CASE NOS. 07-1262, 07-1313, 07-1314

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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DEAN TRANSPORTATION, INC.
Petitioner/Cross-Respondent
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

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GRAND RAPIDS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA,
Intervenor

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NATIONAL LABOR RELATIONS BOARD
Petitioner
v.
DEAN TRANSPORTATION EMPLOYEES UNION
Respondent

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ON APPEAL FROM THE
NATIONAL LABOR RELATIONS BOARD

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# BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, KENT INTERMEDIATE SCHOOL DISTRICT, NATIONAL SCHOOL TRANSPORTATION ASSOCIATION, MICHIGAN CHAMBER OF COMMERCE, AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER DEAN TRANSPORTATION, INC.

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## INTEREST OF THE *AMICI CURIAE*

On November 27, 2007, this Court allowed a joint *amicus curiae* brief to be filed by the National School Boards Association (NSBA), the Kent Intermediate School District (Kent ISD), the National School Transportation Association (NSTA), the Michigan Chamber of Commerce (MCC), and the Mackinac Center for Public Policy.[1] *Amici* are all organizations with a strong interest in the efficient and cost-effective management of public-school resources and/or the preservation of workers' choice in workplace representation.

- NSBA is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students.
- Kent ISD, located in Grand Rapids, provides various services to 20 public school districts (including Grand Rapids Public Schools, or "GRPS") and other non-public schools within Kent County, Michigan. Altogether, Kent ISD serves almost 400 schools and more than 120,000

[1] The Michigan Association of School Boards (MASB), a member of NSBA, was a party to the original motion. However, on November 27, 2007, this Court granted NSBA's motion to participate as *amicus curiae* in substitution of MASB.

students. One of the services provided by Kent ISD is the transportation of special education students to various schools and programs within the County, including students from GRPS. These students' transportation is currently provided by Dean Transportation under a five-year contract with Kent ISD.

- The NSTA is the membership organization for private school transportation companies, such as Dean Transportation, that provide pupil transportation under contract to thousands of school districts across the country that choose not to operate their own school buses. In addition, NSTA member companies provide specialized transportation for students with disabilities, community transportation, and other transportation services. NSTA members range from small family businesses serving one district to large corporations operating thousands of buses across many states.
- The MCC is a Michigan non-profit corporation, with over 7,000 members operating throughout Michigan. The vast majority of its members are private sector businesses. These businesses utilize public services provided by Michigan and local units of government and pay taxes that support these governmental entities.

- The Mackinac Center for Public Policy is a Michigan-based, § 501(c)(3) nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The Mackinac Center is one of the leading advocates for outsourcing generally and for outsourcing educational support services – such as school transportation – specifically.

*Amici* are deeply concerned with the impact of the Board's decision on Michigan public schools' ability to take full advantage of outsourcing non-instructional support services such as student transportation. *Amici* believe that the core mission of public schools is educating children, and that school districts should have as many options as possible to reduce the excessive attention and resources currently spent on non-core areas such as support services. Outsourcing is a crucial technique that public schools can use to recapture money and other resources for their educational mission. Here, however, by misconstruing federal law and misapplying its own precedents, the Board has made the implementation of this important technique substantially more expensive and less feasible.

## SUMMARY OF ARGUMENT

The brief by Petitioner Dean Transportation details the many legal and factual errors committed by the National Labor Relations Board ("Board") in this

case. *Amici* believe, however, that two additional points must be raised so that this Court can fully appreciate the scope of the Board's erroneous decision.[2]

First, in ruling that Dean Transportation was required to bargain with a union that had previously represented only public-sector employees, the Board failed to recognize that the union would gain a significant new power under a private employer: the right to strike. Under the successorship doctrine, generally speaking, a new employer that succeeds an old employer and that hires a substantial portion of the old employer's employees is required to bargain with the union representing the old employer's employees, since that union is presumed to have majority support. But a fundamental assumption of this doctrine (and of the presumption of majority support) is that the nature of the union's representation does not dramatically change due to the shift of employers. That assumption is inaccurate in this case due to the right to strike gained by the union here. Although strikes may be useful tools for unions, they can also cause temporary or even permanent unemployment for individual employees – a risk that is entirely absent under unions that lack the power to strike. Thus, a union that gains the right to strike is substantially different from a union without that right, and it is improper to presume that a union's members necessarily continue to support representation.

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[2] *Amicus* NSBA does not join the first argument.

Second, by requiring successor private employers to inherit the labor relations of public schools, the Board's decision increases the costs and reduces the benefits of outsourcing, a tool to which public schools across the country have turned in an attempt to improve their educational mission. America's public schools are currently facing financial difficulties as they are forced to accommodate more students, higher standards, and less funding than ever before. In an attempt to preserve their educational budgets, public schools have increasingly attempted to reduce the costs of noninstructional support services, such as transportation. Outsourcing these services to a private contractor has proven to be one of the most valuable means of reducing costs and freeing resources for the schools' primary goal of educating children. But outsourcing requires that private employers be able to conduct their businesses – including their labor relations – differently from the public schools' old methods. The Board's ruling in this case essentially insulates labor relations from any such reforms and thus hampers the ability of public schools to rely upon or benefit from outsourcing.

## ARGUMENT

The ruling by the National Labor Relations Board ("Board") in this case requires Dean Transportation to bargain with Grand Rapids Educational Support Personnel Association ("GRESPA"), in a bargaining unit composed solely of employees at a single location (the "Union Street Unit"), despite the fact that for

the past 30 years all of Dean Transportation's drivers throughout the state of Michigan have been represented by the Dean Transportation Employees Union ("DTEU"). This ruling raises a significant legal question about whether the Board erred by presuming continuing majority support for GRESPA under the successorship doctrine when, *inter alia*, GRESPA, as a Michigan public-sector union, did not previously have the legal right to strike. In addition, by ignoring the right-to-strike issue and reaching various other erroneous legal conclusions (as pointed out in Dean Transportation's brief), the Board's ruling frustrates the necessary improvement of the school transportation services provided to the students of Grand Rapids and Kent County, Michigan, by substantially increasing the costs (and thus reducing the benefits) of outsourcing transportation services.

## I. THE BOARD ERRED BY FINDING THAT DEAN TRANSPORTATION WAS REQUIRED TO RECOGNIZE AND BARGAIN WITH GRESPA UNDER THE SUCCESSORSHIP DOCTRINE.

In this case, the Grand Rapids Public Schools ("GRPS") has contracted with Dean Transportation for bus services formerly provided by public employees. These employees formerly belonged to GRESPA, a union certified under a state law that forbade public employee strikes. GRESPA now claims the right to represent the employees working for Dean Transportation. Applying the successorship doctrine, the Board has upheld GRESPA's claim. This holding presumes that the employees continue to support GRESPA even though the union

has gained a significant – and potentially harmful – new power: the power to strike. This presumption is incorrect. The successorship doctrine should not apply in this case or in any other where the union previously lacked the power to strike.[3]

### A. The successorship doctrine should not apply when, as here, a previously public-sector union gains the power to strike under a successor private employer.

A union's most powerful and risk-intensive right is the right to strike. As the Supreme Court has stated, because "the right to strike . . . is an economic weapon which in great measure implements and supports the principles of the collective bargaining system," Congress's "concern for the integrity of the strike weapon has remained constant." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-35 (1963). Yet Congress, in 29 U.S.C. § 152(2), left the states "free to regulate their labor relationships with their public employees." *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2376 (2007), reflecting the fact that "[t]he distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229 (1977). Among the most significant distinctions between public and private labor relations is that "governmental employees did not usually enjoy the right to strike." *NLRB v. Natural Gas Util. Dist. of Hawkins County, Tennessee*, 402 U.S. 600, 604

[3] *Amicus* NSBA does not join Part I of this brief.

(1971); *cf. Abood*, 431 U.S. at 229 ("[T]here has been considerable debate about the desirability of prohibiting public employee unions from striking, a step that . . . Michigan . . . has taken.").

