STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1384,	)	
Complainant,	)	CASE 20250-U-06-5162
vs.	)	DECISION 9667-A - PECB
KITSAP TRANSIT,	)	DECISION OF COMMISSION
Respondent.	)	

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

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

This case comes before the Commission on a timely appeal filed by Kitsap Transit (employer) seeking review and reversal of the Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene.[1] The Amalgamated Transit Union, Local 1384 (union) supports the Examiner's decision.

The employer provides public transportation services in and around Kitsap County. Included in its services are fixed route services which are defined as those routes that are regularly scheduled with fixed and predetermined routes and stops, as well as ACCESS service, which is "door-to-door or curb-to-curb" service where the users call in advance and schedule a pick-up time and the driver then takes the user to a specific location. The union represents

[1] *Kitsap Transit*, Decision 9667 (PECB, 2007).

a bargaining unit of routed service drivers who drive regularly scheduled routes.

Prior to 1999, the employer provided a Port Orchard ferry take-home service which connected ferry passengers from the Port Orchard ferry dock with their homes or other destinations. Following the passage of Initiative 695 (I-695), a statewide citizens initiative that reduced the motor vehicle excise tax to thirty dollars, and I-695's subsequent legislative codification, the economic situation necessitated that the employer reduce the services that it offers.[2] The employer discontinued the Port Orchard ferry take-home service. There is no evidence in this record that the union objected to this action. However, it appears that the employer continued to provide the Bremerton and Bainbridge Island ferry take-home services.

In 2004, an improved economic situation provided the employer with an opportunity to expand its services. Based upon demand from the public, the employer decided to reintroduce the Port Orchard ferry take-home service. The service became effective September 15, 2005. When the service resumed, the employer assigned the work to the ACCESS drivers bargaining unit, as opposed to employees in the routed drivers bargaining unit that had performed the work prior to 1999. The employer did not consult the union when it assigned the work to the ACCESS drivers bargaining unit.

The union sent a letter to the employer noting that the ferry take-home work had always been performed by the routed drivers bargain-

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[2] In *Amalgamated Transit Union, Local 587 v. Washington*, 142 Wn.2d 183 (2000), the Washington State Supreme Court upheld a lower court ruling declaring I-695 unconstitutional. However, prior to this ruling, the Legislature codified much of the language in the initiative that repealed the motor vehicle excise tax. Chapter 1, Laws of 2000.

ing unit, and demanded that the work be returned to that unit. The employer replied by stating it intended to continue the have the ACCESS drivers bargaining unit perform the work, but would be willing to discuss the matter with the union. The union then filed this complaint.

ISSUES PRESENTED

Did the employer transfer the ferry take-home service work from the routed service drivers bargaining unit to the ACCESS drivers bargaining unit without first providing notice to the union of the intended change and providing the union a meaningful opportunity to request bargaining?

In the alternative, did the union contractually waive its right to bargain assignment of the ferry take-home work to the ACCESS bargaining unit?

For the reasons set forth below, we affirm the Examiner's decision that the employer committed an unfair labor practice when it assigned the ferry take-home service work to the ACCESS bargaining unit. This record demonstrates that the routed drivers bargaining unit historically performed the Port Orchard ferry take-home work, but also continued to perform ferry take-home service work in Bremerton and Bainbridge Island during the period that the Port Orchard work was discontinued. Accordingly, the ferry take-home work continued to be assigned to the routed drivers bargaining unit, and any desire by the employer to assign that work to a different bargaining unit required the employer to satisfy its collective bargaining obligation. The union did not contractually waive its right to bargain assignment of the ferry take-home work.

ANALYSIS

Standard of Review

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ISSUE 1 - Skimming of Bargaining Unit Work

Applicable Legal Standards

The Public Employees' Collective Bargaining Act (PECB), Chapter 41.56 RCW, requires employers to bargain collectively with the unions representing their employees.[3] *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996). The scope of bargaining within RCW 41.56.030(4) encompasses "grievance procedures and . . . personnel matters, including wages, hours and working conditions."

Commission and judicial precedents interpreting that definition identify three broad subjects of bargaining: mandatory, permissive,

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[3] RCW 41.56.140 through 41.56.160 protect rights conferred by Chapter 41.56 RCW.

and illegal. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958)(cited in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997); Federal Way School District, Decision 232-A (EDUC, 1977)).

- Employee "wages, hours, and working conditions" are generally mandatory subjects over which the parties must bargain in good faith. It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).

