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U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
WASHINGTON, D.C. 20210

SEP 17 '979

September 17, 1979

This is in response to your inquiry as to the application of the Fair Labor Standards Act to publicly operated local mass transit systems such as the [redacted] Transit System. We have concluded that such systems are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in National League of Cities v. Usery, 426 U.S. 833 (1976), and that they are therefore subject to the Act's requirements as covered enterprises under Sections 3(r)(2), 3(r)(3), 3(s)(6), and 3(x).

As you know, the question turns on whether the provision of local passenger service is a "traditionally governmental function" within the meaning of the ruling in National League. We are guided by the fact that Justice [redacted] opinion gives "railroads" as the example of a public activity which is not "traditionally governmental" (id. at 854-5, n. 18). The opinion goes on to expressly confirm the continuing authority of the several precedents holding various federal regulatory statutes to be validly applicable to railroads operated by a state. (Ibid.)

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In the first of these, United States v. California, 297 U.S. 175 (1936), a state-owned local railroad moving freight within the [redacted] harbor area was held to be constitutionally subject to the Federal Safety Appliance Act. In California v. Taylor, 353 U.S. 553 (1957), the application of the federal Railway Labor Act was similarly upheld as to the same railroad, and in Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), the application of the Federal Employers' Liability Act was upheld as to a state-owned freight railroad operating in the dock area of [redacted], [redacted].

In each of these cases, the local railroad, unlike the [redacted] Transit System, was carrying freight moving in interstate commerce. That fact, however, goes to the affirmative grant of federal power in the Commerce Clause (which is not in question here), and not to the restrictions on that power in the Tenth Amendment on which the holding in National League was based. As Chief Justice [redacted] pointed out in his concurring opinion in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 423-4 (1978), the delimitation of state immunity in National League focuses on whether a particular state operation is "essential to [the] separate and independent existence" of the state. This would not appear to depend, in the case of a local transportation system, on whether it was goods or people that the system was carrying, or on how directly related the service was to interstate commerce. The breadth of the exclusion exemplified by the reference to "railroads" in the National League opinion is moreover shown by the Chief Justice's observation in Louisiana Power that "the reaffirmance of * * * United States v. California [the railroad case] * * * by National League of Cities * * * strongly supports th[e] understanding" that "the running of a business enterprise is not an integral operation in the

area of traditional governmental functions" (Louisiana Power, 435 U.S. at 424). This was in any event true, the Chief Justice added, for the particular activity there in question, the supplying of electric services.

Accordingly, a district court has ruled that in view of the confirmation of the railroad cases in National League, a local passenger railway operated by a public rapid transit authority within the City of [redacted] was not constitutionally immune from the application of the federal Railway Labor Act. "[The] operation, even if characterized as a commuter rail service, is not akin to such state activities as 'fire prevention, police protection, sanitation, public health, and parks and recreation'" which National League lists as being typical of "traditionally governmental functions." Brotherhood of Locomotive Engineers v. Staten Island Rapid Transit Operating Authority, E.D. N.Y., 78-C-2083, February 9, 1979, slip opn. 23-24, appeal pending in the Second Circuit. (Whether application of the Railway Labor Act was nevertheless precluded as a matter of statutory interpretation was, however, not decided, since that question was held to be within the primary jurisdiction of the Interstate Commerce Commission.)

Our conclusion that the [redacted] Transit System is constitutionally subject to the FLSA is further supported by the decision and rationale of the Supreme Court in the controlling tax case, Helvering v. Powers, 293 U.S. 214, 227 (1934). The Supreme Court there ruled that the state operation of a local street railway in Boston was "distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State." Nothing in National League suggests a rejection of Powers or its rationale. While Powers dealt with federal taxation, rather than with federal regulation, it is

not distinguishable on that ground, since both decisions are expressly grounded on the need to protect the states' "separate and independent existence" (426 U.S. at, e.g., 851 and 846).

Chief Justice [redacted] recognized the relevance of the tax cases in his concurring opinion in the Louisiana Power case discussed above. He there cited a tax case, Ohio v. Helvering, 292 U.S. 360 (1934), as authority for the application of the federal anti-trust laws to a publicly operated power utility. 435 U.S. at 422. He found support for that conclusion in the fact that "the Court had already recognized [in the tax case], for purposes of federalism, the difference between a State's entreprenurial personality [in the public operation of a power utility] and a sovereign's decision * * * to [impose] * * * governmental regulation [on private operators.]" The difference is equally pertinent to the instant case, where the municipality has chosen public operation to accomplish its objectives in the field of mass transportation.

For these reasons, we have concluded, as was stated at the outset, that the operations of the [redacted] Transit System are not constitutionally immune from the application of the Fair Labor Standards Act.

Sincerely,

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Deputy Administrator

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