Most states' labor laws continue to prohibit state and local government employees from striking. Six states allow neither collective bargaining nor strikes from their public employees.[4] Twenty-eight states, including Michigan, allow collective bargaining with at least some of their public employees, yet prohibit strikes.[5] Intervenor GRESPA was certified under Michigan's Public Employee

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[4] Relevant portions of the statutes cited in this footnote can be found in the Statutory Appendix attached to this brief. (1) **Alabama** – *Walker County Bd. of Educ. v. Walker County Educ. Ass'n*, 431 So.2d 948, 954 (Ala. 1983); (2) **Arkansas** – *Am. Fed'n of State, County, and Mun. Employees, Local 2957 v. Benton*, No.4:04-cv-492 (RSW), 2005 WL 2244257, at *2 (E.D. Ark. Aug. 2, 2005) (citing *City of Fort Smith v. Ark. State Council, No. 38*, 433 S.W.2d 153 (Ark. 1968); (3) **Arizona** – Ariz. Op. Att. Gen. No. I06-004 (2006) (no collective bargaining); *Commc'ns Workers of Am. v. Ariz. Bd. of Regents*, 498 P.2d 472 (Ariz. Ct. App. 1972) (no strikes) (4) **North Carolina** – N.C. Gen. Stat. § 95-98 (no collective bargaining); N.C. Gen. Stat. § 95-98.1 (no strikes); (5) **South Carolina** – *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000) (no collective bargaining); S.C. Op. Att. Gen. No. 89-121 (1989) (no strikes) (6) **Virginia** – Va. Code Ann. § 40.1-57.2 (no collective bargaining); Va. Code Ann. § 40.1-55 (no strikes).

[5] Relevant portions of the statutes cited in this footnote can be found in the Statutory Appendix attached to this brief. (1) **Connecticut** – Conn. Gen. Stat. §§ 7-475, 5-279 , 10-153e(a) ; (2) **Delaware** – Del. Code Ann. tit. 19 §§ 1316, 1616 ; Del. Code Ann. tit. 14 § 4016; (3) **Florida** – Fla. Const. art. 1 § 6; Fla. Stat. § 447.505; (4) **Georgia** – Ga. Code Ann. §§ 25-5-12(b), 45-19-2 ; (5) **Indiana** – Ind. Code § 20-29-9-1; (6) **Iowa** – Iowa Code § 20.12; (7) **Kansas** – Kan. Stat. Ann. §§ 75-4333(c)(5), 72-5423(c) ; (8) **Kentucky** – Ky. Rev. Stat. Ann. §§ 345.130, 78.470 (police); (9) **Maine** – Me. Rev. Stat. Ann. tit. 26 §§ 1284(2)(C)(1)-(3),

Relations Act ("PERA"), Mich. Comp. Laws § 423.201 *et seq*, and not the National Labor Relations Act ("NLRA"). Under PERA, unlike the NLRA, strikes are prohibited. *Compare* Mich. Comp. Laws § 423.202, *with* 29 U.S.C. § 163. Thus, these employees have likely never had the opportunity to consider whether they want to join a union with this power.

The absence of the strike power in the public sector may help explain the huge disparity between the percentage of employees who belong to public-sector unions and the percentage of employees who belong to private-sector unions. According to 2007 data from the Bureau of Labor Statistics, union membership among public-sector employees was 35.9%, versus just 7.5% among workers in

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979-C(2)(C) (1) to (3), 1027(2)(C)(1) , 964(2)(C) (1)-(3); (10) **Maryland** – Md. Code Ann., State Pers. & Pens. § 3-303; Md. Code Ann., Educ. §§ 6-513, 6-410 ; Md. Ann. Code art. 28, § 5-114.1(e)(6); (11) **Massachusetts** – Mass. Gen. Laws Ann. ch. 150E § 9A; (12) **Michigan** – Mich. Comp. Laws § 423.202; (13) **Missouri** – Mo. Rev. Stat. § 105.530; (14) **Nebraska** – Neb. Rev. Stat. §§ 81-1369 to 90, 48-82 1; (15) **Nevada** – Nev. Rev. Stat. § 288.230; (16) **New Hampshire** – N.H. Rev. Stat. Ann. §§ 273-A:13, 273-C:6(II)(e); (17) **New Jersey** – *Passaic Twp. Bd. of Educ. v. Passaic Twp. Educ. Ass'n*, 536 A.2d 1276 (N.J. Super. Ct. App. Div. 1987); N.J. Stat. Ann. § 34:13A-14(a); (18) **New Mexico** – N.M. Stat. § 10-7E-21; (19) **New York** – N.Y. Civ. Serv. Law § 210; (20) **North Dakota** – N.D. Cent. Code § 15.1-16-16; (21) **Oklahoma** – Okla. Stat. tit. 70 § 509.8; Okla. Stat. tit. 11 §§ 51-101, 51-217; (22) **Rhode Island** – R.I. Gen. Laws § 36-11-6; (23) **South Dakota** – S. D. Codified Laws § 3-18-10; (24) **Tennessee** – Tenn. Code Ann. § 49-5-609(b)(5); (25) **Texas** – Tex. Local Gov't Code Ann. §§ 174.002, 617.003; (26) **Utah** – Utah Code Ann. § 34-20a-5; (27) **Washington** – Wash. Rev. Code §§ 28B.52.078, 41.06.150(11)(c) , 41.56.028(2)(e), 41.56.029(2)(e), 41.56.120, 41.56.430, 41.56.490, 41.76.065, 41.80.060, 47.64.140 , 53.18.020 , 74.39A.270(2)(d) ; (28) **Wyoming** – 1999 Wyo. Op. Atty. Gen. 1 (1999); *Retail Clerks Local 187 AFL-CIO v. Univ. of Wyo.*, 531 P.2d 884 (Wyo. 1975).

private industry. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members in 2007, at 8 tbl.3 (Jan. 25, 2008).[6]

The higher incidence of public-sector union membership suggests that many public-sector employees believe the risks of joining a union are minimal compared to the potential rewards. Among the risks avoided by most public-sector employees that can collectively bargain is the risk of a strike. Although strikes may be useful tools for unions, they can also be highly inconvenient for individual employees, for whom a strike may mean a temporary and even permanent loss of employment and income. *See Lyng v. Automobile Workers*, 485 U. S. 360, 371 (1988) ("[A] striking individual faces an immediate and often total drop in income during a strike."). By contrast, public-sector workers – free from the risk that union leaders might call a strike that backfires and leads to unemployment – bear only one significant cost of union membership: payment of union dues. Further, a public-sector union might face no immediate competition for the services its members provide, allowing these workers to feel safe from marketplace repercussions if their employer faces relatively higher labor costs due to strikes or the risk of a strike. In the private sector, by contrast, the same employees might fear that strikes could lead to replacement workers and unemployment and that the correspondingly higher labor costs (resulting, in part, from the powerful threat of a

[6] *Available at* http://www.bls.gov/news.release/pdf/union2.pdf.

strike) could compromise a business's long-term viability, leading again to unemployment.

An employee's bargaining freedom (under 29 U.S.C. § 157) and First Amendment associational rights are maximized when he or she has the *choice* whether to join a union in the first place. Where, as here, the powers of an employee's union are fundamentally altered by the addition of a right to strike, an employee confronts significant new financial risks and cannot be presumed to support the union. *Cf. NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-93 (1990) (agreeing with the Board that presumptions were inappropriate in determining whether replacement workers support a striking union due to employees' widely varying attitudes toward strikes). Rather, this employee should be given an opportunity to vote on whether to join a union with the right to strike – a policy that would recognize the right of workers to choose their workplace representation.[7] If the successorship doctrine is ever going to apply where the employer changes from the public to the private sector (a broader question that does not need to be reached in this case), the doctrine should be limited to

[7] Of course, there may be situations like the instant case, where there is already an employer-union relationship in place and, if the new employees are found to be part of that bargaining unit, then they will not (absent a decertification election) have a say in regard to whether or not they want to be represented by a union with the power to strike. But to the extent possible, other employees' ability to make important choices regarding collective bargaining, particularly whether those employees want to be part of union that can strike, should be preserved.

situations where the union's powers – including the power to strike – remain largely unchanged.

### B. In the public-sector successorship case law cited by the Board, the unions did not gain the right to strike when their employees were hired by a successor private employer.

