STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1576, Complainant, vs. SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA CORPORATION d/b/a COMMUNITY TRANSIT, Respondent.	)	CASE NO. 7166-U-87-1463 DECISION 3069 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Cogdill, Deno, Millikan and Carter, by W. Mitchell Cogdill, Attorney at Law, appeared on behalf of the complainant.

Allen J. Hendricks, Attorney at Law, appeared on behalf of the respondent.

On December 4, 1987, Amalgamated Transit Union, Local 1576 (complainant), filed a complaint charging unfair labor practices against Snohomish County Public Transportation Benefit Area Corporation (respondent). The complaint alleged that the respondent violated RCW 41.56.140(1), (2) and (4) by "contracting out" certain bus routes to a private bus company. A hearing was held on June 23, 1988, in Everett, Washington. The parties submitted post-hearing briefs on August 10, 1988.

BACKGROUND

Community Transit is a governmental entity formed by a number of municipalities to provide mass transit services. The

respondent has a collective bargaining relationship with Amalgamated Transit Union, Local 1576, concerning a bargaining unit defined in the April 1, 1988, through March 31, 1991, collective bargaining agreement between the parties as:

> a. Regular Coach Operators and Extra Board Coach Operators
>
> b. Dispatch Clerks
>
> c. Trainers
>
> d. Employees who work 420 hours or more in a six consecutive month period excluded from benefits except uniforms ...
>
> e. Information Specialist. This excludes all part-time or relief Information Specialists ...
>
> f. Property Maintenance Workers
>
> g. Hourly Coach Operators employed on an as-needed basis effective June 1, 1988 are defined as "those who work less than seventy (70) hours per month.

Regular operators work 40 hours or more weekly, while extra board drivers typically work 30 to 35 hours per week.[1] In addition, there are a number of "part-time" employees who only work in the event that regular or extra board drivers do not want a specific assignment. The collective bargaining agreement specifies that these part-time employees, referred to in the contract as "Hourly Coach Operators", can be included in the bargaining unit if they have successfully completed a probation period, and that they will be offered employment on a

---

[1] Extra board drivers are not guaranteed work, and must call in each day to find out if work is available for the following day.

rotation basis. The hourly coach employees do not enjoy all benefits under the agreement, and the contract specifies which provisions apply to them.

The collective bargaining agreement also contained the following management rights clause:

> It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the SCPTBAC in all of its various aspects, including, but not limited to, the right to direct the working forces; to plan, direct and control all operations and services of the SCPTBAC; to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; to assign and transfer Employees; to determine whether goods or services should be made or purchased; to hire, promote, demote, suspend, discipline, discharge, or relieve Employees due to lack of work or other legitimate reasons; to make and enforce reasonable rules and regulations; and to change or eliminate existing methods, equipment or facilities.

Community Transit was originally formed as a public transportation benefit area in 1976, and it appears that those terms have developed over the period since 1976.[2]

Prior to 1976, METRO (the Municipality of Metropolitan Seattle) provided some bus transportation services between Seattle and

---

[2] The docket records of the Commission disclose that Local 576 received certification as the results of representation proceedings before the Commission in 1976-77 (Case No. 594-E-76-111, leading to a certification for transit bus operators in Decision 165 (PECB, 1977)), and 1978 (Case No. 1377-E-78-462, leading to a certification for dispatchers in Decision 470 (PECB, 1978)).

the south Snohomish County area. After Community Transit was formed, the new entity contracted with METRO for a time to continue service in Snohomish County area. In 1986, the respondent contracted out the routes formerly served by METRO to a private transportation company, American Transit Enterprises Management Services (ATE).[3]

The instant unfair labor practice dispute relates to the modification of certain bus routes offered by the respondent. In the latter part of May 1987, Local 1576 President Dan McDaniel learned that the respondent was considering modifications in several bus runs. On June 1, 1987, McDaniel wrote a letter to Community Transit Executive Director Kenneth Graska, expressing the union's concern about two proposed changes.

