RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 10, 2015, 10:21 am
BY RONALD R. CARPENTER
CLERK

E CDF
RECEIVED BY E-MAIL

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 TRANSIT ASSOCIATION

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

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Washington State Transit Association ("WSTA") filed its brief on July 13, 2015, in support of Petitioner Kitsap Transit seeking reversal of the decision by the Court of Appeals, Division II, vacating an award issued by the Public Employment Relations Commission ("PERC"). 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.

The arguments advanced by Amicus are of no value to this Court because they mischaracterize the relationship between federal and state labor law and improperly draw from that misrepresentation a standard of deference owed to agency decisions that is not supported by clear statutory and case law issued by this very Court. Additionally, the arguments are premised on a fundamental misunderstanding of key aspects of the record. For these reasons, the argument of Amicus should be rejected.

II. ARGUMENT

A. Amicus Mischaracterizes the Deference Owed by State Courts to PERC Decisions By Misapplying the Connection to Federal Labor Policy Under the NLRA.

Relying on the federal Urban Mass Transportation Act of 1964[1] (UMTA), Amicus seeks to characterize what it perceives as a lack of deference shown by the Court of Appeals to PERC by asserting that the

[1] 49 U.S.C. §5333 et. seq.

court's actions were inconsistent with federal labor law, which Amicus believes is not permitted by the UMTA. Specifically, without citing to any specific authority, Amicus proclaims that "state labor law must therefore be consistent with federal labor law," and that "PERC's authority is as extensive as that of the NLRB."[2] Because, as it claims, the NLRB has "broad discretionary authority to remedy ULPs," so too must PERC be afforded that same degree of discretion. Yet, this entire argument is premised on the assumption that the jurisdiction of the NLRB and PERC are equivalent, which is, significantly, an incorrect assumption that leads to the unraveling of Amicus' entire argument.

This Court, in *State ex. rel. Graham v. Northshore Sch. Dist. No. 417*[3], has previously addressed, and rejected, the notion that the jurisdictional authority of the NLRB versus that of PERC is equivalent and, in turn, has concluded that the degree of deference owed by the State courts to PERC is not the same as under the federal scheme. Going back to at least *Garner v. Teamsters Union*,[4] the U.S. Supreme Court has concluded that within the NLRA, Congress has "entrusted administration of the labor policy for the Nation to a centralized administrative agency."[5] As such, the U.S. Supreme Court has found that "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that

---

[2] Amicus Curiae Br. p. 3 (July 13, 2015).
[3] 99 Wn.2d 232, 662 P.2d 38 (1983).
[4] 346 U.S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953).
[5] *San Diego Bldg.Trades Coun. v. Garmon*, 359 U.S. 236, 242, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959).

these determinations be left in the first instance to the National Labor Relations Board."[6]

In contrast, the "courts in Washington are courts of general jurisdiction 'in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court'."[7] In reviewing state labor laws, this Court has already determined that such laws contain "no language directly removing the jurisdiction of the superior courts over cases involving unfair labor practices..."[8] While agencies must interpret the law to enforce it, "[i]t is a quantum leap in logic, however, to jump from the fact that PERC is empowered to prevent unfair labor practices to the conclusion that PERC is the exclusive decider of public labor law questions."[9] In this State, the "declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies."[10]

Therefore, Amicus' assertion that the UMTA indirectly requires the same degree of deference given to the NLRB be now afforded to PERC is fundamentally at error because it mischaracterizes the jurisdiction of the courts and the labor agencies under the State and federal schemes. The labor laws in Washington State have done nothing to limit or remove the courts' concurrent jurisdiction to prevent and remedy unfair labor practices and the role of the courts to ultimately declare legal rights. Unlike the

---

[6] *Id.* at 244-245.
[7] *State ex. rel. Graham*, 99 Wn.2d at 240; citing Const. art. 4, §6.
[8] *Id.*
[9] *Id.*
[10] *Id.*

NLRB, which is specifically granted plenary authority to administer federal labor laws, even though its decisions still remain subject to judicial review, PERC is not the "exclusive decider of public labor law questions" in Washington State. Our courts, under both the doctrine of concurrent jurisdiction and through the judicial review process in the Administrative Procedures Act ("APA")[11], are fully empowered to declare legal rights and substitute their own views for that of administrative agencies when those agency determinations are contrary to statutory mandates.

B. It is a Gross Misreading of the Court of Appeals Decision for Amicus to Argue the Court Was Simply Substituting its Preferred Remedy Over that of PERC

In its briefing, Amicus' central critique of the Court of Appeals decision is that it was attempting to "fully compensate" ATU for the ULP, which was inappropriate because "PERC's discretion should not be replaced or fettered by a court's notion of what may be a proper remedy for an employer ULP."[12] Since the Legislature did not "mandate [sic] award full compensatory damages"[13] in these situations, as Amicus' misplaced logic goes, the Court of Appeals should not have tried to fully compensate ATU and its members. The primary flaw in this analysis, however, is that the Court of Appeals was in no way simply substituting what it perceived as a "better remedy" for that which was decided on by PERC. In stark contrast, as repeated throughout the decision, the Court of Appeals found

---

[11] RCW 34.05.570.
[12] Amicus Curiae Br. p. 7 (July 13, 2015).
[13] Amicus Curiae Br. p. 7 (July 13, 2015).

that the Commission's modified remedy was *unlawful* because it failed to carry out the statutory mandate in RCW 41.56.160. Since the courts are the ultimate arbiter in terms of "what the law is," if an agency decision runs contrary to a mandate imposed by the Legislature, the courts have no choice but to correct the error, which is precisely what happened herein.