The entirety of the Board's public-to-private-employer analysis in this case appeared in one sentence: "The Board has applied th[e successorship doctrine] even where, as here, the predecessor is a public entity." *Dean Transp., Inc.*, 350 N.L.R.B. No. 4, 2007 WL 1832184, at *16 (June 22, 2007). But none of the case law cited by the Board discussed the argument that a newly acquired right to strike should prevent the extension of the successorship doctrine to a public-sector union entering the private sector. The absence of this discussion in the Board's case review is unsurprising, since each case the Board cited involved one of the minority of states that allow public employees to strike.[8]

[8] It seems odd that in this case the Board did not discuss the right-to-strike issue, of which it has long been aware – see *Harbert Int'l Serv.*, 299 N.L.R.B. 472 (1990), and *Base Serv., Inc.*, 296 N.L.R.B. 172 (1989). Although both of these cases were eventually overturned on other grounds, the ALJs clearly addressed the right-to-strike issue – albeit erroneously, due in part to neglecting 29 U.S.C. § 157 and failing to account for the drastic differences in public-sector and private-sector union participation rates. Furthermore, in this case, the Mackinac Center attempted to file an amicus brief with the Board discussing this issue. Although the Board rejected the brief on the ground that the parties' briefs adequately presented all of the issues, the Board's decision did not devote a single sentence to the right-to-strike issue.

For instance, in *JMM Operational Servs., Inc.*, 316 N.L.R.B. 6 (1995), the union did not acquire new strike powers in the shift from the public to the private sector. Under the Illinois Public Labor Relations Act (IPLRA), most employees have the right to strike. 5 Ill. Comp. Stat. 315/17. In fact, the Board based part of its analysis supporting successorship on the similarities between the IPLRA and the NLRA: "The State's procedures are similar to those set forth under the NLRA. They are fair and regular, [and] they do not conflict with the mandates of the statute or fundamental Board policies interpreting the NLRA." 316 N.L.R.B. at 9.

In *Lincoln Park Zoological Society*, 322 N.L.R.B. 263 (1996), another IPLRA case in which the public-employee union did have the right to strike, the successorship doctrine was not questioned, as the private employer did "not dispute that the successorship doctrine applies even though the predecessor was a public employer." *Id.* at 265. An appeal of that ruling was filed with the Seventh Circuit. *Lincoln Park Zoological Soc'y v. NLRB*, 116 F.3d 216 (7th Cir. 1997). The disputed issue before that court, however, was whether majority status would be presumed when the union was certified under the IPLRA rather than under federal law. Although the private employer emphasized the public-to-private-employer issue at oral argument, the Seventh Circuit refused to consider this question because the employer had not appealed the successorship issue. *Id.* at 220.

In *Comm. Hosps. of Cent. Calif.*, 335 N.L.R.B. 1318 (2001), a private employer assumed control of a county hospital. In California, the Meyers-Milias-Brown Act (MMBA) governs the collective bargaining process for local governments. *In re Work Uniform Cases*, 34 Cal. Rptr. 3d 635, 640-41 (Cal. Ct. App. 2005). The MMBA is silent on the right to strike, but the absence of a law expressly prohibiting strikes means that such strikes are generally permissible, as California's courts have held. *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660,* 699 P.2d 835, 850 (Cal. 1985).

The only successorship issue raised in *Community Hospitals* was whether a shift from public to private employment *necessarily* precluded application of the successorship doctrine. The ALJ, in a decision later adopted by the Board, concluded that it did not: "That fact that Respondent, a private, nonprofit enterprise took control of [Valley Medical Center], a public-sector employer owned and operated by the county of Fresno does not change the normal rules of successorship." 335 N.L.R.B. at 1332 (citing *Lincoln Park Zoological Society*).

The case was appealed to this Court, which affirmed the Board's decision. *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003). On appeal, the private employer highlighted "the change from public to private management." *Id.* at 1083-84. The right to strike, however, was not discussed at all. Thus, while this Court seemed to accept that the successorship

doctrine might sometimes apply when the prior employer was public, it did not address the specific scenario presented in this case – *i.e.*, when a predecessor public employer bargained with a union that lacked the statutory right to strike.

In *Van Lear Equip., Inc.*, 336 N.L.R.B. 1059 (2001), a private company acquired the business of providing bus transportation for a Pennsylvania school district. Pennsylvania law allowed the public school bus drivers to strike. 43 Pa. Cons. Stat. Ann. § 1101.1003. In that case, the sole sentence related to the public-employer issue was: "Further, the successorship doctrine continues to apply even though the predecessor, [Panther Valley School District], is a public employer." 336 N.L.R.B. at 1064 (citing *Lincoln Park Zoological Society* and *JMM Operational Services*).

Thus, none of the cases cited by the Board in the instant matter support a holding that the successorship doctrine should be applied when the union is acquiring a new power to strike, since in each case, the public-sector union already had that power.

## II. BY INCREASING THE COSTS OF OUTSOURCING , THE BOARD'S DECISION LIMITS THE ABILITY OF SCHOOL DISTRICTS TO MANAGE THEIR RESOURCES.

The Board and GRESPA have treated this case as a labor dispute. But *amici* believe that the genuine impact of this case falls not just on drivers' salaries, retirement benefits, and health plans. Instead, this case is fundamentally about

preserving the ability of public schools to utilize options to retain scarce dollars that can be used to improve children's education. In that context, the Board's decision will impose a significant obstacle on many public schools' efforts to pursue their educational mission in tough financial environments.

### A. By forcing private employers to inherit public schools' labor relations, the Board's decision imposes substantial and unnecessary costs on outsourcing efforts.

Central to any transportation company's operations is its labor relations. The cost of labor tends to be the single largest expense of transportation provision, beyond even the cost of equipment acquisition and maintenance. *See* Janet R. Beales, *Total Costing for Transportation Service: How the San Diego City Schools Missed the Bus*, Reason Foundation Policy Study No. 199, at 11 (1995).[9] More importantly, employees (especially drivers) are the public face of student transportation, with the most direct contact with schoolchildren and parents and the most day-to-day responsibility for ensuring that students receive safe and effective transportation.

In this case, the Board's decision seriously interferes with private transportation companies' labor relations and, by extension, raises the costs associated with the transition to outsourcing. Despite the fact that Dean Transportation already has a good bargaining relationship with a well-established

[9] *Available at* http://www.reason.org/ps199.html.

union, DTEU, and despite the fact that DTEU was willing to accept the vast majority of the Union Street employees,[10] the Board nevertheless concluded that Dean Transportation was obligated to recognize and bargain with a separate union for its Union Street employees. This decision impairs outsourcing in several ways.

First, and most importantly, the Board's decision impedes the efficient regionalization of school transportation for the parties involved – *i.e.*, it prevents Dean Transportation from planning routes and sharing drivers and equipment across and between different school districts to maximize efficiency. Regionalization permits school districts to take advantage of economies of scale, coordinated services, shared facilities, and specifically assigned personnel to improve both efficiency and the bottom line.

Private companies can achieve these advantages because they are free of the inherent geographical limitations of the public schools. The public education system in Michigan has long been arranged into individual districts – approximately 550 in total. Some are small, some are urban, and many are financially distressed. Although such localization advances the educational mission of the public schools by ensuring local "ownership" and accountability, it introduces additional costs for non-instructional support services such as school

[10] DTEU only represents drivers and does not represent route planners and mechanics.

transportation by requiring neighboring districts to obtain individually what would be less costly and more efficient to share. One of the key advantages of private contracting in the public educational system (and in the provision of public services in general) has been its ability to transcend localization and to adopt a broader and more cost-effective means of providing support for the schools' educational mission. Indeed, *amicus* Kent ISD hired Dean Transportation to provide special-education transportation for precisely this reason: Dean Transportation's contract with Kent ISD contemplates and eventually requires Dean Transportation to integrate special education transportation services across school districts to increase efficiency in the delivery of students and to reduce costs.[11]

For regionalization to achieve these advantages, however, transportation companies need to establish two related policies: a unified system of managing employees, and a labor pool that is not tied to any particular locale. Dean Transportation has established both of these policies in providing GRPS's and Kent ISD's transportation needs. Dean Transportation has implemented a uniform system of management, procedures, and regulations for all of its drivers, including

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[11] The Michigan legislature has also expressed its interest in increasing regionalization. Mich. Comp. Laws § 380.761, enacted September 19, 2007, requires ISDs (such as Kent ISD) to consider consolidating a broad range of non-instructional services, including transportation services, on behalf of their constituent school districts.

those in the Union Street Unit. Dean Br. at 10-11, 41-43; *see also* ALJ Op. at 12 ("[T]he evidence offered by the Respondent Employer does show that it is a highly centralized operation, with most decisions regarding policies, procedures, and labor relations being made at the Lansing headquarters."). In addition, Dean Transportation has been able to exchange drivers and equipment between the Union Street Unit and other parts of Dean Transportation's extended operations to meet fluctuating demand and reduce unnecessary downtime. Dean Br. at 15.

