH Act, NLRA, § 2(2), 29 U.S.C. § 152(2), StarTran has never claimed the NLRA exemption, Rec. Vol. 1 at 40, 208. Thus,

StarTran's creation as an independent Memphis formula contractor demonstrates that the corporation is not, and cannot be, a political subdivision on penalty of making Capital Metro ineligible for its federal transit funds. *See supra*, pp.15-16.

2. StarTran's response to the above argument is to claim (StarTran's Br. 23-24, 30), first of all, that the Commission gave undue weight to StarTran's status under the NLRA to the exclusion of the other listed regulatory factors; and, second, that the corporation is a private corporation for Texas law, NLRA and Federal Transit law purposes, but a political subdivision for OSH Act purposes. *Id.* at 29-30. The first contention misinterprets the regulation, and the second contention is wrong as a matter of law.

StarTran's objection to the Commission's assignment of weight to the regulatory exemption factors under 29 C.F.R. § 1975.5(c) rests on a misunderstanding of the regulation. StarTran complains that the Commission addressed only three of the regulatory factors, and regarded one of them, treatment under other federal and state laws, especially the NLRA, as

decisive. Contrary to StarTran's assertion, however, the regulation contains no requirement that a decision address all of the factors, regard all, or even many, as important in an individual case, or be confined to the listed factors. To the contrary, section 1975.5(d) states that the list of factors is not meant to be exhaustive and that weight is to be assigned on the merits of each case. Thus, the regulation permits the adjudicator to find even a single unlisted factor decisive in a particular case as long as the decision meets the applicable requirements of the standard of review, s*ee supra*, p. 30. With respect to the second contention, StarTran in essence is saying that it is all right to claim to be a private corporation where a federal transit subsidy is at stake and equally acceptable to disclaim that status to avoid being subject to federal health and safety requirements and possible fines. StarTran's contention is untenable because there is a close interplay among these four state and federal labor laws, and StarTran's public or private status under one law affects the corporation's rights and responsibilities under the others.

In the first place, the OSH Act and the NLRA are sister federal remedial labor statutes, both concerned with protecting workers. The two statutes have identical political subdivision exemptions with virtually identical tests and very similar purposes.[19] As noted earlier, the OSH Act's political subdivision exemption has been construed as representing "an accommodation between the Act's general purpose of ensuring a safe workplace and the states' interest in preserving autonomy in their role as employers." *Chicago Zoo*, 820 F.2d at 913.

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[19] The National Labor Relations Board's ("NLRB") tests for the identical political subdivision exemption in the NLRA, NLRA § 2, 29 U.S.C. § 152(2), are almost verbatim identical to the OSH Act exemption except that the NLRB's second test does not include the phrase "individuals who are controlled by public officials." *NLRB v. Natural Gas Util. Dist. of Hawkins County, Tenn.* ("*Hawkins County*"), 402 U.S. 600, 604-605 (1971); see *Chicago Zoo*, 820 F.2d at 910 (OSHA's regulatory test "is identical to the formula the National Labor Relations Board has long used to determine whether an entity is a political subdivision exempt from the Board's jurisdiction under 29 U.S.C. § 152(2)"). StarTran concedes that the NLRB's second test is the same as the OSH Act's second test. StarTran's Br. 28.

The NLRA's political subdivision exemption has a similar purpose. The NLRA's legislative history reveals that Congress enacted that statute's political subdivision exemption "to except from [National Labor Relations] Board cognizance the labor relations of federal, state and municipal governments, since governmental employees did not usually enjoy the right to strike." *Hawkins County*, 402 U.S. at 604. Both the OSH Act and the NLRA political subdivision exemption, then, are designed to preserve the autonomy of government entities that employ public employees.[20]

