

GARY L. AXON, ARBITRATOR

IN THE MATTER OF ARBITRATION
BETWEEN

THE INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, (UAW), LOCAL
UNION 4121,

Union,

and

THE UNIVERSITY OF WASHINGTON,

Employer.

**UNIVERSITY OF WASHINGTON'S
REPLY IN SUPPORT OF MOTION FOR
RECONSIDERATION**

I. INTRODUCTION

The legislature specifically considered whether to allow students to opt out of fees imposed under RCW 28B.15.610, and decided against it. The Union does not address this key statutory history in its brief, nor does it provide the arbitrator with any interpretation of the state statutes that gives meaning to all provisions. The University respectfully requests that the arbitrator reconsider his decision and deny the Union's grievance.

Even if the grievance is upheld, the Union does not have a basis for monetary damages. The Union's members have already received benefits far in excess of what they

1 have paid. To issue a refund would be to give these few students a windfall at the expense of
2 the rest of the student body.

3 II. DISCUSSION

4 A. THE ARBITRATOR CAN, AND SHOULD, RECONSIDER THE DECISION IN THIS 5 CASE.

6 Reconsideration in any forum is a tool to be used sparingly, but sometimes it is
7 necessary to prevent an injustice. The University believes this is such a case, and appreciates
8 the opportunity to provide additional briefing.
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10 Although the bases for reconsideration of an arbitration award are narrow, it is
11 permissible in this case. The Union correctly notes that, under the doctrine of *functus officio*,
12 an arbitrator may not reconsider a *final* award. The Union also raises, without explaining, an
13 important exception to that doctrine: the arbitrator retains authority over a matter if the award
14 is incomplete. Put another way, an award is “deemed final for *functus officio* purposes if the
15 award states it is final, and if the arbitrator intended the award to be final.” *Bosack v. Soward*,
16 586 F.3d 1096, 1003 (9th Cir. 2009). “An award cannot be final if significant issues still need
17 to be determined.” *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999) (cited
18 with approval in *Bosack*, 586 F.3d at 1103). This makes sense. An arbitrator should not be
19 deprived of jurisdiction over a matter unless and until the award is complete and final. A
20 contrary rule would encourage ambiguity and error.
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22 Here, the arbitrator expressly retained jurisdiction for a period of ninety days to
23 resolve remaining disputes, and the arbitrator’s May 24, 2012 decision did not contain a final
24 award of damages. Arbitrator’s May 24, 2012 decision, at *17 (Apr. 13, 2012). The decision
25 did not say it was final, and the arbitrator’s express retention of jurisdiction belies the notion
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1 that the award was complete and final. Furthermore, the calculation of damages—a
2 significant issue—still remains to be determined. Without resolution of such a significant
3 issue, the arbitrator's award cannot be deemed "final," and, therefore, the arbitrator retains the
4 authority to reconsider and clarify his decision.
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6 Moreover, the Union's citation to the Code of Professional Responsibility for
7 Arbitrators of Labor-Management Disputes is ineffective. In a similar context, the Ninth
8 Circuit Court of Appeals rejected the very same quotation the Union uses here. *Int'l Broth. of*
9 *Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, Local 631 v. Silver State*
10 *Disposal Serv., Inc.*, 109 F.3d 1409, 1412 (9th Cir. 1997). The court stated that a joint request
11 for reconsideration is unnecessary when an arbitrator is asked to complete an award. *Id.*
12 "[A]n arbitrator has the authority to amend an incomplete award. To hold that a joint request
13 is required before an arbitrator may clarify or complete an award would empower a party that
14 would benefit from an error to prevent its correction." *Id.* Here, there is no doubt the award
15 is not complete. The arbitrator may reconsider.
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18 **B. THE UNION'S ARGUMENT RENDERS KEY STATUTORY TERMS MEANINGLESS.**

