

Opinion No. 59-184

November 6, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. John C. Hays Executive Secretary Public Employees Retirement Association P. O. Box 2237 Santa Fe, New Mexico

{*286} This is in response to your recent request for our opinion in regard to the following question:

Is Mr. Laureano Contreras entitled to service credit for retirement purposes for the time he owned and operated a school bus for the Tarrant County Board of Education under contract with said Board?

Our answer to your question is that Mr. Contreras is entitled to such service credit for retirement purposes.

The fact situation relating to your question is briefly as follows.

Mr. Contreras became a member of the Public Employees Retirement Association on November 1, 1951 when he was employed by the capitol custodian. He remained employed by the State until October 29, 1954 when he was retired on duty disability, having been injured while on the job for the Highway Department the previous day. Mr. Contreras continued on duty disability status until March 31, 1959 when he was retired at age 60. At that time you allowed him credit for 20 years' service, counting previous creditable service. Mr. Contreras now claims that additional creditable service for 14 years from 1935 to 1949, at which time he owned and operated the school bus, should be allowed.

The basis for allowing any credit at all for service rendered to a school board under your retirement plan is Sec. 2.2, Chapter 167, Laws of 1947, in force when {*287} Mr. Contreras became a member of the Association. Under this section, any qualified public employee who had become a member of the Association and who had at least one year's continuous service prior to August 1, 1947 was allowed upon application to the board to be allowed credit for retirement purposes for all such services rendered prior to August 1, 1947. You inform me that under this section the Board has uniformly construed service as an employee of a school board as being service allowable for prior credit.

The question is, therefore, whether Mr. Contreras was, while owning and operating a school bus under contract for the school board, an "employee" to be allowed credit for retirement purposes. You contend that Mr. Contreras was not an employee, but an independent contractor.

It is our opinion that under the contract between the Torrance County School Board and Mr. Contreras, there can be no question but what Mr. Contreras was an employee and is, therefore, entitled to the service credit he claims. The terms of a contract exactly like the one in question for all material purposes was discussed in our Opinion No. 57-129, dated June 12, 1957. In this opinion, we held that a school bus driver who owned his own bus and operated it under contract with a school district as a carrier of school children was an employee of the school district for the purposes of the Social Security Act. We feel that the reasoning and authorities of that opinion are equally applicable to this case. Therefore, we conclude that Mr. Contreras was an employee during the time he operated his own school bus under contract with the county board of education and should, therefore, be allowed service credit.

However, the service credit allowed should not include any employment as a bus driver after August 1, 1947, since after that date, in order for service to be credited, such service must have been with an affiliated public employer until September 1, 1949. See our Opinion No. 59-116.

Philip R. Ashby

Assistant Attorney General