Court of Appeals Case No. 43783-0-II
Thurston County Superior Court Case No. 11-2-02686-5

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a COMMUNITY TRANSIT,

Petitioner/Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION and AMALGAMATED TRANSIT UNION, LOCAL 1576,

Respondents/Appellees.

REPLY OF APPELLANT

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I. INTRODUCTION

In its response to Appellant Community Transit's brief requesting reversal of the Public Employment Relations Commission's Decision 10647-A, Respondent Amalgamated Transit Union Local 1576 ("ATU" or "Union") does not successfully rebut Community Transit's arguments that the agency and the trial court erred. The Public Employment Relations Commission ("PERC" or "Commission") decision cannot be reconciled with the Washington Supreme Court's decisions in *City of Richland* and *City of Pasco*, nor with persuasive federal law, including the U. S. Supreme Court's decision in *American National Ins. Co.*[1]

ATU argues that the disputed bargaining proposal (Article 18.2) does not directly relate to employee working conditions and is instead merely a "bargaining procedure" that denies ATU its statutory right to bargain. However, ATU's arguments fail. The PERC's findings of fact include a finding that Article 18.2 directly refers to numerous working conditions, such as hours of work, attendance, and accident policies. The PERC's findings do not state that Article 18.2 is a bargaining procedure or that Article 18.2 does not directly relate to employee working conditions. In an effort to bolster its argument that Article 18.2 is a "procedure" for bargaining, ATU misleadingly quotes from provisions in Article 18.3 of the parties' prior contract, which is not at issue in this case.

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[1] *Int'l Ass'n of Firefighters Local 1052 v. Public Employment Relations Comm'n*, 113 Wn.2d 197, 778 P.2d 32 (1989) ("*City of Richland*"); *Pasco Police Officers Assoc. v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997); *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952).

ATU also argues that if it is required to bargain over Article 18.2, it will lose its statutory bargaining rights. This argument is circular. Moreover, it was expressly rejected by the Washington Supreme Court in *City of Pasco*.

II. ARGUMENT

A. ATU Fails to Reconcile the PERC's Decision with *City of Richland.*

In *Int'l Ass'n of Firefighters Local 1052 v. Public Employment Relations Comm'n*, 113 Wn.2d 197, 778 P.2d 32 (1989) ("*City of Richland*"), the Washington Supreme Court admonished the PERC for resolving a scope of bargaining case without balancing the employer's need for managerial control with the employees' concerns for working conditions. The PERC committed the same error in this case. In its Brief of Respondent ("BR"), ATU makes numerous arguments excusing the omission of the *City of Richland* balancing test from PERC's decision in an effort to salvage the agency's order from judicial review. However, ATU's arguments fall short.[2]

First, ATU claims that the PERC did, in fact, apply the balancing test because the examiner heard testimony on that issue. BR at 30. The fact that the examiner received testimony from Community Transit regarding its need for Article 18.2 does not satisfy the PERC's duty to balance the weight of that testimony against union evidence regarding employees' interest in working conditions. To fulfill "the function

[2] Community Transit raised these arguments before the trial court, but the court did not address them. CP 48; 110-114.

assigned to it by the Legislature," the PERC must make a determination on the extent to which the proposal at issue affects employee wages, hours, or working conditions, and "independently evaluate" the employer's interest. The record does not support ATU's assertion that the PERC did so.

ATU also suggests that the PERC did not have to apply the balancing test because PERC had the "benefit" of its 1998 decision involving the parties. BR at 24-25. However, the 1998 case did not address Community Transit's managerial need for Article 18.2 or the impact of Article 18.2 on employees' working conditions. The issue in the 1998 case was whether contract language gave Community Transit the right to change standard operating procedures. AR 164-169. ATU argued that the contract language did not give Community Transit that right, and Community Transit argued it did. The PERC was not asked to decide (nor did the parties dispute) that Community Transit needed that language. As to the impact of Article 18.2 on employees' working conditions, the 1998 decision supports Community Transit in this case. In the 1998 decision, the PERC examiner explained that standard operating procedures "are mandatory subjects of bargaining, when they contain provisions that impact employee wages and other working conditions." AR 166. Thus, the 1998 case proves Community Transit's position that Article 18.2 is a mandatory subject of bargaining because it impacts employee's working conditions under the balancing test.

