IN THE MATTER OF

KITSAP TRANSIT

AND

AMALGAMATED TRANSIT UNION NO. 1384

PERC No.: 22135-I-08-522

Date Issued: December 8, 2010

INTEREST ARBITRATION OPINION AND AWARD

OF

NEUTRAL CHAIR

OF

ARBITRATION PANEL

Alan R. Krebs, Neutral Chair
Ellen Gustafson, Kitsap Transit Selected Arbitrator
Dennis Antonellis, Amalgamated Transit Union No. 1384 Selected Arbitrator

Appearances:

KITSAP TRANSIT	Bruce L. Schroeder
AMALGAMATED TRANSIT UNION NO. 1384	James M. Cline

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OPINION OF THE NEUTRAL CHAIR

PROCEDURAL MATTERS

In accordance with RCW 41.56.492 an interest arbitration hearing involving certain employees of a public passenger transportation system was held on May 11-13 and June 16-17, 2010, in Bremerton, Washington. Ellen Gustafson was selected by the Employer and Dennis Antonellis was selected by the Union to serve on the Arbitration Panel. The Neutral Chair of the Arbitration Panel selected jointly by the parties is Alan R. Krebs. Kitsap Transit was represented by Bruce L. Schroeder of the Summit Law Group. Amalgamated Transit Union No. 1384 was represented by James M. Cline of the law firm Cline & Associates.

At the hearing, witnesses testified under oath and the parties presented documentary evidence. A court reporter was present, and, subsequent to the hearing, a copy of the transcript was submitted to the Neutral Chair. The Neutral Chair received the parties' briefs on September 1 and 3, 2010.

In consideration of the number of issues and extensive record presented to the Panel, which included an extraordinary volume of exhibits, the parties agreed to waive the time limits for the issuance of the Neutral Chair's decision.

The Neutral Chair consulted with the other Panel members prior to the issuance of this Opinion.

APPLICABLE STATUTORY PROVISIONS

When public passenger transportation systems in the state of Washington and their employees are unable to reach agreement on new contract terms by means of negotiations and mediation, RCW 41.56.492 calls for interest arbitration to resolve their dispute. This dispute involves two separate bargaining units and labor agreements. One involves the Employer's "routed" operations, the other its ACCESS operations. The parties are at impasse on both and they agreed to consolidate their resolution into a single interest arbitration proceeding involving two separate collective bargaining agreements. Arbitrators are generally mindful that interest arbitration is an extension of the bargaining process. They recognize those contract provisions upon which the parties could agree and decide the remaining issues in a manner which would approximate the result the parties would likely have reached in good faith negotiations considering the statutory criteria. A party proposing new contract language has the burden of proving that there should be a change in the status quo.

RCW 41.56.492 sets forth certain criteria which must be considered by the Neutral Chair in deciding the controversy after consultation with the other Panel members:[1]

* * *

> . . . In making its determination, the arbitration panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
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> (a) The constitutional and statutory authority of the employer;
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> (b) Stipulations of the parties;
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> (c) Compensation package comparisons, economic indices, fiscal constraints, and similar factors determined by the arbitration panel to be pertinent to the case; and;

[1] See also WAC 391-55-245.

(d) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment.

The statute does not provide guidance as to how much weight should be given to any of these standards or guidelines, but rather leaves that determination to the reasonable discretion of the Panel.

ISSUES

The Washington Public Employment Relations Commission (PERC) certified 19 issues for interest arbitration which were at impasse following mediation. The parties advised the Panel that after this certification of issues, the parties agreed to settle or withdraw a number of them. The following are the issues remaining, as listed and described in the PERC certification document:

Union Issues

* * *

2. Routed & Access Article 8, and or by glossary: Definitions of work to classifications

3. Routed & Access Article 6: Grievances

* * *

6. Routed Article 9, Access Articles 9 & 10: Seniority

7. Routed Articles 8, 12 & 13, Access Articles 8, 12-14: % assignment to FT/EB/PT.

8. Routed Article 14, Access Article 16: Leave; Earning and Using

* * *

12. Routed Appendix A & B, Access Appendix A: Wages.

* * *

14. Routed Articles 25, Access Article 28: Effective Dates.

Employer Issues

* * *

2. Article 6, 4, B Arbitrator Selection (Routed only).

3. Article 7.2 Time in Personnel File.

* * *

The parties agree that the Agreements for both the routed bargaining unit and the ACCESS bargaining unit shall have a duration from February 16, 2008 through February 15, 2011.[2] For the contract negotiations underlying this dispute, the parties, for the first time, agreed to negotiate the routed contract and the ACCESS contract at the same time.

NATURE OF THE EMPLOYER

The Employer is a municipal corporation functioning as a public transportation benefit area for Kitsap County, Washington. It provides public transportation services to an area population of about 244,800. These services include traditional bus service on designated routes with stops. The coach operators providing this service are included in the "routed" bargaining unit. By law, the Employer is also required to provide door to door transportation service to persons whose disability prevents them from utilizing the fixed route service. The Employer has extended this paratransit service, referred to as ACCESS, beyond its legal requirements to all persons over the age of 80 regardless of whether they have a qualified disability, to women in their last trimester of a high risk pregnancy, and to persons between 60 and 79 who are not disabled and who live more than three quarters of a mile from the nearest bus stop and who have

[2] The processing of this dispute to interest arbitration was delayed by a unit clarification petition and blocking unfair labor practice charges which were filed with the Public Employment Relations Commission.

no means of getting to it. The ACCESS drivers receive a list of addresses and they are required to plot out a route to transport the passengers. ACCESS drivers may have to go to the disabled passenger's door in order to provide assistance. The operators who provide these services to the disabled and the elderly drive vans and smaller buses which accommodate wheel chairs. Routed operators also transport the disabled, but generally this is done from regular stops. Routed buses are equipped to handle wheelchairs and the routed operator must secure the wheelchairs once they are lifted into the bus.

Both the routed and the ACCESS Agreements contain a provision which allows the Employer to implement "experimental service to try out different service concepts before it implements them on a more permanent basis. Examples of experimental service include a route deviation system, or a zoned system with one (1) or two (2) time points and the remaining time points determined by passenger requests for stops." These provisions provide that no more than three pieces of work can be devoted to experimental service at one time, and that if they are continued then they go to the normal bid process. Experimental service was added to the ACCESS contract in 2004. Shortly afterwards, the Employer implemented experimental service on the "Purdy run," assigning it to the ACCESS unit, and eventually made it permanent. That run starts at the Port Orchard ferry terminal where it meets the incoming ferry and goes to Purdy and back. It has a few timed pickup and drop off points at park and rides on the way to Purdy. The ACCESS operator on the Purdy run is authorized to deviate up to three quarters of a mile off the main road in order to drop passengers off at their destination. John Clauson, the Employer's service development director, testified that the ACCESS operator assigned to the Purdy run provides service in that corridor to both paratransit and non-paratransit passengers. Rita DiIenno, the Union's president and business agent, testified that in addition to the scheduled Purdy run,

the Employer also utilizes a dedicated paratransit vehicle in that corridor. Previously, there had been traditional bus service to Purdy utilizing routed operators, but that service had been eliminated because of a decrease in revenues which had occurred in 1999. Ms. DiIenno testified that the Union was not timely in challenging the assignment of the Purdy run to ACCESS drivers rather than to the higher paid routed drivers. Karl Farnsworth, a scheduler/dispatcher, testified that the Purdy service constitutes 0.82% of the ACCESS total weekly service.

The Union did timely challenge the Employer's assignment of the Port Orchard ferry drop off service. This service involved picking up passengers coming off the Port Orchard ferry and then dropping them off at the curb by their destination, and the operator would deviate from their route by up to three to four blocks in order to do this. The Union filed an unfair labor practice charge with PERC alleging that the Employer transferred the ferry take-home service from the routed bargaining unit to the ACCESS bargaining unit without providing notice to the Union and a meaningful opportunity to request bargaining. PERC, in Decision 9667-A-PECB (2008), determined that the Employer unlawfully transferred the Port Orchard ferry take-home work from the routed bargaining unit and required the Employer to restore that work to the routed drivers, and, in addition, ordered monetary relief. PERC observed that routed drivers historically performed the Port Orchard ferry take-home work, and continued to perform ferry take-home work in Bremerton and Bainbridge Island.

In addition to the dial-a-ride service it offers to passengers with disabilities and to the other classes of passengers described above, the Employer also offers dial-a-ride service for non-paratransit passengers in certain areas of the County where ridership is at too low a level to support fixed route service. In these designated areas, any person can call the Employer to schedule a ride, and a driver will pick them up and take them to their destination or to a point

where they can transfer to regular routed service. Routed drivers performed this individual service in the Hansville area until this service was recently cut. When fixed routes were eliminated on Bainbridge Island, they were replaced with dial-a-ride service provided by ACCESS drivers and available to all individuals in a designated area. Mr. Farnsworth testified that such dial-a-ride service amounts to 0.52% of the ACCESS total weekly service. Mr. Clauson testified that it is the Employer's policy generally to change from fixed route service to dial-a-ride with ACCESS drivers when ridership averages less than ten passengers per hour. Mr. Clauson further testified that the Employer's long term plans are for demand response service to increase up to 10% of general public trips by 2015. Mr. Clauson testified that the Employer has no immediate plans to increase service.

Ms. DiIenno testified that the Union is concerned about the Employer's long range plans to implement bus rapid transit with feeder routes, fearing that these feeder routes would be assigned to ACCESS drivers, rather than the higher paid routed drivers. Mr. Clauson testified that feeder service presently is just a concept that the Employer has not yet defined. Ms. DiIenno testified that the Union is also concerned that the Employer will be transferring work from routed to ACCESS because the Employer has been replacing ACCESS vans with small buses. She testified that she is concerned that the number of ACCESS drivers increased from 33 in 2002 to 64 in 2010, while the number of routed drivers increased only from 97 to 99 during this period.

In both the routed and ACCESS contracts, full-time operators are guaranteed between 35 and 40 hours of work per week,[3] with two consecutive days off whenever possible. Both

[3] The hours guarantees for employees will be discussed in more detail in the section of this Opinion on "Guaranteed Hours."

contracts provide for three other types of assignments: Extra-Board, part time A-Board, and part time B-Board. Employees bid for assignments on a quarterly basis. These bids are made on a seniority basis within each bargaining unit. Generally, full time assignments are selected first, then Extra-Board assignments, and then the A- and B-Boards. Extra-Board operators are guaranteed a minimum of 30 hours each week. A-Board operators are guaranteed 15 hours each week. Both the Extra-Board and A-Board operators have no set schedule. Rather, they must call in the day before to receive their assignment for the next day from the Employer's schedulers. They may fill in on pieces of work that are not part of any operator's full-time schedule or that would otherwise be done by an operator who is on leave. Assignments may start as early as 3:10 a.m. and end as late as 9:50 p.m. Half of the Extra-Board routed positions are guaranteed two consecutive regular days off. The other half receives one guaranteed day off, and may have a second "preferred day off . . . when possible." In ACCESS, two Extra-Board bid assignments have two guaranteed days off. The remainder have one guaranteed day off and one preferred day off which need not be honored, depending on service needs. In routed, Extra-Board operators receive full holiday pay, while in ACCESS, Extra-Board operators' holiday pay is pro-rated based on the number of hours worked during the week before the holiday.

