Kitsap Transit, Decision 9667 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1384,	)	
Complainant,	)	CASE 20250-U-06-5162
vs.	)	DECISION 9667 - PECB
KITSAP TRANSIT,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW
Respondent.	)	AND ORDER

Rita C. DiIenno, President/Business Agent, for the union.

Summit Law Group, by *Shannon E. Phillips*, Attorney at Law, for the employer.

On March 8, 2006, Amalgamated Transit Union, Local 1384 (union) filed an unfair labor practice charge against Kitsap Transit (employer) alleging that the employer had interfered with employee rights and refused to bargain. The union represents two bargaining units of bus drivers. One bargaining unit is comprised of routed service drivers, drivers who drive fixed, regularly scheduled routes (Routed Unit). The other bargaining unit is comprised of ACCESS service drivers, drivers who drive "door-to-door or curb-to-curb" services for elderly and disabled passengers (ACCESS Unit).

The union and the employer are parties to separate collective bargaining agreements with the two bargaining units. The union's complaint alleged the employer improperly skimmed the Port Orchard

Ferry Take Home (FTH) service work previously performed by Routed Unit employees to employees in the Access Unit without providing an opportunity for bargaining. The Public Employment Relations Commission issued a preliminary ruling on April 27, 2006, finding a cause of action existed for employer interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4). Examiner Joel Greene held a hearing on October 10, 2006, and November 14, 2006. The employer and union filed post-hearing briefs on January 23, 2007.

ISSUES

1. Was the Port Orchard Ferry Take Home Route the work of the Routed Unit?

2. If so, was the employer obligated to bargain before transferring the work outside of the Routed Unit?

3. Did the union waive by contract the right to challenge the employer's decision to transfer the Port Orchard Ferry Take Home route to the ACCESS Unit?

On the basis of the record presented, the Examiner finds that the Port Orchard FTH service route was previously assigned to Routed Unit employees and that work had attached to the Routed Unit and become that unit's work. The suspension of that work for a period of time did not detach that work from the Routed Unit. When the employer resumed the Port Orchard FTH route work, the employer was obligated to bargain the decision and its effects before transferring the work outside of the Routed Unit. The union did not waive

by contract the right to bargain the employer's decision to transfer the Port Orchard FTH route to the ACCESS Unit.

ANALYSIS - APPLICABLE LEGAL STANDARDS

The Duty to Bargain

Under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW, a public employer commits an unfair labor practice if it refuses to engage in collective bargaining with the exclusive bargaining representative of its employees. RCW 41.56.140(4). The term "collective bargaining" is defined in RCW 41.56.030(4):

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions . . . .

Matters affecting the wages, hours, and working conditions of employees are referred to as mandatory subjects of bargaining. *Kitsap County Fire District 7,* Decision 7064-A (PECB, 2001). The bargaining obligation extends to situations when an employer seeks to remove work from a bargaining unit. *Kitsap County Fire District 7.* At a minimum, the loss of work opportunities affects the work hours of bargaining unit employees and changes in employee work hours give rise to a bargaining obligation. *Federal Way School District,* Decision 232-A (EDUC, 1977). When an employer transfers bargaining unit work to non-unit employees without fulfilling its bargaining obligation, an unfair labor practice violation will be

found for unlawful "skimming" of bargaining unit work. *South Kitsap School District,* Decision 472 (PECB, 1978).

To fulfill its bargaining obligation, an employer must give notice to the union and provide an opportunity for bargaining prior to changing the wages, hours, or working conditions of bargaining unit employees. An employer violates RCW 41.56.140(4) if it presents a union with a fait accompli, or if it fails to bargain in good faith, upon request. *Federal Way School District.*

Bargaining Unit Work

Bargaining unit work is defined as work that has historically been performed by bargaining unit employees. A bargaining unit has a legitimate interest in preserving the work it has historically performed. *Yakima County,* Decision 6594-C (PECB, 1999); *Spokane Fire District 9,* Decision 3482-A (PECB, 1991); *South Kitsap School District.* When an employer assigns bargaining unit employees to perform a certain body of work, that work can attach to the unit and become bargaining unit work. *Kitsap County Fire District 7,* Decision 7064-A (PECB, 2001).