ATU next asserts that the PERC applied the balancing test and concluded Article 18.2 is not a direct concern to employees, therefore, there was no need to consider Community Transit's need for managerial control. BR at 30. This argument cannot be reconciled with the examiner's and the Commission's decisions below.

The examiner did not include the *City of Richland* balancing test in his decision – at all. AR 1762-75. The examiner's decision does not make any findings of fact or conclusions of law on the question of whether Article 18.2 is of direct concern to employees. AR 1771-73. The only finding of fact in his decision that bears on the balancing test favors Community Transit. The examiner found, "The documents described in Article 18.2… address numerous mandatory subjects of bargaining, for example hours of work, work rules, attendance, accident policies, and discipline." Finding of Fact No. 4, AR 1772.

On appeal from the examiner's decision, the PERC cited half of the *City of Richland* balancing test – leaving out the portion regarding an employer's need for managerial control. AR 1844 ("When determining mandatory subjects, the Commission assesses whether the particular proposal directly impacts wages, hours or working conditions of bargaining unit employees.") Nevertheless, the Commission failed to render findings as to whether Article 18.2 directly impacts ATU members' wages, hours or working conditions. Rather, the Commission's conclusion that Article 18.2 is a permissive/non-mandatory subject of bargaining is based solely on the fact that Article 18.2 was held to operate

as a waiver in 1998. The Commission reasoned that since Article 18.2 was a waiver and a waiver had previously been found to constitute a permissive subject of bargaining in another case involving different parties,[3] Article 18.2 was a permissive subject of bargaining. That is exactly the kind of reasoning the Court struck down in *City of Richland*:

> PERC's facile characterization of the substance of Local 1052's contract proposal as "a subject that has previously been held to be a permissive subject of bargaining", is inappropriate under the law. Scope-of-bargaining questions cannot be resolved so summarily. Every case presents unique circumstances, in which the relative strengths of the public employer's need for managerial control on the one hand, and the employees' concern with working conditions on the other, will vary.

City of Richland, 113 Wn.2d at 207.[4]

Although neither the examiner nor the Commission rendered findings in regards to the balancing test, the record reflects that Article 18.2 is of direct concern to employees. Article 18.2 allows Community Transit to make changes in Community Transit's rules and regulations, including standard operating procedures and performance code, and addresses the parties' grievance procedure. AR 132. ATU does not dispute that these subjects "are or contain mandatory subjects of bargaining." AR 2, ¶ 5-6. Subjects that "are or contain" mandatory subjects of bargaining are of direct concern to employees.

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[3] *Whatcom County Deputy Sheriff's Guild v. Whatcom County*, No. 7244-B, 2004 WL 725698 (Wash. Pub. Emp't Relations Cmm'n Feb. 11, 2004).

[4] The trial court made the same error. CP 105.

In further defense of the PERC's actions, ATU again asserts that PERC applied the balancing test but determined that Article 18.2 is not a direct concern to employees because it impacts a "union prerogative," *i.e.*, the right to engage in collective bargaining. BR at 27. This argument is flawed. The right to engage in collective bargaining is not a "union prerogative." Employers have the same right. ATU cites no legal authority for its claim that the right to engage in collective bargaining is a "union prerogative." Union prerogatives are more appropriately considered to be matters of internal union business, such as union voting procedures. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958) (employer could not make a proposal that required the union to hold a secret vote prior to striking).

Moreover, ATU's argument that Article 18.2 impairs ATU's right to engage in collective bargaining suffers from the same circular logic as the argument that contractual waivers deny unions their statutory bargaining rights, an argument the Washington Supreme Court rejected in *City of Pasco*, discussed further below.

Finally, ATU claims that Article 18.2 does not directly impact employees' wages, hours, or working conditions under the balancing test because rather than addressing those subjects, Article 18.2 is a "procedure for bargaining." As detailed below, Article 18.2 is no more a "procedure"

for bargaining than the hours of work and management rights clause at issue in *City of Pasco*.[5]

B. ATU's Attempts to Distinguish *City of Pasco* Fail.

In *Pasco Police Officers Assoc. v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997), the Washington Supreme Court held that two provisions (a management rights clause and an hours of work proposal) were mandatory subjects of bargaining. ATU attempts to distinguish *City of Pasco* by arguing that management right clauses are different from waivers and claiming that *City of Pasco* concerned a management rights clause and Article 18.2 is a waiver. ATU's arguments do not withstand scrutiny.