- Management and union prerogatives, along with procedures for bargaining mandatory subjects are permissive subjects over which the parties may negotiate, but are not obligated to do so. *City of Pasco*, 132 Wn.2d at 460 (as to permissive subjects, each party is free to bargain or not to bargain, and to agree or not to agree).

In deciding whether an issue of bargaining is either mandatory or permissive, this Commission considers two factors: (1) the extent to which managerial action impacts upon the wages, hours, and working conditions of employees, and (2) the extent to which a managerial action is deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989)(*City of Richland*). The Supreme Court in *City of Richland* held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are classified as non-mandatory subjects." *City of Richland*, 113 Wn.2d at 200.

The determination as to when a duty to bargain exists is a question of law and fact for the Commission to decide. *City of Anacortes*, Decision 6830-A (PECB, 2006), *citing* WAC 391-45-550. The National Labor Relations Board (NLRB) and the various state labor relations agencies generally accept as a management prerogative the level of services to be offered by an employer and, as such, a permissive subject of bargaining. *See Federal Way School District*, Decision 232-A. This Commission recognizes that public employers have the right to "entrepreneurial" control over nonmandatory subjects of bargaining. *Snohomish County Fire District 1*, Decision 6008-A (1998); *Wenatchee School District*, Decision 3240-A (PECB, 1990).

Decisions to Transfer or Cease Bargaining Unit Work

This Commission recognizes that a different bargaining obligation exists when an employer decides to contract out bargaining unit work as opposed to and decisions to go-out-of-business. *See City of Anacortes*, Decision 6830-A. For example, in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the United States Supreme Court held that the decision to contract out work previously performed by members of an established bargaining unit that results in the termination of bargaining unit employees is a mandatory subject of bargaining. Similarly, in *South Kitsap School District*, Decision 472 (PECB, 1978), an examiner held that any decision to transfer or "skim" bargaining unit from the bargaining unit that traditionally performed the work to a different bargaining unit or unrepresented employees was also a mandatory subject of bargaining. The examiner reasoned that exclusive bargaining representatives have a legitimate interest in preserving work that their bargaining units historically perform, at least where an employer has not cut back services and personnel. *South Kitsap School District*, Decision 472. This obligation applies to all bargaining unit

work,[4] whether the work be entry level,[5] at the highest level,[6] or new bargaining unit work.[7] Employers are prohibited from altering the scope of the Chapter 41.56 RCW bargaining obligation.

In order to establish a skimming violation, the first step in our analysis is to determine whether or not the work was in fact bargaining unit work. *See Spokane Fire District 9*, Decision 3482-A (PECB, 1991). If that question is answered in the affirmative, we then balance five factors to determine whether a duty to bargain exists concerning the transfer of bargaining unit work. *Port of Seattle*, Decision 7271-B (PECB, 2003); *City of Anacortes*, Decision 6863-B (PECB, 2001); *Spokane County Fire District 9*, Decision 3482-A (PECB, 1991). Those factors include:

1. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed such work before?);

2. Whether the transfer of work involved a significant detriment to bargaining unit members (*e.g.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);

3. Whether the employer's motivation was solely economic;

4. Whether there has been an opportunity to bargain generally about the changes in existing practices; and

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[4] *City of Vancouver*, Decision 808 (PECB, 1980).

[5] *City of Kennewick*, Decision 482-B (PECB, 1980).

[6] *City of Mercer Island*, Decision 1026-B (PECB, 1982).

[7] *Community Transit*, Decision 3069 (PECB, 1988).

5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

If an employer presents its decision to transfer or skim bargaining unit work as a final decision, or *fait accompli*, the union is then excused from its bargaining obligation.

Application of Standards

Here, substantial evidence supports the Examiner's findings and conclusions that the Port Orchard ferry take-home service work belonged to the routed bargaining unit. Although the employer ceased offering service from the Port Orchard ferry dock in 1999, this record demonstrates that the employer maintained ferry take-home service from the Bremerton and Bainbridge Island ferry docks throughout that period. Thus, although the routed bargaining unit ceased performing the specific service offered from the Port Orchard dock because of budget constraints, the routed bargaining unit never ceased performing ferry take-home service work where that service was offered in other locations.

The Five Factor Balancing Test

Having determined that the Port Orchard ferry take-home service is in fact bargaining unit work, we next turn to the five factor test outlined in *Spokane County Fire District 9* to determine whether the employer was obligated to satisfy its bargaining obligation before transferring the work outside the bargaining unit.

