

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

TEAMSTERS LOCAL 589

Involving certain employees of:

KITSAP TRANSIT

CASE 22447-E-09-3466

DECISION 10699 - PECB

DIRECTION OF ELECTION

Reid, Pedersen, McCarthy, Ballew, by *Michael R. McCarthy*, Attorney at Law, for the petitioner.

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

Rita DiIenno, Business Agent, for the intervenor, Amalgamated Transit Union, Local 1384.

On May 5, 2009, Teamsters Local 589 (petitioner) filed a representation petition seeking to represent a group of employees referred to as worker/drivers employed by Kitsap Transit (employer). On May 21, 2009, the petitioner amended its petition to seek a change of representation for the worker/drivers.

On May 8, 2009, the Executive Director directed that the processing of the petition be held in abeyance pending the outcome of Case 21629-C-08-1331 and Case 21775-E-08-3370 that were before the Commission on appeal. Case 22135-I-08-0522, an interest arbitration, was also held in abeyance pending the outcome of both cases. In addition, three unfair labor practice cases involved the same bargaining unit. These cases, 21768-U-08-5554, 21937-U-08-5588 and 22133-U-08-5641, invoked WAC 391-25-370, the "blocking charge" rule. The complaining union, Amalgamated Transit Union, Local 1384 (intervenor or ATU) did not request to proceed with the processing of the petition while those charges remained active.

On August 12, 2009, the Commission issued *Kitsap Transit*, Decision 10234-A (PECB, 2009), finding that the ATU's "routed" bargaining unit at Kitsap Transit was inappropriate because of the inclusion of the worker/drivers in a bargaining unit of routed drivers who worked under different terms and conditions as the worker/drivers. Accordingly, the Executive Director lifted the suspension of the interest arbitration in Case 22135-I-08-052, but amended the certification in that case to exclude any issues related to the worker/drivers. Additionally, the Executive Director rescinded the "blocking charge" that applied to the instant petition, because: "(1) the petition now involves unrepresented worker/drivers, and (2) the unfair labor practice complaints can no longer improperly affect the outcome of an election under WAC 391-25-370(1)(c)."

On September 21, 2009, ATU filed a motion to intervene under WAC 391-25-170, claiming it had "been the exclusive bargaining representative of all or any part of the bargaining unit involved in proceedings under this chapter during the year preceding the filing of the petition". The petitioner and employer did not respond to the ATU's motion to intervene.

Representation Coordinator Sally J. Iverson held an investigation conference on October 7, 2009. Several issues were not resolved during the investigation conference. The Executive Director reserved ruling on the issue of ATU's motion to intervene, and Hearing Officer Guy Otilio Coss conducted a hearing on November 12, 2009. All parties filed briefs which were considered in the formulation of this decision.

ISSUES

1. Should Amalgamated Transit Union, Local 1384's motion to intervene under WAC 391-25-170 be granted?
2. At the time of the filing of the petition, did a contract bar exist under WAC 391-25-030?
3. Are the worker/drivers public employees within the meaning of Chapter 41.56 RCW?
4. Are some of the worker/drivers "casual employees" that should be excluded from the bargaining unit?

Based upon the record as a whole, the Executive Director rules that: the Amalgamated Transit Union, Local 1384's motion to intervene is granted; a contract bar did not exist under WAC 391-25-030 at the time the petition was filed, the worker/drivers are public employees within the meaning of Chapter 41.56 RCW; and the worker/drivers who work less than one sixth of the hours of a full-time worker/driver are casual employees and are appropriately excluded from the proposed bargaining unit. Thus, an election to determine the question concerning representation is appropriate.

Issue 1: Should Amalgamated Transit Union, Local 1384's motion to intervene under WAC 391-25-170 be granted?

During the pendency of this petition, the ATU moved to intervene as an incumbent in this petition. WAC 391-25-170 provides, in relevant part, that:

An organization which demonstrates that it has been the exclusive representative of all or any part of the bargaining unit involved in proceedings under this chapter *during the year preceding the filing of the petition may*, by motion, intervene in the proceedings and, upon granting of its motion for intervention, shall be entitled to participate in the proceedings and to have its name listed as a choice on the ballot in any election.