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[20] Thus, StarTran's citation of *Philadelphia Nat'l Bank v. United States*, 666 F.2d 834, 839 (3d Cir. 1981) (entity's governmental characteristics under one statute do not necessarily control the entity's status under a different statutory scheme), StarTran's Br. 29-30, is distinguishable. The OSH Act and the NLRA have the same tests and similar purposes for their political subdivision exemptions whereas the cited statute, the Internal Revenue Code, has a different test for its exemption, *Philadelphia*, 666 F.2d at 837, and tax law is very different from other areas of the law, *id.* at 839. StarTran also cites *Hawaii Gov't Employees Ass'n v. Martoche*, 915 F.2d 718, 727 (D.C. Cir. 1990), which construed the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401-531, to cover an entity that was an exempt political subdivision under the Labor Management Relations Act ("LMRA"). The *Hawaii* court noted that there is nothing wrong with applying the identical political subdivision exemptions of the LMRDA and the LMRA differently to the

The Federal Transit law requires grantees to preserve the collective bargaining rights of former employees of a private company acquired by a state or municipal government with federal funds. *See supra*, pp. 10-12. Thus, where employees previously enjoyed collective bargaining rights protected by the NLRA, the Federal Transit law guarantees the continuation of those rights for all such employees covered by a certified section 13(c) agreement. *See supra*, pp. 11-12. States and municipalities, however, remain free to reject federal transit funds, rather than accept that condition, and the Secretary accepts some special compliance procedures from States that ban public sector collective bargaining. *See supra*, pp. 12-14.

The Texas law in question, Tex. Gov't Code Ann. § 617.002 (West), bars political subdivisions from making collective bargaining agreements with public employees. Thus, this state law affects Capital Metro's eligibility for federal

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same employer. *Hawaii*, 915 F.2d at 727. StarTran does not show why the court's treatment of these statutes is applicable or should result here in *excluding* from OSH Act coverage an entity that is *not* exempt under the NLRA. Indeed, as explained above, there are good reasons for interpreting the NLRA and the OSH Act similarly with regard to the political subdivision question in this case.

transit assistance, absent some arrangement like the Memphis formula that preserves the collective bargaining rights of the employees covered by the transit authority's certified section 13(c) agreements. There is no dispute that Capital Metro is itself a political subdivision exempt from OSH Act coverage. But to qualify similarly for the OSH Act and NLRA political subdivision exemptions, StarTran must act as a public employer, i.e., must employ public employees. *Chicago Zoo*, 820 F.2d at 913 ("Exempting an entity that does not treat its employees as public employees would obstruct the [OSH] Act's basic purpose without advancing the interests served by the exemption").

The whole purpose of establishing StarTran as an independent entity, however, was to create a private corporation so that it could treat its workers as private employees with collective bargaining rights unavailable to public employees in Texas. As discussed earlier, *see supra*, pp. 15-16, the Texas public employee collective bargaining ban conflicts with the Federal Transit law's condition that grantees preserve the collective bargaining rights of covered employees.

Capital Metro chose to resolve that conflict and retain its federal transit funds by creating StarTran as an independent Memphis formula corporation that employs private employees. *See supra*, pp. 15-16. The necessary consequence of that arrangement is that StarTran is not eligible for the OSH Act political subdivision exemption.

Capital Metro could have resolved the conflict in other ways. For example, Capital Metro could have chosen to use a special compliance procedure to avoid violating state law, such as joint development of protective terms and adoption of those terms in a public body's resolution. *See supra*, pp. 13-14. Alternatively, Capital Metro could have sought a repeal of the state ban on public sector collective bargaining, or an exception for public transit employees. *See supra*, p. 14. These alternatives, if adopted, would have enabled Capital Metro to comply with state law and qualify for the OSH Act political subdivision exemption without jeopardizing its federal transit grant. Capital Metro also had the option of qualifying for the exemption by operating a public transit company with public employees, subject to the state ban on their collective

bargaining rights, and forfeiting its federal transit funding. *See supra*, pp. 14-15. In that event, the transit employees would be working for Capital Metro, which is indisputably a political subdivision exempt from OSH Act coverage.

