STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. BATTLE GROUND SCHOOL DISTRICT, Respondent.	CASE NO. 5040-U-84-874 DECISION NO. 2077 - PECB DECISION OF COMMISSION

Gail Fujita, attorney at law, appeared on behalf of the complainant.

Bischof & Hungerford, by Bruce Bischof, attorney at law, appeared on behalf of the respondent.

An affiliate of Public School Employees of Washington (PSE) has members who are employed by Dorsey Bus Service (Dorsey), a private enterprise which is not a party to these proceedings. Dorsey has a contract to provide busing services to the respondent, Battle Ground School District. PSE charges the school district with a violation of RCW 41.56.140(1) because of the latter's alleged interference with PSE members' exercise of contractual seniority rights on special education transportation routes. PSE argues that the school district is a proper respondent in this case because the degree of control it exercises over the terms and conditions of employment of Dorsey employees indicates that the school district is a co-employer with Dorsey Bus Service. PSE cites NLRB v. Greyhound Corp., 368 F.2d 778 (5th Cir., 1966) and Syufy Enterprises, 220 NLRB 113 (1975) in support of its thesis. The school district maintains it is not a proper party to these proceedings, while the Dorsey Bus Service contends it is an indispensible party subject to the exclusive jurisdiction of the National Labor Relations Board and, since it was not or cannot be joined herein, the matter must be dismissed.

The examiner assigned to these proceedings found that the substance of the unfair labor practice charge was covered by the collective bargaining agreement between PSE and Dorsey, and that the agreement contains an arbitration provision. He therefore deferred the matter to arbitration and entered a stay of the unfair labor practice proceedings. PSE appeals this deferral to the Commission.

We agree that deferral to arbitration is inappropriate. Although an arbitration procedure is quite likely to resolve this dispute, deferral to arbitration is not proper when both parties to the contract are not before

the Commission. 1 Morris, The Developing Labor Law (2nd ed. 1983) at 941. See, General American Transportation Corp., 228 NLRB 808 (1977) (concurring opinion of Chairman Murphy). CF., Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120, 647 F.2d 372 (3rd Cir. 1981) (deferral to arbitration ordered in interference with contract tort claim where it appears all parties in interest were joined).

Rather than proceed with the case, however, we order its dismissal for failure to state a claim. The complaint filed with the Commission charges the school district with a violation of RCW 41.56.140(1), which prohibits employers from interfering with collective bargaining rights. PSE's theory of the case is that the school district is a co-employer in this situation. Assuming, without deciding, that the school district is a co-employer, the facts pleaded at most, however, show a breach of contract. While a refusal to bargain charge under RCW 41.56.140(4) could be a theoretical possibility, PSE did not allege that a demand for bargaining was made. An RCW 41.56.140(1) violation could be derived from an RCW 41.56.140(4) refusal to bargain charge, but only when the basis for the latter charge exists, and it is properly pleaded.

We further are concerned as to whether a proceeding of this nature would be equitable or proper without the joinder of all parties in interest, of which Dorsey is certainly one. See: Cathcart-Maltby-Clearview Community Council v. Snohomish County, 96 Wn.2d 853 (1981).

We note that PSE is not without its remedy outside of the jurisdiction of the Commission. It may proceed against Dorsey Bus Service in a grievance-arbitration procedure, and enforce its demand for arbitration and any arbitral award in the courts. The record shows that the grievance procedure was initiated. We do not know whether it was completed. PSE also might bring a tort action against the school district for interfering with the performance of its contract with Dorsey. See, Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes Barre, supra, at 380-383.

The order of the examiner is set aside and the complaint charging unfair labor practices is dismissed.

ISSUED at Olympia, Washington, this 10th day of December, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson
JANE R. WILKINSON, Chairman

Mark C. Endresen
MARK C. ENDRESEN, Commissioner

Mary Ellen Krug
MARY ELLEN KRUG, Commissioner