Katheryn Jordan is the Employer's operations supervisor and primary scheduler for the routed employees. Ms. Jordan testified that in general, Extra-Board assignments are created on a daily basis, in packages of six and a half to ten hours. She testified that whatever pieces of work are left over are assigned to A-Board. A-Board operators have one regular day off and one preferred day off, receive reduced holiday, leave, and medical benefits, and, are not entitled to the short-term disability benefit which is available to full time and Extra-Board employees. Any pieces of work that are left over after the A-Board assignments have been made are offered to the

B-Board operators. B-Board operators receive no guarantee of hours. They can obtain medical benefits by paying for half of the premium. B-Board operators receive four hours pay for each of six designated holidays. They accrue no leave and receive no disability coverage. On the routed side, there are two types of bids for B-Board operators: the work bid and the limited availability bid. A work bid is for specific pieces of work that would not fit into the full time work bids. Ms. DiIenno testified that such work bids for routed B-Board operators are typically eight to fifteen hours in total. The limited availability bid for routed B-Board operators signifies availability on either mornings, afternoons, or weekends, depending on which is selected. The Employer may ask, but may not require, routed B-Board operators to work at other than their designated bid times. On the ACCESS side, B-Board operators may select the days of the week that they are available to work, but they cannot limit their availability to mornings or afternoons, nor can they bid on specific pieces of work. Usually, new hires are assigned to B-Board and then progress up to A-Board, Extra-Board, and full time, by seniority.

SELECTION OF COMPARATORS

One of the primary "factors" set forth in RCW 41.56.492 which the Panel must take into consideration is "[c]ompensation package comparisons." The statute provides no guidance regarding the selection of the appropriate employers for comparison. The parties agree that the comparators should be confined to the state of Washington and further agree upon the following three comparators: Clark County Public Transportation Benefit Area (C-Tran), Intercity Transit of Olympia (Olympia Intercity), and Whatcom Transportation Authority (Whatcom). In addition, the Employer proposes Ben-Franklin Transit as a comparator. The Union opposes the inclusion

of Ben-Franklin Transit and urges consideration of Community Transit and Pierce County Public Transportation Benefit Area Authority Corporation (Pierce Transit) as comparators.

The Union argues that its five suggested comparators should be selected based on their geographic proximity, service area population, population density, relative proximity to a large urban region, and sales tax revenue, as well as the parties' bargaining history. The Union points out that while Pierce Transit and Community Transit are larger than Kitsap Transit, they all share resources and efforts as part of the Puget Sound Regional Planning Council, are all part of the Central Puget Sound labor market, and there is direct interface at the Pierce-Kitsap boundary where passengers may switch from a Kitsap Transit bus to a Pierce Transit bus. The Union argues that Ben-Franklin Transit should be excluded because it was not one of the comparators jointly selected by the parties during their previous round of negotiations and because it is situated in the less densely populated eastern part of the state distant from any metropolitan area.

The Employer argues that the four transit agencies it has proposed are appropriate for comparison, particularly because these are all the transit agencies in the state of Washington which serve populations within plus or minus 50% of Kitsap Transit's population service area. The Employer maintains that they also share similar demographics, such as revenue vehicle hours, vehicle miles and passenger trips. The Employer argues that Pierce Transit and Community Transit are not comparable inasmuch as they are much larger than Kitsap Transit using any measure of size. The Employer contends that geographical proximity should not override measures of similar size when fashioning appropriate comparables. The Employer notes that there is no evidence of lateral movement between Kitsap Transit and Pierce or Community Transit. The Employer asserts that Ben-Franklin Transit should not be excluded based on its location in Eastern Washington since it is similarly sized to Kitsap Transit and because Eastern

Washington jurisdictions are often compared to Western Washington jurisdictions by interest arbitrators. The Employer avers that its misguided agreement during one cycle of bargaining to drop Ben-Franklin Transit and add Community Transit and Pierce Transit should not be perpetuated in this arbitration. The Employer asserts that only when, during the 2005 negotiations, the Union refused to recognize the historical set of four transit comparables which have been consistently used at the Agency and which the Employer again now advocates, did the former Human Resources Director succumb to the Union's insistence upon dropping Ben-Franklin Transit and adding Community Transit and Pierce Transit.

For the reasons explained below, I find that the following jurisdictions are appropriate for comparison: Ben-Franklin Transit, Community Transit, C-Tran, Intercity Transit of Olympia, and Whatcom Transportation Authority. I have decided on these five based on a consideration of the following criteria: population in the service area, number of employees, sales tax revenue, location, and the need to have an adequate number of comparators. Similarly sized transit systems generally have more in common than systems which are greatly disparate in size, both in the nature of their operations and their resources. Transit systems in Washington generally receive a large proportion of their revenue from sales taxes in the service area, so that is significant for determining comparability. For obvious reasons, it would be best to utilize employers in proximate or comparable labor markets.

As this arbitrator and others have recognized, in order to make a meaningful and reasonable comparison, there must be an adequate number of comparable jurisdictions. If too few are chosen, then the significance of the situation in individual jurisdictions is unreasonably magnified, particularly when information from one or more of the comparables on a particular issue in dispute is either unavailable or inapplicable. For instance, here, Community Transit does

not employ paratransit operators. Washington interest arbitrators generally select between six and ten jurisdictions for comparison, and some arbitrators have found that four or five comparables are the bare minimum. When possible, arbitrators look to in-state comparators and prefer comparators in the same or similar labor market. However, selection of comparables becomes more difficult when dealing with the larger public employers since there are fewer of them, and in such circumstances, arbitrators tend to consider more distant jurisdictions as comparable in order to obtain a sufficient number. City of Tacoma (Gaunt, 2008); City of Redmond (Wilkinson, 2007).

The service area population, number of FTE employees, and the sales tax revenues of the transit companies proposed as comparable by the parties are reflected below:[4]

	Service Area Population	Employees (FTE) Routed	Employees (FTE) Demand Response	Sales Tax Revenues
Ben-Franklin Transit	206,480	139	103	$22,975,166
Community Transit	485,644	850	[5]	76,918,858
C-Tran	345,110	280	64	25,852,664
Olympia Intercity	144,350	192	70	23,757.282
Pierce Transit	732,435	955	65	77,156,577
Whatcom T.A.	188,015	172	46	20,287,475
Kitsap Transit	244,800	186	109	30,148,544

The number of employees employed by Pierce Transit and Community Transit and their sales tax revenues are greatly more than Kitsap Transit's workforce and sales tax revenues. Nevertheless, I have determined to accept Community Transit, but not Pierce Transit, as a comparator for the following reasons. Of the above listed agencies, only Pierce Transit does not

[4] All figures are for 2007.
[5] Community Transit contracts out its paratransit services

fit within a service population band of between half and twice that of Kitsap Transit. Pierce County is so much bigger than Kitsap County that other arbitrators, in the context of uniformed services interest arbitrations, do not find them to be comparable. Unlike Pierce County, Community Transit's service population is not greater than twice that of Kitsap County. In the context of uniformed services interest arbitrations, other arbitrators have considered Snohomish County, which is the county that Community Transit serves, and Kitsap County to be appropriate for comparison, partly in recognition of their geographic proximity. Snohomish County (Axon, 1996); Snohomish County (Wilkinson, 2007); Snohomish County (Reeves, 2007). It is also significant that in negotiations for their previous contract, the parties agreed to utilize Community Transit as a comparable jurisdiction.

I am not persuaded by the Union's argument that based on the parties' previous contract negotiations, Pierce Transit should be included and Ben-Franklin transit should be excluded. While the parties did agree to use Pierce Transit, Community Transit, Intercity Transit, Whatcom Transit, and C-Tran during their 2005 Routed negotiations, they have never utilized this particular list of agencies as comparators during their ACCESS negotiations. Rather, during previous ACCESS negotiations, the parties utilized Ben-Franklin Transit, C-Tran, and Olympia Intercity, and did not utilize either Pierce Transit or Community Transit. The situation at hand is dissimilar from the one where Arbitrator Tinning relied on comparables that the parties had utilized for many years. Pierce County Fire District No. 7 (1993). I agree with Arbitrator Wilkinson that while arbitrators may rely on the parties' own historically used list of comparators, such previously utilized lists are "not set in stone." City of Redmond (2007). I find that Pierce Transit is too large an agency to compare with Kitsap Transit. I am not convinced that this should be overlooked because Kitsap Transit and Pierce Transit are part of the same

regional planning council or because at one point passengers may switch from a Kitsap Transit bus to a Pierce Transit bus. Kitsap Transit passengers may switch at one point to a Jefferson Transit bus, and neither side suggests that the much smaller Jefferson Transit should be a comparator. There are many other agencies besides Pierce Transit and Kitsap Transit which are part of the Puget Sound Regional Planning Council and are not suggested to be appropriate comparables, presumably because they are much smaller size or otherwise not comparable.

I have determined that Ben-Franklin Transit should be included as a comparator because it is reasonably similar in size and population service area to that of Kitsap Transit. While arbitrators prefer using geographically proximate comparators, they will often utilize lists of comparators containing both Eastern and Western Washington comparators in order to obtain a sufficient number. City of Tacoma (Gaunt, 2008); Snohomish County (Wilkinson, 2007); Snohomish County (Axon, 1996); Snohomish County (Reeves, 2007). The number of comparators which I have selected is a bare minimum, particularly since Community Transit is not a particularly useful comparator for the ACCESS contract at issue because Community Transit contracts out its paratransit services.

ECONOMIC INDICES

RCW 41.56.492(c) requires the Panel to take into consideration pertinent "economic indices." The economic indices most frequently utilized by Washington interest arbitrators is consumer price index (CPI) data published by the United States Department of Labor, Bureau of Labor Statistics. This data measures the increase in the cost of living for designated time periods. During contract negotiations, the inflationary rate is often discussed and it is predictable that unions will strive to increase the purchasing power of its members, or at least, not regress.