Factor 1 and 5: Other Personnel Have Not Performed Bargaining Unit Work and There is a Fundamental Difference in Work

As previously noted, we find that the ferry take-home service as a whole was bargaining unit work. The question that we must answer

here is whether other employees have performed bargaining unit work, and whether or not the the ferry take-home work is a fundamental different from ACCESS work.

The Examiner found that both the routed unit and the ACCESS unit are employed to drive buses, and although there may be differences between the two unit, each has the fundamental purpose of driving a bus to pick up and drop off passengers. Additionally, the Examiner noted that while either bargaining unit could perform the work, the employer nevertheless historically assigned the work to the routed unit. Finally, the Examiner found that both the routed unit and the ACCESS unit are employed to drive buses, and although there may be differences between the two units, each has the fundamental purpose of driving a bus to pick up and drop off passengers. Additionally, the Examiner noted that while either bargaining unit could perform the work, the employer nevertheless historically assigned the work to the routed unit.

The employer argues that the ferry take-home work is route-deviated work that substantially differs from the work generally performed by the routed bargaining unit, and asserts that employees other than the routed bargaining unit have performed route-deviated work. To support its argument, the employer compares and contrasts the work performed by the ACCESS unit with the ferry take-home work, and notes that, like the work performed by the ACCESS unit, the ferry take-home work does not generally operate on fixed routes and often takes riders directly to locations not on fixed routs. Accordingly, the employer claims that because the ferry take-home service is a type of door-to-door service and the ACCESS bargaining unit performs similar work, other employees have effectively performed ferry take-home work. We disagree that in this case the work of both bargaining units should be examined with such breadth,

and the employer not only fails to demonstrate that other employees have performed ferry take-home work, but the employer also fails to take into consideration that only the routed drivers have performed the ferry take-home work.

When this Commission examines the merits of a skimming case, the work that the bargaining representative claims is being unlawfully transferred is the starting point for our analysis. For example, if the exclusive bargaining representative of a bargaining unit of clerical employees claims that a general function, such as secretarial work, has been transferred, then we must determine if non-bargaining unit employees have performed "secretarial" work. However, if the exclusive bargaining representative claims that a specific job function is performed by a bargaining unit, such as sorting and delivering mail, then we will only need to examine whether or not non-bargaining unit employees perform the specific job function. Accordingly, the complaint filed by the exclusive bargaining representative will need to specify exactly what work is alleged to have been unlawfully transferred and will drive the analysis.

Here, the union's complaint is narrowly tailored and only seeks redress for the unlawful transfer of ferry take-home service work. Although the employer claims that non-bargaining unit employees have performed similar work to the ferry, such as Dial-A-Ride service, it cannot point to any instance where employees other than those in the routed unit performed ferry take-home work.[8]

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[8] Much of the employer's argument is based upon the theory that the ferry take-home work is more appropriately assigned to the ACCESS bargaining unit. We note that the employer voluntarily recognized this particular bargaining unit and assigned it the ferry take-home work.

Factor 2: Detriment to Bargaining Unit Employees

The Examiner found that the employer's action caused a significant detriment to bargaining unit employees. He noted that any loss of work opportunity invariably affects the work hours of bargaining unit employees, and noted that if employers could transfer or contract out bargaining unit work, the resulting uncertainty about any remaining work would be detrimental to the statutory purpose of peaceful labor-management relations. The Examiner also rejected the employer's argument that the routed bargaining unit could not have suffered any detriment because it had never performed the work. By specifically noting that the bargaining unit *had* performed the work before, the employer reinstated the work and gave that work to a different bargaining unit. We agree with the Examiner's conclusion that the employer's action caused the union a significant detriment.

The employer also argued before the Examiner that the routed unit could not have suffered any detriment because, unlike the employer in *Spokane Fire District 9* which concerned providing twenty-four hour fire service, the employer was not required to bring back the ferry take-home service. If it did, it would not have brought service unless it could have assigned the work to the ACCESS unit. The employer raises this argument once again, and we reject the employer's contention because not only does it ask for us to speculate as to the employer's motive, it also ignores the fact that the employer did in fact resume the work.