By requiring Dean Transportation to bargain with a separate union solely for its Union Street drivers, the Board's decision impedes both of these basic prerequisites for effective regionalization. As a practical matter, Dean Transportation will likely be forced to treat the Union Street drivers as a separate unit altogether, with different policies and practices emerging from separate collective bargaining processes, despite the fact that all of Dean Transportation's drivers are engaged in similar activities in similar circumstances. Moreover, bargaining over coordinated or consistent bus routes, transfers, assignments, pay scales, and other terms in what should be a common transportation system is realistically not feasible in a situation with two different unions and two different bargaining units. At the very least, bargaining with multiple units that otherwise share a community of interests is substantially more expensive in terms of time, legal costs, and resources than negotiating with just a single bargaining unit. Such

bargaining also creates instability in collective bargaining relationships, which could lead to a greater risk of labor disputes affecting school transportation. *See West Jersey Health Sys.*, 293 N.L.R.B. 749, 751 (1989) (noting "the potential for adverse consequences ensuing from a labor disruption at a single-facility unit" that is part of a multi-facility operation).

The practical consequences of the Board's ruling in this case are particularly troubling because the Board's decision is not in keeping with the NLRA's "paramount goal[s]" of "promot[ing] labor peace," *Titanium Metal Corp. v. NLRB*, 392 F.3d 439, 447 (D.C. Cir. 2004), and "stability in collective-bargaining relationships," *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987). In this case, DTEU, a union that has been in operation for 30 years, currently represents all of Dean Transportation's drivers, and continues to represent all of Dean Transportation's drivers outside of Grand Rapids under the Board's ruling. Nothing indicates that any of the drivers currently represented by DTEU are dissatisfied by that union's representation. As a result, the Board's ruling in this case sets up a situation where two competing unions represent substantially similar employees from the same employer. Such an arrangement inherently risks disputes between the unions and between each union and the employer. *See NLRB v. Radio & Television Broadcast Eng. Union*, 364 U.S. 573,

574-75 (1961) (noting that work stoppages and other severe labor disruptions resulted from the presence of competing unions).

In short, the Board's decision significantly handicaps public schools' ability to select from a range of financial options, including outsourcing of support services, and forces private companies to needlessly inherit labor relations while creating the potential destabilization of industrial peace.

### B. Reducing the benefits of outsourcing non-instructional support services such as student transportation prevents schools from properly fulfilling their primary mission of educating children.

In recent years, many public schools have come under increasing financial strain as demands to improve the education of America's youth run up against the cold reality of many schools' limited resources. Budget deficits have become a familiar feature of public school administration around the country,[12] leading to hard and often unpopular decisions by districts such as increasing class size, reducing instructional support staff, delaying technology upgrades in the

[12] *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) ("In 1995, a Federal District Court declared a 'crisis of magnitude' and placed the entire Cleveland school district under state control."); Amy Gardner, *Property Tax Rate May Rise In Fairfax: Funds Would Go to Schools, Human Services*, Wash. Post, Apr. 6, 2008, at C1; Megan Greenwell, *Schools, Charles at Odds on Funding: Increase Sought in Education Budget*, Wash. Post, Feb. 17, 2008, at SM1; Carlos Sadovi, *Schools ask state's help on $180 million shortage: $90 million in cuts proposed by Duncan*, Chicago Tribune, Feb. 15, 2008, at C3; Duke Helfand & Jean Merl, *Schools Win, Lose in Governor's Proposal: Schwarzenegger says he will raise funding 2% but withhold $2 billion owed to districts and community colleges*, Los Angeles Times, Jan. 9, 2004, at B14.

classroom, postponing much needed facilities improvements or construction, and cutting programs such as gifted and talented opportunities, summer enrichment classes, and athletic and extracurricular activities normally subsidized by school funds.

Michigan public schools have not escaped this general trend. Michigan's school finance structure provides funding to schools on a per-pupil basis and further permits students to attend schools outside their districts of residence. *See* Office of Revenue and Tax Analysis, Mich. Dep't of Treasury, *School Finance Reform in Michigan: Proposal A: Retrospective* 31-39 (2002).[13] However, Michigan's schools have seen a drop in student enrollment in large part due to the state's overall economic decline, leading to "an increased premium on schools' cost management" as schools attempt to conserve resources. *See* Michael D. LaFaive, Mackinac Ctr. for Public Policy, *A School Privatization Primer for Michigan School Officials, Media and Residents* 33-35 (2007).[14]

"Because of [Michigan's] recession, taxpayers and parents are looking to municipal entities such as school districts to take proactive measures to reduce their costs and not strain their existing tax burden." Jim Romeo, *How Much*

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[13] *Available at* http://www.michigan.gov/documents/propa_3172_7.pdf.

[14] *Available at* http://www.mackinac.org/archives/2007/s2007-07.pdf.

*Privatization Is Too Much?*, School Planning & Mgmt., July 2007.[15] One prominent way in which public schools have attempted to economize is to outsource non-instructional support services. The Michigan legislature has expressed its support for such outsourcing: in amending the labor laws for public schools in 1994, the legislature specifically exempted outsourcing decisions from the requirement of collective bargaining, thus giving local school boards full discretion with regard to "[t]he decision of whether or not to contract with a third party for 1 or more noninstructional support services." Mich. Comp. Laws § 423.215(3)(a)(f); *see also Mich. State AFL-CIO v. Employment Rels. Comm'n*, 551 N.W.2d 165 (Mich. 1996) (upholding this provision against union's constitutional challenges).

Student transportation – along with food and janitorial services – is one of the most common areas of outsourcing. *See* Romeo, *supra*. A 2001 survey found that 31.8 percent of school districts nationwide contracted out their bus services; that average, however, encompasses an enormous range, with some states, such as Connecticut and Massachusetts, outsourcing nearly all of their public school transportation, and others, such as Michigan, outsourcing only a small fraction of overall busing. *See* LaFaive, *supra*, at 18-19. Given the financial challenges that

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[15] *Available at* http://www2.peterli.com/spm/resources/articles/archive.php?article_id=1553.

face public schools, *amici* believe that school districts must be able to consider and implement a full range of options to save money and direct the bulk of their resources and attention to their most important mission: educating children. And *amici* believe that outsourcing of school transportation is an important means for public schools to respond to their difficult financial position.

When properly implemented, outsourcing promises to reduce the costs of school transportation, making more money available for the schools' other priorities. *See, e.g.*, E. Bruce Hutchinson & Leila J. Pratt, *The Comparative Cost of Privatized Public School Transportation in Tennessee*, 27 Policy Studies J. 446 (1999) (concluding that in 15 of 19 of the studied school systems, outsourcing resulted in 27% reduction in costs); Beales, *Total Costing*, *supra*, at 11-14. Unlike government-run enterprises, private transportation companies usually face competitive market pressures to minimize costs while preserving the high quality of service that their public school clients demand. Moreover, as noted earlier, private transportation companies – which can operate in multiple school districts and even multiple states – can take advantage of economies of scale to reduce costs further. For example, private transportation companies can share equipment and personnel across multiple areas, centralize administrative operations (including personnel decisions), and utilize their larger size and purchasing power to obtain favorable prices from equipment sellers.

The potential cost savings are significant. Last year, for example, Michigan schools sent $740 million on student transportation, with GRPS spending $6.5 million and Kent ISD spending nearly $20 million.[16] These figures are likely to rise this year – both absolutely (due to increased gas prices) and relatively to the schools' overall budgets (due to the declining economy and decreasing enrollment). It is essential that school districts have every tool at their disposal, including outsourcing, to minimize or even reverse these rising costs.

The true benefits of outsourcing, however, go well beyond the bottom line. By outsourcing non-instructional support services such as student transportation, public schools that choose this option can refocus their resources and attention on their primary mission: educating children. As one former Michigan school official has noted, "[c]ontracting allows our school district to focus on what we're really supposed to do . . . . It means more resources in the classroom and less money spent on noninstructional services." Janet R. Beales, *Doing More With Less: Competitive Contracting for School Support Services*, Reason Foundation Policy Study No. 179, at section II (1994) (quoting Mark Tennant, Trustee and Former

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[16] Figures are available at the Mackinac Center's Michigan School Money District Revenue and Expenditure Report, *at* http://www.mackinac.org/depts/epi/fiscal.aspx, which draws from data collected by the Michigan Department of Education.

