

MEBA’s RESPONSE BRIEF

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INTRODUCTION

In its opening brief the State continues not to come to grips with the obvious reason the Arbitrator and the Marine Employees' Commission ordered it to pay the Union's attorney fees: the State's bad faith, frivolous conduct. Instead, it offers self-serving and unseemly mischaracterizations of the reason for the award of attorney fees, claiming that the Arbitrator and the MEC were merely "displeased" and that they did not want the State to "exercis[e] its right" to arbitrate.

The undisputed facts establish that the Arbitrator and the MEC were fully justified in awarding fees and that the State's efforts to evade responsibility are unworthy. On May 30, 2007 the Washington Court of Appeals, Division I, bluntly told the State to pay Union members for watch change duties and instructed that "whether watch changes must be compensated is not an issue for future grievance or arbitration." In response, the State defied the Court of Appeals, refusing to pay as directed, denying the Union's grievance, and forcing the Union to persevere through nearly two years of needless litigation. Then, in an extraordinary display of disregard for the Court of Appeals, the State did the very thing at the arbitration hearing the Court had instructed it not to do: it contended that it was not required to compensate Union members for watch changes.

In the presence of this misconduct, it cannot be said that the Arbitrator and the MEC acted “illegally by exceeding [their] authority under the contract” when they awarded attorney fees to the Union. As a consequence, Washington Supreme Court authority requires that the award be upheld. The parties voluntarily granted the Arbitrator and the MEC exclusive power to interpret their contract and fashion appropriate remedies for violations, and agreed that their decisions are “final and binding.” Thus, the Arbitrator and the MEC were entitled to interpret the collective bargaining agreement to permit the remedy awarded. Indeed, the award is justified on the basis of any number of plausible contract interpretations: 1) the collective bargaining agreement’s attorney fee clause is the analogue of the “American Rule” in the courts, to which the usual exceptions should apply, including bad faith, frivolous conduct; 2) the Union’s attorney fees “result[ed] [not] from an arbitration hearing,” as stated in the CBA, but exclusively from the State’s bad faith, frivolous conduct; and/or 3) the State was estopped to insist upon strict application of its preferred interpretation of the contract’s attorney fee clause, because it should not be provided the benefit of the very contract it frivolously repudiated.

Finally, if the award is overturned, there will be nothing to prevent prosperous and powerful parties (like the State and many

employers) from simply wearing down impecunious parties (like most labor unions) via a strategy of delay and frivolous litigation, as exemplified here.

COUNTER-STATEMENT OF ISSUES

1. Can an administrative agency acting as a labor arbitrator award attorney fees against a party who acted frivolously and in bad faith, thereby forcing the other party to incur needless arbitration expense, even where the collective bargaining agreement states that costs incurred by a party resulting from an arbitration hearing will be paid by the party incurring them?

SUPPLEMENTAL STATEMENT OF THE CASE

The Court of Appeals Decision

In its May 30, 2007 decision, the Court of Appeals repeatedly and forcefully told the Department of Transportation (DOT) that the Union's collective bargaining agreements unambiguously require that the State pay employees for previously-uncompensated watch change duties. From the outset, the Court was unequivocal. At page 1, it stated:

We hold that, under the collective bargaining agreement (CBA), watch changes are a work activity for which the State must compensate employees.

Davis v. WSDOT, 138 Wash. App. 811, 814 (2007) *rev. denied* 163 Wash. 2d 1019 (2008). In order to drive home this message, the Court

virtually browbeat DOT, telling it no fewer than five times that the CBAs are “unambiguous.” 138 Wash. App. at 818 (“The CBA unambiguously addresses compensation for watch changes....”); at 818 (“...the language itself is not ambiguous.”); at 819 (“...we refuse to add to, modify, or contradict the unambiguous provisions of the CBA.”); at 820 (“...the definition of wages is unambiguous and clear: The State must compensate the employees for watch changes.”); at 820 (“..., the CBA unambiguously addresses compensation for watch changes....”). The Court’s concluding message to the DOT could hardly be clearer:

...we emphasize that watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.