For whatever reason, however, Capital Metro opted to use the Memphis formula to create StarTran. The necessary consequence of that arrangement is that Capital Metro cannot extend its political subdivision exemption to StarTran and StarTran cannot claim an exemption based on a condition (i.e., public employer status) that Capital Metro sought to avoid by creating StarTran as an independent (i.e., private) corporation. *Williams v. Eastside Mental Health Center*, 669 F.2d 671, 678 (11th Cir. 1982) (nonprofit mental health institution created by a public mental health authority not a political subdivision exempt from the Fair Labor Standards Act ("FLSA")); *Conway v. Takoma Park Volunteer Fire Dep't, Inc.*, 666 F. Supp. 786, 795-96 (D. Md. 1987) (fire and rescue corporations providing services in county not public agencies for purpose of FLSA public fire protection agency exemption). Similarly, Capital Metro and StarTran must also accept the consequences of this

appeal, which include the possibility that a favorable ruling declaring StarTran a political subdivision could affect Capital Metro's eligibility for a federal transit grant if the State of Texas does not recognize StarTran employees' collective bargaining rights.

C. StarTran's Control over Employment Conditions Also Shows That StarTran Is Not Administered or Controlled by Capital Metro.

The courts have regarded control over employees and working conditions as a decisive factor in determining whether the OSH Act political subdivision exemption applies. *Tricil Res., Inc. v. Brock*, 842 F.2d 141, 142-44 (6th Cir. 1988); *Chicago Zoo*, 820 F.2d at 912-13. In denying the exemption to a private, nonprofit operator of a public zoo, the Seventh Circuit emphasized that the operator had exclusive authority to establish the terms and conditions of employment, and to negotiate collective bargaining agreements. *Chicago Zoo*, 820 F.2d at 913; see also *Tricil*, 842 F.2d at 142-44 (exemption also denied where nonprofit operator of city garbage-conversion facility had the same exclusive authority and handled all hiring and personnel matters).

In accordance with this precedent, the Commission reasonably concluded that StarTran's absolute control over employment conditions and its exclusive authority to negotiate and implement collective bargaining agreements show that the corporation is not administered or controlled by Capital Metro. According to the service agreement, Capital Metro's required services are "ministerial only," and StarTran "retain[s] absolute and real day-to-day control over all matters relating to the terms and conditions of employment, supervision and control of its employees." Rec. Vol. 3, Ex. C-1 at ST.07-.08; *accord* Rec. Vol. 1 at 191-93; Rec. Vol. 2, Ex. R-1 at ST.01.

Moreover, StarTran has exclusive authority to hire, fire, pay, promote, supervise and direct employees, and to handle discipline and grievance procedures. Rec. Vol. 2, Exs. R-1 at ST.01, ST.07, R-10 at 4, 17-18, 21-22, R-11; Rec. Vol. 1 at 77-79. Employees raise day-to-day work concerns only with StarTran. Rec. Vol. 1 at 80.

Furthermore, the service agreement gives StarTran complete responsibility to negotiate and implement collective bargaining agreements, and explicitly states that for collective

bargaining purposes, "StarTran is an independent corporate entity which shall in no way be deemed to be . . . under . . . [Capital Metro's] control . . . ." Rec. Vol. 1 at 191; Rec. Vol. 2, Ex. R-1 at ST.01, ST.07. Capital Metro has no authority to administer any collective bargaining agreement with StarTran employees, or to ask StarTran to depart from the terms and conditions of any such agreement. Rec. Vol. 2, Ex. R-1 at ST.01; Rec. Vol. 8, Doc. 37 at 6.

Thus, the terms of the service agreement insulate StarTran from Capital Metro's control with respect to establishing employment conditions and administering collective bargaining agreements, a decisive factor in applying the second regulatory exemption test. Once again, as with StarTran's independent corporate status, the same Memphis formula features that made Capital Metro eligible for federal transit funds without violating Texas law (i.e., the creation of an independent entity to handle employment relations and collective bargaining) make StarTran ineligible for the OSH Act political subdivision exemption.

D. StarTran's Administration of Its Safety Program Further Shows That StarTran Is Not Administered or Controlled by Capital Metro.

1. The courts have treated responsibility for workers' safety as a very significant, if not decisive, factor, in determining whether an entity qualifies as an exempt political subdivision under the OSH Act. *Tricil*, 842 F.2d at 144; *Chicago Zoo*, 820 F.2d at 913. The Commission properly emphasized this factor, noting that ensuring occupational safety and health is the very purpose of the OSH Act. Rec. Vol. 9, Doc. 48 at 8. The Commission also found that StarTran was responsible on a day-to-day basis for the safety and health of its employees. *Ibid*.