The Commission uses the term "skimming" to describe bargaining unit work that is transferred to employees of the same employer who are outside of the existing bargaining unit. Both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining. *Community Transit,* Decision 3069 (PECB, 1988); *Battle Ground School District,* Decision 2449-A (PECB, 1986); *City of Kelso,* Decision 2120-A (PECB, 1985). A public employer must bargain the transfer of bargaining unit work to employees outside of the unit. *South*

Kitsap School District. "Skimming" has the same effect on a bargaining unit, and invokes the same duty to bargain, as the "contracting out" of bargaining unit work. *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

When an employer is dealing with two bargaining units within its workforce, it is obligated to respect the separate work jurisdictions of both bargaining units, absent a tri-party agreement. *Kitsap County Fire District 7*. Further, an employer can not use a characterization of its decision as "staffing" to avoid being responsible for unlawful "skimming:"

> An employer does not have to negotiate a decision to reduce or curtail part of its operation. *Wenatchee School District*, Decision 3240 (PECB, 1989). An employer does, however, have a duty to bargain with the exclusive bargaining representative of its employees concerning a decision to transfer work to employees outside the bargaining unit (skimming of unit work), as in *South Kitsap School District*, Decision 472 (PECB, 1978) and *City of Mercer Island*, Decision 1026-A (PECB, 1981).

City of Tacoma, Decision 5634 (PECB, 1996)(emphasis added).

In *Spokane Fire Protection District 9*, Decision 3482-A (PECB, 1991), citing *Clover Park School District*, Decision 2560-B (PECB, 1989), the Commission used a two-step analysis to determine whether a skimming violation has occurred:

Step 1: Is the work bargaining unit work?

Step 2: If so, is the employer obligated to bargain before transferring the work outside of the bargaining unit?

When the answer to the first question is affirmative, the Commission used a five-factor factual analysis to answer the second question:

Factor 1: Previous practice - had non-bargaining unit personnel ever performed the work?

Factor 2: Does the transfer of the work involve a significant detriment to the members of the bargaining unit?

Factor 3: Was the employer's motivation solely economic?

Factor 4: Had there been an opportunity to bargain generally about the changes in existing practices? and

Factor 5: Was the work fundamentally different from regular bargaining unit work?

Spokane Fire Protection District 9. Therefore, the Commission has determined that an employer may be excused from its obligation to bargain the transfer of bargaining unit work based on a balancing of the employer's interests versus the impact on the bargaining unit as determined by application of the five-factor factual analysis just listed.

The fourth factor of the analysis is an inquiry into whether an opportunity to bargain over the transfer of work had been provided, or had taken place. A "yes" answer to this question is determinative: if the employer offered to bargain and the union declined, the union will be found to have waived its opportunity to bargain over the issue. If the employer bargained to a lawful impasse or to settlement, the employer would have met its duty to bargain. Conversely, a "no" answer to this question is not determinative. If the employer did not offer to bargain or no actual bargaining occurred, the Examiner must evaluate the remaining factors in

questions one, two, three, and five to determine whether the employer is excused from its normal obligation to bargain over the transfer of the unit's work.

Factors one, two, three, and four require a balancing test. In considering the weight to be accorded the factors, the obligation to bargain does not require agreement and does not prevent an employer from managing its employees:

> [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.

Port of Seattle, Decision 7271-B (PECB, 2003)(emphasis added), citing *Awrey Bakeries, Inc.*, 217 NLRB 730 (1975); *Stone & Thomas*, 221 NLRB 567 (1975); *Dixie Ohio Express Co.*, 167 NLRB 573 (1967). The Examiner's evaluation of the factors must weigh the extent of the employer's burden of bargaining (given that compelling "an employer to bargain is not to deprive him of the freedom to manage his business") against the burden of the effect of the transfer of work on the affected employees.

In *City of Seattle*, Decision 8313-A (PECB, 2003), the Commission noted that the bargaining obligation attaches to both the decision and its effects: both the decision to transfer bargaining unit

work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining. *City of Seattle,* Decision 8313-A (PECB, 2004), *aff'd,* Decision 8313-B (PECB, 2004).