First, *City of Pasco* did not only concern a management rights clause. It also concerned an hours of work proposal, separate and apart from the management rights clause. The hours of work proposal is similar to Article 18.2 – it outlines the scope of unilateral action the employer may take and requirements for doing so, including notice.[6] The hours of work proposal stated:

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[5] ATU's argument that Article 18.2 is a "procedure" for bargaining is discussed further in Section (II)(C).

[6] Article 18.2 states:

> The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor agreement.

AR 132.

> The Association recognizes the right of the City to establish and/or modify work schedules and the City recognizes the need to confer with the Association to take employee interests into account. Except for emergency situations, at least forty-eight (48) hours will be given to the Union before an overall long-term change in the regular work schedule is implemented.

Pasco Police Officers Ass'n v. City of Pasco, No. 4695, 1994 WL 900086 at *4 (Wash. Pub. Emp't Relations Comm'n April 26, 1994), *aff'd,* 132 Wn.2d 450 (1997). ATU's argument that *City of Pasco* only concerned a management rights clause is incorrect.

Second, both of the proposals in *City of Pasco* (the management rights clause and the hours of work proposal) were waivers. The *City of Pasco* PERC examiner's Finding of Fact No. 4 stated, "At an early stage in the negotiations, the employer proposed management rights and hours of work language by which the union would waive its statutory bargaining rights on certain matters for the life of the collective bargaining agreement." *Pasco Police Officers Ass'n v. City of Pasco*, No. 4694, 1994 WL 900086 (Wash. Pub. Emp't Relations Comm'n April 26, 1994) at *17 (emphasis added). The Commission affirmed Finding of Fact No. 4. *Pasco Police Officers Ass'n v. City of Pasco*, No. 4694-A, 1994 WL 900087 (Wash. Pub. Emp't Relations Comm'n Dec. 1994) at *10.

Neither party in *City of Pasco* disputed that the proposals were waivers. Indeed, the union's arguments before the Washington Supreme Court were predicated on the fact that the proposals were waivers. *City of Pasco*, 132 Wn.2d at 461-64.

ATU suggests that although the PERC examiner and the Commission held that the *City of Pasco* proposals were waivers, the Washington Supreme Court reversed that finding. The Washington Supreme Court did not reverse that finding. On the contrary, the Court affirmed PERC in its "entirety."[7] *City of Pasco*, 132 Wn.2d at 471. The Court simply explained that in a scope of bargaining case, if a proposal later gives an employer the ability to change a mandatory subject during the term of the contract (a waiver), the union cannot claim it lost its statutory rights to bargain because it already exercised those rights in bargaining over the contract. *Id.* at 464. The Court's reasoning is sound. ATU's argument that a union loses its right to bargain by being required to bargain is circular and illogical.

Such circular and illogical reasoning, rejected in *City of Pasco*, is best illustrated by example. Suppose a superior court wants to bargain with a union representing its staff for contract language stating: "The court agrees to notify the union of any changes to attendance requirements." The court might propose the provision so it can adjust attendance requirements during periods when workloads are heavy, while preserving the union's right to bargain the impacts or effects of such a change. The court would not unilaterally add the proposal to the parties' contract. It would bargain with the union to include the proposal in the parties' next

[7] ATU claims that the issue of whether a waiver is a mandatory subject of bargaining is a case of first impression at the Court of Appeals. BR at 21. Although technically correct, this statement omits that the question has been previously considered by the Washington Supreme Court.

contract, and the proposal would be open to renegotiation when the contract expired. If the proposal was ultimately included in the contract, the union could not later claim that it had been excluded from its statutory role as bargaining representative or denied the right to bargain changes to attendance rules because the union would have fully exercised those rights in the negotiations that lead to the written contract.