McDaniel first outlined the complainant's disagreement with the respondent's decision to allow ATE to provide service from the Mariner Park-and-Ride area (located in Mukilteo, Washington) to the 45th Street exit from Interstate 5 in Seattle. The bus route would bring riders into the "University District", near the University of Washington, and then continue into downtown Seattle.[4] McDaniel pointed out that Community Transit already had regular bus routes which ran between Lynnwood, Edmonds, and the Mariner Park-and-Ride area and the University District.

---

[3] ATE employees are represented for collective bargaining by Amalgamated Transit Union, Local 1576, in a collective bargaining relationship separate from that involved in this case. As a private employer, ATE's labor relations matters are governed by the National Labor Relations Board (NLRB).

[4] The record indicates that ATE already provided service to downtown Seattle. The proposed change was the addition of a "flyer stop" for University District passengers. The record further indicates that Community Transit did not offer any other downtown service for its customers.

McDaniel contended that ATE had never provided service to the University District, and that the addition of an ATE bus stop in the area amounted to a form of contracting out of bargaining unit work.

Second, McDaniel's letter complained of a modification in existing bus routes between Stanwood, Washington (located in northern Snohomish County), and Seattle. In a newspaper article, Community Transit officials were quoted as considering the creation of direct commuter service between those points, to be provided by ATE. Up to that time, a commuter could travel from Stanwood to Seattle on Community Transit buses, but several transfers were necessary. Community Transit provided service from Stanwood to Everett, from Everett to Lynnwood, and from Lynnwood to Seattle, with each route operating separately. McDaniel demanded bargaining on the proposed changes in the bus routes, and again maintained that the respondent was attempting to contract out work traditionally performed by Community Transit employees.

On June 11, 1987, Graska sent a letter to McDaniel, responding to the concerns raised about the new bus services. Graska disagreed with McDaniel's characterization of events. Denying that any contracting out of bargaining unit work occurred, Graska wrote:

> Since the ATU represents operating personnel of both Community Transit and ATE Management and Service Company, I am surprised and puzzled by the ATU's charges and positions presented in your letter. All services provided under contract by ATE, whether it be current or future, supplement services already provided by Community Transit in Snohomish and King Counties, and in no way impact job security of present Local #1576 members.

> It is important to point out that management retains the exclusive right to plan, schedule and implement service wherever it may be required. Additionally, management reserves the authority to provide that service in any manner it sees appropriate. Community Transit has no intentions of altering its plans or contractual relationship with ATE in view of the issues presented in your letter of June 1. Furthermore, is my opinion that the issues addressed by the ATU in your letter are non-negotiable and, thus, management is not compelled to bargain or negotiate on these or any other issues related to the subcontracting of service.

By October, 1987, the new bus routes were in place, with ATE personnel responsible for the additional services. The record does not reflect whether the complainant made additional bargaining demands prior to the implementation of the new bus services. The complainant filed the instant unfair labor practice complaint on December 4, 1987.

POSITIONS OF THE PARTIES

The complainant argues that the respondent contracted out bargaining unit work by allowing ATE to take over several new bus routes. The complainant maintains that it had the right to bargain over the new routes, and contends that the respondent's actions precluded extra board and part-time drivers from work opportunities for which they should have been considered if bargaining had taken place.

The respondent argues that it did not commit any unfair labor practice by expanding the amount of work given to ATE. The respondent contends that the work at issue was not traditionally performed by Community Transit employees, and that the

decision to give the new routes to ATE was based on business necessity. The respondent further contends that the collective bargaining agreement did not prohibit subcontracting, and that the complainant cannot prove that damages have been incurred because it represents ATE employees as well as Community Transit personnel.

DISCUSSION

Commonality of Representation

In the course of the hearing, the respondent argued that the complainant did not suffer any damages because it represented employees of ATE, as well as those of Community Transit. This position was also taken by Executive Director Graska in his response to McDaniel's June 1, 1987, letter. It must be emphasized that such an argument has no bearing on the outcome of this dispute.

While the respondent seems to be taking an "institutional" approach to the matter, analyzing whether the union, as an entity, would suffer any losses, the complaint deals with alleged losses suffered by bargaining unit employees of Community Transit. See: City of Centralia, Decision 1534-A (PECB, 1983). The following discussion shall center on the obligations owed by the respondent to its employees in the circumstances presented at hearing.