Published interest arbitration awards in this state frequently reference the CPI in determining wage increases, though it should be noted that, at least in recent years, the parties to this dispute have not referenced the CPI in their contracts. According to the Bureau of Labor Statistics the consumer price index (CPI-U) for the Seattle-Tacoma-Bremerton area rose by an annual average of 3.9% in 2007, by 4.2% in 2008, by 0.6% in 2009, and by less than 0.3% over the 12 month period preceding April 2010.

FISCAL CONSTRANTS

Unlike the statutory interest arbitration provisions in Washington for uniformed personnel, those applying to transit employees specifically require the Panel to consider "fiscal constraints." Thus, the Employer's financial circumstances must be a significant consideration. Jefferson Transit (Axon, 1994).

The Employer's finances have been negatively affected by the deep recession that the nation has experienced over the past several years. These particularly challenging circumstances have severely impacted the Employer's revenues, and the resulting fiscal constraints must be considered when determining modifications to wages and benefits.

Until 1999, the Employer's revenues had three principal sources: motor vehicle tax, sales tax, and passenger fares. In 1999, a state initiative, I-695, passed by a vote of the citizens, resulting in the elimination of the motor vehicle tax. Until then, the motor vehicle tax comprised about 40% of the Employer's revenues. As a result, the Employer was compelled to reduce bus service. In 2001, the citizen's of Kitsap County voted to accept an increase in their sales tax in order to restore some service. State law permits a maximum 0.9% sales tax for transit. Prior to 2001, Kitsap County's sales tax included an additional 0.5% devoted to the transit system. The

2001 vote resulted in that dedicated sales tax increasing to 0.8%. In 2007, about 83% of the Employer's revenues were derived from the sales tax, while about 11% came from passenger fares.

In December 2007, the Employer's sales tax revenues began a steep decline. That month it was 6.21% below the sales tax revenues collected in December 2006. In 2008, its sales tax revenue dropped by an additional 6.8%. In 2009, it dropped by another 8.63%. The last revenue figures available to the Employer at the time of the hearing in this matter were for the first two months of 2010. Sales tax revenues received during January and February of 2010 were down 10.05% as compared to the same period in 2009. While the Employer received $30,453,075 in sales tax revenue in 2007, in 2009 it received $25,934,418, a decrease of 14.85%, and that does not count the additional decrease in early 2010.

The Employer was forced to act in order to deal with its declining revenues. In 2008, it raised the bus fares from $1.25 to $1.50. Then in 2009, the fare was raised to $2.00. Several rounds of service reductions were implemented. All Sunday bus service was eliminated. In many routes, the length of the service day was shortened. A still ongoing hiring freeze was put into effect in early 2008 and layoffs occurred. As a result, the number of employees declined from 412 to 352.

The Union points out that the Employer has unused bonding capacity and can generate another three million dollars in annual revenue by increasing the sales tax by 0.1%. Paul Shinners, the Employer's finance director, testified that such an increase would have to be approved by a vote of the citizens, and that this was not an option in the current environment. He testified that the city of Bremerton, which is the largest city within the Employer's boundaries, recently had their voters vote down an increase in the car tab tax which was to be devoted to road

improvements. I agree with the Employer that in the current economic climate, it would be very unlikely that the voters would approve a tax increase, even if that was dedicated to service restoration and not to an increase in wages. It should not be expected that the Employer incur new bond indebtedness in order to pay current operating expenses.

The Union points out that the Employer recently surplused vehicles before the end of their normal life, and it gave them away rather than selling them. Mr. Shinners testified that those vehicles were replaced using dedicated federal grant money. He testified that the surplused vehicles were donated to nonprofit organizations within the community who signed contracts committing to utilize those vehicles to provide rides to their clientele, such that the donation of those vehicles would actually save money for the Employer. He testified that this transfer of the surplused vehicles was approved by the state auditor as not being a gift of public funds. I find that these transactions do not indicate that the Employer had the ability to raise substantial additional revenues and have no significance to the Panel's determination.

The parties disagree about the adequacy of the Employer's financial reserves. The Union placed into evidence a recommendation made by the GFOA, an association of state and local government finance officers, regarding the appropriate level of the unreserved fund balance in a government's general fund. GFOA recommended that governments establish a formal policy on the level of the unreserved fund balance that should be maintained based on their specific circumstances. GFOA recommended that at a minimum, the unreserved fund balance in the general fund should be no less than 5% to 15% of regular general fund operating revenues or no less than one to two months of regular general fund operating revenues. A government that has less than one month of operating reserves may be unable to meet payroll or unexpected expenses. During 2009, the Employer's Board established a policy of maintaining a reserve of two months

of operating expense plus an additional amount for depreciated assets. Mr. Shinners testified that the Board recognized that the reserves were not at these levels, but established a five year plan to reach them. The last audit report for the Employer was for 2008. The State Auditor reported that as of December 31, 2008, the Employer had "cash and cash equivalent" of $4,835,410. This was significantly less than the $7,761,743 of such cash reserves that the Employer had at the end of 2007. The State Auditor also reported that in 2008, the Employer had operating expenses, not including depreciation and amortization, of $33,177,065. If one assumes that the monthly operating expense is one-twelfth of that figure, then it would be $2,764,755. Thus, at the end of 2008, the Employer had a cash reserve of about 1.75 months of operating expenses, which is below Board policy, but above the critical level of one month of operating expenses.[6] The Employer's unaudited cash reserves at the end of 2009 were $5,417,000, and its operating expenses for 2009 were $29,007,874, according to figures provided by the Employer. Based on these figures, the cash reserves at the end of 2009 were more than two months of operating expenses. The Employer's 2010 budget indicates cash reserves which are expected to be less than two months of operating expenses.

In January 2010, Washington's Economic and Revenue Forecast Council predicted that the state's unemployment rate would peak during the second quarter of 2010 at 9.8%, and that employment growth would turn positive with the expected continued recovery in the economy. The Union submitted into evidence a number of newspaper articles from early 2010 which can be summarized in the following sentence:

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[6] Ms. DiIenno testified that the relevant reserve level should be the figure in the audit report for unrestricted net assets. Net assets may include hard assets, such as furniture and supplies that would not be available for meeting expenses. I credit Mr. Shinners' testimony that the reserves relevant to this proceeding are the cash and cash equivalents and not the reported unrestricted net assets.

> After the worst downturn since the Great Depression, signs of recovery are mounting – albeit tinged with ambiguity.

While the author of this article noted that the economy was predicted to grow by more than 3% in 2010, he opined that further expansion may depend on the job market, which remains weak. Goodman, "From the Mall to the Docks, Signs of Rebound," in The New York Times, April 25, 2010. Another newspaper article submitted by the Union reported:

> The economy has shown signs of renewal in recent months with the help of significant government spending. Analysts generally say they believe the recovery will endure even in the absence of stimulus programs.
>
> * * *
>
> But substantial worries persist. Consumer spending remains tepid, though it has improved modestly in recent months. Real estate markets are still severely depressed, holding back hiring in critical industries like construction. And many state and local governments, facing ballooning deficits are poised to make severe cutbacks. Last month, they cut 9,000 jobs.

Rampell and Hernandez, "Signaling Jobs Recovery, Payrolls Surged in March," in The New York Times, April 2, 2010. The Employer submitted into evidence a number of newspaper articles which indicated the difficulties confronting Kitsap County public employers because of declining tax revenues. Kitsap County and the cities of Bremerton and Bainbridge Island all laid off employees, and, in addition, Bremerton and Bainbridge Island reduced the work hours of some of the remaining employees.

The Employer's unfavorable financial condition, particularly its falling revenues and resulting service reductions and layoffs, must be considered when determining appropriate changes in wages and benefits. The Employer's revenues began to fall in late 2007 and were still declining in early 2010, as extraordinarily high local unemployment, 8.8% in February 2010, negatively affected the sales tax which is the Employer's primary revenue source. It is undisputed that the Employer had less revenue during 2008 and 2009 than it had in 2007, despite

its very large fare increase. There is little reason to believe that this situation will change in 2010.

RECRUITMENT AND RETENTION

RCW 41.56.492(d) requires the Panel to consider "other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment." Arbitrators often consider employee turnover, or lack thereof, when determining appropriate compensation rates. A high level of turnover or difficulties in recruitment may signify that the compensation levels are inadequate. During 2009, 2 of the 94 routed operators resigned and 7 of the 63 ACCESS operators resigned. Jeff Cartwright, the Employer's human resources director, testified that employees who resign are asked to complete a survey in which they were asked for the reasons that they resigned. He testified that of those who responded during the past five years, none indicated that they resigned because of the pay. The low level of turnover in the context of a lengthy hiring freeze is significant in evaluating the adequacy of the compensation package.

INTERNAL EQUITY

Arbitrators frequently consider the settlements reached by the employer with its other bargaining units as well as compensation increases provided to non-represented employees. Employers tend to have an understandable desire to achieve consistency among its various employee groups. From a union's standpoint, it wants its membership to be treated at least as favorably as the other employees have been treated. At the bargaining table, it is likely that

either the employer or the union will bring up how the employer has dealt with its other employee groups.

The Employer has contracts with the Machinists Union for the facilities maintenance employees and with the Machinists and Teamsters jointly for the vehicle maintenance employees. The facilities maintenance contract was negotiated in 2006 and ran from November 1, 2006 through October 31, 2009. That contract provided for a wage increase connected to the change in the published cost of living. As a result, effective November 1, 2007, the facilities maintenance employees received a wage increase of 3.0%, and effective November 1, 2008, they received a wage increase of 3.5%. On September 17, 2009, the Employer and the Machinists negotiated a one year contract extension calling for a $400 bonus, and, in addition, a COLA increase equal to the one that A.T.U. receives. The vehicle maintenance contract, which was negotiated in 2007, contained wage increases effective November 1, in 2007, 2008, and 2009, utilizing a cost of living formula for the latter two years. As a result, the vehicle maintenance employees received wage increases of 3.5% the first year, 3.5% the second year, and 2.5% the third year. The Employer points out that when it negotiated these contracts in 2006 and 2007, the Employer was enjoying rapid sales tax growth. Mr. Shinners testified that non-represented employees received 3% in 2008, 2% in 2009, and no increase in 2010.

WAGES

Proposals For General Wage Increases

The Employer proposes the following across-the-board wage increases for both the routed and the ACCESS bargaining units:

Effective February 16, 2008	2%
Effective February 16, 2009	1%
Effective February 16, 2010	0%

The Employer proposes that these increases be made retroactively for all employees still on the payroll on the date of the award.

The Union proposes for the routed bargaining unit the following across-the-board wage increases:

Effective February 16, 2008	4.566%
Effective February 16, 2009	4.0%
Effective February 16, 2010	0%

For the ACCESS bargaining unit, the Union proposes pay parity with the routed bargaining unit.