In this case, ATU employs the same circular reasoning that was rejected in *City of Pasco*. ATU argues that it will be denied its statutory role as exclusive bargaining representative to bargain over changes to standard operating procedures if it is required to bargain over Article 18.2, which addresses whether Community Transit can change standard operating procedures during the term of the contract. If Article 18.2 is a mandatory subject of bargaining, not only will ATU have the right to bargain over whether and how the employer can make changes to standard operating procedures, Community Transit can insist that ATU bargain over that mandatory subject.

In a further effort to distinguish *City of Pasco,* ATU argues that management rights clauses are different from waivers. BR at 39. This argument is deeply flawed. The PERC frequently holds that management rights clauses are waivers. *Int'l Ass'n of Fire Fighters Local 3266 v. Port of Bellingham*, No. 6017, 1997 WL 584245 (Wash. Pub. Empl't Relations Comm'n Aug. 22, 1997) at *5 (contractual management rights clauses are a mandatory subject of bargaining and at the same time a waiver by the union of bargaining rights on specifically identified issues). See

additional cases cited at Brief of Appellant at 18-19. Indeed, PERC reached that conclusion in *City of Pasco* and *Whatcom County*. ATU's suggestion that management rights clauses are different from waivers is not only incorrect, it is confusing.

Finally, in an effort to harmonize PERC's decision in this case with *City of Pasco*, ATU argues that Article 18.2 is not a mandatory subject because it "goes too far," citing *Toledo Typographical Union Decision 63 v. N.L.R.B.*, 907 F.2d 1220, (D.C.Cir.1990) ("*Toledo Blade*"). BR at 38. The proposal at issue in *Toledo Blade* would "permit the Company to make retirement and/or separation incentive offers directly to employees." *Toledo Blade*, 907 F.2d at 1221. The court explained that it was improper for the employer to propose bargaining directly with employees (*i.e.*, "direct dealing.") *Id.* at 1223. The court explained,

> By allowing the Employer to bargain directly with its employees, Toledo Blade's proposal would deprive the Union *pro tanto* of its central statutory role as their representative in dealing with the Employer. This direct dealing clause, therefore, is different in kind from the management rights clause in *American National*, which would have ceded back to the employer an area within which it could set the terms and conditions of employment notwithstanding the union's statutory right to bargain over those matters. The employer's subsequent decisions would be made unilaterally; they would not entail its negotiating with its employees.

Id. Thus, *Toledo Blade* directly supports Community Transit's appeal. Not only is Article 18.2 not a "direct dealing" clause, *Toledo Blade*

recognizes that it is lawful to propose language like Article 18.2 that cedes back to an employer an area within which it can set terms and conditions of employment without negotiating with the union. Article 18.2 is a mandatory subject of bargaining under *Toledo Blade*.

C. Article 18.2 is Not a Procedure for Bargaining: It Is the Outcome of the Bargaining Process and Sets Terms of Employment to Apply During the Labor Contract.

ATU argues that Article 18.2 is a "procedure" for bargaining and therefore does not directly relate to employees' wages, hours, or working conditions. To make this argument, ATU improperly includes a subsequent contract provision, Article 18.3 (which is not in dispute). Further, Article 18.2 is not like the bargaining proposal at issue in *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 728 P.2d 1044 (1986), which involved a procedure for bargaining future contracts. Article 18.2 is like the proposals at issue in *City of Pasco*. It is not a procedure for bargaining, it is the outcome of the bargaining process and it sets terms of employment to apply during the labor contract.

1. ATU's attempts to include Article 18.3 in its argument and analysis are improper.

When ATU filed its complaint, it identified the issue in dispute as Community Transit's proposal to maintain Article 18.2 in the parties' labor contract. AR 2. Thus, the PERC identified the subject in dispute as Article 18.2 in its Preliminary Ruling. AR 5. Under the PERC's rules, Article 18.2 is the only proposed contract language in dispute in this case. WAC 391-45-110(2)(b) ("The preliminary ruling limits the causes of

action before an examiner and the commission.") *See Bentson v. University of Washington*, No. 11091-A, 11092-A, 2012 WL 694311 (Wash. Pub. Emp't Relations Comm. Feb. 28, 2012) at *7 (the Preliminary Ruling limits the scope of a complaint).

