No. 91697-7

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.

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE TRANSIT ASSOCIATION

FOSTER PEPPER PLLC
P. Stephen DiJulio, WSBA No. 7139

1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
dijup@foster.com
Attorneys for Washington State Transit Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

GLOSSARY OF TERMS

Decision	*Amalgamated Transit Union, Local 1384 vs. Kitsap Transit*, 23496-U-11-6124, Decision 11099-A (PECB 2012), reversed by the Court of Appeals, Division II, at __Wn.App.__, 349 P.3d 1, 2015 WL 1730693, 2015 LRRM 181059 (April 14, 2015).
Division II	Division II of the Washington Court of Appeals.
NLRA	The National Labor Relations Act, 29 U.S.C. §151-61, originally enacted in 1935 and sometimes referred to as the National Labor Management Relations Act (NLMRA). *See* Taft-Hartley Act, Pub. L. 80-101, 29 U.S.C. §401-531 (1947).
NLRB	National Labor Relations Board.
PECBA	Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.
PERC	Public Employment Relations Commission, *see* Chapter 41.58 RCW.
ULP	Unfair Labor Practice.
UMTA	Urban Mass Transportation Act of 1964 (Pub. L. 88–365) as amended, at Title 49 USC, Chapter 53.
WSTA	Washington State Transit Association

1. INTRODUCTION

For eighty years, state and federal courts have deferred to the particular expertise of the administrative agency charged with overseeing private-sector labor management relations. When Congress passed the National Labor Relations Act in 1935, it specifically granted discretionary remedial authority to the NLRB. When our Legislature enacted statutory remedies for public-sector labor management relations in this State under the PECBA, it provided PERC with the same discretionary authority to remedy unfair labor practices as that of the NLRB. *Compare* NLRA Section 10(c) (authorizing the NLRB to "take such affirmative action ... as will effectuate the policies of" the NLRA) *with* RCW 41.56.160 (authorizing PERC "to take such affirmative action as will effectuate the purposes and policy of" the PECBA). Neither act requires back pay upon a ULP finding.

In this case, Division II departs from the fundamental rule and long standing policy of court deference to the remedial discretion of state and federal labor boards. This Court should accept review of Division II's ruling and fully consider this matter.

2. IDENTITY AND INTEREST OF WSTA

WSTA is a non-profit association representing thirty public transit agencies in the State of Washington. These agencies vary in size and

location, from urban to rural.[1] Collectively, WSTA represents transit agencies providing the public with more than 228 million trips per year on buses, vanpools, light rail, commuter rail, streetcars, passenger ferries and special needs transportation vehicles. The relationship between member transit agencies and its employees is of substantial interest to WSTA.

3. STATEMENT OF THE CASE

This matter comes before the Court on appeal from the PERC decision in *Amalgamated Transit Union, Local 1384 vs. Kitsap Transit*, 23496-U-11-6124, Decision 11099-A (PECB 2012). WSTA relies on the statement of the case from the Brief of Amicus Curiae Washington State Association of Municipal Attorneys. The current status of proceedings is the petition for this Court's review of the Division II ruling at __Wn.App._, 349 P.3d 1, 2015 WL 1730693 (April 14, 2015).

4. SUMMARY OF ARGUMENT

On review of PERC's decision, this Court does not review the decision of PERC's examiner, the Superior Court, or the Court of Appeals. Instead, this Court considers PERC's decisions under long-standing deferential standards of review afforded to the agency charged with implementing public sector labor management relations in the State.

---

[1] Members span the state from Asotin County (Asotin County PTBA) to Clallam County (Clallam Transit System), and from Okanogan County (Transit for Greater Okanogan) to Clark County (C-TRAN).

Since 1964, UMTA has required public transit agencies throughout the country meet federal-type labor relations standards as a condition to receive federal funding. UMTA, at 49 U.S.C. §5333. Application of state labor law must therefore be consistent with federal labor law. And federal labor law, as consistently reaffirmed by state and federal courts, recognizes the NLRB's broad discretionary authority to remedy ULPs. As most recently recognized by Division II:

> With the passage of the NLRA, 29 U.S.C. §§151-69, Congress "centralized the administration of its labor policies by creating the [NLRB] and giving it broad authority."

Walmart Stores, Inc. v. United Food and Commercial Workers International Union; et al., No. 45442-4-II, 2015 WL 3985812 (June 30, 2015), citing *Kilb v. First Student Transp.*, 157 Wn. App. 280, 285, 236 P.3d 968 (2010).

PERC's authority is as extensive as that of the NLRB. Yet, Division II only mentions this fundamental policy in passing. 2015 WL 170693 at 8-9. And, instead of deferring to PERC's decision, it chose to formulate and express its own position on labor policy and direct PERC to act consistent with that court's own view. Division II failed to give PERC proper deference (under long-standing federal and state labor management relations law and policy) to the agency created by the Legislature with

specialized expertise to address these issues. In doing so, Division II interfered with the Legislature's grant of discretionary remedial authority to PERC. This Court should accept review of this matter and apply long-standing deferential standards of review to PERC's decision.