President, Pinckney Board of Education, Pinckney, Michigan).[17] Private contractors whose primary business is pupil transportation have a single focus: to provide quality school transportation services in the most efficient and cost-effective way possible while maintaining the highest levels of safety and reliable service. School administrators who convert to contracted transportation are thus able to redirect their energies and resources to their core function of education.

Outsourcing, of course, is not a panacea, and *amici* are fully aware that, in some school districts, contracting out student transportation has sometimes led to higher costs, less efficiency, or more distractions for public school officials and teachers. The important point, however, is that outsourcing of non-instructional support services has proven to be a valuable option for many public schools to respond to the financial and performance pressures imposed by governments, parents, and the students themselves. By raising the costs of outsourcing, the Board's decision in this case limits the benefits of outsourcing and thus deprives public schools of the full advantage of an important tool for improving their educational mission.[18]

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[17] *Available at* http://www.reason.org/ps179.html.

[18] These clear, non-union-related motivations for public schools to outsource provide another reason to question the application of the successorship doctrine in this case. As the Supreme Court has recognized, the successorship doctrine is intended in large part to prevent corporate malfeasance against established unions: "Without the presumptions of majority support and with the wide variety of

### C. Imposing barriers to outsourcing of school transportation services will have broader repercussions for public schools and their communities.

In this case, Dean Transportation has committed to servicing GRPS and Kent ISD, and *amici* believe that Dean Transportation will complete its obligations regardless of the extra expense imposed by the Board's erroneous factual and legal conclusions. But *amici* are concerned about the effect that the Board's decision in this case will have on future outsourcing efforts in Michigan and elsewhere. If private firms bidding for the right to provide public services know they will be forced to recognize new or multiple and overlapping collective bargaining relationships, in addition to continuing to recognize any existing union with which they already have bargaining relationships, then public entities seeking to save their constituents money by outsourcing public services are much less likely to find willing private bidders. Moreover, even if private companies continue to find such

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corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence." *Fall River Dyeing,* 482 U.S. at 39-40 (1987); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990). But state and local governments, unlike corporations, cannot easily change their form, and any significant decisions they make require substantial popular and political support. In other words, outsourcing of public services is not a corporate shell game; rather, outsourcing is a government entity's fundamental policy decision to end its own monopoly on producing a particular service in order to better serve its fundamental mission. Thus, the Supreme Court's policy justifications for the successorship doctrine simply do not apply to outsourcing decisions by public entities.

work profitable, the higher expenses they will be forced to incur will cut into the savings that the public schools hope to achieve through outsourcing – as will happen in this case, as Dean Transportation is forced to deal with a separate union in a separate bargaining unit.

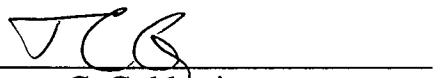
Impairing public schools' outsourcing efforts will also interfere with Michigan's ability to attract businesses, a particular concern of *amicus* MCC. Among the factors considered by employers to determine where to locate or expand their businesses are the public services provided by state and local governmental entities, the cost efficiency of those public services, and the level of taxation on businesses and individuals. The ability of governmental entities to operate cost-effectively is particularly critical in a state such as Michigan, where public bodies are caught in extremely difficult budgetary problems.

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the petition and decline to enforce the Board's order.

Dated: May 6, 2008

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Steven C. Wu, certify that a copy of the foregoing was mailed, postage prepaid, on this 6th day of May, 2008, to:

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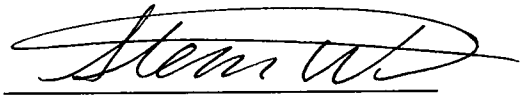

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# Statutory Appendix

# States allowing neither collective bargaining nor strikes

North Carolina – N.C. Gen. Stat. § 95-98:

> Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.

North Carolina - N.C. Gen Stat. § 95-98.1:

> Strikes by public employees are hereby declared illegal and against the public policy of this State. No person holding a position either full- or part-time by appointment or employment with the State of North Carolina or in any county, city, town or other political subdivision of the State of North Carolina, or in any agency of any of them, shall willfully participate in a strike by public employees.

Virginia – Va. Code Ann. § 40.1-57.2:

> No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service.

Virginia – Va. Code Ann. § 40.1-55:

> Any employee of the Commonwealth, or of any county, city, town or other political subdivision thereof, or of any agency of any one of them, who, in concert with two or more other such employees, for the purpose of obstructing, impeding or suspending any activity or operation of his employing agency or any other governmental agency, strikes or willfully refuses to perform the duties of his employment shall, by such action, be deemed to have terminated his employment and shall thereafter be ineligible for employment in any position or capacity during the next twelve months by the Commonwealth, or any county, city, town or other political subdivision of the Commonwealth, or by any department or agency of any of them.

## States that allow collective bargaining, but not strikes

Connecticut – Conn. Gen. Stat. § 7-475:

> Nothing in sections 7-467 to 7-477, inclusive, shall constitute a grant of the right to strike to employees of any municipal employer and such strikes are prohibited. In the event an agreement expires before a new agreement has been approved by the municipal employer and the employee organization, the terms of the expired agreement shall remain in effect until such time as a new agreement is reached and approved in accordance with section 7-474. Nothing in this section shall affect the rights and duties of the municipal employer and the employee organization under sections 7-468 to 7-470, inclusive, during the period of time such expired agreement remains in effect.

Connecticut – Conn. Gen. Stat. § 5-279:

> Nothing in sections 5-270 to 5-280, inclusive, shall constitute a grant of the right to strike to state employees and such strikes are prohibited.

Connecticut – Conn. Gen. Stat. § 10-153e(a):

> (a) No certified professional employee shall, in an effort to effect a settlement of any disagreement with the employing board of education, engage in any strike or concerted refusal to render services. This provision may be enforced in the superior court for any judicial district in which said board of education is located by an injunction issued by said court or a judge thereof pursuant to sections 52-471 to 52-479, inclusive, provided the Commissioner of Education shall be given notice of any hearing and the commissioner or said commissioner's designee shall be an interested party for the purposes of section 52-474.

Delaware – Del. Code Ann. tit. 19 § 1316:

> (a) No public employee shall strike while in the performance of official duties.
>
> (b) No public employee shall be entitled to any daily pay, wages, reimbursement of expenses, benefits or any consideration in lieu thereof, for the days on which the employee engaged in a strike.
>
> (c) Where a public employee has lost entitlement to any daily pay or other consideration pursuant to subsection (b) of this section, any agreement between such public employee or employee organization bargaining on the employee's behalf and a public employer which provided for the direct or indirect restoration of such entitlement shall be void as against public policy.

Delaware – Del. Code Ann. tit. 19 § 1616:

(a) No public employee shall strike while in the performance of the public employee's official duties.

(b) No public employee shall be entitled to any daily pay, wages, reimbursement of expenses, benefits or any consideration in lieu thereof, for the days on which the public employee engaged in a strike.

(c) Where a public employee has lost entitlement to any daily pay or other consideration pursuant to subsection (b) of this section, any agreement between such public employee or employee organization bargaining on the public employee's behalf and a public employer which provided for the direct or indirect restoration of such entitlement shall be void as against public policy.

Delaware – Del. Code Ann. tit. 14 § 4016:

(a) No public school employee shall strike while in the performance of that public school employee's official duties.

(b) No public school employee shall be entitled to any daily pay, wages, reimbursement of expenses, benefits or any consideration in lieu thereof, for the days on which the employee engaged in a strike.

(c) Where a public school employee has lost entitlement to any daily pay or other consideration pursuant to subsection (b) of this section, any agreement between such public school employee or employee organization bargaining on such employee's behalf and a public school employer which provided for the direct or indirect restoration of such entitlement shall be void as against public policy.

Florida – Fla. Const. art. 1 § 6:

Right to work.--The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Florida – Fla. Stat. § 447.505:

No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike. Any violation of this section shall subject the violator to the penalties provided in this part.