On appeal from the PERC's decision and in an attempt to strengthen its argument that Article 18.2 is a "procedure," ATU cites Article 18.3. BR at 4. Unlike Article 18.2, which merely states that Community Transit will notify ATU of changes to its standard operating procedures and other rules, Article 18.3 creates a five-day comment period and a requirement that Community Transit consider any comments prior to making a changes. AR 132. In its argument that Article 18.2 is a "procedure," ATU includes a discussion of provisions from Article 18.3, which is not before this Court. *See* BR at 35.[8]

Article 18.3 is clearly beyond the scope of this case and it is a violation of WAC 391-45-110(2)(b) for ATU to advance arguments based on the notice and comment period contained in Article 18.3. ATU has explicitly admitted in its prior briefing that Article 18.3 will be excluded from the parties' next labor contract. AR 1746 at n. 3. Article 18.3 is not properly considered as part of this case.[9]

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[8] ATU argues, "Article 18.2 established a notice and comment provision just like that in *Whatcom County.*" BR at 35. Article 18.2 does not establish a notice and comment period. It only establishes notice. AR 132. A notice and comment period sounds more like a procedure than merely notice.

[9] The Commission quoted Article 18.3 in its decision although its reasons for doing so are not apparent because Article 18.3 is not at issue. AR 1845.

Community Transit raised this argument before the trial court. CP 96-97. The court did not address Community Transit's arguments; instead, it adopted ATU's inaccurate characterization of the subject in dispute as a procedure involving "notice, comment, and hav[ing] those comments considered." CP 112.

2. Article 18.2 is not a bargaining procedure.

Procedures for bargaining can be a permissive subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341-42, 728 P.2d 1044 (1986). However, such proposals are different from Article 18.2.

In *Klauder*, the parties were bargaining a contract to be effective in 1982. *Klauder,* 107 Wn.2d at 340. The union wanted the 1982 contract to contain contract language stating that disputes over the terms of the successor contract (the 1983 contract) that were not settled through negotiations would be determined by arbitration. *Id.* at 339. The court held that parties need not bargain on "procedures by which wages, hours and the other terms and conditions of employment are established." *Id.* at 342. The court had no difficulty finding that the disputed proposal was a procedure by which future wages, hours, and working conditions would be established by the union and employer.

Article 18.2, which Community Transit proposed for inclusion in the parties' 2008 contract, does not propose how the parties will bargain terms and conditions of employment in future contracts – or in any contracts. Article 18.2 permits the employer to make changes while the

agreement is in effect. No procedure is contemplated. A provision stating that an employer can make changes during the term of the contract is not a procedure for how the employer and union will bargain future contracts.

In an effort to support its argument that Article 18.2 is a bargaining procedure, ATU claims, "Article 18.2 replaces the statutory bargaining scheme with a new bargaining procedure involving notice and period for comment." BR at 26. Again, ATU inappropriately refers to a "notice and comment period" in its argument about Article 18.2, which inaccurately includes Article 18.3. Additionally, neither the examiner's nor the Commission's decision contains a finding of fact or conclusion of law that Article 18.2 is a bargaining procedure. AR 1771-73; 1847. Further, the 1998 case did not address whether Article 18.2 is a bargaining procedure as that term is used to define permissive subjects of bargaining under *Klauder*. In the 1998 decision, the examiner wrote:

> The parties have bargained about the procedure for establishing the employer's rules and regulations, including SOPs and the performance code, applicable to the employees in the ATU bargaining unit. In doing so, the ATU waived the right to negotiate the particulars of the changes in exchange for notice of changes, opportunity to provide comments and suggestions; and the union obtained an obligation by Community Transit to consider the ATU's comments and suggestions.

AR 168. The use of the term "procedure" in the decision refers to components in Article 18.2 combined with components in 18.3. Furthermore, the decision does not label the two articles a procedure for

"bargaining;" it merely uses the word "procedure" in the general sense to explain that ATU received something of value in exchange for the waiver: the right to participate in the process as reflected in Article 18.3.