APPLICATION OF THE TWO STEP AND FIVE FACTOR ANALYSIS FROM SPOKANE FIRE DISTRICT 9

Among other services, Kitsap Transit provides fixed route transit service and ACCESS service. Fixed route services are generally defined as those routes that are regularly scheduled with fixed time points and pre-determined, fixed routes and stops. These fixed routes are assigned to Routed Unit employees represented by the union.

ACCESS services are "door-to-door or curb-to-curb" services for the elderly and disabled and are designed to meet Americans with Disabilities Act requirements. ACCESS services are generally not regularly scheduled nor do they generally have pre-determined stops. Rather, users of the employer's ACCESS services call in advance and reserve, or schedule, a pick-up. The driver goes to the caller's location at a specific time and picks up the person and drives him or her to the requested destination.

Prior 1999, the employer provided a transit service known as the Port Orchard Ferry Take Home route. The Port Orchard FTH route was, prior to 1999 and upon its return in 1995, what the parties term "route deviation" service. The employer's brief defines "route deviation" as:

> any transit service where there are more limited time points than in traditional routed service. Passengers can join the vehicle at these points at specified times.

> In between getting to the scheduled time points, the operator can "deviate" on either side of the route to drop passengers off or to pick up passengers who have called to schedule a pick up.
>
> . . . .
>
> "Ferry-take-home" is thus a route deviation service that starts at the ferry terminal, and is intended to connect ferry passengers with their homes or other destinations.

The employer's brief acknowledges that "route deviation" work has been performed by employees of the Routed Unit and the ACCESS Unit. However, the Port Orchard FTH route, prior to its discontinuation in 1999, was operated by employees of the Routed Unit.

In 1999, Washington State voters approved Initiative 695 (I-695), which replaced the motor vehicle excise tax (MVET) with a $30 vehicle license tab fee. I-695 also required voter approval of all future tax and fee increases.[1] The MVET provided revenues for, among other things, public transit. As a result of anticipated reductions in revenue, the employer decided to discontinue the Port Orchard FTH route.

Effective September 18, 2005, the employer decided to resume the Port Orchard FTH route and assigned that work to the ACCESS Unit rather than the Routed Unit. The employer's decision to resume the Port Orchard FTH route and to assign the work to the ACCESS Unit, are the subject of this unfair labor practice case.

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[1] On October 26, 2000, the Washington State Supreme Court declared Initiative 695 unconstitutional.

ISSUE 1: Was the Port Orchard FTH Route the work of the Routed Unit? and,

ISSUE 2: If so, was the employer obligated to bargain before transferring the work outside of the Routed Unit?

To decide these issues, the Examiner must apply the two-step analysis adopted by the Commission in *Spokane Fire Protection District 9*:

Step 1: Is the work bargaining unit work?

The answer to this question is yes. Bargaining unit work is defined as work that has historically been performed by bargaining unit employees. When an employer assigns bargaining unit employees to perform a "certain body of work," that work can attach to the unit and become bargaining unit work. *Kitsap County Fire District 7*. The issue in this case is not the broad issue of whether ferry take home service work as a general "type" of work is, or is not, the work of the Routed Unit. The "certain body of work" at issue here is the specific, narrow body of work comprised of the Port Orchard FTH route. As to that work, the record is clear that prior to the reinstatement of the Port Orchard FTH route in 2005, Routed Unit employees had exclusively performed the work. The employer's brief acknowledges that "[p]rior to the passage of I-695 in 1999, an 8 p.m. ferry-take-home service from the Port Orchard ferry was provided by Routed operations."

In the present case, the "certain body of work" at issue is the Port Orchard FTH route. Both parties agree that, prior to this dispute, that body of work had been exclusively performed by employees of the Routed Unit. Therefore, the Port Orchard FTH route attached to the

Routed Unit and became that bargaining unit's work. The employer does not cite any precedent holding that an employer may "detach" this body of work from the Routed Unit simply because a period of time elapsed when the work was not being performed by the Routed Unit.