138 Wash. App. at 825-26.

The State’s Disregard of the Court of Appeals

Nonetheless, the DOT simply ignored the Court of Appeals. It continued not to pay employees for watch turnover functions. Indeed, it did not even begin keeping accurate records of the numbers of uncompensated watch turnovers or the amount of uncompensated time they consumed. Instead, when the Union filed its grievances only a week later, on June 8, 2007, DOT denied them and continued with

business as usual, forcing a needless arbitration hearing. *See*, AR 338, 341 (Union’s grievances).

Perhaps most remarkably, at the hearing on April 3, 2009, the DOT’s only defense was the very one the Court of Appeals told it not to interpose. In its opening statement DOT stated that the issue to be decided by the Arbitrator was “whether the collective bargaining agreement of the parties requires additional overtime compensation for routine watch turnover” – virtually word-for-word what the Court of Appeals told DOT not to contend. AR at 141 (Transcript page 28). Thereafter, the Union offered testimony and documentary exhibits, including spreadsheets, intended to quantify amounts owed under the Court of Appeals’s decision. AR 332, 334, 336, 344, 345 (Union exhibits 6, 7, 8, 12, 13). In contrast, DOT “went limp,” refusing to offer any counter-calculation. In its post-hearing brief DOT continued to pursue only one defense, the one the Court of Appeals had already rejected. AR at 45 *et seq.*

The MEC Arbitration Decision

In their Decision, Arbitrator Cox and the Marine Employees’ Commission (MEC) strongly emphasized the clarity of the Court of Appeals’s decision and DOT’s inexplicable failure to comply with it. In

their opening summary the Arbitrator and the MEC quote the Court of Appeals's concluding instruction to DOT:

However, the Court of Appeals' decision emphasized that "Watch changes are a regular, essential and required work activity for which the State must compensate under the CBA. And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration."

AR at 81 (Arbitrator/MEC decision). In Finding of Fact No. 5, they again quoted the identical language, putting the concluding sentence in bold-face type. AR at 84. They then chided DOT for ignoring the Court of Appeals and failing to offer any calculation of compensation owed.

Findings of Fact 9, 10 and 11 stated:

9. There was no evidence that WSF made any attempt to calculate backpay for watch turnover to determine liability, even after the Court of Appeals issued its Decision.
10. The State provided no evidence to the Arbitrator as to any alternative or compromise position regarding watch turnover pay.
11. The only evidence in the record that provides any reasonable basis for quantifying backpay was submitted by the Union . . .

AR at 84-85. In their "Discussion," the Arbitrator and the MEC tersely noted DOT's failure to adhere to the Court of Appeals's instructions, saying that "WSF ignored the directive of the Court at its peril." AR at

86. They express frustration:

When the Court determined watch turnover to be work and deferred the matter back to the grievance procedure, the WSF should have begun a method of recordkeeping to track the amount of time worked by employees. It failed to do so. It failed to take any position on remedy.

AR at 87.

In their Decision denying DOT's Motion to Reconsider the attorney fee award, Arbitrator Cox and the MEC again emphasized DOT's studied ignorance of the Court of Appeals. In particular, they explained that DOT was essentially bringing to the Arbitrator the very same arguments that had already been rejected by the Court of Appeals, a superior tribunal, which the Arbitrator and the MEC were powerless to ignore:

The employer was on notice from the Court of Appeals that payment for watch turnover was a contractual obligation of WSF.

. . . WSF and the State were aware that the Courts have spoken twice and the very language of the Court of Appeals' remand was convincing and compelling:

We emphasize that watch changes are a regular, essential and required work activity for which the State must compensate under the CBA and whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.

(Emphasis supplied by Arbitrator and MEC). It is only reasonable to assume that learned and esteemed counsel exhaustively argued and presented the same rationale and advocacy to the Courts that was advanced to the Arbitrator.