5. ARGUMENT

5.1 As Recognized by this Court, the UMTA Ensures Employees of Public Transit Agencies Receive the Same Protections Available to Private Sector Employees under Federal Labor Law. The Court Should Provide for Consistency in Application of Federal and State Public Sector Labor Law, including Agency Discretion over Remedies.

This Court recognizes that the UMTA provides public employees the protections available to private-sector employees under federal labor law.

> . . . UMTA[2] was enacted to protect state public employees, and to ensure that transportation employees were afforded the protection available to private employees under federal labor law. *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 17, 72 L. Ed. 2d 639, 102 S. Ct. 2202 (1982).

Metro Seattle v. Transit Union, 118 Wn.2d 639, 647, 826 P.2d 167 (1992). *See also Martin v. Seattle*, 90 Wn.2d 39; 578 P.2d 525 (1978) (discussing federal funding of local transit agencies). Federal courts similarly interpret the UMTA:

---

[2] UMTA at 49 U.S.C. §5333 [formerly UMTA section 13(c) (1964) at 49 U.S.C. § 1609(c)].

> . . . Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of [UMTA] section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

Amalgamated Transit Union v. Donovan, 767 F.2d 939, 950-51 (D.C. Cir., 1985). UMTA's legislative history "reveals Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy." *Id.*, at 948. UMTA does leave to the states the management of public sector labor relations. *Metro Seattle v. Transit Union*, 118 Wn.2d at 666-67. But, there remains a firm connection between federal private sector labor law and state public sector labor law as applied to public transit agencies. That connection should be maintained through consistent application of the deference standard to a labor board's remedial decisions.

Neither the NLRA nor the PECBA require agencies to fully compensate for injuries caused by ULPs in the course of collective bargaining.[3] PERC's evaluation of this case and its discretionary determination of the appropriate remedy upon finding a Kitsap Transit

[3] Decisions construing the NLRA, while not controlling, are persuasive in interpreting state labor acts which are similar or based on the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24, 32, 677 P.2d 108 (1984). Here, the provisions of NLRA Section 10(c) and PECBA at RCW 41.56.160 are not merely similar; they use nearly identical phrasing.

ULP should therefore not be disturbed on appeal. There is no good reason to deviate from this standard, which is regularly applied by the courts in consideration of the NLRA's nearly identical language.

The United States Supreme Court summarizes this standard:

> 'The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act.' *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 198, 61 S. Ct. 845, 854 [85 L.Ed. 1271 (1941)]. The power to order affirmative relief under §10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. **Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.** *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 666—667, 74 S. Ct. 833, 838—839 [98 L.Ed. 1025 (1954)]. In *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533, 543, 63 S. Ct. 1214, 1220, [87 L.Ed. 1568 (1943)] in speaking of the Board's power to grant affirmative relief, we said:
>
> ". . . monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. *Cf. Agwilines, Inc. v. National Labor Relations Board*, 5 Cir., 87 F.2d 146, 150, 151 [(5th Cir. 1936]; *Phelps Dodge Corp. v. National Labor Relations Board*, [*supra*]. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. **It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained.**

> **Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge.'**

UAW v. Russell, 356 U.S. 634, 643-44, 78 S. Ct. 932, 2 L.Ed.2d 1030(1958) (emphasis supplied).[4] *See also Fallbrook Hospital Corp. v. NLRB*, 785 F.3d 729, 735 (D.C. Cir. 2015). The Legislature did not mandate award full compensatory damages for injuries caused by wrongful conduct under the PECBA. Like NLRA §10(c), the PECBA at RCW 41.56.160 instead grants PERC the authority to decide the "complex problem" based on its "administrative experience and knowledge." 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.

This Court has previously recognized PERC's discretionary authority to craft remedies. *Metro Seattle*, 118 Wn.2d at 634. So has Division II in a different case. *City of Vancouver v. PERC*, 180 Wn. App. 333, 347, 325 P.3d 333 (2014) ("The Legislature 'empowered and directed [PERC] to prevent any unfair labor practices and to issue appropriate remedial orders.'"). But in this case, Division II substituted its judgment for PERC's and directed PERC to fashion a different remedy. This Court

[4] One commentator observes that the NLRB's fashioning of effective remedies "is at least as much an art as a science." Theodore J. St. Antoine, A Touchstone for Labor Board Remedies, *14 Wayne L. Rev. 1039*, 1056 (1968). As creative as courts may be, they should not be engaged in fashioning remedies and thereby fashioning labor policy.

should accept review and apply the proper deferential standard to review PERC's remedial orders.

5.2 On Appeal, Courts Review PERC's Decision, Not the Examiner's Decision. The Legislature Granted PERC, Not the Courts, the Authority to Implement State Public Sector Labor Management Policy and to Fashion Appropriate Remedies upon Finding Unfair Labor Practices.