A finding that the passage of time detaches work from a bargaining unit would allow the employer to temporarily suspend a certain body of work, for either valid or invalid reasons, and then assign it to a bargaining unit (or to unrepresented employees) of its choice. This would allow the employer to circumvent its bargaining obligations concerning the transfer of bargaining unit work. As the Commission held in *Port of Seattle*, Decision 7271-B (PECB, 2003)(citing *Ozark Trailers, Inc.*, 161 NLRB 561 (1966)), "The authority, duties, and prerogatives of a bargaining representative are dictated by the statute and they are not subject to diminution or modification because of any employer's good faith or economic necessity."

The Port Orchard FTH route body of work was the work of the Routed Unit prior to the employer's decision to discontinue the service in 1999. The Examiner holds that the Port Orchard FTH Route body of work remained the work of the Routed Unit upon its resumption in September 2005.

Step 2: Since the work is bargaining unit work, is the employer obligated to bargain before transferring the work outside of the bargaining unit?

Because the answer to the first question is affirmative, the Examiner must next analyze the five factors in *Spokane Fire*

Protection District 9, and determine whether the employer was obligated to bargain before transferring the work outside the bargaining unit.

Factor 1: Previous practice - had non-bargaining unit personnel ever performed the work?

Both the union and the employer provided testimony that the Port Orchard FTH route had previously been performed by the Routed Unit. The employer, in its brief, agreed that "[p]rior to the passage of I-695 in 1999, an 8 p.m. ferry-take-home service from the Port Orchard ferry was provided by Routed operations." No testimony or evidence was presented that prior to September 2005 the Port Orchard FTH work had ever been performed by any employee outside of the Routed Unit.

The employer asserts that employees outside of the Routed Unit presently, or have in the past, performed a similar "type" of work. However, the issue in this case does not concern the broad issue of whether ferry take home route work in general belongs to the Routed Unit. The issue in this case concerns whether a certain body of work, the Port Orchard FTH route, belongs to the Routed Unit. An analysis of the "type" of work might be required if the controversy at issue concerned all ferry take home routes or a new ferry take home route that had never existed and had never been attached to a bargaining unit.

This is not the case here. "Commission precedents consistently hold that we will not rule upon the parties' hypothetical scenarios." *Kitsap County*, Decision 8292-B (PECB, 2007). In the present case, the parties are not starting with a clean slate. The parties have

a bargaining history concerning the Port Orchard FTH route that cannot be ignored due to a hiatus of that work. The issue presented in this case involves a "certain body of work" not a "type" of work, and the issue of whether ferry take home routes as a "type" of work are properly in one unit or another need not be addressed.

The parties agree, and the record supports, that prior to this dispute, only Routed Unit employees had ever performed the specific work in question, *i.e.*, the Port Orchard FTH route. The Examiner holds that the Port Orchard FTH route work was, prior to its discontinuation in 1999, exclusively Routed Unit work and continued to be Routed Unit work upon its resumption in September 2005.

Factor 2: Does the transfer of the work involve a significant detriment to the members of the bargaining unit?

Any loss of work opportunities inevitably affects the work hours of bargaining unit employees. *Newport School District*, Decision 2153 (PECB, 1985). If employers could transfer or contract out bargaining unit work without fulfilling their bargaining obligations, the resulting uncertainty about whether there would be any jobs to fill would be exceedingly detrimental to the statutory purpose of peaceful labor-management relations. Under these circumstances, the interests of employees clearly predominate over the employer's interests. *Port of Seattle*, Decision 7271-B (PECB, 2003). The loss of work hours available to the Routed Unit due to the transfer of the Port Orchard FTH routed to the ACCESS Unit is a significant detriment to the employees of the Routed Unit.

The employer asserts that because the work was not being done immediately prior to the time that it was reinstated, there were no

Routed Unit employees who lost any work. This argument misses the point: the employer did not take away currently existing work when it brought back the work and gave it to another bargaining unit. However, once the work was brought back and transferred to the ACCESS Unit, the Routed Unit employees lost the transferred work.

The employer also asserts that it would not have resumed the work if it would have been required to assign it to Routed Unit employees. The employer argues that the Routed Unit employees did not lose work because, given a choice between giving the work to Routed Unit drivers or not resuming the work, the employer would have decided not to resume the work.