AR at 103. Arbitrator Cox and the MEC then clearly implied that it was DOT's own bad faith ignorance of the Court of Appeals that was the direct cause of the expenditure of needless attorney fees by the Union:

Upon receipt of the Court of Appeals' findings, WSF had every opportunity to work with the Union to pursue an appropriate remedy short of requiring the MEBA to present their members' case to an arbitrator and require additional attorney's fees, in spite of the direction of the Courts.

AR at 103. On this basis, the Arbitrator and the MEC denied the motion for reconsideration of the attorney fee award.

ARGUMENT

I.

BECAUSE DOT CANNOT ESTABLISH THAT ARBITRATOR COX AND THE MEC "ACTED ILLEGALLY BY EXCEEDING THEIR AUTHORITY UNDER THE CONTRACT," THEIR DECISION CANNOT BE OVERTURNED.

The Washington Supreme Court holds that the scope of review of public sector labor arbitration awards is among the most restrictive to be found anywhere in the law. In its seminal pronouncement, *Clark County PUD v. International Brotherhood of Electrical Workers*, 150 Wash. 2d

237 (2003), the Supreme Court held that arbitration awards are to be affirmed by the courts unless “the arbitrator acted illegally by exceeding his or her authority under the contract.” *Id.*, at 245. The Court cautioned that a reviewing court “does not reach the merits of the case.” *Id.*, at 245. Moreover, “the arbitrator is the final judge of both the facts and the law, and ‘no review will lie for a mistake in either.’ ” *Id.*, at 245 [citations omitted]. Thus, even “arbitrary and capricious” arbitration awards are to be affirmed by reviewing courts. *Id.*, at 246-7 (expressly declining to adopt “arbitrary and capricious” scope of review).

The *Clark County* Court’s application of these standards to its facts typifies the extraordinary deference extended to arbitrators by the courts. On the liability issue, the Court upheld the arbitrator’s finding that the employer had breached the collective bargaining agreement with the union when it failed to comply with its own personnel manual in the laying off and declining to recall two union members. The Court did so despite that the personnel manual expressly stated that it was not to be construed as a contract (*Id.* at 241) and the collective bargaining agreement expressly incorporated several personnel manual provisions, not including the provisions relied upon in the arbitrator’s opinion (*Id.* at 241). While the Supreme Court implied that the arbitrator’s interpretation was “strained,” it nonetheless upheld it. *Id.*, at 248.

Equally significant for present purposes, the Supreme Court showed similar deference with respect to the arbitrator's remedial order. The arbitrator ordered that two union members be placed in non-bargaining unit positions and paid backpay from the date of their layoff until the date they were offered positions by the employer (*Id.* at 242). She did so despite that, as non-bargaining unit employees, the grievants were "at will" employees who could be fired at any time for no reason (*Id.* at 248). Nonetheless, the Court upheld the arbitrator's remedy, because she had not acted illegally.

Federal law, quoted with approval in *Clark County*, is to similar effect, and contains important lessons for the present case. The United States Supreme Court has consistently held that arbitration decisions that hinge upon interpretation of the terms of collective bargaining agreements are all but unreviewable in the courts. In the seminal case on the subject, *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), the Court tersely instructed the lower courts that "refusal" to review the merits of arbitration awards is "the proper approach." *Id.*, 363 U.S. at 596. Any other approach, the Court warned, might undermine the federal policy of settling labor disputes via arbitration reflected in Section 203(d) of the Labor-Management Relations Act and other Supreme Court decisions. *See*, 29 U.S.C.

§173(d); e.g., *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).¹ Refusal to review an arbitrator's decision is especially appropriate, the *Enterprise Wheel* Court noted, when that decision is premised upon the arbitrator's interpretation of the terms of the collective bargaining agreement. The Court stated:

The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for; and so far as the arbitrator's decision concerns construction of the contract, **the courts have no business overruling him because their interpretation of the contract is different from his.**

Enterprise Wheel, supra, 363 U.S. at 599, 4 L.Ed.2d at 1429 (emphasis added). Only where an arbitrator's decision does not “draw its essence” from the collective bargaining agreement can the courts intervene. *See, Id.*, 363 U.S. at 597, 4 L.Ed.2d at 1428.