Substantial evidence supports this Commission finding. Capital Metro's safety manager testified that he developed the safety program used by both Capital Metro and StarTran, but admitted that he did not enforce the program as disciplining StarTran employees was beyond his authority. Rec. Vol. 1 at 127, 146. Although the original service contract between Capital Metro and StarTran stated that Capital Metro was to provide safety and other training, Rec. Vol. 3, Ex. C-1 at

ST.07, an amendment expressly reassigned these duties to StarTran, *id.* at ST.03. The collective bargaining agreement between StarTran and ATU provides that StarTran will supply employees with protective equipment and can require them to attend safety meetings. Rec. Vol. 3, Ex. C-2 at ST.089. The ATU recording secretary testified that StarTran also has sole authority to discipline employees for safety violations. Rec. Vol. 1 at 78. He also said that he raises any workplace health or safety concerns with his StarTran supervisor. Rec. Vol. 1 at 79-80. In light of this evidence and the importance of controlling an employee safety program, the Commission reasonably concluded that StarTran was not subject to Capital Metro's control.

2. StarTran disputes this conclusion, arguing that the Commission ignored contrary testimony by StarTran's witnesses and improperly focused on who disciplined safety and health violators. StarTran's Br. 25-26. Neither contention withstands scrutiny.

StarTran's first complaint is that the Commission improperly credited an amendment to the service agreement

transferring safety and other training duties to StarTran, Rec. Vol. 3, Ex. C-1 at ST.03, over contrary testimony by StarTran's witnesses. StarTran's Br. 25-26. Notwithstanding StarTran's contention, however, the Commission's finding was supported by substantial evidence. The amendment constitutes such evidence even in the face of contrary evidence by Capital Metro officials that the Commission could have reasonably found self-serving.[21] Furthermore, the Commission also relied on the collective bargaining agreement and the testimony of the union's recording secretary and Capital Metro's safety manager in reasonably finding that StarTran controlled its own safety program. *See supra*, p. 45 (citing applicable record passages). Thus, the Commission's finding was not erroneous.

StarTran's claim that the Commission focused too narrowly on discipline is also unwarranted. StarTran's

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[21] Since "substantial evidence" is "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than the weight of the evidence," *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), the service agreement amendment would still constitute substantial evidence even if the contrary evidence were stronger.

exclusive authority to discipline StarTran employees for safety violations and thus enforce its safety rules is the decisive factor in determining whether StarTran exercises control over its safety program. In any event, the Commission's decision also addressed who provides safety training and protective gear, and who requires employees to attend safety meetings. Rec. Vol. 9, Doc. 48 at 8. In addition, the decision considered whether StarTran employees raised safety or health concerns with StarTran or Capital Metro. *Ibid*.

E. StarTran's Arguments on Appeal Are Without Merit.

1. *None of the Regulatory Factors StarTran Discusses Materially Affects the Commission's Decision*.

As demonstrated above, based on the facts, the applicable case law, and StarTran's treatment under other applicable federal and state labor laws, the Commission determined that three factors decisively weighed in favor of coverage -- StarTran's status under other law, StarTran's control over employment conditions, and StarTran's control over employee safety and health. In challenging the Commission's decision, StarTran must show why

consideration of other regulatory factors not specifically addressed by the Commission materially affects the Commission's determination. StarTran has not made this showing. Rather, based on the merits of this case, the other regulatory factors are either not significant here, or fail to provide a basis for reversing the Commission's decision.

The first three regulatory factors that StarTran discusses concern who selects the members of StarTran's board, whether these individuals may be dismissed, and who pays their salaries. StarTran's Br. 31-34. None of these factors is important here because the Commission reasonably found that StarTran had contractual autonomy to determine its employment conditions, the implementation of its collective bargaining agreements, and the administration of its safety program. Thus, even though all of StarTran's five board members are appointed and removable by Capital Metro's chief executive officer, Rec. Vol. 1 at 173-77, StarTran is not controlled by Capital Metro in these critical areas.

