Supreme Court No. 91697-7

Court of Appeals No. 45687-II

SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP TRANSIT,

Petitioner-Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent-Appellee,

and

AMALGAMATED TRANSIT UNION, LOCAL 1384,

Respondent-Appellee,

ANSWER TO BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

Christopher Casillas,
WSBA #34349
Cline & Casillas
520 Pike Street, Suite 1125
Seattle, WA 98101
(206) 838-8770 (Phone)
(206) 838-8775 (Fax)
Attorney for Amalgamated
Transit Union, Local 1384

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On July 1, 2015, Respondent Amalgamated Transit Union Local 1384 (ATU) was in receipt of a motion (accompanied by a brief) from the Washington State Association of Municipal Attorneys (WSAMA) seeking amici status, supporting Petitioner's, Kitsap Transit, appeal. The Court of Appeals determined that the agency failed to discharge its statutory duty to issue remedies that effectuate the purpose of the statute, and it remanded the matter back to PERC to issue a new remedial order consistent with the decision.

Amicus' brief fails to establish how its additional argument is necessary to the case. The additional briefing submitted by Amicus is proffered for two stated reasons – to supply the Court with "pertinent authorities not referenced by the parties' brief" and to more fully brief the "standard of review used by federal courts." Neither of these arguments meet the threshold under RAP 10.6 to support additional argument. The authorities cited by Amicus were discussed by the Court of Appeals and previously briefed by the parties. The federal standard of review in administrative cases comports with the standard applied by the Court of Appeals and is, nevertheless, inapposite because this case involves a different statutory framework.

II. ARGUMENT

A. Amicus Mischaracterizes the Review Standard in APA Cases and the Review Standard Employed by the Court of Appeals.

The submission of briefing by Amicus was done for the stated reason of more fully briefing the "standard of review used by federal courts" and to provide the court with research and citation to "pertinent authorities not referenced by the parties' brief."[1] Yet, the parties' briefs already discussed the cases now cited by Amicus. It would appear, instead, the main purpose of the brief from Amicus is to reargue the petitioner's meritless point that the standard adopted by the Court of Appeals somehow conflicts with decisions by this Court. Like Petitioner, Amicus misrepresents the standard of review employed by the Court of Appeals and seeks to manufacture a conflict where none exists.

In claiming that the Court of Appeals in this case was "inventing" a new standard, Amicus cites to two decisions – *Municipality of Metro. Seattle v. Pub Emp't Relations Comm'n.*[2] and *State ex rel. Wash. Fed'n of State Emp., AFL-CIO v. Bd. of Trs. Of Cent. Wash. Univ.*[3] – as being in conflict with the ruling from the Court of Appeals. Curiously, both decisions were cited to, and relied upon, by the Court of Appeals in detailing its review procedures and subsequently briefed by the parties concerning the Petitioner's Petition for Review. To the extent, as indicated, Amicus reviewed the parties' briefing, it is unclear why it now indicates the need to

---

[1] Mot. Amicus Curiae Br. p. 2-3 (June 26, 2015).
[2] 118 Wn.2d 621, 826 P.2d 158 (1992).
[3] 93 Wn.2d 60, 605 P.2d 1252 (1980).

cite to pertinent authorities not referenced by the parties when, in fact, the cases it references were previously discussed in briefing.

Beyond that issue, like the Petitioner, Amicus both misunderstands how the Court of Appeals applied the relevant precedent in this case as well as the import and meaning of the now citied decisions. In *Bd. of Trs. Of Cent. Wash. Univ.*, comporting with the federal standard, this Court observed that because the Higher Education Personnel Board is the "legislatively designated agency to enforce the unfair labor practice provisions...its determination as to remedies should be accorded considerable judicial deference".[4] Importantly, however, this Court went on to note that "[n]evertheless, the board's remedy is limited by the mandate of its statute, *RCW 41.56.160.*"[5] Similarly, in *Municipality of Metro. Seattle*, this Court again acknowledged that PERC has considerable authority to "issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act...*unless such orders are otherwise unlawful.*"[6]