Duty to Bargain Transfer of Bargaining Unit Work

The Commission has addressed the issue of contracting out bargaining unit work on a number of occasions. In City of Kennewick, Decision 482-B (PECB, 1980), the employer sought to

contract out custodial work performed at Kennewick City Hall. Relying on "management rights" and "complete agreement" clauses, the employer maintained that it did not have any obligation to negotiate with the incumbent union about contracting out bargaining unit work. Rejecting the employer's "waiver by contract" argument, the Commission held that the issue must be negotiated:

> Contracting out of work which has been done or which may be done by bargaining unit employees is a subject of mandatory bargaining. Westinghouse Electric Corporation, 150 NLRB 1574 (1965); Fibreboard Paper Products Corporation, 138 NLRB 550 (1962), affirmed, 379 U.S. 203 (1964); Town and Country Manufacturing Company, 136 NLRB 1022 (1962). The city's action in contracting out this work was unprecedented and a sharp departure from past practice. It was motivated by a desire to remove certain entry level jobs from the ambit of the seniority clause of a collective bargaining agreement. As in Fibreboard, supra, this unilateral contracting out involved a departure from previously established operating procedures and effected a change in conditions of employment. See: Westinghouse, supra, at p. 1576.

In City of Vancouver, Decision 808 (PECB, 1980), an Examiner determined that the employer committed an unfair labor practice when it initiated a contract arrangement with a private firm that would have led directly to the termination of existing bargaining unit employees from their employment with the public employer. The Examiner also explained the employer's duty to bargain in such cases, citing with approval the decision reached in Wellman Industries, Inc., 222 NLRB No. 44 (1976), at p. 206:

> ... an employer's obligation to bargain does not include the obligation to agree, by 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.

Contracting out cases have not always involved the simple removal of bargaining unit work. In City of Kelso, Decision 2120 (PECB, 1985), the employer claimed that it was "going out of business" with respect to fire suppression services, and argued that its actions must be judged as a business necessity. In rejecting the employer's contention, the Commission reiterated the principles set forth in City of Kennewick and City of Vancouver, and held that the employer's argument failed because it remained in business as a governmental entity which would continue to provide funding for fire services, even if another agency was to provide the actual suppression work.[5]

The Commission has also addressed the issue of whether the work to be performed by subcontract is actually bargaining unit work in the first place. In Clover Park School District, Decision 2560-A (PECB, 1988), the contracting out dispute had already been submitted to grievance arbitration, but the arbitrator's decision led to the conclusion that no "waiver by contract"

---

[5] In a subsequent case involving the same parties, the Commission held that the employer even had a duty to bargain concerning contracting out fire suppression services during a transition period prior to the effective date of an annexation. City of Kelso, Decision 2633-A (PECB, 1988).

defense was available to the employer. The matter was referred to an Examiner for further proceedings. The Examiner noted that the disputed work was performed in "emergency" conditions, such that the work had to be performed in a relatively short period of time, but nevertheless concluded that the nature of the work to be performed was not so extraordinary as to negate bargaining obligations. While the employer may have had legitimate concerns about health and safety, the employer still had an obligation to inform the exclusive bargaining representative of its intentions, and to offer negotiations. The Commission affirmed in Decision 2560-B (PECB, 1988).

Turning to the instant unfair labor practice allegations, a unique employment relationship exists. The complainant recognizes that the respondent has historically contracted with ATE to provide certain transit services. However, the record indicates that the respondent has never before sought to expand the level of services provided by the private company. The complainant correctly points out that its claim is not intended to be "territorial", with the union fighting to keep ATE within established geographic limits. Rather, the type of services to be provided must be analyzed.

Examination of the record and briefs discloses that the respondent was seeking to use ATE personnel for work that could have been performed by Community Transit employees. Community Transit personnel already provided service to the University District, and also provided service on which a rider could get from Stanwood to Seattle. In fact, the addition of a direct commuter line appears to create the real possibility of the Community Transit operations being curtailed in the Stanwood-Seattle corridor. Thus, while presenting a new fact pattern, it appears that the situation in this case is very similar to that presented in City of Kennewick, supra. The type of work

involved could be performed by bargaining unit employees, and the complainant had a legitimate interest in bargaining over both the decision and effects that expanded contracting out may have had on its members.[6]

Waiver of Bargaining Rights

The management rights clause relied upon by the employer in this case, although detailed, does not specifically address the right to contract out bargaining unit work. Accordingly, the Examiner is unable to conclude that the union has waived its bargaining rights by contract. City of Kennewick, supra.