Georgia – Ga. Code Ann. § 25-5-12(b):

(b) Any collective bargaining agreement negotiated under this chapter shall specifically provide that the firefighters who are subject to its terms shall have no right to engage in any work stoppage, slowdown, or strike, the consideration for such provision being the right to a resolution of disputed questions. Whether or not a collective bargaining agreement has been negotiated, no firefighter shall engage in any work stoppage, slowdown, or strike at any time.

Georgia – Ga. Code Ann. § 45-19-2:

No public employee shall promote, encourage, or participate in any strike; provided, however, that no right to collective bargaining currently recognized by law is abridged by this article.

Indiana – Ind. Code § 20-29-9-1:

Sec. 1. It is unlawful for:

(1) a school employee;
(2) a school employee organization; or
(3) an affiliate, including state or national affiliates, of a school employee organization;

to take part in or assist in a strike against a school employer or school corporation.

Iowa – Iowa Code § 20.12:

1. It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify or participate in a strike against any public employer.

2. It shall be unlawful for any public employer to authorize, consent to, or condone a strike; or to pay or agree to pay any public employee for any day in which the employee participates in a strike; or to pay or agree to pay any increase in compensation or benefits to any public employee in response to or as a result of any strike or any act which violates subsection 1. It shall be unlawful for any official, director, or representative of any public employer to authorize, ratify or participate in any violation of this subsection. Nothing in this subsection shall prevent new or renewed bargaining and agreement within the scope of negotiations as defined by this chapter, at any time after such violation of subsection 1 has ceased; but it shall be unlawful for any public employer or employee organization to bargain at any time regarding suspension or modification of any penalty provided in this section or regarding any request by the public employer to a court for such suspension or modification.

3. In the event of any violation or imminently threatened violation of subsection 1 or 2, any citizen domiciled within the jurisdictional boundaries of the public

employer may petition the district court for the county in which the violation occurs or the district court for Polk county for an injunction restraining such violation or imminently threatened violation. Rules of civil procedure 1.1501 to 1.1511 regarding injunctions shall apply. However, the court shall grant a temporary injunction if it appears to the court that a violation has occurred or is imminently threatened; the plaintiff need not show that the violation or threatened violation would greatly or irreparably injure the plaintiff; and no bond shall be required of the plaintiff unless the court determines that a bond is necessary in the public interest. Failure to comply with any temporary or permanent injunction granted pursuant to this section shall constitute a contempt punishable pursuant to chapter 665. The punishment shall not exceed five hundred dollars for an individual, or ten thousand dollars for an employee organization or public employer, for each day during which the failure to comply continues, or imprisonment in a county jail not exceeding six months, or both such fine and imprisonment. An individual or an employee organization which makes an active good faith effort to comply fully with the injunction shall not be deemed to be in contempt.

4. If a public employee is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, the employee shall be ineligible for any employment by the same public employer for a period of twelve months. The employee's public employer shall immediately discharge the employee, but upon the employee's request the court shall stay the discharge to permit further judicial proceedings.

5. If an employee organization or any of its officers is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, the employee organization shall be immediately decertified, shall cease to represent the bargaining unit, shall cease to receive any dues by checkoff, and may again be certified only after twelve months have elapsed from the effective date of decertification and only after a new compliance with section 20.14. The penalties provided in this section may be suspended or modified by the court, but only upon request of the public employer and only if the court determines the suspension or modification is in the public interest.

6. Each of the remedies and penalties provided by this section is separate and several, and is in addition to any other legal or equitable remedy or penalty.

Kansas – Kan. Stat. Ann. § 75-4333(c)(5):

(c) It shall be a prohibited practice for public employees or employee organizations willfully to:

. . .

(5) Engage in a strike.

Kansas – Kan. Stat. Ann. § 72-5423(c):

> (c) Nothing in this act, or the act of which this section is amendatory, shall be construed to authorize a strike by professional employees.

Kentucky – Ky. Rev. Stat. Ann. § 345.130:

> No firefighter shall engage in, and no firefighter labor organization shall sponsor or condone any strike.

Kentucky – Ky. Rev. Stat. Ann. § 78.470:

> In any county in the Commonwealth of Kentucky, which has a population of 300,000 or more, and which has adopted the merit system, the county employees in the classified service as police may organize, form, join or participate in organizations in order to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to bargain collectively through representatives of their own free choice. Such employees shall also have the right to refrain from any or all such activities. Strikes by said members of any such collective bargaining unit shall be prohibited at any time.

Maine – Me. Rev. Stat. Ann. tit. 26 § 1284(2)(C)(1)-(3):

> 2. Judicial employee prohibitions. Judicial employees, judicial employee organizations, their agents, members and bargaining agents are prohibited from:
>
> . . .
>
> C. Engaging in:
>
> (1) A work stoppage;
> (2) A slowdown;
> (3) A strike; or
> . . .

Maine – Me. Rev. Stat. Ann. tit. 26 § 979-C(2)(C)(1) to (3):

> 2. State and legislative employee prohibitions. State and legislative employees, employee organizations, their agents, members and bargaining agents are prohibited from:
>
> . . .
>
> C. Engaging in:

(1) A work stoppage;
(2) A slowdown;
(3) A strike; or
. . .

Maine – Me. Rev. Stat. Ann. tit. 26 § 1027(2)(C)(1):

2. University, academy, community colleges; prohibitions. University employees, university employee organizations, their agents, members and bargaining agents; academy employees, academy employee organizations, their agents, members and bargaining agents; and community college employees, community college employee organizations, their agents, members and bargaining agents are prohibited from:

. . .

C. Engaging in:
(1) A work stoppage, slowdown or strike; and
. . .

Maine – Me. Rev. Stat. Ann. tit. 26 § 964(2)(C)(1)-(3):

2. Public employee prohibitions. Public employees, public employee organizations, their agents, members and bargaining agents are prohibited from:

. . .

C. Engaging in
(1) A work stoppage;
(2) A slowdown;
(3) A strike; or
. . .

Maryland – Md. Code Ann., State Pers. & Pens. § 3-303:

(a)

(1) In this section, "strike" means any concerted action to impede the full and proper performance of employment duties in order to induce, influence, coerce, or enforce demands for a change in wages, hours, terms, or other conditions of employment.

(2) "Strike" includes a total or partial:
(i) refusal or failure to report to work;
(ii) refusal or failure to perform employment duties;
(iii) withdrawal from work;
(iv) work stoppage; or

(v) work slowdown.

(b) State employees are prohibited from engaging in any strike.

(c) An appointing authority may take disciplinary action, including termination of employment, against an employee who participates in a strike.

(d) The Board shall revoke the certification of an exclusive representative who engages in any strike activity in violation of this section.

Maryland – Md. Code Ann., Educ. § 6-513:

(a) An employee organization may not call or direct a strike.

(b)

(1) Any employee organization designated as an exclusive representative that violates any provision of this section shall have its designation as exclusive representative revoked by the public school employer and the employee organization and any other employee organization that violates any provision of this section is ineligible to be designated as exclusive representative for a period of 2 years after the violation.

(2) If an employee organization violates any provision of this section, the public school employer shall stop making payroll deductions for dues of the organization for 1 year after the violation.

Maryland – Md. Code Ann., Educ. § 6-410:

(a) An employee organization may not call or direct a strike.

(b)

(1) Any employee organization designated as an exclusive representative that violates any provision of this section shall have its designation as exclusive representative revoked by the public school employer and the employee organization and any other employee organization that violates any provision of this section is ineligible to be designated as exclusive representative for a period of 2 years after the violation.

(2) If an employee organization violates any provision of this section, the public school employer shall stop making payroll deductions for dues of the organization for 1 year after the violation.

Maryland – Md. Ann. Code art. 28, § 5-114.1(e)(6):

(6) Employees may not engage in a strike.

Massachusetts – Mass. Gen. Laws Ann. ch. 150E § 9A:

> (a) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.
>
> (b) Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

Michigan – Mich. Comp. Laws § 423.202:

> A public employee shall not strike and a public school employer shall not institute a lockout. A public school employer does not violate this section if there is a total or partial cessation of the public school employer's operations in response to a strike held in violation of this section.

Missouri – Mo. Rev. Stat. § 105.530:

> Nothing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered in sections 105.500 to 105.530 to strike.

Nebraska – Neb. Rev. Stat. § 81-1369 to 90:

> NEBRASKA REVISED STATUTES OF 1943
>
> . . .
>
> § 81-1369. Act, how cited.
>
> Sections 81-1369 to 81-1390 shall be known and may be cited as the State Employees Collective Bargaining Act.

