STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION, DIST. NO. 1 MARINE ENGINEERS BENEFICIAL ASSOCIATION, MASTERS MATES & PILOTS, SHIPWRIGHTS LOCAL 1184, SHEET METAL WORKERS LOCAL 66, PLUMBERS & PIPEFITTERS LOCAL 32 Complainants, v. WASHINGTON STATE FERRIES, Respondent.	)	MEC CASE NOS. 10-97, 11-97, 12-97, 15-97, 18-97, 19-97 DECISION NO. 197 – MEC DECISION AND ORDER

Schwerin, Campbell and Barnard, attorneys, by Michelle Mentzer, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Davies Roberts and Reid, attorneys, by Michael R. McCarthy, appearing for and on behalf of District No. 1, Marine Engineers Beneficial Association and Shipwrights Local 1184, Sheet Metal Workers Local 66 and Plumbers and Pipefitters Local 2.

Steven N. Ross, attorney, appearing for and on behalf of the Masters Mates and Pilots Union.

Christine Gregoire, Attorney General, by Ann MacMurray, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

These matters came on regularly before the Marine Employees' Commission on March 29, 1997 when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice complaint against the Washington State Ferries (WSF). IBU's complaint charged WSF with engaging in unfair labor practices within the meaning of RCW 47.64.130(1)(a) and (e), to wit: interfering with, restraining or coercing employees in exercise of rights and refusing to bargain collectively with representatives of employees when it announced that it would implement a "no-beards/respirator policy without bargaining with the Inlandboatmen's Union.

Thereafter, on April 17, 1997, District No. 1 MEBA filed similar charges with the MEC, docketed as MEC Case No. 11-97. On April 18, 1997, the Masters Mates & Pilots filed a similar complaint, docketed as MEC Case No. 12-97. On May 5, 1997, Shipwrights Local 1184 filed MEC Case No. 15-97; on May 9, 1997, Sheetmetal Workers Local 66 filed MEC Case No. 18-97; and on May 12, 1997, Plumbers and Pipefitters Local 32 filed MEC Case No. 19-97. These unions also charged that the WSF announced it would implement a "no-beard"/respirator policy without benefit of bargaining with these unions.

NATURE OF THE CASE

After the passage of some 17 years, WSF determined officially that it would recognize and enforce the following provisions of the Washington Administrative Code (WAC) against bearded member of the complaining union unilaterally, *i.e.*, without engaging in collective bargaining with complainants relative to the impact of that action on the working conditions of the represented employees:

> A negative pressure respirator, any self-contained breathing apparatus, or any respirator which is used in an atmosphere which is immediately dangerous to life or health (IDLH), equipped with a face piece shall not be worn if facial hair comes between the sealing periphery of the face piece and the face or if facial hair interferes with valve function. (WAC 296-62-07109(8)).
>
> Respirators shall not be worn when conditions prevent a seal of the respirator to the wearer.
>
> (a) A person who has hair (stubble, moustache, sideburns, beard, low hairline, bangs) which passes between the face and the sealing surface of the face piece of the respirator shall not be permitted to wear such a respirator.

Actually, in this connection, the parties have stipulated of record, that, in accord with a deliberate policy of WSF, no bargaining regarding such impact has taken place and that the right to bargain with respect thereto has been demanded and has not been waived by the complainants.

In responding to the consolidated complaints, the WSF argues that:

> (1) It has no duty to bargain in the circumstances because bargaining relative to the underlying "regulatory requirement" would be "illegal";

(2) If for sake of discussion bargaining about such requirements is not illegal, it is permissive and not mandatory;

(3) In any case, unilateral implementation of the quoted relations would be without "material/substantive impact" on the employees' conditions of employment;

(4) Moreover, by agreeing to the "management function provisions" in their various collective bargaining contracts, each union waived any statutory right to bargain which it may have otherwise had in the premises;

(5) The contents of numerous arbitration awards support the analysis of WSF in the instant case.