The Employer argues that its proposal is fair in light of the economic realities, including the local labor market, the comparable employer factor, the virtual absence of inflation, and the absence of voluntary staff turnover. The Employer asserts that the cost to implement parity between routed and ACCESS would be $1,300,199, and at a time when the agency is implementing wage freezes, hiring freezes, layoffs, and service reductions, there is no justification for such a significant expense.

The Union argues that its wage proposal should be granted because it is necessary to narrow the large wage cap with the comparables. The Union asserts that its pay parity proposal for ACCESS employees is justified by reference to the comparables and by equity and common sense inasmuch as the nature of the work performed by the two sets of employees is overlapping in nature. The Union maintains that settlement trends, CPI data, economic developments, internal settlements, and fiscal capacity all militate in favor of its proposal.

Comparisons

The statute requires consideration of compensation package comparisons. The reference to packages signifies that the Panel must consider more than a mere comparison of base wages,

to the extent possible and practicable, given the evidence and arguments presented. The parties disagree about whether or not to include the Employer's group and individual bonus plans in the compensation package comparison. Both the routed and the ACCESS contracts provide for a group bonus and individual bonuses, and neither party has proposed to this Panel any substantive change to this language.

The group bonus award is awarded in a lump sum in December of each year based on the achievement of designated goals during the preceding year. The Employer establishes the goals prior to the beginning of this period, and the contracts require the Employer to "review the goals annually with the Union prior to implementation." Ms. DiIenno testified that in practice over the years, the Employer has unilaterally established the group goals without any input from the Union. The maximum group bonus that can be received is 4% of the employee's annual salary. If the goals set by the Employer for the agency and for the operator group are fully met, then each employee still employed receives the full bonus. If certain goals are only partially met, then employees receive a reduced bonus percentage in proportion to the achievement of the goals. The goals established relate to the overall number of preventable accidents, customer complaints, unscheduled absences, etc. If employees resign or are terminated during the year, they receive no group bonus. Retirees and deceased employees receive a prorated share of the group bonus based on a proportion of the year worked.

Individual bonuses are provided quarterly and are based on the operator achieving defined goals which are set forth in the routed and ACCESS contracts regarding "passenger sensitivity," "safety," and "attendance." According to the Agreements, in each of these three categories, employees may receive a bonus of between $0 and $150, if they meet the criteria. Thus, an employee may receive a total quarterly individual bonus ranging from nothing to a maximum of

$450. The amount of the bonus goes up with the number of consecutive quarters that an employee meets the criteria in a category. In each contract, there are four such bonus levels for each category, with eligibility for the top bonus level requiring at least 20 consecutive quarters meeting the performance criteria. Employees must meet the "passenger sensitivity" criteria for a quarter by having no more than one "customer complaint, not determined to be unfounded," and "[n]o preventable incidents with passengers." In order to meet the "safety" criteria for a bonus, an employee cannot have a preventable accident, a chargeable safety incident, a performance report about unsafe driving, a less than satisfactory rating on a surveillance review, and no more than one customer complaint about unsafe driving, not determined to be unfounded. In addition, the ACCESS contract also requires that there be no preventable on-the-job injuries in order to meet the safety criteria. In order to meet the "attendance" criteria for a quarterly bonus, an employee may have no more than one unscheduled absence or late report call-in, no late reports or unexcused absences, and no time off on disability insurance. Additionally, the routed contract adds the criteria that there be no bereavement leave longer than ten days and no leaves of absence or medical leave longer than five consecutive days, excluding FMLA absences. Operators who do not meet an individual bonus criteria will not receive a bonus that quarter for that category and drops back one bonus level. In order to qualify for individual bonuses at all, employees must have been employed for three full quarters, having worked a minimum of 375 hours in the current quarter, with no leave of absence longer than 30 days, and no suspension notice issued during the previous two quarters. Employees are eligible "for a half bonus" if they work a minimum of 112 hours but less than 375 hours.

I have decided that it is appropriate to consider the group bonus as part of the compensation package for purposes of comparison with the comparable agencies, but not the

individual bonuses. The parties' Agreements require the payment of an identical group bonus to all employees in the bargaining unit, with the exception of those who resigned or were terminated during the year. Considering the very limited turnover, this exception is not significant enough to disregard the fact that employees can reasonably expect a year-end bonus. The year-end bonuses have been in effect for a period of years, and have already been paid out for the first two years of the contracts in dispute. There was no suggestion that the established criteria for the 2010 group bonuses are unrealistic or unobtainable. It is appropriate to consider as part of the compensation package a benefit which is available to almost all the employees. King County, (Lankford, 2005). However, here there is no guarantee that employees will receive the 4% maximum possible bonus. In 2009, employees in both bargaining units received a group bonus of 3.46%. In 2008, routed employees received a group bonus of 3.17%, while ACCESS employees received a bonus of 4.0%. The value of the group bonus is estimated to be $0.50 per hour for routed employees and $0.47 per hour for ACCESS employees, which would be close to the average paid to employees during the period 2006 through 2008, according to evidence provided by the Employer.

The individual quarterly bonuses are not as predictable as the group bonuses. The amounts received by individual employees are quite varied, with more employees receiving no individual bonus at all than the maximum possible. Moreover, I am in agreement with the Union's argument that it is not appropriate to factor in such special incentive pay without providing for an accounting of other monetary incentives or other additional compensation paid by comparators. For example, all of the comparators with the exception of Ben-Franklin Transit provide incentives for not utilizing sick leave. Neither party has attempted to factor in the incentive or special pays of the comparators in their compensation comparisons. In these

circumstances, I am not persuaded, based on the data presented, that the individual quarterly bonuses should be somehow estimated and added to wages for purposes of comparison, while ignoring the special forms of compensation paid by the comparators. The evidence presented does not allow for such a comparison. Nevertheless, the wage award is made with the understanding that for many employees, the individual bonuses are substantial.

While there is no disagreement that the compensation of the Employer's routed operators should be compared with the compensation received by routed operators employed by the selected comparable employers, the parties do not agree on which positions in the comparable employers are appropriate for comparison with ACCESS operators. The Employer maintains that its ACCESS operators should be compared to the paratransit operators employed by the comparators. The Union argues that the Employer has organized its work in such a manner that there is not a strict dichotomy of paratransit/non-paratransit work. The Union points out that the Employer's ACCESS operators not only perform paratransit work, but also "deviated" routes and dial-a-ride service for non-ADA passengers. The Union further points out that some C-Tran and Whatcom routed operators drive deviated routes, and in Olympia Intercity and Whatcom, all operators are eligible to bid for routed work.[7] Ms. DiIenno testified that C-Tran and Whatcom routed operators perform the dial-a-ride work and C-Tran routed operators receive a pay premium for doing it. She further testified that Kitsap Transit's ACCESS operators cannot bid into routed assignments. Based on these facts, the Union argues that the most appropriate matches for the Employer's ACCESS operators are the regular routed coach operators employed

[7] The Union asserts that Ben-Franklin Transit and Community Transit are irrelevant regarding the selection of position matches because Ben-Franklin's routed and ACCESS operators have wage parity and Community Transit contracts out its paratransit service.

by the comparators, and not the paratransit or small vehicle operators. The Union relies on several published interest arbitration decisions to argue that where a comparable employer has two positions which perform similar work, the relevant position for comparison purposes is the higher paid of the two.

The appropriate comparison is determined to be routed drivers with routed drivers and paratransit drivers with paratransit drivers or small bus drivers, to the extent possible. While ACCESS drivers perform some non-paratransit dial-a-ride and deviated service, which may be similar to work done by some routed employees in some of the comparators, undisputed testimony establishes that such work comprises in total only a very small portion of the work performed by the ACCESS drivers. It is unreasonable to base an overall compensation comparison on such a small amount of work which is performed by just a very few of the ACCESS drivers.

The Union contends that the appropriate benchmark is at five years of employment. The Employer urges that the benchmark be at the top step. The Union points out that in the other agencies, the operators usually reach the top step after five years, while at Kitsap Transit, it takes seven years to reach the top step. This is a significant difference which should be recognized in the wage comparisons. Listed below are the hourly wages of routed and ACCESS operators employed by the Employer and the selected comparable agencies after five years of employment, and after ten years.

Routed Wage Rates

	At 5-years	At 10 years
Ben-Franklin (2010)	$22.23	$22.23
C-Tran (2010)	23.79	23.79
Community Transit (2010)	26.12	26.37
Olympia Intercity [8] (2010)	20.24	23.37
Whatcom [8](2010)	24.01	24.01
Average	$23.28	$23.95
Kitsap (current) wages	19.57	21.58
Group bonus	.50	.50
Total Kitsap compensation	$20.57	$22.08

ACCESS or Small Bus/Van Wage Rates

	At 5-years	At 10 years
Ben-Franklin (Thru Aug 30, 2010)	$22.23	$22.23
C-Tran (Thru Aug 30, 2010)	20.85	20.85
Community Transit (2010) [9]		
Olympia Intercity[10] (2010)	20.37	20.37
Whatcom[10] (2010)	20.51	20.51
Average	$20.99	$20.99
Kitsap (current) wages	16.14	17.79
Group bonus	.47	.47
Total Kitsap compensation	$16.61	$18.26

[8] For operator driving a large vehicle
[9] Community Transit contracts out its paratransit services
[10] For operator driving a small vehicle

In order to catch up with the average compensation provided by the comparable agencies, the Employer would have to increase wages to routed operators by 13% at five years, and by 8.5% at ten years. For the ACCESS operators, the increases would have to be 26.4% and 15%.

The comparable transit agencies provided the following top step wage increases in 2008, 2009, and 2010:

Fixed Rate Operators

	2008	2009	2010
Ben-Franklin	3.0%	3.0%	Not yet in
C-Tran	3.5%	3.5%	Not yet in
Community Transit	3.3%	3.0%	3.0%[11]
Olympia Intercity	3.0%	4.0%	3.5%
Whatcom	3.0%	3.0%	0.0%
Average	3.16%	3.3%	2.16%

ACCESS or Small Bus/Van Wage Rates

	2008	2009	2010
Ben-Franklin	3.0%	3.0%	Not yet in
C-Tran	3.5%	3.5%	Not yet in
Community Transit	N/A	N/A	N/A
Olympia Intercity	3.0%	4.0%	3.5%
Whatcom	3.0%	3.0%	0.0%
Average	3.125%	3.375%	1.75%

The Ben-Franklin and C-Tran contracts were negotiated in 2007, before the onset of the recession. The Olympia Intercity contract was negotiated during 2008, when the recession was first beginning. Community Transit's contract was signed in 2009. Whatcom executed its most recent contract in 2010.