Nebraska – Neb. Rev. Stat. § 48-821:

> It shall be unlawful for any person:
>
> (1) To hinder, delay, limit or suspend the continuity or efficiency of any governmental service or any governmental service in a proprietary capacity, or the

service of any public utility, by lockout, strike, slowdown, or other work stoppage;

(2) To coerce, instigate, induce, conspire with, intimidate or encourage any person to participate in any lockout, strike, slowdown or other work stoppage, which would hinder, delay, limit or suspend the continuity or efficiency of any governmental service or governmental service in a proprietary capacity, or the service of any public utility; or

(3) To aid or assist any such lockout, strike, slowdown, or other work stoppage by giving direction or guidance in the conduct of any such lockout, strike, slowdown or other work stoppage or by providing funds for the conduct or direction thereof, or for the payment of strike, unemployment or other benefits to those participating therein.

Any person who willfully violates any of the provisions of this section shall be guilty of a Class I misdemeanor.

Nevada – Nev. Rev. Stat. § 288.230:

1. The legislature finds as facts:

(a) That the services provided by the state and local government employers are of such nature that they are not and cannot be duplicated from other sources and are essential to the health, safety and welfare of the people of the State of Nevada;

(b) That the continuity of such services is likewise essential, and their disruption incompatible with the responsibility of the state to its people; and

(c) That every person who enters or remains in the employment of the state or a local government employer accepts the facts stated in paragraphs (a) and (b) as an essential condition of his employment.

2. The legislature therefore declares it to be the public policy of the State of Nevada that strikes against the state or any local government employer are illegal.

New Hampshire – N.H. Rev. Stat. Ann. § 273-A:13:

Strikes and other forms of job action by public employees are hereby declared to be unlawful. A public employer shall be entitled to petition the superior court for a temporary restraining order, pending a final order of the board under RSA 273-A:6 for a strike or other form of job action in violation of the provisions of this chapter, and may be awarded costs and reasonable legal fees at the discretion of the court.

New Hampshire – N.H. Rev. Stat. Ann. § 273-C:6(II)(e):

> II. It shall be a prohibited practice for the exclusive representative of any employee:
>
> . . .
>
> (e) To engage in a strike or other form of job action during the term of the existing agreement.
>
> . . .

New Jersey – N.J. Stat. Ann. § 34:13A-14(a):

> The Legislature finds and declares:
>
> a. Recognizing the unique and essential duties which law enforcement officers and firefighters perform for the benefit and protection of the people of this State, cognizant of the life threatening dangers these public servants regularly confront in the daily pursuit of their public mission, and fully conscious of the fact that these public employees, by legal and moral precept, do not enjoy the right to strike, it is the public policy of this State that it is requisite to the high morale of such employees , the efficient operation of such departments, and to the general well-being and benefit of the citizens of this State to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes; and

New Mexico – N.M. Stat. § 10-7E-21:

> A. A public employee or labor organization shall not engage in a strike. A labor organization shall not cause, instigate, encourage or support a public employee strike. A public employer shall not cause, instigate or engage in a public employee lockout.
>
> B. A public employer may apply to the district court for injunctive relief to end a strike, and an exclusive representative of public employees affected by a lockout may apply to the district court for injunctive relief to end a lockout.
>
> C. The board or local board, upon a clear and convincing showing of proof at a hearing that a labor organization directly caused or instigated a public employee strike, may impose appropriate penalties on that labor organization, up to and including decertificaton of the labor organization with respect to any of its bargaining units which struck as a result of such causation or instigation.

New York – N.Y. Civ. Serv. Law § 210:

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration.

(a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.
(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.
(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize, approve, condone or consent to such strike or engagement.
(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.
(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation, the date or dates thereof and of his right to object to such determination pursuant to paragraph (g) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.
(f) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the

government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(g) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (e) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

North Dakota – N.D. Cent. Code § 15.1-16-16:

Teachers and administrators employed by school districts may not participate in a strike. The board of a school district may withhold some or all the wages otherwise due a teacher or an administrator who elects to participate in a strike in violation of this section.

Oklahoma – Okla. Stat. tit. 70 § 509.8:

The procedure provided for herein for resolving impasses shall be the exclusive recourse of the organization. It shall be illegal for the organization to strike or threaten to strike as a means of resolving differences with the board of education. Any member of an organization engaging in a strike shall be denied the full amount of his wages during the period of such violation. If the organization or its members engage in a strike, then the organization shall cease to be recognized as representative of the unit and the school district shall be relieved of the duty to negotiate with such organization or its representatives.

Oklahoma – Okla. Stat. tit. 11 § 51-101:

A. The protection of the public health, safety and welfare demands that the permanent members of any paid fire department or police department in any municipality not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to such employees of other well-recognized rights of labor such as the right to organize, to be represented by a collective bargaining representative of their choice and the right to bargain collectively concerning wages, hours and other terms and conditions of employment; and such employees shall also have the right to refrain from any and all such activities.

B. It is declared to be the public policy of this state to accord to the permanent members of any paid fire department or police department in any municipality all of the rights of labor, other than the right to strike or to engage in any work stoppage or slowdown. Nothing in this article shall constitute a grant of the right to strike to fire fighters or police officers of any municipality and such strikes are hereby prohibited. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others and without the lawful approval of his superior, wilfully absents himself from his position or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this article. The request shall be filed in writing with the officer or body having the power to remove or discipline such employee within ten (10) days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request, the officer or body shall within ten (10) days after the receipt of such request commence a proceeding for the determination of whether

the provisions of this article have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within ten (10) days following the conclusion of said hearing. If the employee involved is held to have violated this article and his employment terminated or other discipline imposed, he shall have the right of review to the district court having jurisdiction of the parties, within thirty (30) days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record. To provide for the exercise of these rights, a method of arbitration of disputes is hereby established.

C. It is declared to be the public policy of the State of Oklahoma that no person shall be discharged from or denied employment as a member of any paid fire department or police department in any municipality of this state by reason of membership or nonmembership in, or the payment or nonpayment of any dues, fees or other charges to, an organization of such members for collective bargaining purposes as herein contemplated.

D. The establishment of this method of arbitration shall not, however, in any way whatever, be deemed to be a recognition by the state of compulsory arbitration as a superior method of settling labor disputes between employees who possess the right to strike and their employers, but rather shall be deemed to be a recognition solely of the necessity to provide some alternative procedure for settling disputes where employees must, as a matter of public policy, be denied the usual right to strike.

Oklahoma – Okla. Stat. tit. 11 § 51-217:

A. It shall be unlawful for municipal employees to strike. If a strike occurs, the municipal employer may initiate in the district court in the district where the strike occurs, an action for injunctive relief.

B. It shall be unlawful for any municipal employer to authorize, consent to, or condone any strikes; or to pay or agree to pay a municipal employee for any day in which the employee participates in a strike; or to pay or agree to pay any increase in compensation or benefits to any municipal employee in response to or as a result of any strike or any act which violates this act. [Title 11, § 51-200 et seq.] It shall be unlawful for any official, director, or representative of any municipal employer to authorize, ratify, or participate in any violation of this section. Nothing in this section shall prevent new or renewed bargaining and agreement within the scope of negotiations as defined by this act, at any time after a violation of this section has ceased.

Rhode Island – R.I. Gen. Laws § 36-11-6:

Organizations representing state employees, firefighters as defined in § 28- 9.1-3, and police officers as defined in § 28-9.2-3, shall enjoy all the benefits of and be subject to all the provisions of chapter 7 of title 28, except that those employees shall not have the right to strike.

South Dakota – S. D. Codified Laws § 3-18-10:

No public employee shall strike against the State of South Dakota, any of the political subdivisions thereof, any of its authorities, commissions, or boards, the public school system or any other branch of the public service. Provided, however, that nothing contained in this chapter shall be construed to limit, impair, or affect, the right of any public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment with the full, faithful and proper performance of the duties of employment.

Tennessee – Tenn. Code Ann. § 49-5-609(b)(5):

(b) It is unlawful for a recognized professional employees' organization or its representatives to:

. . .

(5) Engage in a strike;

Texas – Tex. Local Gov't Code Ann. § 174.002:

(a) The policy of this state is that a political subdivision shall provide its fire fighters and police officers with compensation and other conditions of employment that are substantially the same as compensation and conditions of employment prevailing in comparable private sector employment.