19 The Union fails to address two key arguments made in the University's Motion. First,
20 the legislature specifically considered whether students should be able to opt out of student
21 imposed fees allowed by RCW 28B.15.610, and decided they cannot. *Regarding Student*
22 *Fees, Charges, and Assessments: Hearing on S.S.B. 5776 Before H. Comm. on State Gov't &*
23 *Tribal Affairs*, 61st Leg. (Wash. 2009) (statement of Rep. Gary Alexander, Member, H.
24 Comm. on State Gov't & Tribal Affairs). Thus, in 2009 the legislature considered—and
25 rejected—the argument the Union is making now.
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1 Second, the Union continues to trumpet the generic language of RCW 41.56.203,
2 while ignoring the specific waiver language contained in RCW 28B.15.615. If all fees are
3 waivable, as the Union claims, the designation of operating and technology fees as waivable
4 for certain graduate students in RCW 28B.15.615 is rendered entirely meaningless. Courts
5 should not adopt a statutory interpretation that renders provisions of a statute meaningless.
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7 *Jongeward v. BNSF R.R. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012). The Union does not
8 dispute this basic statement of the law, but also does not put forth any statutory interpretation
9 that would give meaning to the express waiver language in RCW 28B.15.615. The University
10 does. RCW 28B.15.615 allows for waiver of specific fees, and RCW 41.56.203 allows for
11 bargaining related to that waiver. Since 2004, those are the only fees the University has
12 waived.
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14 The Union claims the University's position—that applicable state statutes do not allow
15 these fees to be waived—is “contrary to the evidence.” Union Br. at 7. Of course, the proper
16 interpretation of state statute is not an evidentiary issue, but a legal one. For that reason, the
17 arbitrator should ignore the biased testimony of David Parsons and other witnesses regarding
18 their subjective understanding. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493,
19 503, 115 P.3d 262 (2005) (admissible extrinsic evidence does not include evidence of a
20 party's unilateral or subjective intent as to contract's meaning). In any event, the evidence in
21 the hearing supported the University's argument. For example, Gary Farris, a member of the
22 original contract negotiating team and the current Director of Finance and Administration for
23 the Graduate School, testified at the hearing that “my understanding is that the board [of
24 Regents] can't waive any fees that aren't authorized to be waived under the RCWs....”
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26 Mr. Farris also stated that the statutes authorize waiver of the operating fee and technology
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1 fee, and that the more specific statute regarding waiver governed over the more general statute
2 on which the Union is relying. AR at 119-20 & 128-29.

3 The Union also argues “the University has always waived one of the ‘student
4 imposed’ fees: the Technology Fee.” Union Br. at 7.¹ This is correct, and it fully supports the
5 University’s position. The Technology Fee is one of the two fees traditionally waived by the
6 University. It is also one of the two fees where waiver is expressly permitted by the
7 legislature in RCW 28B.15.615.
8

9 Here, the University’s interpretation is the only one that gives meaning to both
10 statutes.
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12 **C. THE PLAIN MEANING OF THE AGREEMENT IS CONSISTENT WITH THE**
13 **STATUTES.**

14 It is no coincidence that the fees specified in RCW 28B.15.615 have been historically
15 waived by the University, and have been waived since the CBA was signed in 2004. When
16 those negotiations began, it is undisputed the Union sought an agreement that the “University
17 shall not unilaterally impose new fees.” Union Ex. 13 at 1. That language did not become
18 part of the agreement. As described previously by the University (University’s Motion at 4-
19 5), it has agreed to waive only those fees it previously waived, the building and technology
20 fees.
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26 ¹ The Technology Fee is authorized by separate statute (RCW 28B.15.051) from the voluntary student fees
27 (RCW 28B.15.610) and the student services and activities fees (RCW 28B.15.041) at issue in this case.
28 Although the Technology Fee also has student involvement, it is not considered the same as the other two, in part
because it is expressly waivable by the legislature. The express waivability of that fee means that all involved,
including students, student governments, and the Board of Regents, understand from the outset it can be waived
for certain graduate students.