[11] Community Transit's wage increases in 2010 were phased in with 1.5% increases in January and July.

Request For Wage Parity Between Routed and ACCESS

The Union urges that there be pay parity between routed and ACCESS operators based upon comparability data, equity, and common sense. The Union points out that Ben-Franklin has pay parity, C-Tran pays a premium for deviated route work above what routed drivers receive, and Olympia Intercity and Whatcom pay a different wage tied to the bus size, not the type of assignment. Ms. DiIenno testified that the paratransit work in Kitsap County was performed by a nonprofit agency until the mid-1990s, and when the work was brought in house, it was with the same operators that had been doing the work at a pay rate similar to that which they had been receiving from the nonprofit agency. Ms. DiIenno testified that since then the Union has tried to close the wage gap between the ACCESS and the routed drivers. The Union maintains that the wage gap is unfair because the work performed by routed and ACCESS operators is similar and overlapping in nature, and, in fact, the work performed by ACCESS operators, conducting route deviations or assisting the disabled, is the more challenging.

I agree with the Union's position that there is some overlap in the work performed by routed and ACCESS operators and in some ways the ACCESS work is more difficult inasmuch as ACCESS drivers have to plan their pick ups and constantly respond and adjust to the individual circumstances of non-standard passengers. There is reason to question the fairness of the wide wage gap between routed and ACCESS operators. On the other hand, all but one of the comparators have two wage scales, one for either routed or large bus operators and one for paratransit or small bus or van operators. Moreover, establishing pay parity would be very costly, requiring double digit catch up wage increases for ACCESS operators in addition to any general or cost-of-living wage increase that is provided. Such an increase is unrealistic in the

current economic circumstances. Considering the specified statutory standards of "compensation package comparisons, economic indices, and fiscal constraints," pay parity at this time is not sufficiently justified. However, the wage gap between routed and ACCESS operators, which is much greater than any of the comparators, will be considered when determining the appropriate wage increases.

Retroactivity and Former Employees

The Employer proposes that any retroactive pay awarded by the Panel should be limited to those still employed at the time of the award. The Employer reasons that in view of its dire economic condition, denying retroactive wage payments to those employees who have left the agency seems like an obvious approach. The Union argues that it would be unfair to deny past employees the pay they were entitled to receive. It reasons that employees should not suffer because of delays in obtaining a new contract that were not their fault and that rewarding the Employer for such delays will only incentivize future delays.

The Employer's proposal to limit retroactivity of wage increases to current employees shall not be adopted. The proposed language is a change from existing language in both most recent Agreements, each of which was signed after its effective date. The Employer has not suggested that its proposal is supported by the practice in the comparable agencies. I am not persuaded that adding a new provision to the Agreement limiting retroactive wage increases to current employees would have a significant effect on the Employer's financial condition or is otherwise justified or necessary. Also, it must be remembered that the Employer had taken the position that employees were entitled to a raise, but it was only the size of that raise that was in dispute. In essence, this decision, establishes the wage rate that employees should have been

paid through collective bargaining negotiations. There is an element of unfairness of paying current employees the now established appropriate wage rates for the time they have worked since the expiration of the prior contract, but denying that wage to others who may have left their employment for one reason or another during the lengthy delay in achieving a new contract.

Wage Award

The following wage increases are awarded:

Routed Employees

Effective February 16, 2008	3.5%
Effective February 16, 2009	2.5%
Effective February 16, 2010	0.0%

ACCESS Employees

Effective February 16, 2008	3.5%
Effective February 16, 2009	2.5%
Effective February 16, 2010	1.5%

In this economic environment, with the Employer implementing a hiring freeze two years ago, laying off employees, and reducing service to the public, the wage increases which can be awarded are necessarily limited. That is reflected in the Employer's 2009 and 2010 wage adjustments for non-represented employees, which are just slightly below the wage increases ordered here for the routed employees. The wage increases awarded are generally comparable with the increases negotiated with the Employer's facilities maintenance and vehicle maintenance bargaining units. Consideration has been given to the increases in the cost of living during the past three years, an important consideration since the statute requires consideration of "economic indices." While the local cost of living rose in the 4% range in 2007 and 2008, it dropped to close to zero during 2009 and early 2010. It is significant that the general trend

among the comparable agencies has been to provide wage increases during the past three years and that the wages paid to Kitsap Transit employees are behind the average of the comparators and will remain so even with the awarded increases. While I have rejected the Union's request for wage parity between the Employer's ACCESS and routed operators, I have awarded the ACCESS employees an additional modest catch-up increase in 2010 in order to narrow the wage gap with the routed drivers, and more significantly, to lessen the wide gap evident when compared with the average paid by the comparable agencies to their paratransit and small vehicle operators. With the implementation of the awarded wage increases, routed operators will rank fourth out of six in wages among the comparators, and a little below average. The wages of the ACCESS operators will remain at the bottom of the wage comparison. In view of the Employer's significant decline in revenues over the past few years, this is not the appropriate time for any more substantial catch-up wage awards for either the routed or the ACCESS employees.

Number of Steps

The Union proposes to compress the length of time that it takes to progress to the next pay step from twelve months to eight months. Currently, there are seven pay steps. The Union argues that its proposal is supported by the practice in nearly all the comparables, where employees reach the top step by years four or five. The Union further points out that there are only three pay steps for the Employer's vehicle maintenance and facilities maintenance employees. The Union asserts that its proposal eliminates the delay in reaching the top step without a radical restructuring of the wage grid.

The Employer opposes this change to the contracts. It relies on the testimony of Human Resources Director Jeff Cartwright to the effect that during the parties' 2002 contract negotiations, they agreed to move from a five step wage grid to a seven step wage grid as a trade-off for the Employer agreeing to eliminate the wage differential between small vehicle operator and transit operator wage rates. The Employer claims that the Union is seeking to unwind this quid pro quo.

In each of the comparable agencies, the top step is reached no later than 60 months following the completion of probation. Kitsap Transit employees take two years longer to reach the top step. This disparity, whatever its origins, is no longer justified, since it is out of line with the comparable agencies and because the top step wages paid by the Employer is, even after seven years, below the average of the comparators. However, there is a cost associated with changing the current situation. In view of the Employer's current financial circumstances, and the wage increases which have been awarded, now is not the appropriate time to require the Employer bringing its wage structure more into line with those of the comparators.

Acting Supervisor Pay

In the past, the Employer has sometimes utilized operators to fill in for supervisors who are on leave. Supervisors are excluded from the bargaining unit. When operators have filled in as supervisors, they have been paid at the first step of the supervisors' wage grid. Ms. DiIenno testified that operators are selected to be available to serve as "intermittent supervisors" by the Employer after an interview and then specific training. She testified that intermittent supervisors may perform on-the-road supervision or dispatching, but are not involved with discipline. Ms. DiIenno further testified that the Employer has not utilized intermittent supervisors for the past

two years. The contracts have provisions which permit operators to fill in for absent supervisors, but limits such service for an individual operator to a total of 600 hours in a calendar year. They further provide that the wage for this work will be established by the Employer.

The Union proposes additions to both the routed and the ACCESS contracts in the wage addendums which would read:

> Intermittent Supervisors shall be paid the first step of the supervisory pay scale for the first six calendar months of their intermittent assignment. Beginning the seventh month they shall be paid the second step of the supervisor pay scale.

The Union contends that the contracts should provide a guaranteed wage for operators while they are performing intermittent supervisor duties. The Employer urges that the Union's proposal should be rejected because operators are already paid at the first step of the supervisor's wage scale and the Union provided no justification for inserting a provision to pay intermittent supervisors at the second step after the seventh month of their intermittent supervisor assignment.

No change in the current language regarding intermittent supervisor pay shall be awarded. The Union did not justify its proposal by referencing the practice among the comparable agencies. There was no indication of any difficulties or unfairness with regard to the Employer's treatment of intermittent supervisors. Regarding the Union's proposal for movement to a second supervisory wage step beginning at the seventh month of an intermittent assignment, there was no indication in the record that operators have ever worked such lengthy intermittent supervisor assignments. In fact, there have been no intermittent supervisor assignments at all for the past several years. The evidence presented provides insufficient justification to modify the contract language regarding intermittent supervisor wages at this time.

WORK JURISDICTION

The Union proposes to add new definitions of routed and ACCESS work to the contracts. It would limit ACCESS service to only ADA eligible passengers, seniors over 80, and to "passengers in the rural community (outside of Cities and Urban Growth Boundaries)." It would require routed operators to handle all other passenger service, including "[a]any service blending routed service with demand response or deviated service. . . . Truck routes, Feeder service, Bus Rapid Transit, or any other named similar service." The Union contends that its proposed drawing of bargaining unit lines is needed to deter the Employer's systematic and economically motivated transfer of work from the routed unit to the lower paid ACCESS unit. The Union urges that under the circumstances, the Employer should not be allowed flexibility in the assignment of work.

The Employer contends that the Union's proposal should be rejected. It maintains that the Union seeks to inappropriately usurp the authority of PERC to address jurisdictional disputes by very fact specific analysis. In any event, according to the Employer, the Union has failed to prove actual significant movement of routed work to ACCESS or of plans for such movement in the foreseeable future.

No change in the definition of bargaining unit work shall be awarded. A recent PERC ruling, Decision 9667-A-PECB (2008), held that the Employer may not transfer routed bargaining unit work to the ACCESS unit. That decision already limits the Employer's flexibility in the assignment of work. The Union has not suggested that its proposal is supported by the practice or contract provisions of the comparable agencies. The parties previously agreed to the use, on an experimental basis, of new types of service. Neither party has proposed that these experimental service provisions should be removed from the two agreements. In fact, the

Employer has made very limited use of these provisions. If the Employer is to implement new types of service, it is subject to the limitations of the experimental service provisions, which still remain in the contracts. I am not persuaded by the evidence presented that either a shift of work from routed to ACCESS or the implementation of new types of service is imminent or could not be adequately dealt with by direct negotiations or by utilizing established procedures or dispute resolution mechanisms.

SENIORITY

The Union proposes to modify the seniority article in both the routed and the ACCESS contracts. Each contract provides for layoff and recall to be determined by seniority within the bargaining unit. The Union proposes to add the following language to both contracts:

> . . . This seniority will apply to all operators in the Routed and ACCESS bargaining groups. In the event work reductions are made in the opposite bargaining group the employer will cross train the least senior driver remaining into the vacant work as needed.

The effect of this language is to combine the seniority lists of the routed and the ACCESS bargaining units for purposes of layoff and recall.