This argument also fails. The employer *did* resume the work. An employer cannot defend an improper action that it has already taken based on an assertion that it might, hypothetically, have acted differently. The employer decided to return the Port Orchard FTH route; the employer decided to transfer that work to to the ACCESS Unit. This decision and action resulted in a significant detriment to the members of the Routed Unit.

In this case, the Routed Unit employees lost the opportunity to work, and get paid for, the hours that were given to the ACCESS Unit. This loss is a significant detriment to the members of the Routed Unit.

Factor 3: Was the employer's motivation solely economic?

The intent of this question is to determine whether the employer's action was based solely on economic motives and not on, or combined with, some other improper motive. Examples of improper motives

include decisions based on union animus or made with an intent to punish the union or its employees.[2] An employer's decision to transfer bargaining unit work based solely on a cost savings analysis that considers only a unit's bargained for wages would also be improper. An employer may not circumvent its contractual agreement on wages for a particular unit by transferring that unit's work to another bargaining unit or to an unrepresented group.

In this case, an ACCESS Unit driver's rate of pay is lower than a similarly situated Routed Unit driver's rate of pay. The union asserts that the employer's decision was motivated by a desire to save money by assigning the Port Orchard FTH route to the lower paid ACCESS Unit drivers rather than the Routed Unit drivers. The employer asserts its decision was based on its practice of using "service selection criteria" or "service standards," which include broader issues of cost containment such as ridership levels, cost of bus operation, and the concept of "shared service," *i.e.*, using one vehicle to meet general public and ACCESS needs.

The employer made the decision to transfer the Port Orchard FTH route to the ACCESS Unit drivers for economic reasons. The employer's brief indicates the employer used "service selection criteria" which focused "more broadly on cost effectiveness, as well as other considerations" that incorporated "more than simply the wage of the operator." The employer's decision to transfer the work from the Routed Unit to the ACCESS Unit was based on several

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[2] The listing of these non-economic motivations is not exclusive. Each case must be analyzed on its own set of facts.

economic factors, not solely on the narrow economic issue of the driver's rate of pay.

Based on the above, the Examiner finds that the employer took a number of economic factors into account in making its decision. The Examiner finds no evidence supports the conclusion that the employer's motivation was improper or made with a motivation other than a solely economic one.

Factor 4: Had there been an opportunity to bargain generally about the changes in existing practices?

Effective September 18, 2005, the employer resumed the Port Orchard FTH route utilizing employees from the ACCESS Unit to perform the work. On October 14, 2005, the union wrote the employer and demanded that the employer return the Port Orchard FTH route work to the Routed Unit. In an October 26, 2005, letter the employer responded that it would not return the work to the Routed Unit.

The union's October 14, 2005, letter demanded that the employer return the transferred work to the Routed Unit. The union did not present evidence showing the union demanded to bargain the issue. However, it is well settled that a union does not waive its right to bargain by failing to request bargaining when faced with a fait accompli, as it was here. A fait accompli describes an unannounced, unilateral change involving a mandatory subject of bargaining. *North Franklin School District*, Decision 3980 (PECB, 1992). Bargaining after a fait accompli has been implemented would predictably be futile and would inherently be prejudiced by a decision already made without the union's input or influence. *Seattle School District*, Decision 5733-A (PECB, 1997), citing

Spokane County, Decision 2167-A (PECB, 1985). When an employer does not provide adequate notice and offer to engage in meaningful bargaining, the union's failure to request bargaining is not a waiver by inaction. *Skagit County*, Decision 8886 (PECB, 2005).

In its brief, the employer acknowledges that it did not offer to bargain its decision to assign the Port Orchard FTH route to the ACCESS Unit rather than the Routed Unit. The record indicates that the parties did not bargain this issue.

Factor 5: Was the work fundamentally different from Routed Unit work?

Employees of both bargaining units at issue here are employed to drive transit busses and generally have skills and working conditions of the same nature or type. While differences exist between the duties of the two groups, the main thrust of their duties is to drive busses, pick up, and drop off passengers. While the Port Orchard FTH route work could probably be performed by employees of either bargaining unit, the record indicates that the work at issue was neither fundamentally different from Routed Unit work and was historically and exclusively performed by Routed Unit employees.