StarTran's nonprofit status, StarTran's Br. 34, is also not a significant factor here because StarTran was endowed with

that status to claim to be a private employer under Texas law and the NLRA, and thus the status is not indicative of whether StarTran is an exempt political subdivision. Certainly, there is nothing inconsistent between being a nonprofit corporation and a private employer covered by the OSH Act. *See, e.g., Chicago Zoo*, 820 F.2d at 912-13 (private, nonprofit corporation covered by the OSH Act). Similarly, Capital Metro's complete funding of StarTran, StarTran's Br. 34-35, does not demonstrate relevant control, absent any evidence that Capital Metro uses its power of the purse to usurp StarTran's contractual management powers. *Chicago Zoo*, 820 F.2d at 913; *see also NLRB v. Parents & Friends of the Specialized Living Ctr.*, 879 F.2d 1442, 1454 (7th Cir. 1989) (control over the employer's total budget insufficient by itself to exempt the employer from the NLRA).

StarTran's powers, StarTran's Br. 35-36, do not indicate that the corporation is a political subdivision because the provision of public transit services is the same function that outside private contractors partially perform for Capital Metro today, and have exclusively performed in the past. Rec. Vol. 1

at 22-23, 46, 177, 222-23; Rec. Vol. 3, Ex. C-6 at 1-2. There is no evidence that StarTran has any powers uniquely characteristic of a government such as the power to tax or the power of eminent domain.

StarTran's treatment under other state and federal laws, StarTran's Br. 36, is a significant factor here, as the Commission acknowledged, Rec. Vol. 9, Doc. 48, but that factor is significant only in relation to relevant laws. StarTran cites only one law under this factor, the Texas Tort Claims Act, and claims that courts have recognized StarTran's sovereign immunity under this statute. Immunity to tort claims, however, has nothing to do with this case, and, in any event, under Texas law, applies to a government unit's *agents*, which need not be government entities, as well as to the government units themselves. Rec. Vol. 2, Ex. R-8 at 9 (*Griffin v. Capital Metro*, No. A 99 CA 246 SS (W.D. Tex. Dec. 17, 1999) (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West)).

By contrast, the state and federal laws that the Commission found significant, the NLRA and Tex. Gov't Code Ann. § 617.002 (West), concern collective bargaining. The

courts have found the authority to negotiate collective bargaining agreements to be a strong indication that an entity is not an exempt political subdivision under the OSH Act. *Tricil*, 842 F.2d at 142-44; *Chicago Zoo*, 820 F.2d at 913.

StarTran's tax-exempt status, StarTran's Br. 37, is insignificant here because it stems from StarTran's creation as a nonprofit corporation. *See* 26 U.S.C. § 503 (nonprofits exempt from federal income tax); Tex. Tax Code Ann. § 171.603(a)(1) (West) (nonprofits exempt from state franchise tax). Thus, StarTran's tax-exempt status does not show that the nonprofit organization is a government entity.

The next three factors are whether StarTran employees are regarded as public employees, the financial source of their payroll, and how their fringe benefits, rights, obligations and restrictions compare with those of public employees. StarTran's Br. 37-39. These factors also do not indicate that StarTran is a political subdivision. StarTran employees do not receive the same benefits as state employees, including Capital Metro employees; do not have the same paid holidays, or retirement plan; and have no civil service job protection. Rec.

Vol. 1 at 24-25, 31, 209; Rec. Vol. 2, Exs. R-10 at 28, 34, R-11 at 29. Moreover, unlike Texas public employees, who are not allowed to enter into collective bargaining agreements, StarTran's union employees are bound by such agreements, which govern employment conditions, including employees' wages, benefits, and disciplinary and grievance procedures. Rec. Vol. 3, Ex. C-2; Rec. Vol. 1 at 27-28. Therefore, the above three factors do not show that StarTran is controlled by Capital Metro or that its employees are treated as public employees.

Finally, although there is no dispute that StarTran has a safety program, StarTran's Br. 39-42, the case law shows that the important question is who has responsibility for it. *See supra*, p. 44. As demonstrated above, the Commission reasonably found that StarTran was responsible for administering its safety program. *See supra*, pp.44-47. That finding is a reasonable basis for holding that StarTran is not administered or controlled by Capital Metro in this area of statutory concern, and therefore is subject to OSH Act requirements.