The Union argues that its proposal is necessary to deal with its legitimate concern that in the event there is a reduction of service, operators may be laid off before a less senior operator in the other bargaining unit. Ms. DiIenno testified that with the recent budget cuts, five routed operators were laid off, and some of them were senior to ACCESS drivers who are still employed. The Union maintains that there is considerable overlap in the training and skills of the routed and ACCESS employees, and the Employer can provide any necessary cross training immediately preceding a layoff. The Union asserts that its position is supported by the comparability factor inasmuch as Whatcom, Olympia Intercity, and C-Tran all base layoff and recall on date of hire among the operators as a single classification.

The Employer contends that the Panel lacks authority to dictate layoff order beyond the bargaining unit at issue. The Employer relies on PERC decisions to argue that efforts to dictate personnel decisions beyond the bounds of the bargaining unit are not mandatory subjects of bargaining and therefore are not appropriate in interest arbitration. The Employer further argues that routed and ACCESS operators are not fungible, and in the event of a layoff, it should not be required to have operators move from one type of operation to the other for which they are not qualified.

For the following reasons, I find that the Union's proposal to merge seniority lists in two separate bargaining units is beyond the authority of this Panel to award. Public employers in Washington are required by law to engage in collective bargaining with the exclusive bargaining representative of a bargaining unit. RCW 41.56.030 defines "[c]ollective bargaining" as the obligation to engage in "collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employers, . . ." Such personnel matters are considered to be mandatory subjects of bargaining. PERC has opined that where a public employer must deal with two separate bargaining units, it is under no obligation to meet with the representatives of both units "at the same time or to take any other steps in the direction of joint bargaining or a common contract." Orient School District, Dec. No. 2174-A et.al. (PECB, 1985). In other words, such joint bargaining is a permissive subject of bargaining, which cannot be required of a party. In another decision, PERC stated that the "peculiar to" language in RCW 41.56.030(4) means that the collective bargaining process in each bargaining unit stands alone. City of Kirkland, Dec. No. 6949-A (PECB, 2000). PERC further explained that this language was "intended to simply limit the power of an exclusive bargaining representative to matters that involve the unit it represents." City of Pasco,

Dec. 3368-A (PECB, 1990). In the matter at hand, the Union is proposing to merge the two bargaining units for purposes of seniority. However, the two bargaining units are separate, and the Union's attempt to formally merge them was rejected by PERC. Kitsap Transit, Dec. No. 10234-A (PECB, 2009). In these circumstances, the Employer was under no obligation to engage in joint bargaining involving both bargaining units. By agreeing to joint bargaining, the Employer did not waive its right to insist that each contract deal only with the employees in that bargaining unit. The situations at Whatcom, Olympia Intercity, and C-Tran are not comparable because each of these transit agencies have single contracts which cover both routed and paratransit drivers. Community Transit does not have a collective bargaining agreement covering paratransit drivers. Ben-Franklin is the only comparable transit agency which has separate bargaining units and agreements for its routed and paratransit drivers and those agreements do not combine the seniority lists. The Panel lacks authority to order a merger of the seniority lists in separate bargaining units inasmuch as that is a permissive subject of bargaining. Therefore, no change to the seniority language will be awarded.

SCHEDULING

A-Board Elimination

The Union proposes to eliminate the A-Board entirely from both contracts. According to the Union, the work which had been done by the A-Board would be reassigned to either additional Extra-Board employees or to B-Board employees. The Union argues that quality of life issues are at the heart of its proposal. It reasons that to the extent such work is reassigned to the Extra-Board, employees would be guaranteed more hours and benefits, and would not be as vulnerable to trying to live on the current 15 hours pay per week. Furthermore, it suggests that to

the extent A-Board work is reassigned to the B-Board, employees will have more flexibility to supplement their wages with outside work. The Union recognizes the practice of the comparable agencies regarding boards and hours varies widely, with no industry standard.

The Employer opposes the elimination of the A-Board, arguing that it would have far-reaching consequences on almost every section of the contracts. The Employer maintains that the Union has failed to demonstrate a significant problem with the existing board structure. It points out that the Union's only witness on this issue was Ms. DiIenno, who has no scheduling experience. The Employer claims that the A-Board is critical to covering small pieces of work that exist on a daily basis.

Ms. DiIenno testified that the Union's issue with the A-Board is that A-Board operators have the same availability obligation as Extra-Board operators, but they get half the benefits and half the guarantee, and none of the comparable agencies utilize an A-Board. She testified that in the routed bargaining unit, there were no A-Board operators during the summer bid period and only one during the spring.

Kathryn Jordan is an operations supervisor for the fixed routes. Ms. Jordan testified that the A-Board is needed to pick up small pieces of work that are left over after assignments have been made to regular full-time and Extra-Board operators. She testified that B-Board operators can be offered that work, but they can decline it, while A-Board operators must accept it. Mr. Farnsworth testified that ACCESS utilized seven A-Board operators in the November 2009 bid period and six in the February 2010 bid period. He too testified that the A-Board operators are needed for small pieces of work that remain on a daily basis after the regular full-time and Extra-Board assignments have been made. He testified that the elimination of the A-Board would be

costly because it would require the addition of Extra-Board employees when there would not be a need for their guaranteed 30 hours of work.

The Union's proposal to eliminate the A-Board from both contracts is not adopted by the Panel. The A-Board has historically been part of the parties' contracts and the Employer's scheduling system. The A-Board provides the Employer with flexibility in meetings its scheduling needs, particularly in the ACCESS unit. It is recognized that A-Board employees' guaranteed hours and benefits are less desirable than those received by regular full-time and Extra-Board employees. However, part-time employment in the transit industry is not unusual for less senior transit employees. All of the comparable agencies utilize part-time employees, though each has unique aspects to its scheduling system. As the Union recognizes, there is no clear industry standard. Particularly in the current unsettled circumstances of declining revenues, with layoffs and service reductions, now is not an appropriate time to overhaul the Employer scheduling system in a manner which reduces flexibility. Such changes may lead to additional costs and operational difficulties in a particularly challenging environment for meeting service needs.

Limitation on the Proportion of Work Performed by Each of the Boards

The routed contract provides that "[u]nless funding reductions occur," the Employer will maintain a roster of no fewer than 55 full-time positions with guaranteed pay for 40 hours, and 4 full-time positions guaranteed 35 hours. The ACCESS contract provides for 38 full-time positions guaranteed pay for 35-40 hours, also "[u]nless funding reductions occur." The routed contract limits the number of B-Board bids to no more than 25% of full-time and Extra-Board positions. The ACCESS contract contains no limiting language as to the size of the boards.

In the routed contract, the Union proposes to set the proportion of Extra-Board operators to "no less than 20%, no more than 25% of the full-time positions." The Union also proposes to have the proportion of routed B-Board positions be no more than 10% of full-time positions. For the ACCESS contract, the Union proposes to require the Employer to set the number of Extra-Board positions at between 35% and 40% of the full-time positions and to limit the proportion of ACCESS B-Board positions to no more than 10% of the full-time positions.

Ms. DiIenno testified that the percentages of Extra-Board operators the Union is proposing is consistent with the actual staffing practice of the Employer over the time period of the past several contracts. She testified that the Union has proposed the 10% maximum for B-Board assignments in each bargaining unit because it wants to limit the number of employees working with reduced benefits and hours guarantees and because if the Employer keeps its Extra-Boards full enough, there would be no need to have more than 10% B-Board operators. Ms. DiIenno testified that when the budget cuts occurred, the Employer published a draft bid which reduced the number of full-time and Extra-Board positions and increased the number of A-Board and B-Board positions. Ms. DiIenno testified that after the Union demanded to bargain about this, the Employer restored the percentages of A-Board and B-Board assignments to the historical practice. Ms. Jordan testified that the Union's proposal would result in increased costs to the Employer for wage guarantees.

The Union contends that its proposal is reasonable since it adopts the past practice. The Union maintains that it's in the employees' interest to maintain as many full-time positions as possible, and that if the size of the Extra-Boards was left to the discretion of the Employer, that opens the door for it to increase their sizes disproportionately. The Union asserts that there is a demonstrated need for this new contract language because the Employer drafted bids that had

increased the use of A-Boards and B-Boards while reducing the number of full-time positions. The Union recognizes that there is no specific industry standard regarding the percentage of part-time employees, but maintains that in practice, most agencies put as many pieces of work together to form full-time jobs as possible.

The Employer opposes the Union's proposal. It argues that the increases in the guarantees will likely lead to it paying additional compensation to operators for which the Employer would receive no value. The Employer maintains that the Union's proposal to reconstitute the boards was not supported by the wide variety of scheduling practices utilized in other transit agencies. The Employer argues that with its serious financial difficulties, a proposal that increases costs and reduces efficiency should be rejected.

There is insufficient basis to establish additional limits on the Employer's ability to allocate work between the various boards. The routed and ACCESS contracts already require the Employer to employ 59 full-time routed operators and 38 full-time ACCESS operators, "unless funding reductions occur." There was no evidence that those numbers of full-time operators were insufficient or inappropriate. Moreover, there was no evidence presented that the Employer has failed to maximize its use of full-time operators or abused its utilization of the boards. While there was evidence that on one bid assignment sheet during the Employer's financial difficulties, the Employer proposed more extensive use of the part-time boards, it never implemented it. Rather, after the Union protested, the Employer changed the bid assignment sheet to the Union's satisfaction. The Union's proposals are not supported by any common practice of the comparable agencies. The Union has not established that the Employer's distribution of work among the various Boards is, or has been, unfair or inappropriate. Particularly in the current

difficult financial situation for the Employer, resulting in the necessity to reduce service, establishment of additional staffing requirements on the Employer at this time is unwarranted.

Guaranteed Hours

Currently, the routed contract provides regular full-time operators a guarantee of 40 hours of work per week, with the exception that the Employer may guarantee just 35 hours of work to four regular full-time operators. The Union proposes a change so that all regular full-time routed operators would be guaranteed 40 to 42 hours of work per week. Currently full-time ACCESS operators are guaranteed 35 to 40 hours of work per week. The Union proposes that the guarantee for them also be raised to 40 to 42 hours of work per week. Extra-Board employees in both the routed and ACCESS units are all currently guaranteed 30 hours of work per week. The Union proposes to raise these guarantees to 35 hours of work per week. The Union further proposes that routed B-Board operators may work on a scheduled basis only up to 15 hours per week. Previously, there was no hour limit in the contract. The Employer opposes these proposed changes to the contracts.

The Union contends that its proposal to increase guaranteed pay for regular full-time and Extra-Board operators in each bargaining unit would increase their pay to get closer to parity with many of the comparables. The Union asserts that its proposal to allow the Employer to schedule full-time operators up to 42 hours per week was made to accommodate a management request for flexibility, but limits making full-time packages too large.