CONCLUSION

The employer in this case made a decision based on "service selection criteria" to resume the Port Orchard FTH route. However, the decision also included a unit work decision. Along with deciding to resume the Port Orchard FTH route, the employer decided that the work historically performed by employees of the Routed Unit would be transferred to employees of the ACCESS Unit. While the

employer had the right to make the decision, based on "service selection criteria," when it discontinued, and later resumed, the Port Orchard FTH route, its action went further and transferred the historical work of the Routed Unit to the ACCESS Unit without providing an opportunity to bargain the transfer of work.

The Examiner finds that the Port Orchard FTH route had historically and exclusively been performed by Routed Unit employees. The employer in this case assigned this certain body of work to the Routed Unit and therefore that work attached to the unit and became Routed Unit work. The fact that the work at issue was, for a time, not being performed does not operate to detatch that body of work from the Routed Unit. An employer does not have to negotiate a decision to reduce or curtail part of its operation. *Wenatchee School District*, Decision 3240 (PECB, 1989). An employer does, however, have a duty to bargain with the exclusive bargaining representative of its employees concerning a decision to transfer work to employees outside the bargaining unit (skimming of unit work). *City of Mercer Island*, Decision 1026-A (PECB, 1981). The employer had the right to make the "entrepreneurial decision" to discontinue, and then later to resume, the Port Orchard FTH route. However, the employer's action here went further than an "entrepreneurial decision" when it also decided to transfer the historical work of the Routed Unit to the ACCESS Unit.

Having analyzed the five factors discussed above, the Examiner holds that the employer had an obligation to bargain the decision and the effects of transferring the Port Orchard FTH route from the regular bargaining unit. The transferring of the Port Orchard Ferry Take Home route body of work from the Routed Unit to the ACCESS Unit

without bargaining was an impermissible skimming of bargaining unit work and constitutes an unfair labor practice.

ISSUE 3: Did the union waive by contract the right to challenge the employer's decision to transfer the Port Orchard FTH route to the ACCESS Unit?

The Commission has consistently applied a "clear and unmistakable" standard to evaluate waiver by contract claims. The contract language relied upon must be specific, or it must be shown that parties fully discussed the matter and that the party alleged to have waived its rights consciously yielded its interest in the matter. *See Whatcom County*, Decision 7244-B (PECB, 2004).

The employer relies upon a provision in the Routed Unit's contract as well as provisions in the ACCESS Unit's contract. However, the Routed Unit brought this case; the Routed Unit, not the ACCESS Unit, is asserting its rights. The employer alleges the Routed Unit waived those rights by contract.

The ACCESS Unit's contract cannot waive the Routed Unit's rights. Only the parties to a contract are bound by its terms. The Routed Unit is not a party to the ACCESS Unit's contract and is therefore not bound by its terms. The Examiner does not rely on the terms of the ACCESS Unit's contract in making a decision as to a waiver by contract in this case.

The Routed Unit's contract states that:

> The Employer maintains the right to make changes to regular routed service, as commonly practiced at run cutting and bidding times, including adjusting routes, schedules, runs, or other changes normally reserved to the Employer's discretion.

In this case, the employer did not simply "make changes to regular routed service, as commonly practiced at run cutting and bidding times, including adjusting routes, schedules, runs . . . ." The employer transferred bargaining unit work out of the unit. This was not a "change" to the "regular routed service" nor was it simply "adjusting" of "routes, schedules, [or] runs." The employer's action was to completely transfer the work out of the unit.

Further, a waiver of the right to bargain over the transfer of bargaining unit work cannot be found under the "other changes normally reserved to the Employer's discretion" language. This language does not meet the "clear and unmistakable" standard set by the Commission for a finding of a waiver by contract. *See Whatcom County*, Decision 7244-B (PECB, 2004).

The Examiner rules that there was no waiver by contract concerning the issue of transferring the Port Orchard FTH route from the Routed Unit to the ACCESS Unit. While the employer had the right to discontinue the route in 1999 and to return the route in 2005, it did not have the right to transfer the work from the Routed Unit without first bargaining with the Routed Unit concerning the decision and the effects of its decision to transfer the work.