Newport School District, Decision 2153 (PECB, 1985) dealt with the sufficiency of a union's response to notice provided by an employer before contracting out bargaining unit work. The Examiner determined that the employer willingly met with the affected union to negotiate the matter, and that the parties met on a number of occasions over a six month period, in an effort to resolve the issue. At the end of that time, agreement had not been reached, and the employer finally implemented a contract arrangement with a private company. Given the circumstances presented, the Examiner concluded that the employer had met its bargaining obligation, and ruled that the contracting out did not violate the statute. It must be

---

6 During the presentation of its defense, the respondent produced a letter from the United States Department of Transportation, Urban Mass Transportation Administration, wherein the respondent was notified that its employees were not eligible for participation in a "competitive procurement" of the route extension given to ATE. The finding of the federal agency does not relieve the respondent of its duty to bargain with the complainant about the expanded subcontract.

emphasized that there was no such openness to bargaining by the employer in the instant case.

Remedy

There are a number of considerations that must be taken into account in fashioning a remedy in this case. The conventional remedy in such a situation would be to order an immediate termination of the contracting out and back pay to employees.

It would, however, create undue hardships on commuters using the disputed ATE bus services if such transit services were simply eliminated now. Mass transit has become vital to the state's urban areas, and any reduction in such services will only create hardships on individuals who did not have any part in the events leading to this dispute. Bargaining is ordered. It would be inappropriate to order a return to the status quo by removing the ATE services, since the parties may find a way to address their concerns without termination of the new runs.

The matter of back pay to employees who may have lost work opportunities is also a topic to be addressed. During the hearing, and in its closing brief, the complainant presented a formula of lost wages and benefits, assuming that the respondent should have allowed extra board employees additional work opportunities by giving the new routes to the complainant's Community Transit bargaining unit. Such a result is not forthcoming. Given the nature of the violation, the respondent shall be ordered to bargain collectively with the complainant concerning the decision and effects of the expanded contracting out. The back pay, if any, to be paid to employees should be addressed in the context of that bargaining. It would also be inappropriate for the Examiner to artificially impose a settlement of such negotiations.

Simply ordering the parties to engage in good faith negotiations does not provide a meaningful remedy to the unfair labor practice. See: Entiat School District, Decision 1361-A (PECB, 1982). Continuation of the disputed services would create an unequal bargaining relationship, since the respondent would already have its needs met. Given the conflicting interests presented, it appears that the parties need to negotiate in a climate where both sides are cognizant of the need for meaningful dialogue. It must be remembered that the collective bargaining process is designed to provide the opportunity for labor and management to express their relative concerns about a broad range of employment issues. Such dialogue is intended to be free and unencumbered, and the participants must be placed in relatively equal bargaining positions. To provide such a setting, and to meet the unique public policy issues presented here, it shall be ordered that the parties shall negotiate in good faith, and, in the event agreement cannot be reached, submit remaining issues to final and binding arbitration pursuant to RCW 41.56.430, et seq. The Commission ordered such a remedy in Municipality of Metropolitan Seattle, Decision 2845-A (PECB, 1988), in a case where extreme conduct was involved, but did not limit the availability of interest arbitration as an unfair labor practice remedy to such cases. It appears that its use is appropriate here, as the possibility of final and binding arbitration will remind both parties of the serious nature of their negotiations, and could encourage final resolution of the dispute without disruption of services to the public.

FINDINGS OF FACT

1. Snohomish County Public Transportation Benefit Area Corporation, d/b/a Community Transit, is a municipal

corporation of the state of Washington, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union, Local 1576 represents a bargaining unit of transit bus drivers employed by Community Transit, and is a "bargaining representative" within the meaning of RCW 41.56.030(3).

3. Community Transit was originally formed in 1976. Prior to that time, mass transit services were provided for residents of the southern portion of Snohomish County through METRO bus routes originating in Seattle.