2. *StarTran's Burden of Proof Arguments Do Not Materially Affect the Commission's Decision.*

StarTran makes three arguments designed to show that the Commission erroneously assigned the burden of proving the applicability of the political subdivision exemption to the corporation: (1) that the Commission erred in finding that the OSH Act's definitional employer requirements are jurisdictional, StarTran's Br. 15-17; (2) that even if these requirements were not jurisdictional but coverage requirements, the Commission erroneously assigned the burden of proof to StarTran, StarTran's Br. 17-21; and (3) that the Commission erred in reviewing the burden of proof issue because the Secretary did not raise it before the ALJ, StarTran's Br. 8-14.

StarTran's burden of proof arguments do not affect the outcome of this case, but, as shown below, these arguments are, in any case, invalid. Even if these arguments were sound, StarTran has not shown that they demonstrate that the Commission's decision was wrong. In fact, the assignment of the burden of proof had little or no effect on the Commission's

decision. Two of the Commission's three grounds for its decision were legal conclusions (StarTran's contractual control of employment conditions and implementation of collective bargaining agreements; and the corporation's treatment under other federal and state law) and were not affected by the burden of proof. Since each of these grounds is decisive, each is an independently sufficient basis for the decision that would survive any error in assigning the burden of proof.

The Commission's third ground, StarTran's responsibility for administering its safety program, did involve some issues of fact. StarTran has not shown, however, that the Commission's factual finding on this issue would have been erroneous if the Secretary had the burden of proof, and the record suggests that substantial evidence would still support the Commission's finding even with a different assignment of the burden, *see supra*, pp. 44-47.

3. *StarTran Erroneously Contends That the OSH Act's Definitional Employer Requirements Are Jurisdictional.*

Section 3(5) of the OSH Act, 29 U.S.C. § 652(5), defines an "employer" as "a person engaged in a business affecting

commerce who has employees," but excludes the United States or any state or state political subdivision. *Ibid.* Relying on *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 (2006), the Commission held that these definitional requirements are not jurisdictional but coverage requirements. Rec. Vol. 9, Doc. 48 at 5. This holding was correct.

In *Arbaugh*, the Court held that the numerical threshold requirement of the definition of an "employer" in Title 7 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), limiting employers to those having at least fifteen employees, is not jurisdictional. *Arbaugh*, 126 S. Ct. at 1238. Instead, the Court ruled that the numerosity requirement is an element of a Title VII claim for relief and thus a non-jurisdictional coverage question. *Id.* at 1238-39. The Court drew a "readily administrable" bright line between statutory limitations on coverage that the legislature does not rank as jurisdictional and those that are so designated. *Id.* at 1245.

In an attempt to show that the Secretary had the burden of proving that the political subdivision exemption does not apply here, StarTran asserts (Br. 7, 16) that *Arbaugh* is not

controlling because the case addressed federal court subject-matter jurisdiction rather than administrative agency jurisdiction. Nothing in *Arbaugh*, however, indicates that its analysis is so limited. Furthermore, like *Arbaugh*, this case concerns a statutory definition of "employer" with limitations (being engaged in a business affecting commerce, having employees) that are directly analogous to the numerical threshold requirements of Title VII. In both cases, the statute does not treat these limitations as jurisdictional.

Moreover, the political subdivision exemption is part of the definition of employer, and is no more jurisdictional than are those other determinants of coverage. By contrast, the OSH Act does have other limitations that are labeled as jurisdictional. Thus, section 11(a), 29 U.S.C. § 11(a), limits judicial review of employers' petitions to those filed with the appropriate federal court of appeals within sixty days of the date of a final Commission order. *Ibid.* The provision explicitly indicates Congress' intent to make this filing requirement jurisdictional by declaring that "the court shall have jurisdiction of the proceeding" upon such filing. *Ibid.*

Accordingly, since the OSH Act does not classify the definitional requirements of an "employer" as jurisdictional, those requirements – including the political subdivision exemption -- are not jurisdictional but coverage requirements.