In citing to these same provisions, the critical point missed by both Amicus and the Petitioner is that the Court of Appeals, correctly, determined that the Commission's original order was *unlawful* because it wholly failed to carry out the statutory mandate in RCW 41.56.160. The Court of Appeals specifically identified two different ways in which the

---

[4] 93 Wn.2d at 68-69.
[5] *Id.* at 69.
[6] 118 Wn.2d at 634-635 (emphasis supplied).

"Commission's choice of remedy...fails to discharge [its] statutory duty" to issue "appropriate remedial orders" that require the offending party to "take such affirmative action as will effectuate the purposes and policy of" chapter 41.56 RCW.[7] In determining the Commission's order to be unlawful, the Court of Appeals acted entirely consistent with this Court's precedent indicating no deference is warranted to a remedy that violates the agency's statutory responsibility.

Additionally, in contrast to the case herein, the decisions cited by Amicus involved determinations by the Court that the agency's remedy was lawful even if not specifically permitted or required. In *Municipality of Metro. Seattle*, the issue was whether an order requiring interest arbitration was lawful; likewise, in *Bd. of Trs. Of Cent. Wash. Univ.*, the issue for the Court was whether an award of attorney's fees was within the Personnel Board's statutory authority.[8] In both decisions, the Court found the statutory authorization broad enough to encompass such remedies. As such, this Court afforded considerable deference to those agency determinations, as the adopted review standard would require, since it determined that there was sufficient statutory authority for such remedies.

While Amicus may disagree with the Court of Appeals determination that PERC violated its statutory duty herein, to suggest the court "invented" a standard inconsistent with the aforementioned decisions is wholly inaccurate because it ignores the critical distinguishing factor –

---

[7] RCW 41.56.160.
[8] 118 Wn.2d at 630; 93 Wn.2d at 65.

whether the remedy comported with the statutory requirement or not. Unlike the two decisions cited by Amicus (and previously briefed by the parties), the Court of Appeals in this case was not obligated to, and in fact could not, show deference to the Commission's decision on the remedy due to a finding that the remedy itself was inconsistent with the statutory mandate in RCW 41.56.160. As astutely noted by the Court of Appeals, this is not a case where there was a question as to whether the *means* selected by the Commission to remedy the ULP was the most appropriate. In contrast, this is a case where the *ends* of the statute were not followed by the Commission, which is precisely why the courts have review authority under the Administrative Procedures Act ("APA") in order to ensure that the law is being followed, which is the ultimate province of the courts.

B. Amcius' Citation to Federal Authority is Both Misleading and Irrelevant and Should be Rejected

Although the submitted amicus brief from WSAMA was ostensibly done "because it more fully briefs the standard of review used by federal courts when reviewing remedial orders...",[9] the WSAMA fails to establish why such persuasive authority should impact the case herein. Principally, while this Court has found that interpretations of the federal NLRA can be persuasive in construing state labor laws, this is only the case in which the state acts are "based upon or are similar to"[10] federal authority. In this case, as aptly noted by the Court of Appeals, the relevant statute herein – RCW

[9] Mot. Amicus Br. p. 2-3 (June 26, 2015).
[10] *Bd. of Trs. Of Cent. Wash. Univ.*, 93 Wn.2d at 67.

41.56.160 – is notably different than its federal counterpart. As such, the submission of federal authority by Amicus is of no value to this Court and should be rejected.

