Supreme Court Case No. 89814-6
Court of Appeals Case No. 43783-0-II

SUPREME COURT
OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA,
D/B/A COMMUNITY TRANSIT, Petitioner-Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION, Respondent/Appellee,

And

AMALGAMATED TRANSIT UNION, LOCAL 1576,
Respondent-Appellee

ANSWER TO PETITION FOR REVIEW

Beth Barrett Bloom, WSBA #31702
FRANK FREED SUBIT & THOMAS LLP
Attorneys for Respondent-Appellee
ATU, Local 1576
705 Second Avenue, Suite 1200
Seattle, WA 98104
Telephone: (206) 682-6711
Fax: (206) 682-0401
E-mail: bbloom@frankfreed.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations and Rules

I. IDENTITY OF RESPONDENT

Respondent Amalgamated Transit Union, Local 1576 ("ATU"), represents bus drivers and other transit workers employed by Petitioner Snohomish County Public Transportation Benefit Area, d/b/a/ Community Transit.

II. COURT OF APPEALS DECISION TO BE REVIEWED

Snohomish County Public Transportation Benefit Area d/b/a Community Transit v. State of Washington Public Employment Relations Commission and Amalgamated Transit Union, Local 1576, 2013 WL 6671806, (Wash.App. Div 2, Dec. 17, 2013) (No. 43783-0-II).

III. ISSUES PRESENTED FOR REVIEW

Respondent ATU does not seek review of any issues. This is an answer to Community Transit's petition for review. The Supreme Court should not accept discretionary review of the Court of Appeals decision because the considerations governing acceptance of review are not met. RAP 13.4(b).

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

ATU accepts the statement of facts set forth in Community Transit's Petition For Review with limited exception. Petition at 2-6. The hearing examiner, Washington Public Employment Relations Commission

("PERC"), Thurston County Superior Court, and Court of Appeals have rejected the arguments raised by Community Transit in this petition. Respondent's characterization of those decisions is legal argument rather than statement of fact. The written decisions of the lower courts speak for themselves.

V. THIS COURT SHOULD NOT GRANT REVIEW

Rule of Appellate Procedure 13.4(b) provides that a petition for review may be be granted if (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; ... or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Neither criteria for review is present here. The Court of Appeals' decision synthesized the holdings of this Court with recent PERC decisions determining the outer limits of good faith bargaining where the employer seeks a broad waiver of the union's statutory rights. There is no conflict with any decision of this Court. The unpublished decision is limited to its facts and established law. It does not involve an issue of substantial public interest. This Court should deny Community Transit's Petition for Review.

A. The Court of Appeals Decision Addressed An Issue Not Reached in *City of Pasco.* There Is No Conflict.

City of Pasco addressed whether a management rights clause is a mandatory subject of bargaining that may be pursued to impasse and interest arbitration. The issue addressed by the Court of Appeals presents a different question: whether a broad waiver provision is a permissive subject of bargaining that may not be pursued to impasse and interest arbitration. Because the issues addressed are not the same, no conflict exists.

In *City of Pasco,* the Washington Supreme Court recognized the distinction between mandatory and permissive subjects. 132 Wn.2d 450, 460-61, 938 P.2d 827, 836 (1997). Affirming a PERC decision, the Supreme Court held that the employer's management rights proposal could be bargained to impasse as a mandatory subject of bargaining. The Court also acknowledged the outer limits of bargaining, noting that a management rights clause:

> can go only so far.... [S]uch clauses cannot invade a union's statutory right and duty to be the exclusive representative of the relevant employees.

132 Wn.2d 450 at 466 (citing *Toledo Typographical Union No. 63 v. N.L.R.B.*, 907 F.2d 1220, 1222 (D.C.Cir.1990)). This Court left for another

day questions of when a management rights clause might "go too far" and be ineligible for interest arbitration.

Since *City of Pasco*, the PERC has considered the outer limits of good faith bargaining. It has consistently held that *City of Pasco* does not give employers an absolute right to insist to impasse (and obtain interest arbitration) on waivers of bargaining rights. *Whatcom County Deputy Sheriff's Guild v. Whatcom County*, No. 7244-B, 2004 WL 725698, at *7 (Wash. Pub. Emp't Relations Comm'n Feb. 11, 2004). To the contrary, "a broad waiver of statutory [bargaining] rights" is a permissive subject of bargaining. *Id.*; *accord* CP 10-14; *Int'l Ass'n of Fire Fighters Local 1604 v. City of Bellevue,* No. 11435-A, 2013 WL 3784086, at *6 (Wash. Pub. Emp't Relations Comm'n July 12, 2013).

The law is clear. When an employer insists to impasse on language "so broad as to substantially modify the collective bargaining system by weakening the independence of the union," the employer has not bargained in good faith. *Id.* at *6; *accord City of Pasco,* 132 Wn.2d 450 at 466.

Unlike the management rights clause considered in *City of Pasco*, before this case became an impasse case, it was a waiver case. The employer first defended an unfair labor practice complaint by alleging that the language at issue constituted a waiver. *Amalgamated Transit Union,*

Local 1576 v. Community Transit, No. 6375, 1998 WL 1978452 at *3 (Wash. Pub. Emp't Relations Comm'n July 23, 1998); AR 164. Typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver of rights afforded by statute. *Teamster Local Union 252 v. Griffin School District,* No. 10489-A 2010 WL 2553112 (Wash. Pub. Emp't Relations Comm'n June 18, 2010). However, Community Transit persuaded PERC that the disputed provision, which creates an alternate procedure for bargaining, established a clear and unmistakable waiver of the union's right to bargain over the employer's rules, regulations, and standard operating procedures. AR 164-169.