REMEDY

The conventional remedy for a unilateral change violation is to order the restoration of the status quo ante. Back pay can be awarded to make the affected employees whole for losses they suffered as a result of the unlawful action. *City of Seattle*, Decision 8313-B (PECB, 2004).

In its brief (and also in its complaint) the union requested, among other remedies, the following:

> Provide to those Access Employees who performed the FTH service the difference in pay between what they were paid and what would have been paid as Routed service (same step on the routed wage scale) . . . .

However, as cited above, the goal of remedial awards such as back pay is "to make the affected employees whole for losses they suffered as a result of the unlawful action." In this case it is the Routed Unit employees who have suffered losses, not ACCESS Unit employees. As discussed above, the harm to the Routed Unit from the employer's action was the lost opportunity to work, and be paid for, the hours that were given to the ACCESS Unit. The ACCESS Unit employees have suffered no "harm" to be remedied. Regardless of the employer's decision, ACCESS Unit employees who performed the work would have been paid the rate of pay that their contract defined. They would never have been entitled to the pay rate contained in the Routed Unit's contract.

The harm in this case was the work hours that the Routed Unit drivers would have worked but for the employer's transfer of the unit's work to another bargaining unit. The remedy therefore must make the affected employees whole for losses they suffered. The remedy to make those employees whole is back pay. The record does not reflect the name of a specific individual who actually suffered a work reduction as a result of the employer's actions. The record supports a finding that a Routed Unit employee, or employees, lost work hours and the employee(s) can readily be identified.

Therefore the back pay portion of the remedy in this case is that the employer must determine which Routed Unit employee(s) would have driven the Port Orchard Ferry Route beginning at the resumption of the route on September 18, 2005. The employer must pay that employee, or those employees, at the rate of pay called for in the contract for the hours that they would have worked had the employer not transferred the Port Orchard FTH route work to the ACCESS Unit. Additionally, the employer's decision to assign the Port Orchard FTH route work to ACCESS Unit employees, and to pay them for that work, was made solely by the employer. As such, the employer may not seek reimbursement for wages previously paid to the ACCESS employees for work they were directed to, and did, perform. Neither may the employer take "credit" for the amount it paid employees of the ACCESS Unit employees and deduct that amount from the back pay it is directed to pay the affected Routed Unit employees.

FINDINGS OF FACT

1. Kitsap Transit is a "public employer" within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union, Local 1384 is a bargaining representative within the meaning of RCW 41.56.030(3) and is the exclusive bargaining representative of a unit of employees employed by Kitsap Transit Authority known as the Routed Unit.

3. The employer operates "Ferry-take-home" services which are route deviation services that start at a ferry terminal and are intended to connect ferry passengers with their homes or other destinations.

4. The Port Orchard FTH route is a "ferry-take-home" route.

5. Prior to 1995, the Port Orchard FTH route body of work was performed by members of the Routed Unit.

6. In 1995, the Port Orchard FTH route was discontinued by Kitsap Transit based on service selection criteria and the effects of Initiative 695.

7. Effective September 18, 2005, Kitsap Transit resumed the Port Orchard FTH route body of work and assigned that work to the ACCESS Unit.

8. Prior to making and implementing its decision, the employer did not notify the union of its decision to transfer the Port Orchard FTH route work from the Routed Unit to the ACCESS Unit.

9. On October 14, 2005, the union wrote the employer and demanded that the employer return the Port Orchard FTH route work to the Routed Unit.

10. On October 26, 2005, the employer responded by letter to the union's October 14, 2005, demand and stated that it would not return the work to the Routed Unit.

11. Prior to September 18, 2005, the Port Orchard FTH route work was historically performed by the Routed Unit and non-Routed Unit personnel had never performed the Port Orchard FTH route work.

12. Removing the work from the unit caused a loss of work opportunities to the employees of the Routed Unit.

13. The employer's motivation was solely economic, based on multiple cost analysis factors, and was not based on any improper motive.

14. The union did not have an opportunity to bargain the transfer of the Port Orchard FTH route work prior to the employer's decision to transfer the work or the employer's implementation of that decision.