One of the central issues in this case concerns whether PERC failed to carry out its statutory duty and responsibility to issue appropriate remedial orders, as required by RCW 41.56.160, by relieving the petitioner of the responsibility to pay monetary damages at a level sufficient enough to make ATU's members whole for the loss of the Premera insurance. This Court has previously observed that "reliance on NLRA precedent...is inappropriate"[11] where there are differences in the rights between the federal act and state bargaining laws. In such cases, this Court has justifiably diverged from federal decisions.[12]

In this circumstance, as discussed by the Court of Appeals, there is a significant difference in the relevant state and federal statutes because RCW 41.56.160(2) specifically authorizes an order of monetary damages, which language is not in the corresponding provision of the NLRA.[13] Since the issue of monetary damages is at the core of this case, reliance on federal authority fails to constitute even persuasive authority because of the different statutory schemes.

Secondarily, even if this Court were to look to federal precedent, Amicus presents a wholly incomplete picture concerning the standard of

---

[11] *Green River Cmty. College, Dist. No. 10 v. Higher Educ. Pers.Bd.*, 95 Wn.2d 108, 120, 622 P.2d 826 (1980), *modified on reconsideration*, 95 Wn.2d 962, 633 P.2d 1324 (1981).
[12] *See Muncip. Metro. Seattle v. Pub. Emp't Relations Comm'n.*, 118 Wn.2d 621, 826 P.2d 158 (1992).
[13] Compare RCW 41.56.160 with 29 U.S.C. §160(a), (c).

review for remedial orders issued by the NLRB. As a general matter, Amicus is correct that the U.S. Supreme Court and lower federal courts will uphold the NLRB's construction and interpretation of the act so long as it is "rational and consistent with the Act...even if we would have formulated a different rule had we sat on the Board."[14] However, on a number of occasions, the federal courts have shown little deference to Board decisions, even in the arena of crafting remedies. The review standards applied by the federal courts actually mirror, in many ways, the standard used by the Washington State Courts, as appropriately applied by the Court of Appeals in this case.

The U.S. Supreme Court has refused to show deference to the Board when its decisions fail to interpret the NLRA in a manner consistent with previous decisions by the U.S. Supreme Court.[15] Likewise, when the Board fails to articulate its rationale, numerous federal courts have shown little or no deference to the NLRB's admitted expertise in the area.[16] In the arena of remedies, the federal courts have been reluctant to reverse or modify remedies "*unless* it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of

---

[14]N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990).

[15] *See Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 112 S. Ct. 841, 117 L. Ed. 2d 79 (1992).

[16] *See e.g., Local Joint Exec. Bd. Of Las Vegas v. N.L.R.B.*, 657 F.3d 865 (9th Cir. 2011); Int'l Union of *Operating Eng'rs, Local 513, AFL-CIO v. N.L.R.B.*, 635 F.3d 1233 (D.C. Cir. 2011); United *Food & Commercial Workers Int'l Union, AFL-CIO, Local 150-A v. N.L.R.B.*, 880 F.2d 1422 (D.C. Cir. 1989); Dist. 1199P, Nat. Union of Hosp. & Health Care Employees, AFL-CIO *v. N.L.R.B.*, 864 F.2d 1096 (3rd Cir. 1989).

the Act."[17] Similarly, when the U.S. Supreme Court has found that the Board has failed to identify any "justification for a remedy," then it has been held that the Board "abused its discretion."[18] When there has been a finding of such abuse of discretion, the federal courts have typically remanded the matter back to the Board for reconsideration, exactly as was done by the Court of Appeals herein.[19]

Thus, there is little to no value in the additional briefing offered by Amicus. While only persuasive authority to begin with, given the difference in statutory schemes, reference to that authority is inapposite herein. Additionally, upon a more complete review of the federal standard of review, it is clear that it largely parallels the structure utilized by the Washington State Courts in reviewing agency decisions. Clearly Amicus does not agree with the Court of Appeals' decision to not afford PERC deference herein due to the agency's failure to carry out its statutory mandate, but offering an incomplete picture of the federal standard does little to assist this Court in assessing the merits of the petition.