4. *StarTran Incorrectly Claims That the Secretary Has the Burden of Proving That the Exceptions to the Employer Coverage Requirements Do Not Apply.*

Citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), and *Secretary of Labor v. C.J. Hughes Construction., Inc.*, 17 O.S.H. Cas. (BNA) 1753, 1756 (Rev. Comm'n 1996), the Commission held that StarTran, as the party claiming the political subdivision exemption, has the burden of proving that the exemption applies. Rec. Vol. 9, Doc. 48 at 5. In the face of this Supreme Court and Commission precedent, StarTran claims, on the contrary, that the Secretary has the burden of proof. StarTran's Br. 17-21. As shown below, StarTran is mistaken.

StarTran's first line of attack is to cite six cases assigning to the plaintiff the burden of proving that the defendant is a

covered employer. StarTran's Br. 17-18.[22] None of these cases is apposite, however, because they do not concern *exemptions* or *exclusions* to coverage requirements, but only the requirements themselves. Thus, the Secretary does not dispute that she has the burden of proving that a respondent cited under the OSH Act is engaged in a business affecting commerce and has employees. See OSH Act, § 3(5), 29 U.S.C. § 652(5). The issue here is only whether someone who claims to fall under one of the exemptions, such as the political subdivision exemption, must prove that the exemption is applicable. The *Kentucky River-C.J. Hughes* line of cases says that the claimant must do so, and the six allegedly contrary cases that StarTran cites are all consistent with that well-established proposition.

StarTran next cites (Br. 20) a Seventh Circuit dictum that distinguishes between statutory exceptions and definitional

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[22] The cited cases are *Arbaugh*, 126 S. Ct. at 1245; *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 183-84 (2d Cir. 2006); *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F. 3d 113, 118 (2d Cir. 2004); *Gold v. Carus*, 131 Fed. Appx. 748 (2d Cir. May 16, 2005); *Chao v. OSHRC*, 401 F.3d 355, 362 (5th Cir. 2005); *Austin Road Co. v. OSHRC*, 683 F.2d 905, 907 (5th Cir. 1982).

exclusions and suggests that this distinction "*may* hold important differences in the rules for allocating burdens of proof." *EEOC v. Chicago Club*, 86 F.3d 1423, 1431 (7th Cir. 1996) (emphasis added).[23] The *Chicago Club* court pointed out that the "private club exemption" to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), is actually a definitional exclusion from the term "employer." *Chicago Club*, 86 F.3d at 1429-30.

The court contrasted such an exclusion with a statutory exception found in a different provision, such as the "private club" exception to the prohibition on discrimination in places of public accommodation in Title II, 42 U.S.C. § 2000a(e). *Ibid.* The court doubted whether a party claiming to be a private club under Title VII should have the burden of proof it would bear under Title II. *Ibid.*[24] Nevertheless, the court ruled in the

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[23] The *Chicago Club* court did not include its views on this subject in the judgment because the Club did not file a cross appeal on the burden of proof issue. *Chicago Club*, 86 F.3d at 1431. Instead, the court expressed its views to stimulate discussion. *Ibid.*

[24] The *Chicago Club* court noted that this circuit took the opposite view on the burden of proof in *Quijano v. University Federal Credit Union*, 617 F.2d 129, 132 (5th Cir. 1980)

Chicago Club's favor on the merits without disturbing the district court's assignment of the burden of proof.

Neither StarTran nor the *Chicago Club* court, however, has explained why this distinction is important, or why it makes any difference to the burden of proof. In particular, since it appears that any definitional exclusion could be reformulated and repositioned in another section as an equivalent statutory exception, it is not evident why the burden of proof should be different for exclusions and exceptions.[25]

Furthermore, StarTran also attempts to distinguish *Kentucky River,* StarTran's Br. 19, 21, but that effort is unsuccessful. StarTran claims that *Kentucky River* is not applicable here because it involved an "exemption under a

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(holding that the defendant bears the burden of proving its exemption from Title VII as a private club).