(emphasis supplied). There is no question that, as a part of a larger bargaining unit, ATU represented the worker/drivers who are the subject of this petition during part of the year preceding the filing of this petition. The worker/drivers were covered by the ATU's routed driver collective bargaining agreement with the employer, and there is no evidence that suggests that the ATU did not represent the worker/drivers. Although the larger bargaining unit was found inappropriate because of the inclusion of the worker/drivers, this does not negate the fact that the worker/drivers had long been represented by ATU for purposes of collective bargaining. Therefore, ATU is entitled to participate in the proceedings and to have its name listed as a choice on the ballot in the election.

Issue 2: At the time of the filing of the petition, did a contract bar exist under WAC 391-25-030?

The ATU argues that this petition should be dismissed because the petitioned-for employees were covered by its routed driver collective bargaining agreement. WAC 391-25-030(1)(a)(i) specifically provides that for a contract bar to exist the “agreement must cover a bargaining unit that is appropriate under the terms of the applicable statute.” The contract claimed by ATU as the basis for the contract bar covered an inappropriate bargaining unit as found by the Executive Director, in *Kitsap Transit*, Decision 10234 (PECB, 2008) on November 26, 2008, well before the petition was filed on May 5, 2009, and amended on May 21, 2009. The decision was affirmed by the Commission in *Kitsap Transit*, Decision 10234-A. Because the bargaining unit was found to be inappropriate prior to the filing of this petition, there was no contract bar in place at the time of filing of the petition and there is no impediment to proceeding to an election to determine whether the worker/drivers wish to be represented for purposes of collective bargaining and if so, by which labor organization.

Issue 3: Are the worker/drivers public employees within the meaning of Chapter 41.56 RCW?

The worker/drivers drive Kitsap Transit buses to take their co-workers to and from the Puget Sound Naval Shipyard in Bremerton, Washington, where all are employed. The ATU did not stipulate that the worker/drivers are actually public employees as defined by Chapter 41.56 RCW. RCW 41.56.030(2) defines a public employee as “any employee of a public employer” and then lists a series of exceptions. There is no dispute that Kitsap Transit is a public employer and none of the statute’s exceptions apply to the worker/driver position. The Commission has used a “right of control” test when determining whether an employer is a public employer. *Snohomish County Fire District 1*, Decision 6008-A (PECB, 1998). “The determination of ‘control’ is factual and [t]he facts may show that the public and private entities share control over basic bargaining subjects (‘joint’ employers), that they divide control with each entity controlling allocated areas of the employment relationship (‘dual’ employers), or that one entity or the other maintains virtually total control of the basic bargaining subjects.” *North Mason School District*, Decision 2428-A (PECB, 1986).

John Clauson, the Service Development Director for Kitsap Transit is responsible for the program in which the worker/drivers are employed. Clauson explained that the worker/driver program is:

a form of service that Kitsap Transit provides, wherein the operator is actually an employee of a major employer [mostly the Puget Sound Naval Shipyard]. And that particular driver would use one of our vehicles, they actually become one of our employees to do specifically that. They would pick their coworkers on the way to their employment site. They would then park the vehicle and spend their typical eight hours with their primary employer. And then become an employee of ours again, to pick up their co-workers and take them home and drop them off.

Reviewing control exerted over the employment relationship between Kitsap Transit and the worker/drivers, Clauson gave credible and undisputed testimony that Kitsap Transit has total control over the worker/drivers' terms and conditions of employment while they are performing worker/driver duties prior to and after their work hours at the Puget Sound Naval Shipyard. Clauson testified that:

1. The worker/drivers are required to apply for the worker/driver position with Kitsap Transit using the same application as any other employee with the addition of an addendum specifically for the worker/driver position. Kitsap Transit has the exclusive right to offer employment to an applicant for worker/driver positions. Worker/drivers are hired via an offer of employment letter from Kitsap Transit's Human Resource Department. Two examples of these offers of employment letters were admitted and stipulated into the record by the parties. The letters define the general terms, requirements, and expectations of employment.
2. The worker/drivers are trained by Kitsap Transit by a worker/driver supervisor, other trainers employed by Kitsap Transit, a self-qualifying process for defensive driving, a Kitsap Transit provided computer CD, and training by other worker/drivers within the program. Kitsap Transit requires that worker/drivers complete a workbook/test as they work through the training CD.
3. During training, a worker/driver's performance is evaluated by other worker/drivers. Continued employment with Kitsap Transit depends on these evaluations.

4. Kitsap Transit has job requirements for worker/driver employees including possessing, or obtaining, a Commercial Driver's License (CDL) endorsement and an excellent driving record. These requirements are listed on the worker/driver addendum to the Kitsap Transit employment application.
5. The worker/drivers are required to exclusively use Kitsap Transit owned vehicles to perform their job duties, and are issued and wear a uniform identifying them to the public as Kitsap Transit employees.
6. On occasion, worker/drivers may pick up and collect fares from members of the general public.
7. The worker/drivers are paid an hourly wage by Kitsap Transit and receive holiday pay. Kitsap Transit makes standard deductions from worker/drivers' paychecks for federal withholding tax, FICA, and social security deductions.
8. The worker/drivers have access to various employer-provided employee benefits such as: a deferred compensation program; workers' compensation; an employee assistance program; and access to various employer provided services such as a credit union and a wellness program.
9. The worker/drivers are supervised by a Kitsap Transit supervisor who exercises supervisory authority over worker/drivers in matters of discipline, including two past terminations for cause. Worker/drivers are issued an employee handbook and are required to follow Kitsap Transit policies.
10. Worker/drivers have an ongoing expectation of employment with Kitsap Transit.

In sum, the worker/driver positions at issue have all the indicia of being employees of Kitsap Transit. Kitsap Transit has control over all the primary elements of the employment relationship and terms and conditions of employment. It is clear that the worker/drivers are public employees of Kitsap Transit under Chapter 41.56 RCW and are therefore entitled to engage in collective bargaining under the statute.

Issue 4: Are some worker/drivers "casual employees" who should be excluded from the bargaining unit?

The issue of who is appropriately in the petitioned-for bargaining unit was raised by the intervenor during the investigation conference. Casual employees are excluded from bargaining units under WAC 391-35-350:

(1) It shall be presumptively appropriate to include regular part-time employees in the same bargaining unit with full-time employees performing similar work, in order to avoid a potential for conflicting work jurisdiction claims which would otherwise exist in separate units. Employees who, during the previous twelve months, have worked more than one-sixth of the time normally worked by full-time employees, and who remain available for work on the same basis, shall be presumed to be regular part-time employees. For employees of school districts and educational institutions, the term "time normally worked by full-time employees" shall be based on the number of days in the normal academic year.

Employees who work less than full-time share common duties, skills and working conditions with full-time employees must be included in the same bargaining unit unless they qualify for exclusion as "casual" or "temporary" employees. Presumptions made under the rule "shall be subject to modification by adjudication." WAC 391-35-350(3). Computation of the one-sixth standard under WAC 391-35-350 must be based on the practices in the particular employment setting. For example, in higher education the one-sixth standard is based on the normal academic year. *Western Washington University*, Decision 8871-A (FCBA, 2005).

The intervenor asserts that the one-sixth test for the worker/drivers should be applied to the full-time hours of a regular Kitsap Transit bus driver which is a 35-40 hour work week. The petitioner and the employer assert that the worker/driver hours are specifically designed to be of short duration before and after working for their primary employer, the Puget Sound Naval Shipyard. As such, the intervenor argues that the Executive Director should exercise the authority of WAC 391-35-350(3) to deviate from the presumptive one-sixth test, claiming that such a test would preclude most of the employees from being in the bargaining unit and would lead to uncertainty of which employees were included or excluded from the bargaining unit.

The Commission has already ruled that the worker/drivers do not share a community of interest with the regular bus drivers employed by Kitsap Transit. *Kitsap Transit*, Decision 10234-A. By

design, no worker/driver works a regular full time thirty-five to forty hour work week as do regular routed bus drivers. Just as in higher education where the one-sixth standard is based on the normal academic year, a test for these employees must be based on the “normal” day for a worker/driver. Therefore, the intervenor’s argument that a test based on the full-time work of regular bus drivers is rejected.

The intervenor provided a spreadsheet with data from the employer’s payroll department showing the hours each worker/driver worked over a twelve-month period. This evidence was admitted into evidence without objection and shows that the employer is able to accurately track the number of hours worked over a period of time to determine who is, and who is not, a regular part-time employee. Accordingly, the argument that an “hours worked” test will lead to uncertainty is insufficient in this case to overcome the presumptions in WAC 391-35-350.

There are 57 worker/drivers employed by Kitsap Transit. Of these employees, 29 are classified as “leads” and 28 are classified as “backups.” Lead worker/drivers are the primary drivers of a specific route who generally drive the majority of the hours. The backup worker/drivers are those who fill in when a lead is unable to drive a route and who generally drive fewer hours. Clauson testified that lead worker/drivers work “four to five hours a day, five days a week” and backup worker/drivers’ hours are “pretty unpredictable.” The payroll evidence confirms that the backup worker/driver hours are generally few and vary widely. However, testimony that lead drivers work four to five hours a day, five days per week is not supported by the payroll evidence. The evidence shows that the average number of hours worked annually by the lead worker/drivers¹ is 636 hours. Applying the one-sixth test to that figure equals 106 hours. Therefore, worker/drivers who work less than 106 hours in the previous twelve-month period are casual employees who are excluded from the bargaining unit. Employees who, during the previous twelve months, have worked more than 106 hours, and who remain available for work on the same basis, shall be included in the bargaining unit.

1 The hours worked by one lead worker/driver during the twelve-month period totaled 58.478 hours, which was well below the average number of hours worked by all other leads. The evidence showed that this driver had not worked any hours in the final nine months of the period reported. This driver’s hours were not counted in determining the average full-time lead worker/driver hours as it appears that this employee is no longer driving a route.

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 represented the petitioned-for employees for a time during the last twelve months as a part of a larger bargaining unit which included other employees with different working conditions.
3. Teamsters Local 589 is a bargaining representative within the meaning of RCW 41.56.030(3).
4. On November 26, 2008, the Executive Director ruled that Amalgamated Transit Union's bargaining unit at Kitsap Transit was inappropriate because of the inclusion of the worker/driver employees at issue in this petition. *Kitsap Transit*, Decision 10234 (PECB, 2008). This decision was affirmed by the Commission in *Kitsap Transit*, Decision 10234-A (PECB, 2009) on August 12, 2009.
5. On May 6, 2009, Teamsters Local 589 filed a petition seeking recognition as the exclusive representative of a group of employees referred to as worker/drivers employed by Kitsap Transit. On May 21, 2009, the petitioner amended its petition to seek a change of representation for the worker/drivers.
6. The petition identified in Finding of Fact 6 was filed after the November 26, 2008 ruling by the Executive Director that ATU's bargaining unit at Kitsap Transit was inappropriate because of the inclusion of the employees at issue in this petition. *Kitsap Transit*, Decision 10234 (PECB, 2008).
7. Kitsap Transit has control over all of the primary elements of the employment relationship, including, but not limited to: hiring, training, discipline, supervision and direction. In

addition, worker/drivers are paid by Kitsap Transit and receive benefits that are offered to other employees of Kitsap Transit.

8. Full-time Kitsap Transit worker/drivers worked an average of 636 hours in the relevant twelve-month period.
9. One-sixth of a full-time worker/driver's hours equals 106 hours in a twelve-month period.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-25 WAC.
2. Kitsap Transit worker/drivers are public employees within the meaning of Chapter 41.56 RCW.
3. Amalgamated Transit Union, Local 1384 is an intervenor under WAC 391-25-170 and is entitled to participate in the proceedings and to have its name listed as a choice on the ballot in any election.
4. A contract bar did not exist under WAC 391-25-030 at the time Teamsters Local 589 filed its petition on May 6, 2009, or on May 21, 2009 when it the petition was amended.
5. Kitsap Transit worker/drivers who work less than 106 hours over a twelve-month period are casual employees and shall be excluded from the bargaining unit. WAC 391-35-350.
6. Kitsap Transit worker/drivers who work more than 106 hours over a twelve-month period are included in the bargaining unit as regular part-time employees. WAC 391-35-350.

DIRECTION OF ELECTION

A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, among:

All full-time and regular part-time worker/drivers employed by Kitsap Transit, excluding supervisors, confidential employees, and all other employees.

for the purpose of determining whether a majority of the employees in the unit desire to be represented for the purposes of collective bargaining by the Teamsters Local 589, the Amalgamated Transit Union, Local 1384, or by no representative.

ISSUED at Olympia, Washington, this 12th day of March, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.



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