4. After Community Transit was created, it contracted with METRO to continue to provide certain bus services for Snohomish County commuters. This contractual relationship existed until 1986, when Community Transit contracted with American Transit Enterprises Management Services (ATE) to supplement services provided by Community Transit. ATE employees are also represented for purposes of collective bargaining by Amalgamated Transit Union, Local 1576, but are under the jurisdiction of the National Labor Relations Board.

5. In the latter part of May 1987, Local 1576 President learned that Community Transit was considering changes in certain bus routes. On June 1, 1987, he sent a letter to Community Transit Executive Director Kenneth Graska, asking to bargain the proposed changes. Specifically, McDaniel mentioned a proposed modification of a bus route operated by ATE from Mukilteo, Washington, to downtown Seattle, by the addition of a new "flyer stop" for the ATE route at 45th Street in Seattle, in the city's "University District", and a proposed addition of direct service

between Stanwood, Washington, and Seattle. At the time of the proposed change, Community Transit provided bus service with its own employees through the University District area and provided connecting services with its own employees between Stanwood and Seattle.

6. On June 11, 1987, Graska responded to McDaniel, denying that Community Transit had any obligation to bargain with the union about the new services to be offered through ATE.

7. By October 1987, ATE had begun the direct commuter service from Stanwood to Seattle, and the 45th Street "flyer stop" had been added to the existing ATE downtown Seattle route. Both such services were initiated without any negotiation about the decision to modify services contracted out or the effects of those modified services on Community Transit employees represented by Amalgamated Transit Union, Local 1576.

8. The collective bargaining agreement in effect between Community Transit and Amalgamated Transit Union, Local 1576 did not contain specific language authorizing the employer to contract out bargaining unit work without first giving notice to and, upon request, bargaining with the union representing its employees.

CONCLUSIONS OF LAW

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

2. The collective bargaining agreement in effect at the time the expanded subcontract began did not serve as a waiver of bargaining rights by the complainant, and the union did not waive its bargaining rights by inaction.

3. By events described in paragraphs 5 through 7 of the foregoing Findings of Fact, Community Transit violated RCW 41.56.140(1) and (4), by refusing to bargain over the decision and effects of an expanded contract with American Transportation Enterprises Management Services for services which could have been provided by its own employees.

ORDER

Pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that Snohomish County Public Transportation Benefit Area Corporation, d/b/a Community Transit, its officers and agents shall immediately:

1. Cease and desist from:

   a. Failing to give notice to Amalgamated Transit Union, Local 1576, of any proposal to change the wages, hours and working conditions of its employees represented by that organization.

   b. Refusing to bargain with Amalgamated Transit Union, Local 1576 concerning the decision and effects of the decision to expand the services contracted between Community Transit and American Transportation Enterprises Management Services.

2. Take the following affirmative actions to remedy the unfair labor practice and effectuate the purposes of Chapter 41.56 RCW:

   a. Give notice to, and, upon request, bargain collectively with Amalgamated Transit Union, Local 1576 concerning the decision and effects of the expanded contract with American Transportation Enterprises Management Service, for transit service to the 45th Street bus stop, and the commuter service between Stanwood and Seattle, Washington.

   b. In the event that the parties cannot reach agreement after a reasonable period of good faith negotiations, either party may request that the outstanding issues be submitted to mediation and to interest arbitration, following the procedures and applying the standards outlined in RCW 41.56.430, et seq. The decision of the arbitration panel shall be final and binding upon both parties.

   c. Post, in conspicuous places on the employer's premises where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix". Such notice shall, after being duly signed by an authorized representative of Community Transit, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the employer to ensure that said notices are not removed, altered, defaced, or covered by other material.

   d. Notify the complainant, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at

the same time provide the complainant with a signed copy of the notice required by this Order.

e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time, provide the Executive Director with a signed copy of the notice required by this Order.

DATED at Olympia, Washington, this 19th day of December, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kenneth J. Latsch

KENNETH J. LATSCH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT, CHAPTER 41.56 RCW, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with Amalgamated Transit Union, Local 1576 concerning subcontracting of services that may be performed by bargaining unit employee.

WE WILL, upon request, bargain in good faith over subcontracting issues with Local 1576.

COMMUNITY TRANSIT

BY: _____
Authorized Representative

DATED _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.