STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Respondent-Public Employer,

Case No. C01 K-220

-and-

AMALGAMATED TRANSIT UNION, LOCAL 836,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Miller, Johnson, Snell & Cummiskey, P.L.C., by Craig A. Mutch, Esq., for Respondent

Law Office of Mark H. Cousens, by Mark H. Cousens, Esq., and John E. Eaton, Esq., for Charging Party

DECISION AND ORDER

On June 13, 2003, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent Interurban Transit Partnership had engaged in and was engaging in certain unfair labor practices within the meaning of Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.10(1)(e) by subcontracting bargaining unit work without first giving Charging Party Amalgamated Transit Union, Local 836 notice and an opportunity to collectively bargain.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On July 8, 2003, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On July 15, 2003, Charging Party was granted an extension to file a response to the exceptions, and its timely response and a brief in support were filed on August 14, 2003.

We have carefully and thoroughly reviewed the record in the light of the exceptions and briefs and have decided to affirm the ALJ's findings and conclusions, and to adopt the recommended Order, which is modified to reflect our amended remedy. We

find that a status quo ante remedy must be ordered in this case and therefore modify the Order as set forth below.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission as modified below:

1. Substitute the following for paragraph 1:

> Cease and desist from subcontracting work previously performed exclusively by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful, restore the status quo that existed prior to Respondent's unlawful actions, and make bargaining unit members whole for all losses attributable to such unlawful actions.

2. Substitute the attached notice for that of the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated:_____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, INTERURBAN TRANSIT PARTNERSHIP, a public employer under the MICHIGAN EMPLOYMENT RELATIONS ACT, has been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT subcontract work previously performed exclusively by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

WE WILL restore the status quo that existed prior to our unlawful actions, and make bargaining unit members whole for all losses attributable to such unlawful actions.

WE WILL, on demand, bargain with the above labor organization over any decision to transfer or subcontract work previously performed exclusively by members of that organization.

WE WILL cease and desist from further subcontracting of the unit work, pending satisfaction of the obligation to bargain in this case.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

INTERURBAN TRANSIT PARTNERSHIP

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.

STATE OF MICHIGAN
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In the Matter of:

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_____/

APPEARANCES:

Miller, Johnson, Snell & Cummiskey, P.L.C., by Craig A. Mutch, Esq., for Respondent

Law Office of Mark H. Cousens, by Mark H. Cousens, Esq., and John E. Eaton, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on April 30, 2002, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before June 10, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On November 2, 2001, the Amalgamated Transit Union, Local 836, filed an unfair labor practice charge with the Commission alleging that the Interurban Transit Partnership violated Section 10(1)(e) of PERA by subcontracting bargaining unit work without first giving Charging Party notice and an opportunity to collectively bargain. The Employer filed an answer denying the allegation on December 10, 2001.

Findings of Fact:

The Amalgamated Transit Union (ATU), Local 836, is the exclusive bargaining representative for a unit of bus drivers and mechanics employed by the Interurban Transit Partnership (ITP). The ITP provides public transit service for Grand Rapids and five nearby cities. The ATU and ITP are parties to a collective bargaining agreement covering the period July 1, 1999 to June 30, 2002. The ITP assumed the obligations of the contract from its predecessor, the Grand Rapids Area Transit Authority (GRATA), in 2000.

The public transportation system in operation in the Grand Rapids metropolitan area is primarily a "line-haul" bus system. Line-haul drivers are responsible for driving assigned routes on an established schedule. Customers access the system by boarding buses along these assigned routes. The line-haul system typically utilizes large buses approximately 35 to 40 feet in length. Line-haul buses are in operation Monday through Friday, from 5:45 a.m. to 12:00 a.m., on Saturdays from 6:00 a.m. to 11:00 p.m., and on Sundays from 8:00 a.m. to 7:00 p.m. All line haul bus drivers are members of the unit represented by Charging Party.