The Employer contends that the increases in the guarantees will likely lead to significant payments to operators who did not work up to the guarantee level and such increases are not supported by the practices of the other transit agencies. The Employer urges that with the serious

financial difficulties of the Agency, a proposal that significantly increases its costs should be rejected.

Ms. DiIenno testified that the additional wage guarantees are important because the employees need to have some stability in their income. She testified that the Union proposed a 15 hour cap on B-Board assignments in order to protect full-time jobs.

Ms. Jordan testified that the scheduling goal of the Employer is to get as much work into a full-time bid package as possible, and that is something that is overseen by a committee of operators. The Employer presented documentary evidence indicating that it already pays hundreds of hours of wages during each bid period for hours not worked because of the existing wage guarantees. Ms. Jordan testified that these hours guarantee costs would significantly increase if the Union's proposals were adopted.

Ms. DiIenno testified that the practice of the comparables regarding hours guarantees is "all over the board" and that there is no industry standard. Examination of the contracts of the selected comparable transit agencies confirms this assessment. Ben-Franklin's contract contains no provision guaranteeing hours of work. Community Transit guarantees 40 hours of pay per week for its full-time operators and its Extra-Board operators. C-Tran's contract provides for regular full-time assignments "as near forty (40) hours for five (5) days as possible." C-Tran Extra-Board operators are guaranteed 40 hours of pay per week. Olympia Intercity provides a 40 hour guarantee to 75% of its full-time operators. The other 25% receive a 35 hour guarantee. Whatcom provides a 40 hour guarantee to full-time routed operators who work a five day workweek, a 38 hour guarantee to full-time routed operators who work a 4 day workweek, a 35 hour guarantee for paratransit operators, and a 30 hour guarantee for relief board operators. None of the contracts of the comparable agencies contain a provision similar to the one that the Union

proposes here which would set a maximum number of hours that a part-time operator could be scheduled.

No change is ordered either in the guaranteed work hours for regular full-time or Extra-Board operators, nor in the maximum hours for part-time operators. Nearly all of the routed full-time operators are already guaranteed 40 hours of work. While ACCESS operators are guaranteed 35 to 40 hours of work and Extra-Board operators are guaranteed 30 hours, the evidence presented indicates that the Employer does endeavor to maximize their assignments. There is no indication that it has abused its use of part-time employees to the detriment of more regular assignments. The comparable transit agencies have varying practices regarding assignments and hours guarantees. While several guarantee 40 hours of work to certain classes of employees, it is not an industry standard among the comparators. There is a cost to the Employer for the existing hours guarantees. There would be additional costs if those hours guarantees are to be increased. In this time of declining revenues, service reductions and layoffs, additional hours guarantees are not justified. The evidence presented provides insufficient justification for limiting part-time assignments to 15 hours per week. There is no support for this proposal among the comparators and no indication that such a change is needed to address any existing problem or inequity in assignments.

Maximum Drive Time and Refresh Time

The Union proposes to add the following language to Article 11 of the routed contract and also to both Articles 12 and 13 of the ACCESS contract.

> Actual driving time is limited to 10 hours with a minimum of 8 hours refresh time. (49CFR & FMCSA 395)

In addition, in the ACCESS contract only, the Union has proposed for Extra-Board operators that their "driving time [be] limited to 10 hours with a minimum of 9 hours refresh time."

Ms. DiIenno testified that the proposal limiting driving time to 10 hours with a minimum of 8 hours of refresh time simply incorporates the requirements of federal regulations into the contracts. She testified that the proposal to give Extra-Board operators nine hours of refresh time was made because those operators can start work very early in the morning and end very late at night. While that proposal was only included in the Union's proposals for the ACCESS contract, Ms. DiIenno testified that the Union's intent was to include this language in both contracts.

The Union contends that its proposals for maximum drive time and minimum refresh time should be adopted so that it can utilize the grievance procedure if the Employer violates the law. The Union further contends that a minimum 9-hour refresh time is reasonable and warranted for the Extra-Board operators' health and safety since their circadian rhythm may get upset by driving an evening shift one day and then a morning shift the next.

The Employer contends that these proposals should be rejected because the issue was not certified for interest arbitration, and there was no evidence demonstrating a need for this language.

The Union's proposals regarding maximum drive time and minimum refresh time are not adopted. First, and most significantly, there was no reference to such a matter in PERC's certification of the issues. RCW 41.56.450 provides:

> The issues for determination by the arbitration panel shall be limited to the issues certified by the [PERC] executive director.

That certification makes no reference to a dispute involving Article 11 of the routed contract, maximum drive time or minimum refresh time. In any event, the Union provided no evidence that there is any demonstrated need for this provision. There was no evidence that the Employer

ever violated the federal regulations referenced in the Union's proposal, nor that its scheduling practices have actually impacted the health and safety of employees. The Union has not contended that its proposal draws support from the contracts of the comparable agencies.

GENERAL LEAVE

Leave Accrual

Both the routed contract and the ACCESS contract contain a "General Leave" provision, which provides for accrued leave to be used interchangeably for vacation, sick leave, or any absence. Both contracts contain identical leave accrual schedules, with employees accruing from 22 up to 33 leave days per year depending on years of service. The Union proposes to increase the accrual rate by three days per year during an employee's first five years of service, and by five days per year for those employed over five years. The Employer opposes any change to the leave accrual schedule.

The Union justifies its proposal by reference to the practice among the comparators. It maintains that even with its proposed increase in the accrual rate, the Employer would still be behind the average leave accrual of the comparable transit agencies, when their annual leave and sick leave are added together.

The Employer contends that reliance on external comparables is an "apples to oranges" comparison because none of the comparables use a general leave system, but rather have separate vacation leave accrual and sick leave accrual, and the sick leave portion is only accessible if the employee is sick. The Employer points out that its general leave accrual structure is in place for all of its bargaining units and non-exempt, non-represented employees. The Employer further points out that its leave program is supplemented by a short-term disability benefit which pays an

employee up to $700 a week for up to six months when the employee is out because of an accident or has an extended illness.

No change in the leave accrual rate is ordered. It is simply not appropriate to compare the Employer's general leave accrual rates directly with the average of the sum total of vacation leave and sick leave provided by the comparators. Employees at Kitsap Transit have more control of their general leave. Kitsap employees who are never sick can still use up all of their leave. For such employees, if that leave was instead divided up between separate vacation leave and sick leave, the sick leave portion would be unusable. Of the comparable employers, the only ones which offer general leave like Kitsap Transit are Community Transit for its routed employees and Ben-Franklin Transit for its paratransit employees. Compared to only those two situations, the general leave offered by the Employer is not out of line, even without considering the special disability leave benefit provided by Kitsap Transit. Ben-Franklin provides 19 days of general leave to first year employees, 24 days after 10 years, and 30.5 days after 20 years. Community Transit also provides 19 days to first year employees, and provides 29 days after 10 years and 34 days after 20 years. Kitsap Transit's accrual schedule provides 22 general leave days to first year employees, 26 days after 10 years, and 31 days after 20 years. Moreover, the internal equity standard also supports the Employer's position. The existing benefit is consistent with the leave accrual benefit received by all of the Employer's bargaining units and non-exempt non-represented employees. The Union points out that management employees receive five more general leave days than its members receive. Human Resources Director Cartwright testified that management employees receive an additional five days of leave per year because they may work extra hours, but do not receive overtime like other employees. That provides a reasonable basis for the difference in accrual rates between management and non-

management employees. There is insufficient basis for a change in the general leave accrual rate in the two bargaining units at issue.

Vacation Bids

The general leave articles in both the routed and the ACCESS contracts contain vacation bid procedures. Those procedures allow the Employer to determine the number of vacation slots available for bidding. The bidding is done early each year for requested vacations during a twelve month span. Operators bid on available vacation slots in seniority order, in one week blocks, and also may bid for up to five single days of additional leave, or which four of them may be consecutive. During the summer and spring of 2009, and all of 2010, the Employer made available six full-week slots each week for vacation bidders in the routed unit. Ms. DiIenno testified that during the summer of 2009, there were some weeks when the Employer made less than six slots available because of planned special events. During the winter of 2009, the Employer made available seven such vacation slots. For the annual bid of individual vacation days, the Employer made available two daily slots during the summer of 2009 and throughout 2010. It offered three such daily slots during the winter of 2009. Paul Hinds, the scheduler/dispatcher for the ACCESS employees, testified that for the last three years the number of week-long vacation slots made available for ACCESS operators has been maintained at 10% of the ACCESS work force. Ms. Jordan testified that once an employee selects vacation time, they have the opportunity to cancel their request 21 days or more in advance of their scheduled vacation days. She testified that available slots are made available to other employees in regular updated postings. Ms. Jordan testified that when employees turn in a leave request 14 days or less before the day that they want off, the scheduler will determine whether to approve the

request based on work force needs. Ms. Jordan testified that such leave requests have been approved for routed operators between 2002 and 2007 at annual rates ranging from 74% to 86% of the time. For ACCESS operators, the approval rate was higher, ranging from 94% to 99% of the time. An employee who takes an unapproved day off may have their individual attendance bonus negatively affected.

The Union proposes to change the vacation bid procedure in each contract by eliminating the language which gives management the right to determine the number of vacation slots open for bidding. Instead, the Union proposes that the following language be added to both the routed and the ACCESS contracts:

> The employer shall maintain at least 10% of the full time positions as the minimum full week blocks available for full week bids and an additional 5% of full time positions for daily bid weeks posted except during the county fair week where one-half that amount shall be the minimum. This number shall be rounded up or down by mid range. For example, if there are 72 full time positions there shall be a minimum of 7 full week bids and 4 weeks slots for daily bids. Likewise, if there are 76 full time positions then there shall be a minimum of 8 full week bids and 4 weeks slots for daily bids.

The Union further proposes to remove the following language which is currently contained in Article 15.3.D of the routed contract:

> Operators who cancel their vacation bid, and that bid is scheduled to be held down by either a Full time vacation bid operator or an Extra board operator, then the operator cancelling vacation shall revert to the top of the extra board, behind any Extra-Board operator holding down vacation, for the length of the vacation bid being cancelled. The operator cancelling vacation shall also be governed by the provisions of the extra board during that period of time.

In the ACCESS contract, the Union proposes a change to Article 17.3. Subsection D of that provision currently reads:

> Full time and Extra Board operators may only bid up to 100% of the amount of general leave they have accrued at the time of the bid.