The Court of Appeals specifically identified two different ways in which the "Commission's choice of remedy...fails to discharge [its] statutory duty"[14] 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.[15] Specifically, the Court of Appeals determined that the "Commission's order does little to put ATU's affected members in the position they occupied before Premera's PPO coverage ended,"[16] which is necessary to make the employees whole as required by the statute. Second, the "Commission's order rewards Kitsap Transit for its unfair labor practices,"[17] which is equally impermissible under the statute. Thus, this is not a situation, as argued by Amicus, where the Court was attempting to merely craft a "better order;" in contrast, vacating the Commission's order was necessary because it was unlawful. 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.

---

[14] *Amalgamated Transit Union, Local 1384 v. Kitsap Transit et. al.*, 187 Wn. App. 113, 130, 349 P.3d 1 (2015).
[15] RCW 41.56.160.
[16] *Amalgamated Transit Union, Local 1384*, 187 Wn. App. at 131.
[17] *Id.*

C. The Courts Have No Duty to Defer to PERC's Remedy that Was Not Supported by the Evidence and Contrary to Law

The Commission modified the hearing examiner's order, as noted by the Court of Appeals, after making two observations in the body of its opinion: "the Commission determined that compliance with the examiner's order to reinstate the PPO coverage could prove impossible and agreed with Kitsap Transit that the examiner's monetary remedies were punitive."[18] In reviewing the record, however, Division II made two critical determinations reference these observations by the Commission:

- "We note also that the APA requires agencies to 'include a statement of findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record, *including the remedy*." RCW 34.05.461(3) (emphasis added). The examiner made no explicit finding or conclusion that ordering the reinstatement of PPO coverage would be impossible, nor did the Commission."[19]

- "While agreeing that the remedial nature of RCW 41.56.160 does not authorize punitive damages, we conclude that the examiner's remedy did not award ATU's members a windfall, and therefore was not punitive..."[20]

In its briefing, Amicus attempts to fault the Court of Appeals for not following the appropriate standard of review under the APA, specifically by substituting its "view of the facts for that of the agency."[21] Relatedly, Amicus also faults the parties and the Court of Appeals for the focus on the

---

[18] *Id.* at 121.
[19] *Id.* at 126.
[20] *Id.* at 129.
[21] Amicus Curiae Br. p. 9 (July 13, 2015).

PERC examiner's decision, which it argues "becomes irrelevant on appeal."[22] Although a creative argument, Amicus' understanding of the relevant record is badly misplaced, which undermines its entire conclusion.

For one, the focus on the hearing examiner's decision is highly relevant in this case because the Commission adopted, in totality, *all* of the examiner's findings of fact, conclusions of law, and all but two of the specific orders issued by the Examiner.[23] The Commission made no separate findings or conclusions of its own, and by law the examiner's findings of fact and conclusions of law then became those of the Commission and verities on appeal.[24] The facts adopted by the Commission were, thus, *identical* to those as found by the hearing examiner. In that regard, the examiner's decision is quite central to the case.

Under the APA, the Court of Appeals had no duty to refrain from overriding the Commission's "view of facts" because that view was not remotely supported by the record or the findings or conclusions from the examiner that the Commission subsequently adopted. In fact, the Court of Appeals has an obligation to grant relief from an agency order if it "is not supported by evidence that is substantial when viewed in light of the whole

---

[22] Amicus Curiae Br. p. 8 (July 13, 2015).
[23] AR 1986.
[24] *Eidson v. State*, 108 Wn. App. 712, 32 P.3d 1039 (2001); *McEntyre v. Em't Sec. Dep't*, 114 Wn. App. 1074, 2002 Wash. App. LEXIS 3506 (2002).

record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter" or if the order is "arbitrary and capricious."[25]

These are significant points because what Amicus fails to understand is that there were no formal factual determinations made by the Examiner (and in turn the Commission) denoting any degree of "impossibility" for Kitsap Transit in restoring the lost Premera plan or a substantially equivalent plan. In fact, the examiner clearly understood that finding a substitute plan was possible because that is precisely what she ordered Kitsap Transit to do in order to remedy the ULP. Subsequent facts, as appropriately allowed in by the Court of Appeals, upon motion by ATU, confirmed that, in fact, finding a substitute plan was entirely possible because this is precisely what Kitsap Transit did some time after the ULP.

Similarly, the Court of Appeals review of agency legal determinations is done *de novo* to determine if the agency erroneously interpreted or applied the law,[26] which the Court of Appeals did in this case in assessing whether the Commission's modified remedy failed to "effectuate the purpose of the chapter." As detailed extensively above, the courts have no obligation to defer to agency legal interpretations or its

[25] RCW 34.05.570(3)(e); RCW 34.05.570(3)(i).
[26] See RCW 34.05.570(3)(d).

efforts to "fill in the gaps" in PECBA when such a determination is contrary to the statutory mandate. For the reasons extensively detailed in its opinion, the Court of Appeals determined that the Commission's modified order in no way appropriately remedied Kitsap Transit's ULP and had to be vacated. Such an outcome is precisely what the judicial review provisions in the APA intended.

III. CONCLUSION

Based on the foregoing, Amicus WSTA's brief is of no value to this Court and its argument in favor of granting Petitioner's Petition should be rejected.

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

CLINE & CASILLAS

By: _____ for
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

This electronic message contains information belonging to the law firm of Cline & Casillas which may be privileged, confidential, attorney work product and/or protected from disclosure under applicable law. This e-mail is covered by the

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.