Ultimately, ATU's argument that Article 18.2 is a permissive "procedure for bargaining" cannot be reconciled with *City of Pasco* based on a simple comparison of Article 18.2 with one of the provisions at issue in *City of Pasco*, the hours of work proposal. Article 18.2 states:

> The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor agreement.

AR 132. The hours of work proposal in *City of Pasco* stated:

> The Association recognizes the right of the City to establish and/or modify work schedules and the City recognizes the need to confer with the Association to take employee interests into account. Except for emergency situations, at least forty-eight (48) hours will be given to the Union before an overall long-term change in the regular work schedule is implemented.

Pasco Police Officers Ass'n v. City of Pasco, No. 4695, 1994 WL 900086 at *4 (Wash. Pub. Emp't Relations Comm'n April 26, 1994), *aff'd,* 132 Wn.2d 450 (1997). The union in *City of Pasco* made the same argument ATU makes here – that the disputed proposal was a permissive "procedure" for bargaining. *City of Pasco*, 132 Wn.2d at 463. The court

disagreed and held the provisions were the outcome of the bargaining process and mandatory subjects of bargaining.

D. ATU's Reliance on *Whatcom County* is Misplaced.

ATU continues to rely heavily on the PERC's prior decision in *Whatcom County Deputy Sheriff's Guild v. Whatcom County*, No. 7244-B, 2004 WL 725698 (Wash. Pub. Emp't Relations Comm'n Feb. 11, 2004). ATU argues that Article 18.2 is a "broad" waiver, like the proposals at issue in *Whatcom County*, and, therefore, a permissive subject. However, Article 18.2 is not like the proposals in *Whatcom County*.

The proposals in *Whatcom County* were (1) a management rights clause that permitted the employer to change mandatory subjects of bargaining that were not listed in the contract; and (2) a rules of operation proposal that required private labor arbitration over whether the employer's rule changes were "reasonable." *Whatcom County* at *10-11.

Article 18.2 does not purport to give Community Transit the ability to change unidentified mandatory subjects of bargaining. Article 18.2 only concerns standard operating procedures and other rules and regulations.[10] Nor does Article 18.2 require that bargaining disputes go to a private labor arbitrator, as in *Whatcom County* and *Klauder*. Article 18.2 is not a "broad" waiver like the proposals at issue in *Whatcom County*. Moreover, unlike *Whatcom County*, here the PERC did not

[10] Nor does Article 18.2 encompass "nearly every employee working condition a union would expect to negotiate." *See* BR at 35. Article 18.2 takes up only one very small paragraph in a 42-page contract. AR 109-150.

render a decision based on the specifics of the bargaining proposal in dispute and a careful review of federal and state authority. Here, the PERC "summarily" disposed of the scope of bargaining question, reasoning that since a waiver was deemed permissive in *Whatcom County*, all waivers are permissive.

In reliance on *Whatcom County*, ATU also attempts to distinguish persuasive federal authority bearing on the issue presented in this case. For example, ATU argues that the provision in *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952), is distinguishable from Article 18.2 because the *American National Ins. Co.* proposal did not "clearly and unequivocally" waive the union's right to negotiate wages, hours, or working conditions. BR at 40. This is incorrect. The provision at issue in *American National Ins. Co.* gave the employer the right "to determine schedules of work." *American National Ins. Co.*, 343 U.S. at 398. The NLRB found the provision was not a mandatory subject because it was a waiver of the union's right to bargain work schedules during the term of the contract. *Id.* at 407-08. The U.S. Supreme Court acknowledged that the provision would have that waiver effect, but reversed the Board as to its mandatory status, holding, "Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board." *Id.* at 409. Thus, *American National Ins. Co.* did involve a waiver.