In 1975, GRATA began using small buses to serve the transportation needs of the elderly and disabled. This para-transit service, known as Go!Bus, is a demand-response system. Go!Bus does not follow prearranged routes or connect with the regular line-haul buses. Rather, the system provides curb-to-curb service to eligible passengers on an as-needed basis. Passengers access the service by calling Go!Bus and making an advance reservation. GO!Bus drivers receive specialized training in servicing the needs of the elderly and disabled. Although operation of a para-transit system is required by statute, GRATA began subcontracting these runs sometime around 1986. Prior to that time, the para-transit work was performed by members of the bargaining unit now represented by Charging Party. At the time of the hearing in this matter, Go!Bus runs were being driven by employees of two independent contractors: TMI during weekdays and Calder City on nights and weekends. However, Respondent remains responsible for scheduling these para-transit runs.

In April of 2000, voters in Grand Rapids and five nearby cities passed a millage to improve public transit service. This millage resulted in the formation of the ITP as successor to GRATA. One of the improvements promised to voters during the millage campaign was the creation of a feeder service to give suburban residents more convenient access to the regular line-haul bus system. This program was ultimately implemented in April of 2001 as the Passenger Adaptive Suburban Shuttle (PASS) service.

PASS is a "deviated line-haul" system. PASS vans operate on assigned routes which run between various hubs. The vans arrive and depart from each hub on a fixed scheduled. Along the way, the buses pick up passengers and take them either to a hub where they can connect to a bus on the regular line-haul system, or directly to their destinations if those locations are along the route. Customers access the PASS service by calling ITP and scheduling an appointment to be picked up, or by boarding a PASS vehicle at a hub for unscheduled or "walk-on" trips. Walk-ons are available on a first come/first served basis. There are no restrictions on who may utilize the PASS service.

At its inception, PASS operated seven days a week during roughly the same hours as the regular line-haul operation. All PASS runs were driven by members of Charging Party's bargaining unit. In the fall of 2001, the ITP determined that there was insufficient demand for the PASS service on nights and weekends. On October 24, 2001, the ITP's Board of Directors voted to cut back PASS service hours to 5:45 a.m. to 6:00 p.m. on weekdays and to discontinue the program entirely during on weekends. Individuals seeking service during nights and weekends were to be referred to the Go!Bus system.

In a letter dated October 29, 2001, Charging Party requested bargaining on the decision to eliminate night and weekend PASS runs. The ITP's director of operations responded to the Union's bargaining demand by letter dated November 15, 2001. The letter provides, in pertinent part:

> I apologize that a Transportation Supervisor left you with the impression that we are sub-contracting jobs, for it is simply not the case. . . . When service concludes on 2 December 2001, all night and weekend PASS routes will cease to exist.
>
> In an effort to meet the millage campaign promise of access to the linehaul system throughout the six cities, the Board has approved utilizing paratransit providers to provide demand-response service during the hours linehaul service is operating but no PASS service is available. Unlike PASS, there will be no scheduled routes, times or hubs for the demand-response, and walk-ons obviously cannot be accepted.

The change went into effect on December 2, 2001. While members of Charging Party's unit continue to drive PASS runs during weekdays, the Employer began referring PASS customers to the Go!Bus system on nights and weekends. Those runs are driven exclusively by Calder City. As before, the Go!Bus runs are demand-response; i.e. Calder City drivers operate on an as-needed basis. Passengers make reservations for the service by calling the Go!Bus telephone number, and the scheduling of these runs is handled by the ITP. However, the service now being performed by Calder City on nights and weekends is not limited to the handicapped and elderly. At the time of the hearing in this matter, Calder City was using its own cabs, as well as some PASS vans owned by ITP, for the night and weekend service. However, the ITP plans on providing Calder City with vehicles for all of these runs at some point in the future.

The collective bargaining agreement in effect between the parties contains a management rights clause, Article III, which provides, in pertinent part:

> THE MANAGEMENT of the Authority's operations and the direction of the working forces shall be retained by the Authority, to be exercised in its sole discretion except for any rights specifically and explicitly restricted in this Agreement. The Authority has the right to determine the types and amount of service to be provided, including the making of schedules, frequency of service, and the amount of time allowed on individual runs; to modify, adopt, install, operate and maintain existing, new or improved

> equipment or methods of operation; to hire, promote, discharge for cause and maintain discipline and efficiency, subject to any limitations of this Agreement.

The agreement also contains a grievance and arbitration procedure, Article IV, pursuant to which all controversies "involving the interpretation or application of the express terms" of the contract are to be resolved.

Positions of the Parties:

Charging Party argues that the ITP violated PERA by subcontracting night and weekend PASS service to Calder City without giving the Union notice and an opportunity to bargain over the decision, or its impact on the bargaining unit. According to Charging Party, members of ATU Local 836 have always driven line-haul runs for ITP, and its predecessor GRATA, and the PASS service is merely an extension of that historical bargaining unit work. Charging Party further contends that night and weekend PASS runs were driven exclusively by members of ATU Local 836 from the inception of the service until the work was subcontracted to Calder City. Charging Party alleges that the transfer of this work resulted in fewer runs being made available to unit members, a reduction in the amount of overtime work, and diminished job security. Finally, Charging Party argues that the decision to subcontract the night and weekend PASS work was amenable to collective bargaining because it was primarily motivated by labor costs.

Respondent contends that the decision to utilize an independent contractor was not a mandatory subject of bargaining because the service being performed by Calder City has not been performed exclusively by members of Charging Party's unit. According to Respondent, bargaining unit work is limited to driving line-haul or deviated line-haul runs, while the work being performed by Calder City is a point-to-point, demand-response service virtually identical to the Go!Bus program which the ITP has subcontracted for over fifteen years. Respondents asserts that even if the decision constituted a mandatory subject of bargaining, the Union waived its right to bargain over the issue by its past practice of permitting the ITP to subcontract Go!Bus work. Respondent also claims that Charging Party waived its right to bargain over this issue by agreeing to a management rights clause in the contract which gives the ITP the authority to determine the type and amount of service to be provided. Finally, Respondent argues that the dispute should be resolved via the grievance procedure set forth in the contract because the charge constitutes a challenge to the ITP's exercise of its rights under the management rights clause.

Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours and other terms and conditions of employment. In varying contexts, the subcontracting of bargaining unit work has been found to constitute a mandatory subject of bargaining. See e.g. *Van Buren School Dist v Wayne Circuit Judge*, 61 Mich App 6 (1975); *Davison Board of Education*, 1973 MERC Lab Op 824. Whether a decision to subcontract is subject to mandatory collective bargaining depends upon the

particular facts presented in the individual case. *Southfield Police Officers Assoc*, 433 Mich 168, 178 (1987). [1]

In determining whether a public employer has a duty to bargain over subcontracting, the Commission, as well as the courts of this state, have relied heavily upon federal precedent, beginning with the U.S. Supreme Court's decision in *Fibreboard Paper Products Corp v NLRB*, 379 US 203; 85 S Ct 398; 13 L Ed 2d 233 (1964). In *Fibreboard*, the employer subcontracted its maintenance work to a third party to cut labor costs without first bargaining that decision with the union representing its regular maintenance staff. The change did not alter the employer's basic operation; the employees of the subcontractor worked in the same building and performed essentially the same work as the bargaining unit members who had been laid off. *Id.* at 213. The Court found that the employer's decision to replace its employees with those of an independent contractor fell within the phrase "terms and conditions of employment" in Section 8(d) of the National Labor Relations Act (NLRA) and, thus, was subject to mandatory bargaining. *Id.* at 215. In so holding, the Court noted that "a desire to reduce labor costs . . . was at the base of the employer's decision to subcontract" and that such a desire is "peculiarly suitable for resolution within the collective bargaining framework." *Id.* at 213-214. In addition, the Court recognized that finding a duty to bargain on these facts would not significantly abridge the employer's managerial freedom given that the same work was still being performed and that the employer had not contemplated any capital investment. *Id.* at 213.

Following the Supreme Court's decision in *Fibreboard*, the National Labor Relations Board (NLRB) employed several different tests to determine whether a decision to subcontract unit work constitutes a mandatory subject of bargaining. For example, in *Dubuque Packing Co*, 303 NLRB 386; 137 LRRM 1185 (1991), the Board articulated a three-part analysis pursuant to which the General Counsel bore the initial burden to establish that the employer's subcontracting decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. Once that prima facie case was met, the burden shifted to the employer to present evidence that (1) the work performed by the nonunit employees varied significantly from the work performed at the employer's plant; (2) the work was discontinued rather than relocated; or (3) the decision involved a change in the scope and direction of the enterprise. If none of these defenses were available, the employer could still prevail by showing that either labor costs were not a factor in the decision or that the matter was not amenable to the collective bargaining process. See also *Otis Elevator Co (Otis Elevator II)*, 255 NLRB 891; 115 LRRM 1281 (1984) (the critical issue is whether the employer's decision turned upon a change in the nature or direction of the business or whether it was motivated by labor costs).

In 1992, however, the NLRB revisited the issue of subcontracting of the type addressed by the Supreme Court in *Fibreboard*. In *Torrington Industries*, 307 NLRB 809; 140 LRRM 1137 (1992), the employer made a decision to subcontract the operation and maintenance of its

[1] In their post-hearing briefs, the parties rely in large part on MERC decisions involving the transfer of unit work to nonunit positions. The instant case, however, has to do with the subcontracting of work to a private contractor. Although these concepts overlap to some extent, see *City of Detroit (Police Department)*, 1990 MERC Lab Op 551, the test which is applied in a transfer case is not entirely applicable in a subcontracting case of this nature.

rock trucks and graders. There was no change in the scope and direction of the enterprise. Rather, the decision to subcontract essentially involved the substitution of unit employees by employees of a private contractor. On these facts, the Board held that it was not necessary to consider whether the potential benefits of bargaining would outweigh the burdens that bargaining would place on the business. According to the Board, the *Fibreboard* Court had "implicitly engaged in a balancing of [such] factors before reaching the conclusion that an employer had a duty to bargain" over this kind of subcontracting decision, and that there was "no need to reinvent the wheel by rebalancing the factors weighing for and against a finding that the decision is subject to the bargaining obligation." *Id.* at 811. Thus, the Board held that where the subcontracting decision does not involve "a change in the scope and direction of the enterprise," it is a prototypical *Fibreboard* case and there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. *Id.* at 810. See also *Rock-Tenn Co v NLRB*, 101 F3d 1441, 1446; 154 LRRM 2021 (DC Cir 1996) (when a subcontracting decision turns on labor cost considerations and involves the same work under similar conditions of employment, it is a prototype *Fibreboard* case regardless of the alleged futility of bargaining). But see *Furniture Rentors of America*, 36 F3d 1240, 1248; 147 LRRM 2401 (3rd Cir 1994) (criticizing the NLRB's analysis in *Torrington* as "ham handed").

Although it predated *Torrington* by several years, the Michigan Supreme Court's decision in *Detroit Police Officers Assn (DPOA) v City of Detroit*, 428 Mich 79, 95 (1987), also eschewed the use of any balancing test in a *Fibreboard* subcontracting situation. The *DPOA* case involved a decision by the City of Detroit to subcontract security work at the newly created 36th District Court. The subcontract did not change the nature of the work; rather, similar positions were filled by different personnel and the work continued, but in different locations. In concluding that the subcontracting decision was a mandatory subject of bargaining, the Court found "no basis for distinguishing decisions concerning subcontracting in Michigan public sector labor law from those concepts defining subcontracting in the private sector as set forth in the *Fibreboard* case." *Id.* at 95. In so holding, the Court rejected the City's argument that it had no duty to bargain because the decision was based upon a fundamental change in the nature and direction of its business, rather than on a mere reduction in labor costs, citing *First National Maintenance Corp*, 452 US 666; 107 LRRM 2705 (1981). In *First National Maintenance*, the U.S. Supreme Court held that bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. The Michigan Supreme Court characterized *First National Maintenance* as a "partial closing" case and found it to be inapplicable in a *Fibreboard* subcontracting situation. *DPOA*, *supra* at 98.

The seminal Michigan court case concerning the subcontracting of bargaining unit work under PERA is *Van Buren School District v Wayne Circuit Judge*, 61 Mich App 6 (1975). In *Van Buren*, the Court held that the public employer had a duty to bargain over the decision to subcontract to a private company transportation services previously provided by members of the plaintiff's bargaining unit. In so holding, the Court rejected the employer's assertion that the decision to subcontract was not amenable to collective bargaining because the change was made to improve service rather than save money. The Court was not convinced that bargaining would have served no purpose, noting that discussion of the subject would have given the union the

opportunity to offer an alternative to subcontracting which would have protected the interests and met the objectives of both parties, thus furthering PERA's goal of promoting the peaceful settlement of industrial disputes. *Id.* at 25-26.