(b) The policy of this state is that fire fighters and police officers, like employees in the private sector, should have the right to organize for collective bargaining, as collective bargaining is a fair and practical method for determining compensation and other conditions of employment. Denying fire fighters and police officers the right to organize and bargain collectively would lead to strife and unrest, consequently injuring the health, safety, and welfare of the public.

(c) The health, safety, and welfare of the public demands that strikes, lockouts, and work stoppages and slowdowns of fire fighters and police officers be prohibited, and therefore it is the state's duty to make available reasonable alternatives to strikes by fire fighters and police officers.

(d) Because of the essential and emergency nature of the public service performed by fire fighters and police officers, a reasonable alternative to strikes is a system of arbitration conducted under adequate legislative standards. Another reasonable alternative, if the parties fail to agree to arbitrate, is judicial enforcement of the

requirements of this chapter regarding compensation and conditions of employment applicable to fire fighters and police officers.

(e) With the right to strike prohibited, to maintain the high morale of fire fighters and police officers and the efficient operation of the departments in which they serve, alternative procedures must be expeditious, effective, and binding.

Texas – Tex. Gov't Code Ann. § 617.003:

(a) Public employees may not strike or engage in an organized work stoppage against the state or a political subdivision of the state.

(b) A public employee who violates Subsection (a) forfeits all civil service rights, reemployment rights, and any other rights, benefits, and privileges the employee enjoys as a result of public employment or former public employment.

(c) The right of an individual to cease work may not be abridged if the individual is not acting in concert with others in an organized work stoppage.

Utah – Utah Code Ann. § 34-20a-5:

It is the duty of any corporate authority to meet and collectively bargain in good faith with the bargaining representative within ten days after receipt of written notice from such representative that it represents a majority of the employees in the bargaining unit. No collective bargaining agreement shall be executed for a period of more than two years. Each bargaining agreement shall contain a no-strike clause.

Washington – Wash. Rev. Code § 28B.52.078:

The right of college faculty to engage in any strike is prohibited. The right of a board of trustees to engage in any lockout is prohibited. Should either a strike or lockout occur, the representative of the faculty or board of trustees may invoke the jurisdiction of the superior court in the county in which the labor dispute exists and such court shall have jurisdiction to issue an appropriate order against either or both parties. In fashioning an order, the court shall take into consideration not only the elements necessary for injunctive relief but also the purpose and goals of this chapter and any mitigating factors such as the commission of an unfair labor practice by either party.

Washington – Wash. Rev. Code § 41.06.150(11)(c):

(11) Collective bargaining procedures:

. . .

(c) Written agreements may contain provisions for payroll deductions of employee organization dues upon authorization by the employee member and for the cancellation of such payroll deduction by the filing of a proper prior notice by the employee with the appointing authority and the employee organization: PROVIDED, That nothing contained herein permits or grants to any employee the right to strike or refuse to perform his or her official duties;

. . .

Washington – Wash. Rev. Code § 41.56.028(2)(e):

(2) This chapter governs the collective bargaining relationship between the governor and family child care providers, except as follows:

. . .

(e) Family child care providers do not have the right to strike.

Washington – Wash. Rev. Code § 41.56.029(2)(e):

(2) There shall be collective bargaining, as defined in RCW 41.56.030, between the governor and adult family home providers, except as follows:

. . .

(e) Adult family home providers do not have the right to strike.

Washington – Wash. Rev. Code § 41.56.120:

Nothing contained in this chapter shall permit or grant any public employee the right to strike or refuse to perform his official duties.

Washington – Wash. Rev. Code § 41.56.430:

The intent and purpose of chapter 131, Laws of 1973 is to recognize that there exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.

Washington – Wash. Rev. Code § 41.56.490:

The right of uniformed employees to engage in any strike, work slowdown, or stoppage is not granted. An organization recognized as the bargaining

representative of uniformed employees subject to this chapter that willfully disobeys a lawful order of enforcement by a superior court pursuant to RCW 41.56.480 and 41.56.490, or willfully offers resistance to such order, whether by strike or otherwise, is in contempt of court as provided in chapter 7.21 RCW. An employer that willfully disobeys a lawful order of enforcement by a superior court pursuant to RCW 41.56.480 or willfully offers resistance to such order is in contempt of court as provided in chapter 7.21 RCW.

Washington – Wash. Rev. Code § 41.76.065:

The right of faculty to engage in any strike is prohibited. The right of a board of regents or trustees to engage in any lockout is prohibited. Should either a strike or lockout occur, the representative of the faculty or board of regents or trustees may invoke the jurisdiction of the superior court in the county in which the labor dispute exists, and such court has jurisdiction to issue an appropriate order against either or both parties. In fashioning an order, the court shall take into consideration not only the elements necessary for injunctive relief but also the purpose and goals of this chapter and any mitigating factors such as the commission of an unfair labor practice by either party.

Washington – Wash. Rev. Code § 41.80.060:

Nothing contained in chapter 354, Laws of 2002 permits or grants to any employee the right to strike or refuse to perform his or her official duties.

Washington – Wash. Rev. Code § 47.64.140:

(1) It is unlawful for any ferry system employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify, or participate in a strike or work stoppage against the ferry system.

(2) It is unlawful for the employer to authorize, consent to, or condone a strike or work stoppage; or to conduct a lockout; or to pay or agree to pay any ferry system employee for any day in which the employee participates in a strike or work stoppage; or to pay or agree to pay any increase in compensation or benefits to any ferry system employee in response to or as a result of any strike or work stoppage or any act that violates subsection (1) of this section. It is unlawful for any official, director, or representative of the ferry system to authorize, ratify, or participate in any violation of this subsection. Nothing in this subsection prevents new or renewed bargaining and agreement within the scope of negotiations as defined by this chapter, at any time. No collective bargaining agreement provision regarding suspension or modification of any court-ordered penalty provided in this section is binding on the courts.

(3) In the event of any violation or imminently threatened violation of subsection (1) or (2) of this section, any citizen domiciled within the jurisdictional

boundaries of the state may petition the superior court for Thurston county for an injunction restraining the violation or imminently threatened violation. Rules of civil procedure regarding injunctions apply to the action. However, the court shall grant a temporary injunction if it appears to the court that a violation has occurred or is imminently threatened; the plaintiff need not show that the violation or threatened violation would greatly or irreparably injure him or her; and no bond may be required of the plaintiff unless the court determines that a bond is necessary in the public interest. Failure to comply with any temporary or permanent injunction granted under this section is a contempt of court as provided in chapter 7.21 RCW. The court may impose a penalty of up to ten thousand dollars for an employee organization or the ferry system, for each day during which the failure to comply continues. The sanctions for a ferry employee found to be in contempt shall be as provided in chapter 7.21 RCW. An individual or an employee organization which makes an active good faith effort to comply fully with the injunction shall not be deemed to be in contempt.

(4) The right of ferry system employees to engage in strike or work slowdown or stoppage is not granted and nothing in this chapter may be construed to grant such a right.

(5) Each of the remedies and penalties provided by this section is separate and several, and is in addition to any other legal or equitable remedy or penalty.

(6) In addition to the remedies and penalties provided by this section the successful litigant is entitled to recover reasonable attorney fees and costs incurred in the litigation.

(7) Notwithstanding the provisions of chapter 88.04 RCW and chapter 88.08 RCW, the department of transportation shall adopt rules allowing vessels, as defined in RCW 88.04.015, as well as other watercraft, to engage in emergency passenger service on the waters of Puget Sound in the event ferry employees engage in a work slowdown or stoppage. Such emergency rules shall allow emergency passenger service on the waters of Puget Sound within seventy-two hours following a work slowdown or stoppage. Such rules that are adopted shall give due consideration to the needs and the health, safety, and welfare of the people of the state of Washington.

Washington – Wash. Rev. Code § 53.18.020:

Port districts may enter into labor agreements or contracts with employee organizations on matters of employment relations: PROVIDED, That nothing in this chapter shall be construed to authorize any employee, or employee organization to cause or engage in a strike or stoppage of work or slowdown or similar activity against any port district.

Washington – Wash. Rev. Code § 74.39A.270(2)(d):

(2) Chapter 41.56 RCW governs the collective bargaining relationship between the governor and individual providers, except as otherwise expressly provided in this chapter and except as follows:

. . .

(d) Individual providers do not have the right to strike