Perhaps most instructive for present purposes, the U.S. Supreme Court has stated that ambiguity or uncertainty regarding an arbitrator's rationale provides no basis for overturning the award, because an

¹ Section 203(d) of the LMRA, 29 U.S.C. §173(d), states:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement....

arbitrator has no obligation to give reasons for his/her decision. In

Enterprise Wheel, supra, the Court stated:

A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration.

Enterprise Wheel, 363 U.S. at 598 (1960) (footnote omitted).²

Enterprise Wheel's more recent progeny have strongly reinforced its rule of deference to arbitrators. In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Court forbade review of arbitration decisions even where the reviewing Court becomes convinced that the arbitrator has committed serious error. The *Misco* Court stated:

² Analogous Washington cases incorporate this principle from *Enterprise Wheel*. In *Westmark Properties v. McGuire*, 53 Wash. App. 400, 403 (1989) the court stated that “[a]n [arbitration] award consists of a statement of the outcome, much as a judgment states the outcome.” Thus, “[a] statement of reasons for the award is not part of the award.” In fact, arbitrators are under no obligation even to give reasons for their awards. *Dept. of Agriculture v. State Personnel Board*, 65 Wn. App. 508, 515 (1992) *rev. denied* 120 Wash. 2d 1003 (citing *Enterprise Wheel*, 363 U.S. at 598).

As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, **that a court is convinced that he committed serious error does not suffice to overturn his decision.**

Id., 484 U.S. at 38 (emphasis added). Indeed, according to the *Misco* Court, so long as no “dishonesty” is alleged, even “improvident ... silly factfinding” is an insufficient basis for overturning an arbitrator’s findings. *Id.*, 484 U.S. at 39.

The Ninth Circuit has amplified the Supreme Court's rule of unreviewability. In *Stead Motors v. Automotive Machinists Lodge*, 1173, 886 F.2d 1200 (9th Cir., 1989), *cert. denied* 495 U.S. 946 (1990), the Court characterized the level of deference afforded arbitrators' decisions as “nearly unparalleled.” It opined that courts are “bound ... to defer” to an arbitrator's decisions “even if we believe that the decision finds the facts and states the law erroneously.” *Id.*, 886 F.2d at 1204-5. Indeed, the *Stead* Court indicated that an arbitrator’s interpretation of the terms of a collective bargaining agreement is absolutely and always unreviewable by the courts. The Court stated:

Since the labor arbitrator is designed to function in essence as the parties' surrogate, **he cannot 'misinterpret' a collective bargaining agreement.**

Id., 886 F.2d at 1205 (emphasis added) *citing St. Antoine, Judicial Review of Labor Arbitration Awards, A Second Look At Enterprise Wheel And Its Progeny*, 75 Mich. L. Rev. 1137 (1977) (“in the absence of fraud or an overreaching of authority on the part of an arbitrator, he is speaking for the parties, and his award *is* their contract” [emphasis added]).³ *See also, United States Postal Service v. American Postal Workers Union*, 553 F.3d. 686, 695 (D.C. Cir., 2009)(“The arbitrator has a right to be wrong in his interpretation of the parties’ CBA.”).

Judged by these standards, the Court should uphold the Arbitrator’s attorney fee award. In the collective bargaining agreements, the DOT expressly agreed that all disputes were to be “refer[red] ... to the Marine Employees’ Commission for a final resolution.” AR at 275, 294. The DOT likewise agreed that “the arbitrator’s decision shall be final and binding on the union, affected employee[s] and the employer.” AR at 275, 294-5. In this capacity, the Arbitrator was entitled to fashion a remedy that included an award of attorney’s fees to the Union. As detailed in the Supplemental Statement of the Case, above, Arbitrator

³ Although Judge Reinhardt’s *Stead* opinion represents only a plurality opinion on several issues, it is for all intents and purposes a majority opinion on the question of the unreviewability of an arbitrator’s interpretation of the terms of a collective bargaining agreement. Judge Wallace’s concurrence in *Stead* expressly disagrees with the plurality opinion only to the extent that it applies a broad rule of deference in areas other than an arbitrator’s interpretation of contractual terms. *See, Stead Motors, supra*, 886 F.2d at 1227 (9th Cir. 1989) (Wallace, concurring).