---

[17] *Virginia Elec. & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 63 S. Ct. 1214, 87 L. Ed. 1568 (1943) (emphasis supplied). *See also N.L.R.B. v. United States Postal Serv.*, 486 F.3d 683 (10th Cir. 2007); *N.L.R.B. v. Velocity Exp., Inc.*, 434 F.3d 1198 (10th Cir. 2006); *Consolidated Freightways v. N.L.R.B.*, 892 F.2d 1052 (D.C. Cir. 1989), cert. denied, 498 U.S. 817 (1990).

[18] *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 99 S. Ct. 1123, 59 L. Ed. 2d 333 (1979).

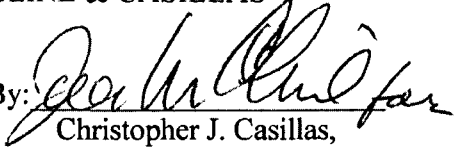
[19] *N.L.R.B. v. Food Store Employees Local 347*, 417 U.S. 1, 94 S. Ct. 2074; 40 L. Ed. 2d 612 (1974).

III. CONCLUSION

Based on the foregoing, Respondent submits that the briefing from WSAMA presents an incomplete and inaccurate picture of this case and the relevant legal authority and should be rejected by this Court.

DATED this 10th day of August, 2015, at Seattle, WA.

CLINE & CASILLAS

By: 

Christopher J. Casillas,
WSBA #34349
Attorney for Amalgamated
Transit Union, Local 1384

DECLARATION OF FILING AND SERVICE

I certify that on August 10, 2015, I caused to be filed via email and U.S. Mail the original of the foregoing *ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE TRANSIT ASSOCIATION* and this *CERTIFICATE OF FILING & SERVICE* in the above-captioned matter. I further certify that on this same date, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the same above-referenced documents on the party below:

Tim Donaldson
Walla Walla City Attorney
15 N. Third Avenue
Walla Walla, WA 99362
tdonaldson@wallawallawa.gov
Attorneys for Applicant

Daniel Heid
Auburn City Attorney
25 W. Main Street
Auburn, WA 98001-4998
dheid@auburnwa.gov
Attorneys for Applicant

Mark Lyon, AAG
Office of the Attorney General
P.O. Box 40108
Olympia, WA 98504-0100
MarkL1@atg.wa.gov
Attorneys for Respondent PERC

Shannon Phillips
Sophia Mabee
Summit Law Group
315 5th Ave. S, Ste 1000
Seattle, WA 98104
shannonp@summitlaw.com
sofiam@summitlaw.com
Attorneys for Petitioner-Appellant Kitsap Transit

I certify and acknowledge under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 10th day of August, 2015.

Silvia Bass

Silvia Bass, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Silvia Bass
Subject: RE: Supreme Court No. 91697-7

Rec'd 08/10/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Silvia Bass [mailto:SBass@clinelawfirm.com]
Sent: Monday, August 10, 2015 10:20 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Supreme Court No. 91697-7
Importance: High

Re: Kitsap Transit v. State of Washington Public Employment Relations Commission and Amalgamated Transit Union, Local 1384
Supreme Court No. 91697-7

Good morning:

Enclosed please find the following for filing in the above matter:

1. Answer to Brief of *Amicus Curiae* Washington State Association of Municipal Attorneys; and
2. Answer to Brief of *Amicus Curiae* Washington State Transit Association.

Regards,

Silvia Bass

Silvia Bass, Legal Assistant
CLINE CASILLAS

520 Pike Street, Suite #1125
Seattle, WA 98101
(206) 838-8770
(206) 838-8775 Fax
Website: www.clinelawfirm.com
Blog: www.nationalpoliceandfirelaborblog.com

Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2521, and is legally privileged. The information is intended only for the use of the individual or entity named above. If you think you have received this message in error, please notify the sender either by email or telephone. Receipt by anyone other than the named recipient(s) is not a waiver of any attorney-client work product or other applicable privilege. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited.