

Opinion No. 57-129

June 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

TO: John C. Hays, Administrator, Social Security Division, Public Employees' Retirement Board, P. O. Box 2237, Santa Fe, New Mexico

QUESTIONS

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Are school bus drivers, who own their own bus and contract with the school district as a carrier of school children, employees of the school district?

CONCLUSION

Yes.

OPINION

ANALYSIS

As indicated by your letter, this question is asked for the purpose of determining whether the "contract school bus drivers" are eligible for coverage under the Social Security System. As indicated by Handbook for State OASI Administrators, Section 4, the term "employee" in most instances is determined by the common law tests. See *Party Cab Company v. United States of America*, 172 F.2d 87, 10 A.L.R. 2d 358. It thus becomes necessary to examine the common law rules of determining whether a person in such circumstances is an employee or an independent contractor.

There is a split of authority on this particular subject. In 66 A.L.R., at page 724, there is an annotation covering the question of whether "contract school bus" drivers come within the provisions of Workmen's Compensation Acts. This annotation is similar inasmuch as the question there is also a question of employer-employee relationship versus independent contractor relationship. The cases seem to be decided upon the facts of each situation. *Ridgdell v. Tangipahoa Parish School Board*, 17 So. 2d 55. There are many tests used to determine whether the status is that of an employee or that of an independent contractor. Important considerations have adequately been pointed out in the *Ridgdell* case as follows:

"the ownership of the truck or tools by the employee is not the only test to be applied to a decision of this question. The way in which the work is to be performed and whether the employee is to use his own judgment in performing it or has to do it under the

direction of his employer, are equally important tests in considering and determining his status. If the employer maintains supervision over him and directs the manner in which he is to perform his duties, the employee, although owning his own equipment, is none the less an employee only, and is not an independent contractor."

See also *Arthur v. Marble Rock Consolidated School District*, 225 N.W. 70, 66 A.L.R. 718, holding that a contract school bus driver was an independent contractor for the purposes of Workmen's Compensation Act.

We now turn to the contract which was submitted by you as being the contract authorized by the State Board of Education. The contract provision sets out in detail the means by which the contract is to be carried into effect. It can be argued, however, that these duties are nothing more than the conditions imposed by the contract, rather than the control and regulation of an employee. See *Arthur v. Marble Rock Consolidated School District*, *supra*. However, we believe the 16th paragraph of the contract, reading as follows:

"to recognize the Superintendent or Principal of the school as the administrative officer of the Board in charge of all activities of the school, to follow his instructions and reasonable interpretations in all matters pertaining to the school and the transportation of pupils; and otherwise to cooperate with said superintendent or principal promptly and cheerfully in every way possible."

actually gives the School Board control over the operation of the bus driver as to the means by which he will carry out his work. In other words, the final authority as to how school children are to be transported rests not with the "contract driver" but with a representative of the School Board, and such driver is bound to follow his instructions and reasonable interpretations in matters pertaining to the school and the transportation of the children.

We are further led to the conclusion that such contract driver is an employee rather than an independent contractor by reason of the fact that he is paid a "salary" by the terms of the contract; he is not permitted to substitute a driver except upon consent of the Board; and further, that by the provisions of § 73-12-31, N.M.S.A., 1953 Compilation, 1955 Pocket Supplement, he is brought within the provisions of the school employees' retirement system as are the other employees of the school system.

We, therefore, conclude that a contract school bus operator is actually an employee of the school district rather than an independent contractor. The fact that he furnishes the bus and insurance is much like an employee who has to furnish tools of his trade, and in this situation we do not feel these factors are controlling.