To support its arguments, the employer's attempts to distinguish this case from *Spokane Fire District 9*, Decision 3482-A, and *Western Washington University*, Decision 9010 (PSRA, 2005). In *Spokane Fire District 9*, the employer used volunteer firefighters for standby work. The volunteers were paid on a point system, and

if enough individuals failed to show up to staff the station, then the regular uniformed personnel would be paid overtime to ensure sufficient staffing. The employer unilaterally changed the compensation rate for the volunteers from the point system to five dollars an hour to ensure that they would arrive. The Commission found that this action constituted a significant detriment because a reasonable inference could demonstrate that bargaining unit employees could have realized even more overtime opportunities had the employer not taken the detrimental action. *Spokane Fire District 9*, Decision 3482-A, citing *Amcaar Division v. NLRB*, 596 F.2d 1344, 1349 (8th Cir. 1979)(upholding NLRB's reasonable inference that a subcontracting arrangement resulted in loss of reasonable work opportunities).

In *Western Washington University*, the employer reallocated a bargaining unit position performing "events managing" work without satisfying its collective bargaining obligation. An examiner found that the employer's action caused a detriment to the bargaining unit because the transfer of work caused an entire position to be removed from the bargaining unit. Accordingly, the examiner ordered the work returned to the bargaining unit.

We disagree with the employer that these cases are distinguishable. In both cases, this Commission examined whether bargaining unit employees lost opportunities and, like the case before us, the bargaining unit lost what would otherwise have been bargaining unit work.[9]

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[9] With respect to *Spokane Fire District 9*, the fact that the employer deems fire services as a mandatory service, and that characterization somehow changes the character of the work for a skimming analysis, is not only misplaced, but would allow employers to assign new bargaining unit work to non-bargaining unit employees based solely upon how necessary the service is.

Factor 3: Economic Motives

The Examiner found that the employer's motive was purely economic based upon the difference of pay between the routed drivers and the ACCESS drivers, who make less in total wages, and not on some other insidious motive. Nothing in this record lead us to refute the Examiner's findings with respect to this factor.

Factor 4: Opportunity to Bargain

The Examiner found that the employer announced that it was resuming the Port Orchard ferry take-home work on September 18, 2005, and the union demanded the work be returned to the routed unit on October 14, 2005. The employer denied the union's request on October 26, 2005. The Examiner found that although the union did not specifically demand bargaining in its October 14, 2005 letter, the employer nevertheless presented the union with a fait accompli, thus absolving the union of its statutory requirement. We agree with the Examiner that the employer presented its decision to assign the Port Orchard ferry take-home work to the union unannounced, thereby relieving the union of its bargaining obligation.

Conclusion

This record clearly demonstrates that the employer was obligated to satisfy is collective bargaining obligation before assigning the ferry take-home work away from the routed unit.

ISSUE 2 - Contractual Waiver of Bargaining Rights

Applicable Legal Standard

When a knowing, specific and intentional contractual waiver exists, an employer may lawfully make unilateral changes as long as those changes conform with the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). A waiver of statutory collective bargaining rights must be consciously made, must be clear, and must

be unmistakable. *City of Yakima*, Decision 3564 (PECB, 1990). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). We have long held the general management rights clauses often asserted by employers as waivers of union bargaining rights are generally found inadequate under the high standards for finding a waiver. *See Chelan County,* Decision 5469-A (PECB, 1996).

Application of Standard

The Examiner found that the union did not contractually waive its right to contest the employer's assignment of the Port Orchard ferry take-home work to the ACCESS unit. He noted that while the routed drivers' collective bargaining agreement allows the employer to make changes to routes, schedules, and runs, no specific language exists allowing the employer to completely transfer work from the bargaining unit.

The employer argues that the Examiner should have found a contractual waiver regarding assignment of work, and notes that the routed unit agreement allows the employer to make changes to the routed service. The ACCESS agreement allows the employer to create, delete, modify routes, shifts, hours of work as well as allowing the employer to designate all work duties and introduce new and revised existing routes within the unit.

To the extent that the employer relies upon the ACCESS collective bargaining agreement, the employees at issue in this case are covered by the routed unit collective bargaining agreement, and the employer may not use a contractual waiver from a different collective bargaining agreement as a waiver of this bargaining unit's rights. More importantly, none of the language pointed to

by the employer clearly and unambiguously allows the employer to transfer bargaining unit work without bargaining.

Conclusion

We agree with the Examiner's findings and conclusions that the employer unlawfully transferred the Port Orchard ferry take-home work from the routed bargaining unit. Accordingly, we also affirm the Examiner's remedial order requiring the employer to compensate routed bargaining unit employees for lost work opportunities the routed bargaining unit may have suffered from the time the employer reintroduced the Port Orchard ferry take-home service until the employer returns the work to the routed bargaining unit.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 19th day of December, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner