STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

RAY TWITTY Complainant, v. DISTRICT NO. 1 MARINE ENGINEERS BENEFICIAL ASSOCIATION and WASHINGTON STATE FERRIES, Respondents.	)	MEC Case No. 11-96 DECISION NO. 191 - MEC DECISION AND ORDER

Shawn Timothy Newman, appearing for and on behalf of Ray Twitty.

Davies, Roberts & Reid, L.L.P., attorneys, by Kenneth J. Pedersen, appearing for and on behalf of District No. 1, Marine Engineers Beneficial Association.

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

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on October 7, 1996, when WSF employee and District No. 1 MEBA (MEBA) member Ray Twitty charged MEBA with engaging in unfair labor practices within the meaning of RCW 47.64.130(2)(a), to-wit, restraining or coercing employees in the exercise of rights guaranteed by chapter RCW 47.64. On October 10, 1996, Mr. Twitty amended his complaint by expanding the facts alleged in his original complaint. On December 4, 1996, Mr. Twitty filed a second amendment to his complaint in which he charged the Washington State Ferries (WSF) with engaging in unfair labor practices within the

Meaning of RCW 47.64.130(10)(a), to-wit, interfering with, restraining or coercing employees in the exercise of rights guaranteed by chapter 47.64 RCW.

Specifically, Ray Twitty alleged that between 1985 and 1987, WSF/MEBA members elected to defer a portion of their legislatively authorized 2.5% wage increase to enhancement of their health benefits through the MEBA Medical and Benefits Plan (hereinafter, "MEBA Plans"). In 1994, WSF/MEBA members voted to transfer their health care coverage to plans offered by the state of Washington. Mr. Twitty charged that following MEBA members' departure from the MEBA Plans, the union unilaterally decided that active MEBA members would continue to contribute a $35 wage deferment to the MEBA Plan for medical coverage of those who had retired prior to December 1, 1994. Mr. Twitty asserted that the MEBA membership did not vote on the decision. Ray Twitty charged that WSF continued to withhold this money without approval of MEBA employees, and despite numerous letters written by employees to WSF protesting the withholding. He alleges that in spite of his attempts to obtain documentation concerning the union's actions related to the medical premium contributions, his requests were either ignored or denied. Further, Mr. Twitty charged the union with delaying concluding the WSF/MEBA contract negotiations over this issue, thereby depriving MEBA members of the wage increase that was to have become effective July 1, 1995.

As a remedy for these alleged unfair labor practices, Mr. Twitty requested: (1) an accounting by respondents and full reimbursement of deferred wages since December 1, 1994; (2) a full accounting of the 1985-1987 collective bargaining wage increase. The increase was legislatively approved for 2.5% but the union set aside 1.42% to be placed in the MEBA plans. 1.08% of the wage increase was credited to wages. All subsequent wage increases should be recalculated to reflect the original 2.5% and employees be remunerated for the differential: (3) no implementation of the "Letter of Agreement" relating to any contract issue without a referendum vote by the union rank

And file: and (4) attorneys fees, costs and other such remedy as this Commission may deem appropriate.

A prehearing conference was held in this matter on December 6, 1996. However, due to a scheduling conflict, counsel for WSF was unable to attend on that date. Therefore, new prehearing and hearing dates were scheduled. A prehearing conference was held on April 29, 1997. At that conference, the parties agreed to strike the May 9, 1997 hearing date and to submit briefs on the issue of MEC's jurisdiction to hear wage claims made pursuant to chapters 49.52 RCW and 49.48 RCW. A briefing schedule was set. To accommodate negotiations between the parties regarding settlement of the issue by stipulation, the briefing schedule was changed as follows: Respondents' briefs were due June 2; complainants reply brief was due June 20; and rebuttal briefs were due June 27, 1997. Briefs were all timely received. On July 15, 1997, Hearing Examiner Sullivan issued an order, which confined MEC's jurisdiction to chapter 47.64 CW. Thereafter, MEC scheduled a hearing date for August 28, 1997. The hearing convened on that date, and was concluded on October 9, 1997. Post-hearing briefs were all timely received.

POSITIONS OF THE PARTIES

Position of Complainant, Mr. Twitty

Ray Twitty began working at WSF on October 12, 19993 as an assistant engineer. MEBA/WSF active employees decided in fall, 1994, by referendum vote, to leave the MEBA Plans and receive health care benefits from the State of Washington medical plan. In spite of the outcome of that vote, from December 1, 1994 and continuing to the present, MEBA and WSF have continued to deprive Mr. Twitty of the $65 per month deferment, which is no longer being sent to the MEBA Plans. From December, 1, 1994,

to the present time, WSF restored only $30 of the $65 he was entitled to receive. WSF wages should not be diverted to pay for the MEBA Medical Plan benefits, which no WSF employee participates in and which WSF employees have not agreed to pay for. By representing non-employees outside the bargaining unit, to-wit, WSF/MEBA retirees, MEBA breached its duty of fair representation owed to the active WSF/MEBA members.