On the other side of the controversy, the unions submit:

(1) Here, there is no dispute as to whether WSF refused to bargain relative to the impact of the new policy, whereby the WACS will be enforced against employees represented by the unions:

(2) Such "new policy" presents matters for mandatory bargaining because it deals with working conditions, *i.e.* "work rules regarding safety and health as well as rules of employee conduct";

(3) The Statutory obligation of the WSF to bargain with the unions prevails over conflicting state laws.

ISSUES

Does WSF have a duty, under the governing statute, to bargain with the complainant unions, relative to effects on working conditions for personnel in the various units, relative to its contemplated policy whereby the regulations cited above will be "enforced." If so, what remedy is reasonably appropriate for the breach thereof?

DISCUSSION

As noted above, the state regulations of basic concern here were generated some 17 years before the WSF issued its unilateral pronouncements that they would be enforced strictly. Plainly, the direct and intended implication of such pronouncements is that many bearded employees, heretofore allowed to wear their facial hair without interference, will be clean shaven as a condition of continued employment with the WSF. Understandably, as the statutory bargaining agencies for such employees, the

Complaining unions have an undeniable responsibility to advance claims that a subject of such manifest concern as to a condition of employment for a large group of their constituents is subject to collective bargaining as to its impact and effect on affected members of the units involved.

The question to be determined here then, is whether such claims by the bargaining agencies for the bearded men were and are and should be supported by the applicable laws of this jurisdiction, *viz*., chapter 47.64 RCW.

At the start, it is recognized that the validity and effectiveness of the regulations here at base are not in question.

As noted, the instant inquiry is confined fundamentally to whether the employer, after some 17 years, may change its rules drastically for bearded personnel, without bargaining as to the consequences of that unilateral action on their working conditions aboard the ferries and in the shops.

In the field of contemporary labor law, as explained more than two decades ago by Professor Gorman of the University of Pennsylvania Law School, there is a general and primary proposition of relevance to the instant issue. Thus,

> ...the requirements of continued employment for one already on the job are literally "conditions of employment" about which both parties must bargain. Thus, the employer may not set unilaterally – or bargain directly with individual employees about – the allowable causes of discharge and the manner in which employer decision on discharge may be reviewed through a grievance procedure. National Licorice Co., v. NLRB (U.S. 1940) (by implication). Gorman, BASIC TEXT ON LABOR LAW, UNIONIZATION and COLLECTIVE BARGAINING, West Publishing, St. Paul, 1976, p. 504, ch. 21).

In cases with content and substance similar essentially to that of the matter here before the Commission, the National Labor Relations Board has ruled that an employer must bargain with the representative union, as to the application and weight of a work rule for the represented and bearded employees on the unit job relating to mandatory use of a given variety of respirator. J.P. Stevens & Co., Inc., 239 NLRB 738 (1978), affirmed

625 F.2d 231 (1980). See also, Hanes Corporation, 260 NLRB 557 (1982). Reference is made additionally to AT&T Corporation, 97-98 CCH NLRB ¶16, 441 for further example as to a necessity for "effects" bargaining in circumstances involving a binding statute.

In this instance, the WAC referenced by WSF (WAC 296-62-07109) promulgates and embodies variables, exceptions and qualifications presenting a need for collective bargaining, rather than unilateral determination by the employer, as to "written operating procedures," "physiological and psychological limitations," "training," "respirator fit," "the proper type of respirator for each respiratory hazard," "inspections," "monitoring," "evaluating hazards," "medical and bioassay surveillance," "respiratory maintenance," and "respirator program evaluation.