Cox and the MEC essentially found that DOT's behavior was frivolous and outrageous. Most important, DOT utterly ignored a decision of the Washington State Court of Appeals, disobeying the Court's order to compensate employees for watch turnover and, even, contriving not to document the numbers and lengths of uncompensated turnovers. Arbitrator Cox and the MEC appropriately concluded that the matter should have been resolved "short of requiring" that MEBA expend "additional attorney's fees." AR at 103 (MEC Decision denying Motion for Reconsideration of Attorney's Fees). Thus, the Arbitrator and the MEC found that DOT's frivolous conduct was the but-for and proximate cause of the needless expenditure of attorney's fees by the Union. This finding is correct and, even if it isn't, it is unreviewable under *Clark County*.

Although the Arbitrator was under no obligation to provide a specific contract interpretation forming the basis of the award (*see, Enterprise Wheel, supra*), there are at least three arguable contract interpretations sufficient to justify it. First, the Arbitrator was legally entitled to conclude that the contract's attorney fee clause was the analogue of the so-called "American Rule," and that it incorporated all of the usual exceptions to that Rule, including the exception for frivolous

conduct.⁴ Second, the Arbitrator could legally exercise the plenary authority granted to him by the parties to interpret the contract's attorney fee clause as follows: attorney fees incurred by the Union did not "result[] from the arbitration hearing," but exclusively from DOT's frivolous insistence upon continued litigation. AR at 275, 295. Third, the Arbitrator had legal authority to find that, in light of DOT's frivolous conduct, it was estopped to rely upon its preferred interpretation of the attorney fee clause. Any other result, he was legally entitled to conclude, would give DOT the benefit of the very contract it was openly and frivolously repudiating, in violation of its obligation of good faith and fair dealing. While these interpretations may be strained or even wrong, *Clark County* requires they be upheld nonetheless.

Finally, as a matter of policy, arbitrators and the MEC need the authority to award attorney's fees to compensate the prevailing party for bad faith or frivolous conduct by the losing party, even where the collective bargaining agreement requires that the parties bear the costs of presenting their own cases. In the presence of bad faith or frivolous conduct, such awards are necessary to compensate the prevailing party

⁴ Under the American Rule, parties must pay their own attorney fees, even if they prevail. However, Washington courts recognize several exceptions to the Rule, including one for "bad faith or misconduct of a party." See, *City of Seattle v. McCready*, 131 Wash. 2d 266, 273-74 (1997).

fully for the actual losses incurred and to deter frivolous conduct by non-prevailing parties resulting in needless arbitration proceedings.

For these reasons, the Union requests that the Court deny the DOT's petition for certiorari and uphold the Arbitrator's and the MEC's award of attorney fees to the Union.

II.

ADMINISTRATIVE AGENCIES AND LABOR ARBITRATORS, LIKE THE COURTS, HAVE AUTHORITY TO AWARD ATTORNEY'S FEES AGAINST A PARTY WHO HAS ENGAGED IN WILLFUL, WANTON, BAD FAITH OR FRIVOLOUS CONDUCT.

The Washington Supreme Court has made it clear that Washington State administrative agencies, like the MEC, have authority to award attorney's fees to the prevailing party where the losing party has acted in bad faith or has brought frivolous claims or defenses. The seminal case on the issue is *State, ex rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wash.2d 60 (1980). There, the Higher Education Personnel Board awarded attorney's fees and costs against two employers whom it found had engaged in unfair labor practices. The Supreme Court reversed the award against one employer, but affirmed it against the other. In the process, the Court enunciated several core principles governing a court's review of an award of attorney's fees by an administrative agency:

First, when the Court is reviewing such an award the agency's "determination as to remedy should be accorded considerable judicial deference." *Id.* at 68-9.

