C-TRAN (Amalgamated Transit Union, Local 757), Decision 7087-A (PECB, 2001)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

C-TRAN, Employer.	
DANIEL DURINGER, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 757 Respondent.	CASE 14872-U-99-3746 DECISION 7087-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
C-TRAN, Employer.	
BARBARA DEJEAN Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 757 Respondent.	CASE 14873-U-99-3747 DECISION 7088-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Duringer and *Barbara DeJean* appeared *pro se*.

Susan Stoner, Attorney at Law, appeared for the respondent.

On November 2, 1999, Daniel Duringer and Barbara DeJean filed identical complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC,

naming Amalgamated Transit Union, Local 757 (union) as respondent. The complaints alleged that the union had discriminated against the complainants, in connection with their employment with C-TRAN (employer). Separate case numbers were assigned, as required by WAC 391-08-650(4), but the cases were consolidated for processing. A preliminary ruling was issued on January 24, 2000, under WAC 391-08-110, framing the cause of action as:

> Union breach of its duty of fair representation on or after July 1, 1999, by making proposals which benefit bargaining unit employees working full-time while discriminating against bargaining unit employees working part-time.

A hearing on the consolidated cases was held on November 28, 2000, before Examiner Rex L. Lacy. The parties filed post-hearing briefs.

Based on the evidence and record as a whole, the Examiner rules that no unfair labor practices were proven.

BACKGROUND

Clark County Public Transportation Benefits Area, d/b/a C-TRAN, is a "public employer" within the meaning of RCW 41.56.030(1). It operates a public passenger transportation (bus) system throughout Clark County, Washington. Since July 1, 1999, the services provided by the employer have included a "paratransit" (van) service that was formerly operated by Laidlaw, Inc.

Daniel Duringer and Barbara DeJean were both employed by Laidlaw, Inc. prior to July 1, 1999, as drivers in the paratransit service.

They both limited their work with Laidlaw to the summer months and weekends during the balance of the year, to avoid conflicts with their jobs as regular part-time school bus drivers for the Washougal School District.

Amalgamated Transit Union, Local 757, has historically been the exclusive bargaining representative of a bargaining unit of coach operators employed by C-TRAN, under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The employer and union have been parties to a series of collective bargaining agreements covering the coach operators, including a contract that was in effect as of July 1, 1999. That contract contains a "five day availability" clause which could, if implemented according to its terms, effectively preclude the "weekends only during the school year" schedule by which Duringer and DeJean made themselves available to work as employees of Laidlaw, Inc.

The union was also the exclusive bargaining representative of the paratransit drivers employed by Laidlaw, Inc. under the National Labor Relations Act (NLRA). On March 23, 1999, the union learned that C-TRAN would be assuming operation of the paratransit services then being provided by Laidlaw. The union requested to bargain with C-TRAN concerning the wages hours, and working conditions of the paratransit employees.

C-TRAN agreed to bargain with the union, and it requested that the paratransit operators be included in the existing collective bargaining agreement covering the transit operators. Negotiations between C-TRAN and the union concluded on May 18, 1999, and they signed a written contract on June 23, 1999. Thus, the assumption of the former Laidlaw paratransit (C-VAN) operation by C-TRAN on July 1, 1999, was accompanied by a merger of the historically separate bargaining units.

POSITIONS OF THE PARTIES

Duringer and DeJean contend that the union has breached its duty of fair representation because it did not attempt to negotiate contract provisions which allowed for part-time school bus drivers to be employed by C-VAN, did not resolve conflicts to allow part-time school bus drivers to continue to be employed by C-VAN, did not definitely answer their questions about a contractual "five day availability" requirement, and did not resolve a benefits issue. The complainants contend that the union improperly aligned itself against school bus drivers in a manner which deprived them of employment opportunities with the employer.

The union contends that Duringer and DeJean initiated these unfair labor practice proceedings because the union failed to negotiate amendments to the existing labor contract which would meet their special work schedule preferences, that amendment to the contract would have been necessary because the existing labor agreement gives the employer the sole discretion to schedule bus routes, that the labor agreement provides the employer the latitude to design the exact schedule the complainants desire, that the union notified the employer that it was willing to discuss the complainants problem, and that the employer made a business decision to eliminate the weekend work schedule.

The employer was not named as a party in these cases,[1] and neither attended nor participated in the hearing.

[1] The preliminary ruling issued in these cases pointed out that the employer's name would appear in captions and other documents, even though the employer is not a party. Every case processed by the Commission must arise out of an employment relationship subject to the agency's jurisdiction, and the agency's case docketing procedures require identification of the employer in all cases.

DISCUSSION

Applicable Legal Standards

The Duty of Fair Representation -
A duty of fair representation arises from holding status as the "exclusive bargaining representative" of a bargaining unit under RCW 41.56.090. Under that duty, the union must fairly represent the interests of *all* bargaining unit members during negotiations and administration of collective bargaining agreements. As set forth by the Supreme Court of the United States in *Vaca v. Sipes*, 386 U.S. 171 (1967), a union is required to deal with all employees without hostility or discrimination, in a reasonable, nonarbitrary manner, and in good faith. Commission precedents adopting the same principles include *Pateros School District*, Decision 3744 (1991).