Having established the union's broad waiver of rights in the first matter, the employer cannot then insist to impasse upon inclusion of the broad waiver language in future contracts without weakening the collective bargaining system and running afoul of the holding in *City of Pasco*. CP 13; *See also City of Bellevue*, at *6 (citing *City of Pasco,*132 Wn.2d at 463-64).

PERC followed *City of Pasco* when it found that Community Transit could not bargain the waiver clause to impasse. As the PERC explained:

> [I]t is simply inconsistent with the purpose of the statute to permit an employer to insist to impasse on the exclusion of the employees' statutory representative from the bargaining process.

CP 13 (quoting *Whatcom County*) (internal quotations omitted). The Court of Appeals correctly affirmed the ruling of the PERC consistent with *City of Pasco.*

B. The Court of Appeals Followed *City of Richland.*

Whether a proposed contractual provision addresses a mandatory or permissive subject of bargaining depends on the facts of each case. *International Ass'n of Fire Fighters, v. Public Employment Relations Commission*, 113 Wn.2d 197, 778 P.2d 32 (1989) ("City of Richland"). *City of Richland* established a balancing test meant to be used when a provision addresses both mandatory subjects of bargaining and permissive subjects of bargaining. *Id.* at 203. In such a case, "the focus of inquiry is to determine which of these characteristics predominates." *Id.*

Community Transit contends that PERC failed to apply the *City of Richland* balancing test. This argument ignores the close scrutiny of the provision PERC applied in both the waiver and the impasse cases. PERC did not begin with a clean slate. It relied on its 1998 decision in which it found that Article 18.2 waived the union's right to negotiate changes to the employer's rules, regulations, and standard operating procedures. AR

164-169. In the impasse case, PERC recognized the broad waiver of rights. CP 10-14 (incorporating hearing examiner's finding of fact); AR 1762-1773. The waiver provision is exceedingly broad. It governs almost every aspect of employee working conditions and eliminates any real opportunity for ATU to contest Community Transit's changes to working conditions. Decision at 9.

The waiver provision has only an indirect impact on employee concerns because it is a procedure addressing the relationship between the union and the employer rather than wages, hours, or working conditions. CP 13. Having closely scrutinized the same language in 1998 and held that the provision established a broad waiver of the union's statutory rights, it was not necessary for the PERC to again closely weigh the impact of the provision under the *City of Richland* test. To do so would have been "superfluous." Decision at 10.

C. The Unpublished Court of Appeals Decision is Limited to the Facts of This Case. No Substantial Public Interest is Involved.

Whether a proposal is a mandatory subject of bargaining is determined on a case-by-case basis. *City of Richland,* 113 Wn.2d at 203. In reaching its decision, the Court of Appeals relied on factual findings from both the impasse and waiver cases concerning the language at issue. The decision of the Court of Appeals is limited to the facts of this case. It

was not designated for publication in the Washington Appellate Reports. Decision at 11.

Community Transit claims the Court of Appeals has fashioned a new interpretation of how subjects of bargaining are evaluated. It claims that review is needed to avoid the "substantial confusion" created by the decision about how parties should approach the duty to bargain. In fact, the decision synthesizes this Court's *City of Pasco* and *City of Richland* decisions with PERC decisions dating back to 2004 in *Whatcom County* through 2013 in *City of Bellevue.*

In *City of Pasco,* this Court made clear that an employer may not insist to impasse on a provision that invades the union's statutory right and duty to represent employees in bargaining. 132 Wn.2d at 466. The waiver provision at issue in this case invades the union's statutory rights. Following *City of Pasco*, PERC has repeatedly held that a broad waiver of statutory rights may not be bargained to impasse. There should be no confusion on this point.

The unpublished decision of the Court of Appeals is a case-specific analysis based on the facts of this case and established law. Discretionary review would not involve an issue of substantial public interest that should be determined by the Supreme Court.

VI. CONCLUSION

The Court of Appeals' decision considers the broad waiver of statutory rights. This question was not addressed in *City of Pasco.* The Court of Appeals followed *City of Richland.* This unpublished decision is limited to its facts and established law such that no substantial public interest exists. This Court should deny Community Transit's Petition for Review.

RESPECTFULLY SUBMITTED the 18th day of February 2014.

FRANK FREED SUBIT & THOMAS, LLP

By: _____
Beth Barrett Bloom, WSBA # 31702
Attorneys for Respondent-Appellee ATU

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on February 18, 2014 I caused true and correct copies of the foregoing Opposition To Petition For Review to be served by legal messenger to the following:

Shannon E. Phillips
Sofia D. Mabee
Summit Law Group PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 098104-2682

Michael P. Sellars, Executive Director
Marilyn Glenn Sayan, Chairperson
Washington Public Employee Relations Commission
112 Henry Street NE, Suite 300
Olympia, WA 98506

Office of Attorney General
State of Washington
1125 Washington Street SE
Olympia, WA 98504-0100

Dated this 14th day of February 2014.

Sheila Romoff