15. The Port Orchard FTH work is not fundamentally different from other work performed by the Routed Unit.

16. The parties' collective bargaining agreement does not contain language that contractually waives the union's right to bargain the transfer of the bargaining unit work.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By the events described in the above Findings of Fact, Kitsap Transit interfered with employee rights in violation of RCW 41.56.140(1) and refused to bargain in violation of RCW 41.56.140(4), by skimming of the Port Orchard Ferry Take Home service body of work previously performed by Routed Unit employees without providing an opportunity for bargaining.

ORDER

Kitsap Transit, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with Amalgamated Transit Union, Local 1384, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described in paragraph 2 of the above findings of fact.

   b. Skimming work from bargaining unit positions without first giving notice to, and upon request bargaining with, the exclusive bargaining representative of its employees concerning both the decision and effects of the employer's decision.

   c. In any other manner interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights under by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Restore the status quo ante by reinstating the wages, hours, and working conditions which existed for the employees in the affected bargaining unit prior to the

unilateral change in transferring bargaining unit work outside the bargaining unit found unlawful in this order.

b. Determine which Routed Unit employee(s) would have worked the Port Orchard Ferry Take Home Route beginning at the resumption of the route on September 18, 2005, and pay those employee(s) identified for the number of hours they would have worked, at the rate of pay that they would have earned, had we not transferred the Port Orchard FTH route work from the Routed Unit to the ACCESS Unit.

c. Give notice to Amalgamated Transit Union, Local 1384, prior to transferring any bargaining unit work to persons outside of the Routed Unit bargaining unit.

d. Bargain collectively, upon request, with Amalgamated Transit Union, Local 1384, as an exclusive representative of an appropriate bargaining unit, with respect to the transfer of bargaining unit work, wages, hours, and working conditions.

e. Post copies of the notice attached to this order in conspicuous places on our premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of Kitsap Transit, and shall remain posted for 60 consecutive days from the date of initial posting. We shall take reasonable steps to ensure these notices are not removed, altered, defaced, or covered by other material.

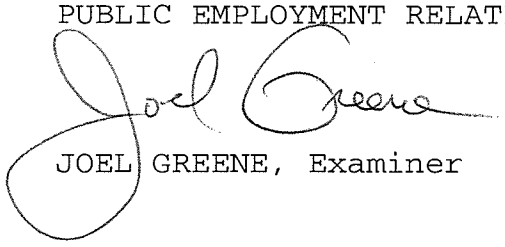
f. Read the notice attached to this order into the record at a regular public meeting of the Kitsap Transit Authority Board, and permanently append a copy of the notice to the official minutes of the meeting when the notice is read as required by this paragraph.

g. Notify the Amalgamated Transit Union, Local 1384, in writing, within 20 days following the date of this order, as to what steps we have taken to comply with this order, and at the same time provide the union with a signed copy of the notice attached to this order.

h. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps we have taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this order.

ISSUED at Olympia, Washington, this 7th day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JOEL GREENE, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

Case 20250-U-06-05162

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY skimmed the Port Orchard Ferry Take Home service work previously performed by Routed Unit employees and transferred that work to employees in the ACCESS Unit without providing an opportunity for bargaining in violation of RCW 41.56.140(1) and RCW 41.56.140(4).

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL restore the status quo ante by reinstating the wages, hours, and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change in transferring bargaining unit work outside the bargaining unit found unlawful in this order.

WE WILL determine which Routed Unit employee(s) would have worked the Port Orchard Ferry Take Home Route beginning at the resumption of the route on September 18, 2005, and pay those employee(s) identified for the number of hours they would have worked, at the rate of pay that they would have earned, had we not transferred the Port Orchard FTH route work from the Routed Unit to the ACCESS Unit.

WE WILL give notice to Amalgamated Transit Union, Local 1384, prior to transferring any bargaining unit work to persons outside of the Routed Unit bargaining unit.

WE WILL, upon request, bargain collectively with Amalgamated Transit Union, Local 1384, as an exclusive representative of an appropriate bargaining unit, with respect to the transfer of bargaining unit work, wages, hours, and working conditions.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ KITSAP TRANSIT

BY: _____

Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.