Second, "[t]he relation of remedy to policy is peculiarly a matter of administrative competence." *Id.*, at 69.

Third, the appropriate scope of review of an award of fees is "abuse of discretion." *Id.*, at 65 (. . . "[w]as it an abuse of discretion to exercise that authority in the instant cases"). *See also, Green River Community College v. Higher Education Personnel Board*, 107 Wash. 2d 427, 442 (1986) ("We cannot say that the HEP Board abused its discretion in ordering payment of attorney's fees and litigation expenses").

Fourth, administrative agencies have the power to award attorney's fees against a non-prevailing party in cases where "a defense to the unfair labor practice charge can be characterized as frivolous or meritless." *Id.*, at 69.⁵ *See also, Municipality of Metropolitan Seattle v.*

⁵ The Court's conclusion was based, in part, upon analysis of language in RCW 41.56.160 providing for "appropriate remedial orders" and giving the administrative agency the power "to take such affirmative action as will effectuate the purposes and policies of [the enabling legislation]." This language is materially indistinguishable from WAC 316-65-560, which governs "grievance arbitration remedies" at the MEC. That rule states that the "arbitrator or commission" has the power "to take such affirmative and corrective action as necessary to restore a grievant's rights and to effectuate the policies of RCW 47.64.005 and 47.64.006 . . ." In turn, RCW 47.64.006 states that it is the public policy of the State of Washington, among others, "to promote harmonious and cooperative relationships between the ferry system and its employees..

Public Employment Relations Commission, 118 Wash. 2d 621, 634 (1992) (“The remedial provision of the statute has been interpreted to be broad enough to authorize an award of attorney’s fees when such an award ‘is necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless.’”).

Significantly, the *Board of Trustees* Court made clear that the administrative agency need not make an express finding of bad faith or frivolous conduct; an award of fees can be affirmed if the agency’s findings and the record evidence disclose such conduct. The Court affirmed the HEPB’s award of fees against Central Washington University despite that “[n]o reason for the imposition of litigation expenses was given by the HEPB....” *Board of Trustees, supra*, 90 Wash. 2d at 69. *See also, Green River Community College, supra*, 107 Wash. 2d at 441 (“Although the HEP Board could not have anticipated the language this Court would require to uphold an award of attorney’s fees under RCW 41.56.160, its disposition of the College’s arguments before it indicates that they did, in fact, find the College’s arguments ‘frivolous’ and ‘meritless.’”).

Subsequent to *Board of Trustees*, the Supreme Court laid out the policy reason for awarding fees against an employer who has acted

.” and “to protect the rights of ferry employees with respect to employee organizations.”

frivolously or in bad faith. In *Green River Community College v. Higher Education Personnel Board*, *supra*, the Court affirmed the HEPB's award of attorney's fees against the College. In doing so, it explained that "the remedy is proper to curtail the College's arbitrary behavior and to prevent its reoccurrence, and is necessary to make the order to negotiate in good faith at reasonable times effective." *Id.* at 442.

Arbitrators likewise frequently award attorney's fees to the prevailing party where the losing party has engaged in bad faith or frivolous conduct, and courts have upheld the awards. For example, in *Synergy Gas Company*, 91 LA 77 (Simons, 1987), the arbitrator rejected the employer's argument that an arbitrator "lacks authority" to award attorney's fees, and found an award of legal expenses to be "logical and appropriate" in order for the Union to be "made whole" for the employer's violations. *Id.* at 91-92. The arbitrator based his award on his finding that the employer's conduct in litigation had been "meritless," stating:

It seems wholly appropriate to follow the example of many courts which indeed award legal costs to a litigant when faced with conscious, deliberate and egregious wrongdoing by another. It is my view that the employer, in bad faith, consciously and deliberately chose to violate its contractual obligations.