Position of District No. 1 MEBA

MEBA acted for the good of all WSF/MEBA members – active employees as well as retirees – when in the 1985-1987 WSF/MEBA contract, it negotiated a $65 wage offset to enhance medical coverage received under the MEBA Plans.

One of the benefits received by MEBA members under the MEBA Plans was cost-free retiree health and welfare coverage. When WSF/MEBA members elected to shift their medical coverage from MEBA Plans to the Washington State Health Plan, existing retirees were not eligible to receive medical coverage from the State of Washington. Provision needed to be made for existing retirees to continue to receive medical coverage. Toward that end, MEBA and WSF executed a Letter of Agreement in which the parties agreed to continue to derive retiree medical coverage from a $65 wage offset to which the engineroom had agreed in 1985. The parties further agreed to add $30 a month to each active member's paycheck and continue to forward $35 to MEBA Plans to provide continued medical coverage for approximately 47 MEBA/WSF employees who had retired prior to December 1, 1994. MEBA and WSF acted properly in negotiating and signing the "Letter of Agreement."

Mr. Twitty's dissatisfaction with the outcome of MEBA union bargaining in the 1985- 1987 collective bargaining agreement and the "Letter of Agreement" with WSF in December 1, 1994 does not indicate that there was any breach of duty by the union or

that they breached their duty of fair representation.

Position of Washington State Ferries

WSF acted properly and responsibly in its dealing and negotiations with MEBA in negotiating a 1.42% or $65 enhancement from the wage increase of 2.5% directly to the MEBA Plans, and they accepted the obligation to forward that sum per month per active MEBA/WSF employee.

Retiree's medical coverage is a permissive subject of bargaining. The Letter of Agreement negotiated by and between WSF and MEBA in December 1994 reduced from $65 to $35 per active MEBA/WSF employee per month the amount contributed to the MEBA Plans for WSF/MEBA employees who had retired prior to December 1, 1994. WSF acted appropriately in entering into that "Letter of Agreement".

WSF committed no unfair labor practice by referring unhappy union members to their representative for discussion of their questions concerning the "Letter of Agreement" and/or its contents.

STATEMENT OF THE ISSUE

1. Did MEBA and WSF commit unfair labor practices in December, 1994, in violation of RCW 47.64.130, when they entered into a "Letter of Agreement" in which they agreed to continue to provide health coverage, under the MEBA Plans, for MEBA/WSF retirees, who were not eligible for state health care coverage, by payment of contributions derived from a wage offset authorized by employees in 1985, although, effective December 1, 1994, MEBA/WSF employees transferred their health care coverage from the MEBA Plans to the Washington state employees' medical plan?

2. Did the Washington State Ferries commit unfair labor practices in violation of RCW 47.64.130, when it referred engineroom employees who contacted them to express disapproval of the December, 1994 Letter of Agreement between MEBA and WSF back to their MEBA representatives?

3. If MEBA committed unfair labor practices as alleged, what is/are the remedy/remedies?

4. If WSF committed unfair labor practices as alleged, what is/are the remedy/remedies?

Having read and carefully considered the entire record herein, including the initial complaint filed, as well as two amendments, the hearing transcript and exhibits and post-hearing briefs, this Commission now hereby enters the following findings of fact.

FINDINGS OF FACT

1. Licensed engineers and unlicensed WSF engineroom employees are members of a bargaining unit represented by District No. 1 MEBA.

2. In 1985, the Washington State Legislature authorized a 2.5% wage increase to all state employees. At that time, licensed engineers working under the MEBA/WSF contract, paid into and received health and welfare benefits from the MEBA Plans. In negotiations between WSF and MEBA, for the 1985-1987 contract, the parties agreed to a wage offset. 1.42% of the wage increase (approximately $65/month) would go directly to the MEBA Plans for enhanced medical coverage of active and retired MEBA/WSF employees. In 1988,

unlicensed engineroom employees, who were represented by the Inlandboatmen's Union of the Pacific, voted to join District No. 1., MEBA. Subsequent contracts negotiated by MEBA on their behalf included a wage offset of approximately $65 per month per employee, which was directed to the MEBA Plans for enhancement of their medical coverage. This contract was ratified by a majority of MEBA members.