All bargaining unit members are protected by the fair representation doctrine, including employees who actively oppose the union or its leadership. Even those who refuse to become members are covered, along with those who only pay dues under a lawful union shop or other contractual union security arrangement.

The union correctly notes that the Commission has declined to assert jurisdiction over "breach of duty of fair representation" claims arising exclusively from the processing of contractual grievances. *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982). A separate line of precedent holds, however, that the Commission will police its certifications, and will assert jurisdiction over "fair representation" claims which call into question a union's status as exclusive bargaining representative. *See Tacoma School District (Tacoma Education Association)*, Decision 5465-E (EDUC, 1997); *Pe Ell School District*, Decision 3801-A (EDUC, 1992); *Pateros School District*

(Pateros Education Association), Decision 3744 (EDUC, 1991); *King County*, Decision 5889 (PECB, 1997).

The duty of fair representation only extends to employees while they are within the particular bargaining unit. In *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir., 1981), certain individuals who moved back and forth between supervisory positions and bargaining unit positions, as workloads dictated, alleged a violation of the duty of fair representation. The court held that, because supervisors could not be represented by the union under the NLRA,[2] the union owed them no duty of fair representation while they were working in their supervisory capacity.

Application of Standards

Commission Jurisdiction Limited to Current Period -
Even if the union owed Duringer and DeJean a duty of fair representation prior to July 1, 1999, while they were employees of Laidlaw, Inc., the Public Employment Relations Commission has no jurisdiction to hear or determine any claims concerning that period. The bargaining relationship between Laidlaw, Inc. and the union was regulated by the National Labor Relations Board and the federal courts under the NLRA, and was entirely outside of the Commission's jurisdiction under Chapter 41.56 RCW.

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[2] The legal analysis would be only slightly different under Chapter 41.56 RCW. Different from their status under the NLRA, supervisors have full bargaining rights under state law. *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977). However, supervisors are routinely excluded from the bargaining units which contain their rank-and-file subordinates. *City of Tacoma*, Decision 95-A (PECB, 1977); *City of Richland*, Decision 279-A (PECB, 1978), *aff'd,* 29 Wn. App. 599 (1981), *review denied,* 96 Wn.2d 1004 (1981).

<u>The Context of this Controversy</u> -
"Good faith bargaining is never 'from scratch', but from the status quo." *Shelton School District*, Decision 579-B (PECB, 1984). When the union and C-TRAN sat down to negotiate the wages, hours and working conditions of the employees to be transferred from Laidlaw, the "five day availability" clause and other contract terms negotiated by the union and C-TRAN prior to March 1999 were part of the existing status quo.

<u>Discrimination</u> -
The standard of proof for "discrimination" claims was summarized in *Seattle School District*, Decision 5946 (PECB, 1997), as follows:

> The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, protects the right of public employees to organize and designate representatives of their own choosing for the purposes of collective bargaining. Employees also enjoy protection from interference with their statutory collective bargaining rights under RCW 41.56.140(1), and protection from discrimination for filing unfair labor practice complaints under RCW 41.56.140(3). The standard for enforcing the "interference" and "discrimination" protections has been established by the Supreme Court of the State of Washington. In *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991), the Court adopted a "substantial factor" test for determining discrimination cases. While a charging party retains the burden of proof at all times, it only needs to establish that the statutorily protected activity was a "substantial" motivating factor in the . . . decision to take adverse action against the employee.
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> As the Court indicated in *Wilmot*, at page 70:
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>> If the plaintiff presents a prima facie case, the burden shifts to the employer. To satisfy the burden of production, the employer must artic-

> ulate a legitimate nonpretextual nonretaliatory reason for the discharge. . . . [I]f the employer produces evidence of a legitimate basis for the discharge, the burden shifts back to the plaintiff . . . [to] establish [that] the employer's articulated reason is pretextual.
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> The Commission has embraced a "substantial factor" test. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *City of Federal Way*, Decision 4088-B (PECB, 1994). That standard was discussed recently in *North Valley Hospital*, Decision 5809 (PECB, 1997) and *Mukilteo School District*, Decision 5899 (PECB, 1997).

The "substantial factor" method of analysis is equally applicable to analysis of employee claims that a union had discriminated in violation of its duty of fair representation.

Application of Standards

The evidence provided by Duringer and DeJean fails to establish a breach of the union's duty of fair representation, by discrimination or otherwise.

Absence of Controversy -
There is no evidence that Duringer and/or DeJean were activists for or against the union or its leadership. Nor is there any evidence that they were members of any class traditionally protected with regards to discrimination.

Absence of Deprivation of Ascertainable Right -
Any merger of bargaining units or workforces presents some difficult problems for the union involved: One of the employees who held the first place on a seniority list will inevitably hold

a lower place on a merged seniority list, and similar issues will arise on down the list. In this case, however, the evidence does not indicate any systematic discrimination against the former Laidlaw employees. Instead, they were given credit for their service with Laidlaw when they were integrated into the C-VAN seniority list on July 1, 1999. Duringer brought several years of service with him from Laidlaw, and he was ranked high on the C-VAN seniority list; DeJean was also credited for her prior service, and was ranked high on the C-VAN seniority list.