The Union proposes to delete the first four words from this sentence so that it would begin: "Operators may only . . ." The Union further proposes the addition of the following subsection to Article 17.3:

> Any unbid vacation slots from Section A. above shall remain available for first come first serve request throughout the year. Nothing in this section shall preclude the employer from offering more slots that required, (sic) or approving additional requests for absence.

The Employer opposes any change to the language in the two contracts regarding the vacation bid process.

Employer records reveal that from June 6, 2010 through September 25, 2010, routed operators entirely filled the six weekly vacation slots. During other parts of the year, weekly vacation slots went unselected in all but a few weeks clustered around holidays. During ten weeks in 2010 no vacation slots were selected. Ms. DiIenno testified that summer is always a desirable time for vacations. She testified that the Union proposed that the number of weekly vacation slots be set at 10% of the number of operators because that approximates the number of vacation slots normally designated by the Employer. She testified that the Union proposed that the number of individual daily vacation slots be set at 5% of the number of operators because that would allow 15% of employees to be on vacation on any given day and the Employer should be able to cover that number of employees off work with the remaining employees. Ms. Jordan testified that the number of weekly offered vacation slots had been reduced from seven to six because since the hiring freeze, employment has been declining. She testified that it was in the Employer's interest to spread guaranteed vacation leave throughout the year so as to minimize any additional need for Extra-Board or part-time employees to fill in. Of the comparable agencies, only Whatcom's contract contains a provision guaranteeing a specified number of vacation slots.

The Union contends that there is a need to include in the contracts its proposed formula for determining how many bid vacation slots are made available because employees are often unable to utilize their leave benefit. The Union maintains that it merely proposes "to put into the contract the 10% the employer had been providing during the prior contracts." The Union asserts that its proposal to increase the available daily leave slots to 5% of the full time positions would allow greater pre-planning of days off, without subjecting the employee to discretionary denial by the Employer, resulting in discipline and loss of bonus.

The Employer contends that the Union has not satisfied its burden to prove that current vacation usage practices are inadequate. The Employer maintains that the Union has failed to demonstrate that the current system does not allow employees to schedule their general leave. It claims that most employees are getting their preferred choices for leave. The Employer asserts that it has been very generous in accommodating short notice requests for general leave. According to the Employer, additional vacation availability would require additional employees to fill in, driving up its costs at an inopportune time.

No change to the vacation bid procedures shall be ordered. The Union's proposals draw almost no support from the comparable agencies' contracts. There was no evidence to support the Union's contention that the employees are often unable to utilize their general leave benefit. In fact, evidence presented establishes that the Employer usually approves requests for days off when made outside the bid process. Moreover, it appears from the records presented that most vacation leave is already taken during the summer or holiday periods. It is not unreasonable for the Employer to seek to have vacations spread throughout the year, at least to some extent, in order to meet staffing requirements without additional costs. With regard to the other changes to the vacation bid procedures that were proposed by the Union, no justifying evidence or argument

was put forward. The evidence presented regarding the vacation bid procedure just did not establish any unfairness, inequity, or difficulty with the current practice such than new contract language is needed.

DISCIPLINE

Currently, Article 7.2 in both the routed and ACCESS contracts provides:

> For all events except those under the excessive absenteeism and customer comment policies, the following policy applies:
> A. Oral and written reminders and notices of decision-making leave shall be removed from the employee's personnel file after twelve (12) months from the date of the most recent event.
> B. A notice of suspension shall be removed from the employee's personnel file after eighteen (18) months from the date of the most recent event.
>
> * * *

The Employer proposes to increase the amount of time that it may retain discipline in an employee's personnel file to 18 months for oral and written reminders and notice of decision-making leave, and to 24 months for suspensions. The Union opposes any change to this language.

The Employer contends that its proposal is intended to provide an adequate amount of time to ensure that the employee has corrected the behavior which led to the discipline. The Employer maintains that leaving discipline in the employees' personnel files for an additional six months would bring the time periods closer in line with the comparable agencies. The Employer denies that the change would affect employee eligibility for either the group or individual bonuses.

The Union argues that the Employer's proposal has less to do with the employer's observation of a disciplined employee and more to do with saving money in the payout of bonuses. The Union points out that the Employer's proposal would lead to a greater chance that

an employee's discipline would advance to decision making leave which would cause the affected employees to lose half of the group bonus.

Mr. Cartwright testified that the Employer's proposal would allow sufficient time to show that the employee has understood the consequences of their action and has changed their behavior. Ms. DiIenno testified that the new language would increase the risk of an employee's termination.

In the comparable transit agencies, the length of time that discipline may remain in a personnel file is set forth below.

	Oral and Written	Suspension
Ben-Franklin	12 months	5 years
Community Transit	12 months	12 months
C-Tran	No limit	No limit
Olympia Intercity	12 months	12 months
Whatcom	18 months	36 months

No change in the discipline procedure is ordered. There was no indication in the record that the current procedures have caused any difficulties for the Employer. A comparison with the practice of the comparable agencies does not demonstrate sufficient basis to conclude that the current practice is inconsistent with prevailing practices. There is just insufficient evidence that a change is needed.

ARBITRATION PROCEDURES

Each side proposes to change the arbitration procedures. The Employer proposes for the routed contract that the parties select an arbitrator from a panel selected from a list provided by the Federal Mediation and Conciliation Service (FMCS) rather than relying on a list from the Washington Public Employment Relations Commission (PERC) as currently called for in that contract. The Union opposes this change. The Union proposes that the ACCESS contract be

changed to require that arbitration lists be obtained from PERC, rather than from the FMCS as currently provided in that contract. Also, the Union proposes for both contracts that the request to PERC would be initiated by "[t]he grieving party" rather than the current language, which in the routed contract provides for initiation by "[t]he Employer and the Union or either party unilaterally" and in the ACCESS contract by "[t]he Employer and the Union." The Union further proposes for both contracts that the grieving party would have the option of requesting PERC to appoint a PERC staff arbitrator rather than providing a list of arbitrators to decide the dispute. Currently, the two contracts each require the parties to meet within 10 days to select an arbitrator from the agency-provided list. The Union proposes to add the following language to both contracts:

> If either party fails to meet to select or strike, that party forfeits the right to select or strike.

All of the comparable transit agencies use lists supplied by the FMCS to select an arbitrator, except for Ben-Franklin, which obtains its lists from PERC but does not utilize PERC staff arbitrators. The Employer's facilities maintenance contract and its vehicle maintenance contract both provide for FMCS arbitration lists. None of the comparable transit agencies and neither of the Employer's other two internal labor contracts provide for a forfeiture of a party's right to participate in arbitrator selection.

Mr. Cartwright testified that until the 2005 routed contract, the parties had always utilized the FMCS for arbitrator selection and the Employer prefers to go back to using the FMCS in order to remain consistent with its internal contracts and its comparators. Mr. Cartwright testified that there is a small fee for obtaining a list from the FMCS, which he believed to be $50.

Ms. DiIenno testified that the Union prefers to utilize PERC to obtain arbitrator lists for a number of reasons. PERC does not charge a fee for a list. She testified that she has had some

problems utilizing the online mechanism FMCS uses for panel requests. She testified that her experience with the lists is that whereas arbitrators on the PERC list have a Washington address, FMCS lists contain arbitrators from other states whose use would increase travel costs. She testified that the Union would like to bring the ACCESS contract in line with the routed contract with regard to arbitrator selection. Ms. DiIenno testified that utilizing a PERC staff member to arbitrate would save both parties the cost of the arbitrator. She testified that she believes that the Employer was trying to drain the Union of funds by repeatedly violating the contract. The Union provided evidence that since 2005, nine matters have been arbitrated and the Union prevailed in six of them. Ms. DiIenno testified that in one matter, the Employer refused to participate in the selection of an arbitrator.

The Employer contends that its proposal to utilize the FMCS for the routed contract is supported by reference to the comparators and to the Employer's other labor contracts, while the Union's proposals draw no such support. The Employer argues that PERC staffers should not be utilized to arbitrate because of the significant delays in receiving decisions from PERC.

The Union contends that bringing the ACCESS contract in line with the routed contract reduces costs and the potential that the filing may occur with the wrong agency. The Union asserts that not only does FMCS charge a fee, but it also utilizes more costly out of state arbitrators. The Union maintains that its proposal to allow a choice between a PERC staff member and a PERC list allows for a far less costly procedure, particularly for an issue which is not complex. The Union avers that since it submits the paperwork and pays the fee for arbitrator lists, its preferences should be given great weight. The Union argues that its proposal for free arbitration provided by PERC is supported by the Employer's repeated contract violations which have resulted in a depletion of the Union's treasury. The Union argues that the Employer should

be penalized if it fails to engage in the selection process by forfeiture of its right to meet to select an arbitrator. The Union reasons that it has no remedy, except to go to court, when the Employer refuses to participate in the selection of an arbitrator, and going to court would further deplete Union resources.

No change in the arbitration provisions of the contracts is ordered. Neither party has presented convincing evidence that the previously negotiated procedures are not working properly, unfair, or causing problems that need to be remedied. No convincing evidence was presented which would establish that either FMCS or PERC provides better lists of arbitrators. While Ms. DiIenno provided her subjective assessment of those lists, no such lists were presented in evidence. The fact that all of the comparators except one utilize FMCS lists, even though there is a small fee and PERC lists are free, suggests that PERC lists are not obviously superior. The nominal fee charged by FMCS for providing a list cannot be a deciding factor in which agency is used, particularly since the parties generally engage in arbitration only a couple of times a year.

There is insufficient justification for implementing a new procedure which would allow the Union to have a grievance decided by a PERC staff member who is appointed by PERC rather than by an arbitrator mutually selected by the parties. None of the comparable contracts provide for arbitration by any process other than by mutual selection by the parties. The Union's proposal for the use of an arbitrator appointed by PERC is out of the arbitration norm and, as such, would require compelling justification or the mutual concurrence of the parties. The Union's allegation that the Employer is purposely draining the Union's treasury by violating the contract and forcing arbitration is not sufficiently supported by the record. There is no evidence

that the number of arbitrations here is inherently unreasonable or disproportionate to the numbers that the comparators have.

There is insufficient basis to include a provision for forfeiture of a party's right to engage in the arbitrator selection process. The Union provided only one example of a situation where the Employer would not agree to select an arbitrator, and the details of that situation were not fully explained during the hearing. By law, parties have a right to refuse to arbitrate matters which are not substantively arbitrable and then a court is the proper forum to decide whether or not the matter is to be arbitrated. That the Employer apparently took the position on one occasion that a matter was not arbitrable does not establish sufficient basis for adding a provision for forfeiture of a party's right to engage in the arbitrator selection process.

Sammamish, Washington

Dated: December 8, 2010

/s/ Alan R. Krebs
Alan R. Krebs, Neutral Chair