Id., at 92. The Second Circuit Court of Appeals affirmed the arbitrator’s award of fees in *Synergy Gas Company v. Sasso*, 853 F.2d 59 (2d Cir.), *cert. denied*, 488 U.S. 994 (1988). The Second Circuit noted that “it has been held that [attorney’s fees] may be awarded in certain circumstances” in labor disputes. *Id.* at 65. Such circumstances include, the Court noted, where “the employer’s defenses are frivolous.” *Id.* at 65. Significantly, the Second Circuit likewise rejected the employer’s argument that the award of attorney’s fees was “punitive” rather than compensatory, reasoning that the arbitrator “was attempting to make the Union whole” and that, as a consequence, “the award can be considered compensatory.” *Id.* at 65-66. *See, also, Litton Systems v. Local 522*, 90 LRRM 3176 (S.D. Oh., 1975) (awarding fees “where mockery is openly made of the arbitration process” and rejecting argument that fees represent punitive rather than compensatory damages); *Rust Engineering Co.*, 77 LA 488, 490-91 (Williams, 1981) (awarding attorney’s fees and noting “attorney’s fees incurred as a result of bad faith breaches of a labor agreement are recoverable”); *Levenworth Times*, 71 LA 396, 409 (Bothwell, 1978) (“The arbitrator believes that an arbitrator does have jurisdiction and authority to award damages, including attorney’s fees, under appropriate circumstances, even though the agreement contains no language authorizing the arbitrator to award damages. . . . An award of

attorney's fees is not an award of punitive damages when the damages are limited to the actual expenses incurred in the unnecessary legal proceedings."); *Sonic Knitting*, 65 LA 453, 469 (Helveld, 1975) (awarding fees to union because the employer acted in "bad faith"); *Tam Produce*, 119 LA 1157, 1160 (Scholtz, 2004) (awarding attorney's fees to union because employer refused in bad faith to arbitrate). *Cf. Waste Management*, 113 LA 353, 362 (2006) (denying fees but noting fees may be awarded "for cases where the contract violation betokened bad faith, or where the positions taken in the arbitration were frivolous").

For these additional reasons, the Union requests that the Court deny DOT's petition and uphold the award of attorney fees by the Arbitrator and the MEC.

III.

CASE AUTHORITIES FAVOR AFFIRMANCE; CASES CITED BY THE STATE ARE UNPERSUASIVE OR IRRELEVANT.

While the circumstances in *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wash. App. 304 (Division III, 2010) are not precisely identical to ours, its similar fact pattern and rationale suggest that the arbitrator's attorney fee award should be affirmed. There, the arbitrator awarded attorney's fees against the

employer and the employer responded with the identical arguments the State makes here on the basis of identical contractual provisions:

The County says the Guild concedes there is no statutory or contractual basis for an attorney fee award. [Citation omitted]. And CBA Section 20.8 Step 3(f)(ii) requires each party to bear its own expenses.

Id., at 334.⁶ Likewise, the CBA provided that “The arbitrator shall not have the authority to add to, subtract from, alter, change or modify the terms of this agreement.” *Id.*, at 338. Division III soundly rejected the employer’s defenses, finding that the arbitrator was authorized to award attorney’s fees on an “equitable ground.” *Id.*, at 339.

The State’s purported distinctions of *Yakima County’s* circumstances are insufficient to undercut the applicability of its basic rationale. First, it is immaterial that the arbitrator awarded fees for a preceding court action, rather than the arbitration proceeding itself. Either way, the arbitrator awarded fees for the employer’s frivolous conduct, despite that the CBA required that each party bear its own fees.⁷ Second, it is likewise immaterial that Division III found that the Union waived attorney’s fees in its action to enforce the arbitrator’s award.

⁶ The contract provision stated, “Each party shall pay the expenses of their own representatives, witnesses, and other costs associated with the presentation of their case. The cost and expense of the arbitrator shall be borne equally by the parties.” *Id.*, at 344.

⁷ Of course, as the *Yakima County* case exemplifies, it is entirely consistent to find that an employer’s refusal to arbitrate is frivolous, while its defense of its disciplinary decision at arbitration is not.