Extensive briefing in the lower courts, and Division II, focuses on the PERC examiner's decision. *See* 2015 WL 170693 at 8-9. But, that decision is relevant only to the extent the full Commission adopts an examiner's decision. This is because judicial review is limited to PERC's decision. If PERC does not adopt the examiner's decision, that decision becomes irrelevant on appeal. RCW 34.05.464(4) gives PERC all power it would have had, had it presided over the hearing in the first instance. *PERC v. City of Vancouver*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001). Thus, when a court is reviewing an agency order, "it is the commissioner's decision that is relevant for review," not the examiner's decision. *Barker v. Empl. Sec. Dept.* 127 Wn. App. 1005, 112 P.3d 536 (2005). Administrative tribunals like PERC therefore have discretion to evaluate the evidence presented; and, this evaluation will not be reconsidered on appeal. *See Black Ball Freight Serv., Inc. v. State Utils. & Transp. Comm'n*, 74 Wn.2d 871, 874, 447 P.2d 597 (1968); RCW 34.04.100.

Appeals under RCW 34.05.570(3)(e), moreover, are deferential and limited to substantial evidence review. Courts review the evidence in the light most favorable to Kitsap Transit, because Kitsap Transit prevailed in the highest forum that exercised fact-finding authority, namely PERC. *Ongom v. State Dept. of Health,* 124 Wn. App. 935, 949, 104 P.3d 29 (2005). Consistent with general principles of appellate review of trial court findings, courts refrain from substituting their view of facts for that of the agency. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929 P.2d 510 (1997), *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997). Because it is PERC's responsibility to find the facts giving rise to the remedy it believes appropriate, courts defer to PERC findings. *See* RCW 41.56.160.

Claims under RCW 34.05.070(3)(a)–(d) are questions of law, generally reviewed de novo. *Quadrant v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Nevertheless, courts defer to an agency's legal interpretations where agency expertise is useful in the interpretative task. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 958 P.2d 1091 (1998). In addition to its specific statutory authority at RCW 41.56.160, PERC also has authority to "fill in the gaps" to effectuate the PECBA. *Hama Hama Co. v. Shorelines Hearings Bd.* 85 Wn.2d 441, 448, 536 P.2d 157 (1975).

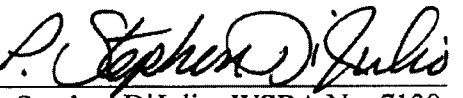
Under long-established administrative law standards, and consistent with RCW 41.56.160, PERC has the authority "to take such affirmative action [remedy] as will effectuate the purposes and policy of" the PECBA. *See Brown v. Vail*, 169 Wn.2d 318, 330, 237 P.3d 263 (2010) quoting *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) ("'[I]mplied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature.'"). Similar to Congress' intent in the NLRA, the Legislature intended in the PECBA for PERC, not the courts, to carry out state public sector labor management policy by fashioning appropriate remedies.

6. CONCLUSION

Amicus WSTA requests this Court accept review, apply the correct standard of review to PERC's remedial order, and reverse Division II.

RESPECTFULLY SUBMITTED this 13th day of July, 2015.

FOSTER PEPPER PLLC



P. Stephen DiJulio, WSBA No. 7139
Attorneys for Washington State Transit Association

OFFICE RECEPTIONIST, CLERK

To: Susan Bannier
Cc: Shannon E. Phillips (shannonp@summitlaw.com); Mark Spencer Lyon (MarkL1@atg.wa.gov); Christopher James Casillas (ccasillas@clinelawfirm.com); Timothy J. Donaldson (tdonaldson@wallawallawa.gov); Stephen DiJulio
Subject: RE: Kitsap Transit v. State of Washington PERC

Received 7-13-15

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: Susan Bannier [mailto:banns@foster.com]
Sent: Monday, July 13, 2015 2:29 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Shannon E. Phillips (shannonp@summitlaw.com); Mark Spencer Lyon (MarkL1@atg.wa.gov); Christopher James Casillas (ccasillas@clinelawfirm.com); Timothy J. Donaldson (tdonaldson@wallawallawa.gov); Stephen DiJulio
Subject: Kitsap Transit v. State of Washington PERC

Case Name:

Kitsap Transit, Petitioner-Appellant,

v.

State of Washington Public Employment Relations Commission, Respondent-Appellee,

And

Amalgamated Transit Union, Local 1384

Case No. 91697-7

Filed by:

P. Stephen DiJulio
(206) 447-4400
WSBA No. 7139

diju@foster.com
Attorneys for Washington State Transit Association

Susan Bannier
Assistant to P. Stephen DiJulio and Richard L. Settle
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Phone: 206-447-7891
Fax: 206-447-9700
banns@foster.com
www.foster.com

FOSTER PEPPER