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PUBLIC CONTRACT—TRANSPORTATION OF SCHOOL PUPILS—BOARD OF EDUCATION MAY MODIFY OR CHANGE SUCH CONTRACT IF CHANGED CONDITIONS SO WARRANT—CONSTRUCTION SAME AS BETWEEN NATURAL PERSONS.

SYLLABUS:

1. *Public contracts should be construed as are contracts between natural persons.*
2. *The cardinal principle for the construction of contracts, to the effect that the intention of the parties should govern in the interpretation of the terms of the contract and that the facts surrounding the parties at the time of entering into the contract may be considered as an aid to determining that intention, is equally applicable in the construction of public contracts as it is in the construction of contracts between natural persons.*
3. *A board of education after making a contract for the transportation of school pupils, may later lawfully modify or change the contract if changed conditions make such action necessary.*

COLUMBUS, OHIO, November 28, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“The board of education of Franklin Township Rural School District accepted last July an offer to transport children from Amsterdam to Tippett, within said district, for forty dollars per month for the term 1930-1931 in a ‘Dodge machine that is well closed,’ this being the lowest bid received. At that time, the enumeration showed, and it was a fact, that there were only five pupils of school age residing in the school district to be transported from Amsterdam to Tippett. Between that time and the present, six additional children have moved into Amsterdam and are required to be transported from that place to Tippett. Since the board accepted a bid which expressly stated that the children were to be hauled in a Dodge machine, of which machine the members had knowledge, the same being a touring car, they are inquiring whether, in view of the changed situation, they may pay this same individual, or anyone else, an increased compensation, make a new contract or employ further transportation. The contractor is now hauling eleven children in the Dodge car and is fulfilling the terms of his contract. However, the parents of the pupils are protesting and the board would like, if possible, to find some way to provide additional and comfortable and convenient transportation.”

Boards of education are authorized by statute to furnish transportation for school children attending the public schools, under certain circumstances. In some instances the duty to furnish such transportation is mandatory. There is no specific statutory direction as to whether this transportation be furnished by contract or whether the board purchase vehicles and employ drivers and provide the transportation under the direct supervision of the board instead of having it provided by an independent contractor. Either method has always been recognized as lawful.

If the transportation is to be furnished by an independent contractor, the contract, entered into between the board of education and this contractor, to furnish the transportation, should be construed as any other contract would be construed. It is said in Donnelly on Public Contracts, Section 82:

"A public contract is measured and governed by the same laws that control natural persons in contract matters, whether it be the nation, state, city, town or village."

Quite a large number of cases are cited by the author in support of this statement. See also Donnelly on Public Contracts, Section 172. The same author, in Section 164, observes:

"Public bodies, from the fact that they possess the power to contract, have also the power to modify or change contracts the same as natural persons in the absence of statutory restriction. * * If a public contract, because of changed circumstances or through some mistake, becomes oppressive it is within the power of the public body to modify it and allow additional compensation, or it may annul it."

Although public officers and agencies are limited in their powers to those expressly granted and those necessarily implied to carry into effect the expressly granted powers, their acts within the limits of their authority are judged by the same standards and bounded by the same rules as are those of private individuals. Their contracts lawfully entered into, will be construed and interpreted as contracts between individuals under the same circumstances.

The cardinal principle in the interpretation of all contracts, whether public or private, is the intention of the parties at the time of entering into the contract. As an aid in determining this intention, the facts surrounding the parties at the time of making the contract are a proper subject for consideration.

The situation disclosed by your inquiry appears to be that the Franklin Township Rural Board of Education entered into a contract with some person to transport the children attending a certain school from Amsterdam to Tippetts for \$40.00 per month, for the school years of 1930 and 1931, in a "Dodge machine that is well closed." At that time there were but five children to be transported, and so far as anyone knew, they were all the children there would be to be transported during the life of the contract. Later, however, several more children came into the vicinity and there were then so many that they could not well be transported in the Dodge machine spoken of in the contract.

To construe the contract, thus made, to mean that the contractor must transport all the children of the district, no matter how many there may be, under the terms of his contract for \$40.00 per month, would not only do violence to the language of the contract but to common sense and the welfare of the public interests which the making of the contract was intended to serve. The fact that the contracting parties specifically provided that the transportation was to be in a Dodge machine of a certain type, indicated that they clearly intended that the number of children to be transported was limited.

I am of the opinion that the board of education in question may at this time provide further facilities for the transportation of the additional children, the transportation of whom was not in contemplation at the time of making the contract spoken of. These additional facilities may be made by making another contract with some other person, or changing the contract already made, inasmuch as the law does not require that contracts of this kind be let at competitive bidding.

Respectfully,

GILBERT BETTMAN,
Attorney General.