1 **D. EVEN IF RECONSIDERATION IS NOT GRANTED, THE UNION MEMBERS ARE**
2 **NOT ENTITLED TO ADDITIONAL COMPENSATION BECAUSE THE BENEFITS**
3 **THEY HAVE RECEIVED OUTWEIGH ANY POTENTIAL DAMAGES.**

4 **1. The Union's proposal seeks up to \$1 million in additional benefits.**

5 The Union's members have already obtained a substantial benefit from the new
6 universal U-PASS program. When the universal U-PASS program was established for the
7 2011-12 academic year, the cost of the U-PASS went down 23 percent from the 2010-11
8 price. University Ex. 4 at 1-000016. During the 2011-12 academic year, ASEs took trips
9 valued at \$1,426,280 under the terms of the transit contract negotiated using the University's
10 buying power, and \$1,999,200 at retail rates. Supplemental Declaration of Joshua Kavanagh
11 ("Kavanagh Decl.") at ¶ 2. ASEs contributed only \$848,870 to the program, resulting in a net
12 benefit to ASEs ranging from \$577,410 (University rate) to \$1,150,330 (retail rates). *Id.* at
13 ¶ 3. Thus, the ASEs have already obtained a benefit from the U-PASS program far in excess
14 of what they contributed.

15 Now, the Union is attempting to increase that benefit by asking that "50 percent
16 ASEs" who used their U-PASSes as many as 19 times be given a full refund. Union Br. at 9.
17 This would allow each of those ASEs to receive a benefit of up to \$99.75 in transit trips
18 without any payment at all.² Kavanagh Decl. at ¶ 4.

19 The agreement between the University and the Union has never allowed for free
20 U-PASS transportation. By asking for a full refund for ASEs who used the pass, the Union is
21 again trying to obtain through arbitration what it failed to obtain at the bargaining table.
22 During the negotiations for the original contract, the Union asked for "Free U-Pass." Union

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24 ² As previously described by the University, there are other significant benefits of the U-PASS program,
25 such as Night Ride transportation, Zip Car discounts, and discounted vanpool parking. These benefits cannot be
26 tied to individual users. University Mot. at 11.

1 Ex. 13. That did not become part of the CBA, and cannot be added now. Even under the old
2 opt-out program, 50 percent ASEs had to pay for the their U-PASS, and the cost was the same
3 regardless of how many trips an ASE took. If any refund is awarded, it should go only to
4 ASEs with an appointment of 50 percent FTE or greater who did not use the U-PASS for
5 transit.
6

7 **2. If ASEs do not participate in the universal program, they are not**
8 **entitled to the universal rate.**

9 The University believes the ASEs are required to pay the universal U-PASS fee
10 because it is a mandatory student-imposed fee and is not waivable. If the arbitrator reaches a
11 different decision, the ASEs should not be able to obtain the benefit of the lower fee offered
12 by the universal U-PASS program.
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14 The universal U-PASS program was instituted by students in response to soaring
15 prices for the old opt-out U-PASS program. *E.g.*, University Ex. 4 at 1-000020 (Graduate and
16 Professional Student Senate Resolution supporting universal U-PASS program). It is
17 undisputed the cost of a U-PASS rose 98 percent in one year, and more significant increases
18 were projected. *Id.* To save the program, students collectively decided to make participation
19 universal, thus providing greater fees to support the program and allowing the price of the
20 U-PASS to stabilize. The agreement with the student governments provides that if the
21 University offers any U-PASS product to other populations, the rate “shall be higher than the
22 Universal Student U-PASS fee.” University Ex. 4 at 1-000027. This protects the student
23 body from being forced to subsidize those who are not participating in the universal program.
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25 It is undisputed that the projected cost of a U-PASS without the universal system was
26 \$134.40 in 2011-12 and \$148.16 in 2012-13. University Ex. 4 at 1-000034. If the arbitrator
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1 concludes ASEs with 50 percent FTE appointments are able to opt out of the universal
2 U-PASS program, they should be required to pay the opt-out rates listed above, with interest,
3 to be contributed back into the transportation fund. Any other outcome would require the rest
4 of the student body to subsidize use of the universal program by ASEs with 50 percent FTE
5 appointments.
6

