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DIVISION II

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No. 38341-1-II
Pierce County Superior Court Cause No. 08-09832-5
STATE OF WASHINGTON
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

ILWU LOCAL 23

Appellant/Plaintiff

v.

PORT OF TACOMA AND ILWU LOCAL 22

Appellee/Defendants

REPLY BRIEF OF APPELLANT/PLAINTIFF

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ORIGINAL

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ARGUMENT

I. THE SUPERIOR COURT HAS JURISDICTION OVER THIS COMPLAINT TO ENFORCE AN ARBITRATION AWARD; PERC DOES NOT HAVE JURISDICTION TO CONSIDER ARBITRATION OR CONTRACT CLAIMS.

The crux of Defendant's argument that the superior court does not have jurisdiction over this case is that the Public Employment Relations Commission (PERC) has exclusive jurisdiction over representation of employees. Port Brief at 7; Local 22 Brief at 5. The argument does not withstand scrutiny. The basis for the argument is RCW 53.18.030 providing simply:

Controversies as to the choice of employee organization within a port shall be submitted to the public employment relations commission. Employee organizations may agree with the port district to independently resolve jurisdictional disputes, PROVIDED that when no other procedure is available the procedures of RCW 49.08.010 shall be followed in resolving such disputes."

Nothing in the statute suggests that PERC's jurisdiction as to such matters is exclusive. A similar argument was rejected by the Court in *State ex rel. Graham v. Northshore School District No. 417*, 99 Wn.2d 232, 662 P.2d 38 (1983). In *Northshore* PERC intervened to assert that it had exclusive jurisdiction under the Educational Employment Relations

Act over unfair labor practice charges preventing the superior court from exercising jurisdiction. The Court responded, 99 Wn.2d at 240:

We do not agree with PERC's contentions. Superior 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". Const. art. 4, § 6. The Educational Employment Relations Act contains no language directly removing the jurisdiction of the superior courts over cases involving unfair labor practices or involving interpretation of RCW 41.59. The chapter in question merely establishes a system of collective bargaining, grants and defines certain rights of the parties in the collective bargaining agreements, and confers certain regulating and enforcement powers on PERC. In order to enforce its orders, PERC petitions the court. RCW 41.59.150(3). Naturally, PERC must define and interpret the language in RCW 41.59 in order to carry out its functions. Every administrative agency must interpret the law in order to enforce or to follow it. It 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.

The declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies. PERC's arguments amount to no less than a suggestion that the Legislature has by implication carved out an area of law and assigned a traditional judicial function to an administrative body.

This analysis was recently confirmed in *Wright v. Terrell*, 135 Wn. App. 72, 145 P.3d 1230 (2006), *reversed on other grounds*, 162 Wn.2d 192, 170 P.3d 570 (2007). PERC did not intervene in this case. Neither RCW 53.18.010 *et seq.* applying RCW 41.56 to ports nor the Public

Employment Relations Act contain language explicitly removing labor representation issues from the general jurisdiction of superior courts.

Nor is the issue PERC purported to decide the same dispute that was before the superior court. PERC's representation jurisdiction as applied to ports is to "determine[e] ... which employee organization will represent [employees]" RCW 53.18.040. The complaint in this case seeks to enforce a contractual arbitration award to transfer work. It is not about the choice of representation by employees performing the work. It is instead about the transfer of that work to a different work force. CP 38-43. In addition PERC, by its own recognition, does not assert jurisdiction over the contractual dispute that is the subject of this case. *City of Walla Walla*, Decision 104 (PECB 1976):

In enacting the Taft-Hartley Act of 1947, Congress had before it the idea of making violation of a collective bargaining agreement an unfair labor practice justiciable before the National Labor Relations Board.^[FN3] Congress rejected that idea, making violations of a collective bargaining agreement justiciable in the courts under Section 301 of the Taft-Hartley Act and through the arbitration process referenced in Section 203(d) of that Act. Our legislature has picked up on the endorsement of arbitration as a prefer-able procedure, and has not delegated to the Commission authority to determine violation of contract allegations as unfair labor practices under Chapter 41.56 RCW. The undersigned therefore concludes that the Public Employment Relations Commission lacks jurisdiction to hear and decide the instant matter and that these violation of contract allegations should be litigated, if at all, under the grievance and arbitration machinery

provided in the collective bargaining agreement between the parties.

PERC has adhered to this determination of its jurisdiction in countless cases. See, e.g. *University of Washington (SEIU Local 925)* Decision 8760 (PSRA 2004). The Port has cited no PERC or other authority to support the argument that PERC would exercise its jurisdiction to interpret and enforce an arbitration award.

The Port's citation of cases representing conflicting representational claims in PERC jurisprudence, *Seattle School District*, Decision 5220 (PECB 1995) and *Port of Seattle*, Decision 6181 (PORT 1998), does not support its argument that the superior court lacked jurisdiction. Those cases are inapplicable. Both cases addressed the argument that PERC should defer to an arbitration award or proceeding. The complaint in this case does not seek deferral. It seeks confirmation of an arbitration award. *Seattle School District* presented an issue of conflicting representational claims that is not applicable here. Local 23 does not seek to represent the employees performing the work. It seeks confirmation of an arbitration award that the work be transferred. *Port of Seattle* treated a claim that PERC should defer its jurisdiction to decide a unit issue to arbitration. Neither case supports the argument that the

Commission has exclusive jurisdiction over a contractual dispute that deprived the superior court of jurisdiction.

II. NATIONAL LABOR RELATIONS BOARD CASES CITED BY THE PORT AND LOCAL 22 ARE INAPPLICABLE; THERE IS NO COUNTERPART IN WASHINGTON LAW AND NO PREDICATE UNFAIR LABOR PRACTICE UNDER FEDERAL LAW.

