STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1576,	)	
Complainant,	)	CASE 13218-U-97-3215
vs.	)	DECISION 6255 - PECB
COMMUNITY TRANSIT,	)	
Respondent.	)	ORDER OF DISMISSAL

Chris Reiter, President, filed the complaint on behalf of the union; Jared C. Karstetter, Attorney at Law, appeared on behalf of the union in subsequent proceedings.

Hendricks and Hendricks, by Allen J. Hendricks, Attorney at Law, appeared on behalf of the employer.

On June 9, 1997, the Amalgamated Transit Union, Local 1576 (union), filed an unsigned document with the Public Employment Relations Commission, in the form of complaint charging unfair labor practices under Chapter 391-45 WAC. A copy of the same document, but bearing the signature of the local union president, was filed on June 12, 1997. The complaint alleged Community Transit (employer) had violated the collective bargaining agreement and a memorandum of understanding between the parties, by its refusal to include the union in development of a bid to be submitted to itself for contract commuter service.

The complaint was reviewed by the Executive Director pursuant to WAC 391-45-110. In a deficiency notice dated July 10, 1997, the union was informed that the Commission does not assert jurisdiction to enforce collective bargaining agreements or other contractual

rights.[1] The union was given 14 days in which to file an amended complaint which explicitly asserted any claim it had for breach of the duty to provide information,[2] or face dismissal of the complaint for failure to state a cause of action.

A letter filed by the local president on July 24, 1997, was taken as an amended complaint. It alleged the employer refused to give the union timely and adequate access to a bid for commuter service which the employer was preparing for submission to itself, and that the union needed access to the bid so it could respond to the employer's demand for wage concessions. A preliminary ruling was then issued on September 9, 1997, referring the refusal to provide information allegation to Examiner Pamela G. Bradburn for hearing.

On January 15, 1998, the union's attorney filed a second amended complaint.[3] It abandoned the refusal to provide information allegation and substituted assertions that: (1) The employer should have given the commuter service work at issue to the bargaining unit under Community Transit, Decision 3069 (PECB, 1988), which found the employer had unlawfully contracted out certain work; (2) the employer unlawfully sought wage concessions from the union by bidding on its own work; and (3) these actions constituted a refusal to bargain, interference with employee rights, and an effort to dominate the union.

On January 16, 1998, the employer filed a motion for dismissal of the complaint (and any amendments) as untimely, asserting the Board

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[1] City of Walla Walla, Decision 104 (PECB, 1976).

[2] The documents accompanying the complaint suggested the employer had denied an information request.

[3] An earlier version of the amendment had been sent to the Examiner and the employer's attorney by telefacsimile, during a prehearing conference held on January 12, 1998, by telephone conference call.

of Directors had awarded the commuter service contract on December 5, 1996, more than six months before the June 9, 1997 filing date. On January 20, 1998, the employer filed an objection to the second amended complaint, arguing it did not relate back to the original complaint.[4] The Examiner requested a response from the union on the timeliness question.

In a letter filed on January 29, 1998, the union argued that its second amended complaint clarified a poorly-drafted original complaint, so that its timeliness should be judged by the date of the original filing. It also contended that the employer could have reversed its decision at any time until a contract was actually awarded and/or signed some "3-4 weeks after the December 5th meeting", and that the unfair labor practice complaint was not ripe until the commuter service work was actually assigned to persons other than bargaining unit employees.

The Examiner has referred the matter back to the Executive Director for further review under WAC 391-45-110.

Relation Back of the Second Amended Complaint

Commission precedent limits relation back to amended complaints which allege facts that are mentioned, however tangentially, in the original complaint. Fort Vancouver Regional Library, Decision 2396-A (PECB, 1986). In other words, the decisive factor is whether both complaints refer to the same fact situation(s) or event(s); comparing the causes of action or legal theories alleged in the two complaints is irrelevant to the relation back question. In this case, the union contends its second amended complaint should inherit the filing date of the original complaint involving the same contracting out decision, while the employer asserts

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[4] Other arguments advanced by the employer on January 20 are not listed, as they have no bearing on the outcome.

relation back is impossible because the second amended complaint raises different claims (i.e., the original complaint and first amendment concerned a refusal to provide information, while the second amended complaint concerns a failure or refusal of the employer to bargain over contracting out the commuter service).

The second amended complaint asserts that the employer violated the law by submitting a bid to itself for the disputed commuter service, and by eventually contracting out that work. The original complaint mentioned the employer was preparing its own bid, and that there had been or was about to be some contracting out of commuter service. The second amended complaint therefore relates back to facts set forth in the original complaint, and inherits the June 9, 1997 filing date of the original complaint.

Timeliness of the Complaint

RCW 41.56.160 both authorizes the Commission to process unfair labor practice cases and limits that processing, providing in pertinent part:

> (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That **a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.** ...

[Emphasis by **bold** supplied.]

The focus of inquiry when applying that statute of limitations is on the event(s) which the complainant alleges constituted unfair labor practices. Seattle School District, Decision 5237-B (EDUC, 1996).

The mention of a bid in original complaint was taken as related to some current activity. The failure to specifically allege that (or the date when) the bid had been awarded was not critical, or was overlooked, because of the larger issue concerning the absence of "violation of contract" jurisdiction.

The first amended complaint was taken to allege that unreasonable limitations on access to the bid information related to negotiations then in progress. In reflection, the absence of specific dates in that amendment could well have been a basis for a second deficiency notice, but the narrow "refusal to bargain" cause of action provided no apparent reason to question whether or when the bid had actually been awarded.