Applying the reasoning of *Fibreboard*, the *Van Buren* Court concluded that the subcontracting of work performed by school bus drivers was covered by the phrase "terms and conditions of employment" under Section 15 of PERA. The Court found that the subcontracting had not changed the employer's basic operation because busing of students was still being carried out within the school district, and that the employer had a statutory obligation, even with the subcontractor operating the system, to continue providing transportation to its students. *Id.* at 35-36. The Court also noted that the employer had not recouped any of its capital investment from the sale of its buses because that money merely offset the payments which it was now making to the subcontractor. *Id.* at 38. Finally, the Court determined that requiring the employer to bargain would not unduly restrict its right to manage its business because it was not obligated to agree on any proposals or make any concessions and, thus, remained free to manage its transportation system. *Id.* at 31-40.

Based upon the above principles, I find that Respondent's decision to subcontract night and weekend public transportation services in the instant case was a mandatory subject of bargaining. Respondent did not significantly alter the scope and nature of its basic operation. The ITP remains in the business of providing public transportation to individuals within the Grand Rapids metropolitan area, including operation of the PASS service during weekdays. More importantly, there has been no significant change in the service available to the ITP's customers on nights and weekends. Suburban passengers who would otherwise be unable to utilize the regular line-haul system are still being provided with access to public transportation during those off hours. The only significant change is that nonunit employees of an independent contractor are now driving these runs.

Although there are no longer any scheduled PASS routes on nights and weekends, the record establishes that the ITP continues to serve the same customers in the same geographic areas using, at least in part, the same vehicles previously driven by bargaining unit members. In fact, Respondent admitted that it plans on having Calder City utilize ITP owned vehicles exclusively for all night and weekend runs in the future. Furthermore, the scheduling of night and weekend runs continues to be handled by the ITP. Thus, this is not a case where the employer completely abandoned a program which was later taken up by another entity. See *Benton Harbor Area Schools*, 1989 MERC Lab Op 614 (finding no fundamental change in employer's business where school district contracted with local college regarding secondary level vocational education instruction, but retained significant control over the program).

There is nothing in the record to establish that the subcontracting decision involved capital investment, nor is there any suggestion that Calder City drivers have unique skills or require specialized training to perform this work. Moreover, it seems clear that the Employer subcontracted the unit work for purely economic reasons. The ITP's director of operations testified that there was virtually no demand for PASS service on nights and weekends and that it "didn't make sense to continue operating it." Whether Charging Party's members could have driven these "demand-response" runs now being handled by Calder City, or whether there were

other cost-saving alternatives to subcontracting, were proper subjects of bargaining. Instead of discussing the matter, however, the Employer simply replaced its employees with those of an independent contractor to perform similar work under like circumstances. Under such circumstances, there is no need to apply any further tests; I find this to be a prototypical *Fibreboard* subcontracting situation giving rise to a mandatory duty to bargain.

I find no merit to Respondent's contention that the work in dispute is not exclusive bargaining unit work. It is true that employees of private contractors have driven Go!Bus runs for over fifteen years; I conclude, however, that this work is quite different than the work at issue in the instant case. Go!Bus is a para-transit service dedicated to serving the transportation needs of the elderly and disabled. Operation of the service is mandated by statute, and Go!Bus drivers receive special training with respect to how to meet the needs of their riders. In contrast, the PASS program is essentially an extension of the ITP's regular public transportation system which has been staffed exclusively by Charging Party's members for years. Its purpose is to provide suburban customers with access to the line-haul buses driven by unit members. Anyone can ride a PASS vehicle, and no special training is required of PASS drivers. Since employees of the private subcontractors utilized by the ITP have never performed general transit work of this nature, Respondent's reliance on the Go!Bus program is unpersuasive.

The fact that there was no direct evidence of any significant detriment to the members of Charging Party's bargaining unit as a result of the subcontracting is not relevant to a finding of a duty to bargain in this case. The Commission has held that an employer could be required to bargain over this type of subcontracting even though no employee lost his or her job as a direct result. See e.g. *Davison Board of Education*, 1973 MERC Lab Op 824, 828-829; *Lenawee County Road Commission*, 1970 MERC Lab Op 913, 919 (no exceptions).

Likewise, the NLRB has held that a finding of a duty to bargain under *Torrington* is not limited to situations where a direct adverse impact on the unit has been affirmatively shown. For example, in *Overnite Transportation Co*, 330 NLRB 1275; 170 LRRM 1146 (2000), the employer, a national freight carrier, unilaterally decided to use leased drivers to perform bargaining unit work. The use of subcontractors did not result in the layoff of any unit members or a diminution of the average number of hours worked by regular drivers. In fact, the record indicated that the regular drivers, on average, worked more hours per week after the subcontracting than they worked before. Nevertheless, the Board found a violation based on the prospect that unit members "'might' have lost the opportunity for additional work. *Id.* at 1276. In so holding, the Board stated, "We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees. . . ." *Id.*[2] See also *Acme Die Casting*, 315 NLRB 202 n 1; 147 LRRM 1189 (1994).

[2] The Board's decision in *Overnite Transportation Co* was reversed by the Third Circuit Court of Appeals in an unpublished decision. 248 F3d 1131; 170 LRRM 2589 (2000). However, the NLRB's judges continue to cite *Overnite* with approval (see e.g. *In re Electric Materials Co (TEMPCO)*, 2002 NLRB Lexis 540; *St. George Warehouse*, 2002 NLRB Lexis 523), and I find its reasoning with respect to this issue persuasive.

Respondent argues that the Union waived its right to bargain over the issue by its past practice of permitting the ITP to subcontract bargaining unit work. Under certain circumstances, a prior history of subcontracting may negate an employer's duty to bargain. See *Gibraltar School District*, 1987 MERC Lab Op 1032; *Flint School District*, 1985 MERC Lab Op 1071. In those cases, however, the subcontracting in question and the past practice involved the same work. As noted, the prior subcontracting upon which Respondent relies was limited to the Go!Bus program, a specialized para-transit service, whereas the PASS program is essentially an extension of the ITP's regular public transportation system. I find nothing in the record to suggest that the bargaining agent ever agreed to the subcontracting of the work in dispute in this matter. See *Clinton County Intermediate School District*, 1984 MERC Lab Op 529, in which the Commission held that the employer had a duty to bargain with the union, in part because the subcontracting in question varied significantly from the employer's past practice.

I also find no merit to Respondent's assertion that the Union waived its right to bargain over the decision to contract out transportation services by agreeing to Article III of the contract. That clause gives the ITP the exclusive right to "determine the types and amount of service to be provided, including the making of schedules, frequency of service" but contains no reference to subcontracting. The Commission has clearly held that a zipper clause or a broadly worded managements rights which makes no specific reference to subcontracting will not be read as a "clear and explicit" waiver of the right to bargain over subcontracting or the transfer of unit work. See *City of Roseville*, 1982 MERC Lab Op 1377, 1386. Accordingly, I find that the generalized contract provision relied upon by Respondent does not constitute a waiver of bargaining rights in this matter. For the same reason, I reject the ITP's assertion that this case constitutes a dispute regarding interpretation of that management rights provision which should be resolved via the contractual grievance procedure.

In summary, I find that the ITP's unilateral decision to contract out its night and weekend transportation services violated Section 10(1)(e) of PERA. For the forgoing reasons, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

Respondent Interurban Transit Partnership, its officers and agents, are hereby ordered to:

1. Cease and desist from subcontracting work previously performed exclusively by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

2. On demand, bargain with the above labor organization over any decision to transfer or subcontract work previously performed exclusively by members of that organization.

3. Cease and desist from further subcontracting of the bargaining unit work, pending satisfaction of the obligation to bargain.

4. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, INTERURBAN TRANSIT PARTNERSHIP, a public employer under the MICHIGAN EMPLOYMENT RELATIONS ACT, has been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT subcontract work previously performed exclusively by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

WE WILL, on demand, bargain with the above labor organization over any decision to transfer or subcontract work previously performed exclusively by members of that organization.

WE WILL cease and desist from further subcontracting of the unit work, pending satisfaction of the obligation to bargain in this case.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

INTERURBAN TRANSIT PARTNERSHIP

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.