Additionally, it is of record that the complaining unions have, with regard to work aboard the ferries, identified some ten aspects of the "respirator-no beard" situation as posing authentic bargainable topics, relative to the impact of the employer's unilateral promulgation, i.e.,

1. Smoke seal testing of respirators;
2. Non-fire fighting (exempt) positions;
3. Transfer procedures;
4. WSF compliance with all components of the pivotal WACs;
5. Compensation for compliance by bearded men, with no beard rule;
6. Severance pay for bearded men who quit rather than shave;
7. Special disciplinary procedures for noncompliance with "no beard" specification;
8. New and different respirators in accord with applicable and available technology;
9. Medical exemptions from no beard rule;
10. Consequences to employment continuity for those who cannot get a "good fit" with the respirator.

Additionally, with special reference to the represented personnel engaged in the employer's Eagle Harbor maintenance shops, the unions observe that "the nuts and bolts need to be bargained; how many respirators, what kind, when are they required to be worn, in light of exposure to what materials."

In essence, the facts of record here present; *inter alia*, a question of job security to the bearded personnel represented by the complainant unions. Understandably, in their minds, the employer now poses a prohibition in the nature of an unconstitutional *ex post facto* law which threatens their "good standing" as acceptable employees.

Although the employer believes apparently that these represented people should not be concerned especially over the WSF's promised edict, the fact is plainly, on the preponderance of the evidence, that they are concerned and dramatically so, in large numbers.

In First National Maintenance Corp., 452 US 666, 681 (1981), the Supreme Court describes generally the rule, relative to job security, which in our opinion establishes a proper guide for disposition of the issues in this case. Thus,

> There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by Section 8(a)(5)[NLRA]. And under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.

The foregoing is to say then that on the facts of record and the governing law, WSF is obliged to bargain here with the complainant unions "as part of the effects bargaining," which as an express holding the Commission finds is mandated by the important scheme for collective bargaining embodied in chapter 47.64 RCW.

In this determination that "effects bargaining" must obtain in the instant circumstances of record, the Commission rejects the conclusions advanced expertly by counsel for WSF that such negotiating will be illegal or non-mandatory or without a substantial basis in terms of "conditions of employment" for the represented people.

WSF urges additionally that the complainants waived their rights to bargain collectively in this context. Such a contention encounters the established rule, whereby to be recognized and applied, a waiver of the statutory right to bargain must be in "clear and unmistakable language" not subject to legitimate dispute. Edison Co. n. NLRB, 460 US

693 (1983). This degree of certainty is not demonstrated here. In any case, the parties stipulated expressly on the record that WSF would not defend against the instant complaints on the basis of an allegation of waiver.

The Commission acknowledges the authoritative nature of the WACs emphasized by the ferry system in this case. However, the complainants' bargaining rights and the obligations of WSF to recognize such entitlement are grounded on an especially vital public purpose effected by enactment of the legislature. Considering the evidence before it as to the extended period of years during which the ferries operated without the employer's invocation of the referenced WACs, as well as the basic rationale expressed in Rose v. Erickson, 106 Wn.2d 420 and union cited determinations by the Public Employment Relations Commission (PERC), the Commission concludes that the legislated obligation to bargain, as to the impact and effect of the contemplated application of such regulations to the represented employees, must be satisfied by WSF.

Having read and carefully considered the entire record, the Marine Employees' Commission now hereby enters the following findings of fact.

FINDINGS OF FACT

1. The Complainants and the WSF are entities covered by chapter 47.64 RCW. Each complainant is the exclusive collective bargaining agency for a unit of WSF employees under and in accord with the cited statutes.

2. At all times herein material, valid and binding regulations were and are set forth in the Washington Administrative Code as follows:

> Respirators shall not be worn when conditions prevent a seal of the respirator to the wearer.
>
> (a) A person who has hair (stubble, moustache, sideburns, beard, low hairline, bangs) which passes between the face and the sealing surface of the face piece of the respirator shall not be permitted to wear such a respirator. WAC 296-62-07115 (3)(a).