After all, with respect to the enforcement action, the Guild in *Yakima County* lacked the very thing the Union possesses here: an arbitral award of attorney's fees on the basis of a finding of frivolous conduct.

Agnew v. Lacey Co.-Ply, 33 Wash. App. 283, 654 P.2d 712 (1982), *review denied* 99 Wash. 2d 1006 (1983), cited by the State, is inapposite. To begin, the *Agnew* court does not vacate an arbitrator's award of attorney's fees; it requires that fees be awarded where the arbitrator had denied them. Perhaps more important, *Agnew* is a commercial case, not a labor case. A careful reading of the opinion discloses that commercial arbitration decisions are subject to an entirely different scope of review than are labor arbitration decisions. In particular, while labor arbitrators are the final judge of both the law and the facts, even if they are mistaken, commercial arbitrators can be overturned for an "erroneous rule" or a "mistake in applying the law." *See, Agnew, supra*, at 287 citing *Northern State Construction Company v. Banchemo*, 63 Wash. 2d 245, 249 (1963). Indeed, when *Agnew* was issued, RCW 7.04.160 provided multiple grounds for overturning an arbitrator's award. This statutory framework directly conflicts with

governing labor law, which makes labor arbitrators' awards virtually unreviewable.⁸

Endicott Education Association v. Endicott School District No. 308, 43 Wash. App. 392 (1986), also cited by the State, actually lends further support to the Union. There, the CBA required that a grievance contain "the remedy sought." *Id.*, at 394. A teacher filed a grievance alleging that she had been denied the contractually-required "preparation period," and indicating that the relief sought as, "I would like my preparation period back." An arbitrator sustained the union's grievance and awarded back pay sufficient to cover the daily preparation period for an entire academic year. *Id.*, at 393. The employer appealed, contending that the arbitrator lacked authority to award back pay, because the teacher had not requested it in her grievance, as required by the CBA. Division III nonetheless affirmed the arbitrator's award, emphasizing the extraordinary deference owed to arbitrators in fashioning remedies. *Id.*, at 394-95.

Hitter v. Bellevue School District No. 405, 66 Wash. App. 391 *review denied* 120 Wash.2d 1013 (1992) is irrelevant. That case is about the ability of a prevailing party to recover fees under RCW 49.48.030, in the absence of a finding of bad faith by the losing party. It says nothing

⁸ RCW 7.04 was repealed effective January 1, 2006.

about a case where, as here, the losing party's frivolous conduct has forced the prevailing party to incur attorney's fees needlessly.

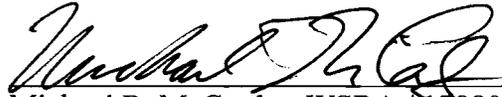
CONCLUSION

For these reasons, the Union requests that the Court affirm the Superior Court's decision, deny DOT's Petition for Writ of Certiorari and uphold Arbitrator Cox's and the Marine Employees' Commission's award of attorney's fees to the Union. The DOT's frivolous conduct justified the Arbitrator and the MEC's interpretation of the contract's attorney fee clause adversely to DOT. This interpretation is unreviewable under governing Washington Supreme Court authority. Finally, arbitrators and labor agencies such as the MEC and PERC must retain the authority to award attorney's fees in order to deter frivolous claims and defenses by labor unions and employers. Without that authority, parties with greater wherewithal will not be deterred from pursuing frivolous litigation in the hope of simply wearing down an impecunious adversary.

DATED this 20 day of January, 2011.

Respectfully submitted,

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AFL-CIO

Ellen M. Beck hereby makes the follow declaration: I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein. I certify that on January 20, 2011 via e-mail and U.S. First Class Mail, postage prepaid, a copy of MARINE ENGINEERS' BENEFICIAL ASSOCIATION's RESPONSE BRIEF and this DECLARATION to the following counsel:

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

DATED this 20th day of January, 2011, in Seattle,
Washington.



Ellen M. Beck