Similarly, ATU claims that *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), supports its position. In *Radisson Plaza Minneapolis*, the NLRB found an employer engaged in bad faith bargaining based on a series of actions intended to impede bargaining with a new union. The employer refused the union's request to discuss changes in job assignments, suggested that the employer meet individually with employees rather than meeting with the union, unilaterally changed wages without bargaining, and failed to respond to the union's information request. *Radisson Plaza Minneapolis*, 307 NLRB at 95. The employer also insisted that the parties' labor contract "incorporate" an employee handbook that covered nonunion employees. *Id.* The handbook contained a statement that the employer "reserved the right to alter or discontinue any of the benefits or other policies contained within it at any time." *Id.* The Board held the provision was too broad and the union "could do just as well with no contract at all." *Id.*

Article 18.2 does not raise the same concerns as in *Radisson Plaza Minneapolis*. Language similar to Article 18.2 has been part of the parties' labor contract since 1979. AR 192. Community Transit's proposal to keep Article 18.2 in the contract is not intended to impede bargaining. Nor is Community Transit proposing to incorporate a personnel manual written for nonunion employees into the contract through which it would retain sole discretion to set, alter, or discontinue all terms and conditions of employment. Community Transit is proposing to continue the parties' long-established, well-settled practice of reserving

Community Transit's ability to make needed changes to standard operating procedure and rules during the contract term, while remaining committed to bargain any impacts of those changes. Proposing Article 18.2 is not bad faith bargaining under *Radisson Plaza Minneapolis.*

ATU also claims that *East Texas Steel Casting Co.*, 155 NLRB 1080 (1965), supports its position. However, as in *Radisson Plaza Minneapolis*, the decision in *East Texas Steel Casting Co.* is based on a series of employer actions demonstrating bad faith bargaining. In *East Texas Steel Casting Co.*, the employer changed employees' wages without notifying the union, avoided discussions with the union, delayed providing requested information, and refused to meet and confer with the union. *East Texas Steel Casting Co.*, 155 NLRB at 1081. The employer also proposed a management rights clause that required the union to waive "practically all of its rights." *Id.* The NLRB found that the management rights proposal was "lacking in concessions of value and that it would be unreasonable to believe that [the employer] tendered such offers without anticipating their immediate rejection by the Union." *Id.* at 1082. The NLRB found, "[W]e are persuaded that [the employer's] proposals and conduct during the entire period of negotiation reveal that it was bargaining in bad faith without any intention of entering into a final and binding agreement...." *East Texas Steel Casting Co.*, 155 NLRB at 1080.

ATU does not contend that Community Transit proposed Article 18.2 in bad faith or that it did not make concessions of value in exchange for the proposal. Nor could it. Article 18.2 is an established part of the

parties' labor relationship. Community Transit bargained in good faith for the continuation of a provision that has been part of the parties' established labor relationship for decades. Article 18.2 does not require ATU to waive "practically all of its rights." Community Transit's Article 18.2 proposal is not evidence of bad faith bargaining under *East Texas Steel Casting Co.*[11]

III. CONCLUSION

Public employers and labor unions representing public employees are required to negotiate in good faith over whether proposals from either side on mandatory subjects of bargaining should be included in the parties' written labor contract. The PERC's Decision 10647-A allows unions to refuse to bargain about employer proposals that give the employer the flexibility to manage certain operational subjects for a defined period (even though the union retains the right to bargain the impacts of any changes.) The PERC's decision cannot be reconciled with *City of Richland, City of Pasco, Toledo Blade, American National Ins. Co.*, and other federal and state authorities upholding an employer's right to bargain for a provision giving it the right to act unilaterally in certain areas during the term of the agreement. Article 18.2 addresses mandatory

[11] In a footnote, ATU also cites *Carbonex Coal Co.*, 248 NLRB 779 (1980). BR at 42, n. 2. However, like *Radisson Plaza Minneapolis* and *East Texas Steel Casting Co.*, *Carbonex Coal Co.* involved an extreme case of bad faith bargaining the NLRB described as "an overwhelming case of discriminatory motivation." *Carbonex Coal Co.*, 248 NLRB at **3. The decision states that the management rights proposal "in the context of all the circumstances of this case supports a finding of bad faith." *Id.* at **33. There is no allegation or evidence of bad faith against Community Transit in this case.

subjects of bargaining (work rules and grievance procedures) and is, therefore, a mandatory subject of bargaining under those federal and state authorities.

ATU claims that the PERC is preserving public resources by limiting the matters subject to interest arbitration. In fact, the opposite is true. By prohibiting public employers from bargaining for contract language like Article 18.2, the PERC is opening the floodgates for the expense of public resources on nonstop union bargaining.

DATED this 19th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Brief of Appellant to be served by hand delivery, addressed to the following:

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