[25] For example, the definitional exclusion of a private club from the term "employer" in Title VII, 42 U.S.C. § 2000e(b), could be expressed as an equivalent statutory exception in another section of the statute. Conversely, the private club exception to Title II's prohibition on discrimination in places of public accommodation, 42 U.S.C. § 2000a(e), could be expressed as an equivalent definitional exclusion from the term "place of public accommodation."

special exception to the prohibitions of a statute." StarTran's Br. 19 (quoting *Kentucky River*, 532 U.S. at 711). In the terminology of *Chicago Club*, however, *Kentucky River,* like this case, also concerned a "definitional exclusion," namely the exclusion of supervisors from the definition of "employee" in the NLRA. *Kentucky River*, 532 U.S. at 718; NLRA, § 2(3), 29 U.S.C. § 152(3). Thus, *Kentucky River* applies and the Commission properly held that StarTran had the burden of proof.

5. *StarTran Mistakenly Asserts That the Commission Erred in Reviewing the Burden of Proof Issue.*

StarTran alleges (Br. 8-14) that the Commission erred in addressing the burden of proof issue because the Secretary did not raise it before the ALJ, and that omission prejudiced StarTran's ability to develop its case. StarTran's contentions are without merit.

In the first place, the Commission's burden of proof rule is long-standing and dates back over thirty years. *Griffin & Brand of McAllen, Inc.*, 4 O.S.H. Cas. (BNA) 1900, 1904 (Rev.

Comm'n 1976).[26] Thus, StarTran was on constructive notice of this rule, and the Commission had discretion to apply its own procedural rules in deciding this case even if neither party had raised the issue. *See Secretary of Labor v. Gem Indus., Inc.*, 17 O.S.H. Cas. (BNA) 1861, 1862 n.4 (Rev. Comm'n 1996); *see also* Commission Rule 92(c), 29 C.F.R. § 2200.92(c) (Commission has discretion to review issues not raised before the ALJ to ensure that judgment will be rendered in accordance with the law and facts).

Second, as the burden of proof issue is a strictly legal question, it is not evident how the Secretary's alleged failure to raise this issue harmed StarTran's ability to develop its case. The parties stipulated that the only issue here was whether StarTran qualified for the political subdivision exemption. Rec. Vol. 4. StarTran has not claimed that it would have raised additional issues, or pointed to any additional witnesses or documentary evidence that it would have presented, had it known that it had the burden of proof. Nor was StarTran

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[26] The Supreme Court's application of this rule goes back at least to 1841. *Chicago Club*, 86 F.3d at 1430.

deprived of the opportunity to brief the burden of proof issue as both parties briefed the issue before the Commission. Rec. Vol. 9, Doc. 44 at 11-13, Doc. 45, 4-10. Thus, even if StarTran had been prejudiced by not having the opportunity to brief the burden of proof issue before the ALJ, that prejudice was cured before the Commission.

Finally, contrary to StarTran's assertion, the Secretary did not waive the burden of proof issue before the ALJ. In support of its contention, StarTran points to several vague references to jurisdiction and the Secretary's burden to prove that StarTran was a covered employer during the ALJ proceedings. StarTran's Br. 9-10. None of these statements, however, claimed that the Secretary had the burden of proving that the political subdivision exemption did not apply to StarTran.[27]

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[27] As noted earlier, the Secretary agrees that she has the burden of proving that a cited respondent is engaged in commerce and has employees. The record statements that StarTran cites to show that the Secretary had the burden of proof are consistent with the Secretary's having only this obligation. *See supra*, pp. 57-58.

Moreover, since briefing before the ALJ was simultaneous, Rec. Vol. 8, Docs. 34-35, and StarTran admits (Br. 11) that it did not raise the burden of proof issue in its petition for discretionary Commission review, the Secretary was not aware of the parties' disagreement on this issue until she read StarTran's opening Commission brief. Thus, the Secretary cannot reasonably be said to have waived an issue that she had no reason to raise, and the Commission rules provide for review of an issue in just such a circumstance. Commission Rule 92(c), 29 C.F.R. § 2200.92(c) (in exercising its review discretion, the Commission may consider whether there was good cause for not raising the issue before the ALJ).

CONCLUSION

For these reasons, the court should affirm the Commission's holding that the political subdivision exemption does not apply to StarTran, and uphold the Commission's

finding of a violation of 29 C.F.R. § 1904.40 and assessment of a penalty of $500.

Respectfully submitted.

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