Both Duringer and DeJean worked for C-VAN during July and August of 1999. They have no complaint regarding that period.

As the commencement of the next school year (in late August or early September) approached, Duringer and DeJean were to return to their jobs as school bus drivers for the Washougal School District, and they wanted to limit their C-VAN assignments to weekends. They sought to negotiate with the employer, and also requested that the union negotiate with the employer to allow them to only work weekends for C-VAN. In essence, however, Duringer and DeJean were also asking the employer to make weekend work available to school bus drivers on a preferential basis.

The employer decided against the scheduling system requested by Duringer and DeJean, and it notified both Duringer and the union of that decision. When school resumed, Duringer and Dejean could not meet the availability requirements to continue as C-VAN drivers.

Nothing is cited or found which makes school bus drivers a protected class, or gives them preferential rights in regard to other employment opportunities. While testimony indicates that both Duringer and DeJean were able to select the days they desired to work while employed by Laidlaw, that neither obligated C-TRAN

to allow them a similar arrangement nor enabled the union to force such an arrangement upon C-TRAN. Thus, the complainants have failed to establish an essential element of proof of discrimination, and have failed to make out even a prima facie case under the applicable legal standard.

FINDINGS OF FACT

1. Clark County Public Transportation Benefit Area d/b/a C-TRAN is a "public employer" within the meaning of RCW 41.56.030(1). The employer provides public passenger transportation services throughout Clark County, Washington. Included in the services provided by the employer is a paratransit service generally known as C-VAN.

2. Amalgamated Transit Union, Local 757, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of full-time and part-time employees engaged in the operation of the employer's public passenger transportation system.

3. The employer and the union have been parties to a series of collective bargaining agreements. An agreement which was in effect on July 1, 1999, provided for the wages, hours, and working conditions of C-VAN operators, including provisions concerning seniority, posting of bus routes for bidding by employees, and a grievance procedure. The contract language and practices then in effect required employees to be available for work five days per week.

4. On or before March 23, 1999, the employer took steps to assume operation of paratransit services provided by Laidlaw, Inc.

5. Daniel Duringer and Barbara DeJean were employed by Laidlaw, Inc. in the paratransit operations to be taken over by C-TRAN.

6. Separate and apart from their jobs as paratransit drivers as described in Finding of Fact 5, Duringer and DeJean were employed as school bus drivers with another employer.

7. While employed as described in Finding of Fact 5, Duringer and DeJean had been permitted to limit their availability to avoid conflicts with their separate employments as school bus drivers described in Finding of Fact 6.

8. On March 23, 1999, the union requested to bargain with C-TRAN concerning the wages, hours, and working conditions of the employees in the paratransit operation to be taken over from Laidlaw. C-TRAN agreed to bargain with the union, and the parties agreed to include the affected employees in their existing collective bargaining agreement. The union proposed and/or accepted contract provisions which may have been perceived as benefitting full-time employees to a greater extent than part-time employees, including retention of the "five day availability" requirement for part-time employees. Negotiations between C-TRAN and the union concluded on May 18, 1999, and they signed a written contract on June 23, 1999.

9. The former Laidlaw paratransit operation became part of the employer's C-VAN operation on July 1, 1999.

10. As of July 1, 1999, Daniel Duringer and Barbara DeJean became "public employees" within the meaning of RCW 41.56.030(2), with regard to their jobs as paratransit drivers described in Finding of Fact 5. They were placed on the C-VAN seniority

list with credit for their service as Laidlaw employees, and they worked as C-VAN employees in July and August of 1999.

11. Duringer and DeJean requested deviation from the "five day availability" requirement practiced at C-TRAN, and requested that school bus drivers be given a preference for weekend work at C-VAN, in order to avoid conflicts with their regular and ongoing school bus jobs described in Finding of Fact 6.

12. The employer rejected the deviations from practice described in Finding of Fact 11, and the union had no means or duty to impose those deviations upon the employer. As a result, Duringer and DeJean were unable to continue working two jobs as described in Finding of Fact 5 and Finding of Fact 6.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By the actions described in Finding of Fact 12, Duringer and DeJean were not deprived of any ascertainable right, status, or benefit to which they were entitled by Chapter 41.56 RCW.

3. The complainants have failed to establish, by a preponderance of the evidence, a prima facie case that Amalgamated Transit Union, Local 757, breached its duty of fair representation by discrimination against Daniel Duringer and/or Barbara DeJean.

4. The complainants have failed to establish, by a preponderance of the evidence that Amalgamated Transit Union, Local 757, aligned itself in interest against them on or after July 1,

1999, by proposing or accepting contract provisions which the complainants have asserted as benefitting bargaining unit employees working full-time to a greater extent than bargaining unit employees working part-time.

ORDER

The unfair labor practice complaints filed by Daniel Duringer and Barbara DeJean are hereby DISMISSED, on their merits.

DATED at Olympia, Washington, this 18th day of May, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.