The second amended complaint has abandoned the duty the "refusal to provide information" claim, however, and has substituted a claim that the employer unlawfully contracted out the commuter service. Accordingly, it is the timing of the contracting out, rather than of the timing of the limitations on access to information, which must now be examined.

The employer asserts, and the union does not contest, that the employer's Board of Directors passed a motion to award the commuter service contract to a private company during its public meeting on December 5, 1996. The original complaint in this matter was filed more than six months later, on June 9, 1997, and was therefore untimely.

The Commission has occasionally tolled the statute of limitations where the existence of an unfair labor practice has been concealed from the injured party. See, City of Pasco, Decision 4197-A (PECB, 1994). In this case, however, the local union president attended the December 5 meeting of the employer's governing board and spoke

against contracting out the commuter service.[5] Thus, there is no basis for a "concealment" finding in this case.

The union argues the Board's action on December 5, 1996, was not final. It notes that the subject was hotly contested, and that one Board member dissented, and it reasons that the Board could have reversed its decision any time until a contract for the commuter service was actually executed. Without getting into the niceties of municipal contracting and the effect of having accepted a bid, this argument can be disposed of under Commission precedent holding that actual or constructive notice of the alleged unlawful act is the trigger for the six month period in which a complaint must be filed. The facts in this case are similar to those in Port of Seattle, Decision 2796-A (PECB, 1988), where an unsuccessful applicant learned he was not chosen for one of several new positions when the names of successful candidates were read at his work site and the list was posted on bulletin boards, but then had his complaint dismissed as untimely because he waited until six months and five days later to file his complaint.[6] In the present case, the local union president received actual notice on December 5th that the employer was contracting commuter services to a private company.[7] The union's proposed focus on the date when the contract with the private firm was actually signed would confuse the issue,

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[5] The minutes of the December 5, 1996 meeting, were supplied by the employer as Exhibit A to its motion for dismissal.

[6] The Commission concluded the announcement and posting gave the complainant actual notice his application was unsuccessful. Port of Seattle was cited in City of Pasco, supra.

[7] Documents filed with the original complaint establish the union knew before October 30, 1996, that the employer was considering contracting out the commuter service.

by allowing subsequent events to influence the determination on whether the earlier action really gave rise to a cause of action.[8]

The union urges that the six-month period should not be treated as jurisdictional. The union cites City of Seattle, Decision 4057-A (PECB, 1993), where the Commission ruled that it would accept waivers of the six-month limitation where the parties to the case entered into a written and signed waiver before six-month period expired, and the waiver is submitted to the Commission with the complaint or in response to a deficiency notice. The conditions for that limited exception have not been met in this case, however, and the union's arguments fail under a long line of Commission decisions dismissing complaint that were not timely filed.

Factual Allegations Insufficient

Even if the union were to revert back to the "refusal to provide information" theory which was earlier forwarded to an Examiner, the facts now before the Executive Director would warrant dismissal. According to the first amendment, the request for information was made in connection with negotiations on wage concessions being sought by the employer in advance of awarding (and seemingly in advance of submitting to itself) a bid on the disputed commuter work. That bargaining would necessarily have occurred prior to the December 5, 1996 meeting, so that the complaint would also be deemed untimely as to the "refusal to provide information" theory which has since been abandoned.

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[8] For example, the union could not have been certain in this case about whether the six month period really began on December 5, 1996, until after June 5, 1997, passed without the employer reversing its decision. Such an approach requires much second-guessing, and injects too much uncertainty into the matter of determining whether complaints are timely filed.

Even if the second amended complaint were timely filed, it fails to allege the necessary elements of a refusal to bargain theory:

- There is no allegation that the contracting out was presented to the union without notice, or as a fait accompli. An inference to that effect is defeated by the allegations in the first amendment indicating the parties were in bargaining.
- There is no allegation that the employer failed to meet at reasonable times and places after a timely union request for bargaining. To the contrary, the second amended complaint alleges the employer permitted the union to participate with it in submitting a bid for the service to be contracted out, which necessarily implies an opportunity to bargain.

These omissions left the complaint, as amended, insufficient to state a cause of action.

Effect of Previous Commission Decision

The union's reliance on Community Transit, Decision 3069 (PECB, 1988), as forever preventing the employer from contracting out potential bargaining unit work is unfounded. The cited decision only held that the employer committed an unfair labor practice by the method it used to contract out the work at issue there.[9] It is clear from the Commission's subsequent decision in North Franklin School District, Decision 3980-A (PECB, 1993), that the focus is on the bargaining process, rather than on the outcome of the bargaining. There are a number of steps to that process (including notice, a timely request for bargaining,[10] timely meetings, and good

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[9] In fact, the remedial order left open the possibility that the employer would be permitted to contract out.

[10] See, Lake Washington Technical College, Decision 4721-A (PECB, 1995), where a union's focus on its contractual rights led to waiver of its statutory bargaining rights.

faith bargaining to an agreement or an impasse), but it can lead to lawful contracting out of unit work.

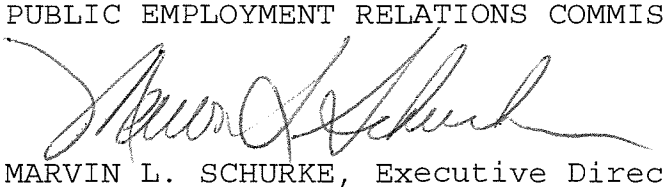
NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is hereby DISMISSED.

Issued at Olympia, Washington, this 15th day of April, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.