7 **3. The Student Facilities Renovation Fee is a commitment by the**
8 **entire student body.**

9 The Union claims the University “has committed itself to bond obligations that
10 conflict with commitments under the CBA....” Union Br. at 10. This sentence highlights the
11 Union’s fundamental misunderstanding of the legislature’s scheme for student fees. The fee
12 for *student* building renovations was enacted by the *students* for the benefit of *students*. This
13 is a commitment students made exercising the governmental power given to them by the
14 legislature in RCW 28B.15.045. This statute contains 13 sections, not one of which allows
15 for waiver. Student services and activities fees are also not authorized for waiver by
16 RCW 28B.15.615.
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18 The Union’s argument reinforces the reason these fees are not waivable. When the
19 student government decides to pass certain fees to be paid by all students for the benefit of all
20 students, those fees must in fact be paid by all students. There is no practical way to exclude
21 Union members who do not pay the fee from the buildings. It is also fundamentally unfair to
22 require other students to provide a free ride to a few students, which is what the Union is
23 asking for here.
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1 **4. Any damages award cannot extend past the period governed by the**
2 **CBA.**

3 For the reasons previously described, the University does not believe the Union should
4 be awarded damages. Even if it is, any damages award cannot extend past the end of the
5 CBA in existence when the Union initiated this grievance. The Union is requesting
6 prospective relief for all Student Facilities Renovation Fees, and for the U-PASS up to a
7 15 percent cap.³
8

9 On May 4, 2012, the University and the Union completed negotiation of a new
10 contract. Bargaining for this new agreement took place from approximately March through
11 May 2012, and was not part of the evidence before the arbitrator in this case. Although the
12 language of Section 7 did not change in this new agreement, there was extensive bargaining
13 related to fees and fee waivers. During this bargaining, the Union agreed to other beneficial
14 terms, including wage increases, instead of fee relief. The arbitrator's authority under the
15 current grievance does not extend to considering the terms of the new contract entered on
16 May 4, 2012. If the Union disputes the University's understanding of the new agreement, it
17 must follow the grievance procedures specified by that agreement.
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20 **III. CONCLUSION**

21 The legislature knows how to be explicit when a fee for college students can be
22 waived. The legislature did not include such language in the statutes authorizing the universal
23 U-PASS fee or the Student Facilities Renovation fee. And for good reason. Allowing
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26 ³ For the U-PASS, the Union is requesting reimbursement for "50 percent ASEs" who do not use the
27 U-PASS, up to a maximum refund amount of 15 percent of the total U-PASS fees paid by eligible ASEs.
28 Union's Motion at 3. Although the University does not believe any prospective relief should be awarded to the
 Union, if it is, the Union has limited its claim for relief by requesting a 15 percent cap. This effectively waives
 any claim by the Union for damages in excess of the 15 percent cap.

1 selective waiver of these fees creates a free rider problem, in which some students obtain a
2 benefit that is being paid for by the rest of the student body.

3 Even if the arbitrator disagrees, the remedy provided to the Union cannot create
4 additional benefits never agreed to by the parties. The CBA never allowed for free
5 U-PASSes. Any ASE who used the pass must pay for it. If the Union truly wants to return to
6 the old opt-out program, its members should pay the higher price associated with that
7 program.
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10 The University asks the arbitrator to reconsider his decision, and deny the grievance.

11 Dated this 21st day of November, 2012.

12 HILLIS CLARK MARTIN & PETERSON P.S.

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ND: 12662.04205 4851-8963-1505v4