The Port and Local 22 cite cases interpreting Sections 8(b)(4) and 10(k) of the National Labor Relations Act to support its argument that Local 23 acted improperly in seeking enforcement of the arbitration award. Port Brief at 11-14; Local 22 Brief at 9. The cases are inapplicable for two reasons. First, contrary to the Port's assertion in footnote 3, there is no counterpart to the complicated NLRA statutory mechanism for dealing with jurisdictional disputes in the Public Employment Relations Act or Washington law. The NLRA makes jurisdictional threats a violation of the NLRA and provides a mechanism to final resolution of them by the NLRB. See, generally, *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S.Ct. 401, 111 L.Ed.2d 320 (1964) and *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). No such statutory mechanism is present in Washington labor law. PERC's jurisdiction to adjudicate unit clarification issues is fundamentally different from NLRA jurisdictional dispute jurisprudence.

Secondly the determinations addressed in the NLRA cases were predicated on a determination that the unions had committed unfair labor practices. There is no assertion and can be no assertion that Local 23 has committed an unfair labor practice by enforcing its collective bargaining agreement.

III. LOCAL 22'S ARGUMENT THAT ENFORCEMENT OF THE ARBITRATION AWARD VIOLATES PUBLIC POLICY OR IS UNCONSCIONABLE SHOULD BE ADDRESSED BY THE SUPERIOR COURT THAT HAS JURISDICTION.

Local 22 asserts that superior court jurisdiction over Local 23's action to confirm and enforce the arbitration award violates public policy, relying in part on the same NLRA cases cited by the Port.. Local 22 Brief at 6-12. For the reasons already stated in Part II the NLRA cases are inapplicable. In making the public policy argument Local 22 conflates the merits of this action with the jurisdiction of the superior court. We acknowledge that the Port and Local 22 will defend the arbitration award enforcement action on the basis of public policy, unconscionability and probably other grounds. Public policy was the argument the Supreme Court addressed in *W.R. Grace and Company v. Local Union 759, International Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) and that this Court addressed in *Kitsap Deputy Sheriffs Guild v. Kitsap County*, 140 Wn. App. 516, 165 P.3d 1266 (2007). But the

essential point is that the court in both cases exercised jurisdiction to address the public policy defense. Neither case stands for the proposition that mere statutory jurisdiction of a public agency deprives the superior court of jurisdiction to decide whether the agency's decision or statutory authority constitute compelling policy to invalidate an arbitration award or whether Local 23's action to enforce its arbitration award is unconscionable.

IV. THE PORTS REQUEST FOR ATTORNEY FEES SHOULD BE DENIED BECAUSE THIS APPEAL IS NOT FRIVOLOUS.

The principles underlying RAP 18.9 sanctions are well understood. As the court in *Satterlee v. Snohomish County*, 115 Wn. App. 229, 237-238, 62 P.3d 896 *rev. denied*, 150 Wn.2d 1008 (2003) observed:

An appeal is frivolous “ ‘if there are no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there [is] no reasonable possibility of reversal.’ ” ^{FN18} In determining whether an appeal is frivolous, the court considers, in addition to the foregoing definition of “frivolous appeal,” the following principles: RAP 2.2 gives a civil appellant the right to appeal, all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant, the record should be considered as a whole, and an appeal that is affirmed simply because the court rejects the arguments is not frivolous.

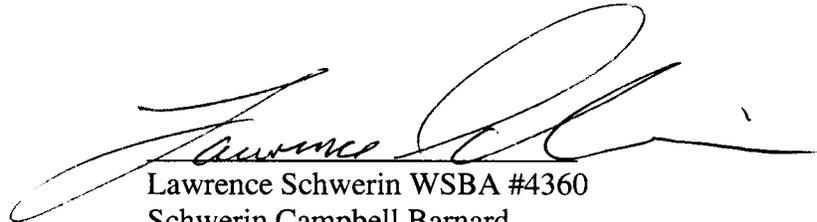
This appeal is clearly not frivolous. The Port's characterization of the PERC decision as controlling prior precedent ignores that PERC is not a court, that PERC did not decide the issue before the superior court, that

PERC disclaims jurisdiction over contract disputes and that a superior court has jurisdiction to review actions of an administrative agency as well as contract actions.

CONCLUSION

This was an action to confirm and enforce an arbitration award issued under a collective bargaining agreement. The superior court had jurisdiction to hear it notwithstanding a public agency decision defendants argue is controlling. The superior court erred in dismissing the action. Its decision should be reversed and the case remanded for trial.

Respectfully submitted this 6th day of February, 2009.



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CERTIFICATE OF SERVICE

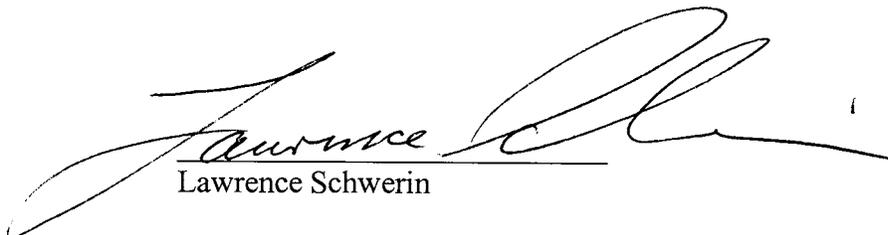
I certify that on this 6th day of February, 2009, I caused a copy of Plaintiff's Reply Brief to be served on the following counsel of record by UPS Next Day Air at the address indicated:

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