> A negative pressure respirator, any self-contained breathing apparatus, or any respirator which is used in an atmosphere which is immediately dangerous to life or health (IDLH), equipped with a face piece shall not be worn if facial hair comes between the sealing periphery of the face piece and the face or if facial hair interferes with valve function. (WAC 296-62-07109 (8)).

3. Some 17 years after promulgation of the quoted regulations, the WSF decided unilaterally that the same would be enforced against bearded WSF employees represented by the complainant unions with a requirement that such personnel become clean shaven.

4. Many of the bearded WSF employees who had worn their bears for extended periods before the unilateral decision of WSF referenced in the foregoing paragraph was published, complained vigorously and sought intervention from their unions about the employer's new policy relative to facial hair and respirators.

5. In consequence of such multiplicity of protests from their members, the unions herein demanded that WSF recognize their right to bargain with the employer as to the impact and effect of its decision on the working conditions of their constituent members.

6. Since such a decision by WSF required that bearded members of the represented units become clean-shaven as a strict condition of continued employment, their concern, in part, was related to the matter of "job security" with WSF.

7. Additionally, the mandate of WSF relative to enforcement of the cited regulations posed numerous matters of interest to the unions and their members employed by WSF relative to the impact and effect on working conditions aboard the ferries and in the shops. Thus, as specified hereinabove under the heading DISCUSSION, there are explicit subsections of WAC 296-62-07109 which, by their content describe issues as to conditions of employment relating to health and safety attendant upon the day to day use of the respirators.

8. The unions here have described reasonably, legitimate issues and potential issues as to the impact and effect of WSF's mandate which relate directly to the conditions of employment for the members of the units.

9. The WSF was not concerned actively with the "no beard" policy *vis a vis* respirators for some 17 years after the provisions of the WACs here at base were in force. During those years, many employees of the ferry system were bearded without an objection from any source although their maritime duties on board the vessels were essentially as they are now. While the instant controversy has been pending, WSF has not actually enforced the "no beard" policy in question pending a determination as to the merit, if any, of the instant consolidated complaints, which is to say that the situation currently does not present immediately compelling emergency which forecloses an authentic opportunity for collective bargaining between the employer and the unions as to the impact and effect of the "no beard" regulations when they are placed in effect relative to those respirators available for use in operation of the ferries.

10. The filing of the complainants' charges of unfair labor practice against WSF and WSF's answers thereto were timely filed and served and otherwise in order.

Having entered the foregoing findings of fact, the Marine Employees' Commission now enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter herein.

2. Pursuant to chapter 47.64 RCW and the facts of record in this proceeding, respondent WSF is obliged, and may not refuse to bargain collectively with the complainant unions relative to the impact and effect of the WAC regulations relating to respirators, including 296-62-07109 and 296-62-07115 which that employer now proposes to apply to the conditions of employment for the represented employees.

3. In such factual and statutory context, WSF is not obliged nor permitted to and should not effect a "no beard" policy on such represented and concerned employees in the absence of the authentic "impact and effects" bargaining, in good faith, with the complainant unions as specified in the immediately foregoing paragraph.

4. Complainants' request for an award of attorneys' fees should be denied.

ORDER

It is hereby ordered that the consolidated complaints of unfair labor practices by the Inlandboatmen's Union, the Marine Engineers Beneficial Association, the Masters Mates and Pilots, Shipwrights Local 1184, Sheet Metal Workers Local 66, and the Plumbers and Pipefitters Local 32 are granted and affirmed. WSF is hereby directed to bargain collectively in good faith with each of the complainant unions relative to the impact and effect on working conditions of WSF's contemplated implementation of WAC regulations pertaining to the use of respirators by the unions' constituents on the ferries and in the related shops. The request of IBU and MM&P for attorneys' fees incurred herein is denied.

DATED this 28th day of May 1998.

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR., Chairman

/s/ JOHN P. SULLIVAN, Commissioner

/s/ DAVID E. WILLIAMS, Commissioner