3. Article Fifteen, Section 3, of the By-Laws of District No. 1, PCD Marine Engineers Beneficial Association, AFL-CIO, 1995, as amended through March 1995, states:

> Section 3: No assessments shall be levied except after a membership referendum ballot conducted under such general rules as may be decided upon by the District Executive Committee unless otherwise directed by a majority of the membership, provided that: (a) The ballot must be secret. (b) The assessment must be approved by a majority of the valid ballots.

4. The MEBA Plans are operated independently and separately from the labor union known as MEBA and from the state ferry system. The MEBA Plans are created and controlled by the provisions of the Employee Retirement Income Security Act of 1974, 29 USC §1001 et seq., ("ERISA").

5. The $65 wage offset was never paid into the MEBA members' paychecks. It was collected off the top at its source, WSF, and sent to the MEBA Plans in Baltimore, Maryland. The $65 was paid administratively by WSF from the funds appropriated for wages by the Washington State Legislature, including the 2.5% legislative wage increase approved in 1985.

6. The Marine Employees' Commission takes official notice of the 1985-1987 MEBA/WSF Licensed Engineers' contract which sets forth the terms for

payment of employees' medical plans coverage as follows:

SECTION XXVI - WELFARE

(a) The Employer agrees to maintain participation in the MEBA Medical and Benefits Plan through June 30, 1987 in accordance with the following:

(1) It is hereby agreed that the benefits and the eligibility rules of said Plans in effect as of July 1, 1983 shall continue in effect except as modified hereafter by the trustees, providing, however, that any such action by the trustees shall not be valid if it results in an increase in the cost of the benefit program prevailing prior to any such change.

(2) The Employer agrees to make the necessary contributions to maintain said Plans on a sound actuarial basis. Effective July 1, 1985, the contributions shall be sixteen dollars ($6.00) per working and vacation day per engineer employed.

(b) Any additional contributions required in compliance with the above shall be made by direct deduction from employee wages.

(c) It is further agreed that no other increases other than those listed above shall be required during the term of this Agreement.

In addition to the language contained in Section XXVI – WELFARE, above, the 1985-1987 MEBA/WSF contract, in Section VI – WAGES AND OVERTIME, which sets forth wage rates effective July 1, 1985 and July 1, 1986, contains a footnote which states; "Rates (straight time/hour effective July 1, 1986) reflect a 1.08% increase; 1.42% of the available 2.5% was offset by higher MEBA Medical and Benefit Plan costs above the current cost of SEIB."

7. The language negotiated in the 1985-19897 MEBA/WSF Licensed

Engineers' contract remained the same in the 1987-1989 and 1989-1991 contracts. In 1991-1993, the parties agreed to language in both licensed and unlicensed engineroom contracts which spelled out that additional $65/month contributed by each active MEBA/WSF employee to the MEBA Plans was for the active and retired MEBA/WSF employees.

SECTION 26 – WELFARE

(a) The Employer agrees to maintain participation in the MEBA Medical and Benefits Plan through June 30, 1993 in accordance with the following:

(1) It is hereby agreed that the benefits and eligibility rules of said Plans in effect as of July 1, 1983 shall continue in effect except as modified hereafter by the trustees, providing, however hat any such action by the trustees shall not be valid if it results in an increase in the cost of the benefit program prevailing prior to any such change.

(2) Effective July 1, 1981, the contribution shall be $363.31 per month per employee for health and welfare contributions. This contribution consists of the sum of the Employer monthly contribution ($298.31) and the Employee monthly contribution ($65).

(3) Effective July 1, 1992, the contribution shall be $391.11 per month per employee for health and welfare contributions. This contribution consists of the sum Employer contribution ($328.11) and the Employee monthly contribution ($65.).

* * *

(6) The Employee contribution described in a(2) and a(3) above, represents that portion of previously negotiated wage increases that were directed by the affected employees for allocation to health and welfare premiums above that funded by the employer.

MEBA members subsequently ratified the 1991-1993 contract.

8. In the summer and fall of 1994, there was discussion between MEBA and WSF representatives concerning the fact that MEBA/WSF employees had expressed an interest in redirecting their state-paid medical premiums from the MEBA Plans to the Washington State Employees' medical plan. MEBA Branch Agent Austin noted that such action would only be taken after a favorable vote by MEBA/WSF employees to receive medical coverage under the state employee medical plan.

9. On September 16, 1994, MEBA notified MEBA/WSF active members of a referendum vote for selection of their medical and benefits plan. Another notice on November 14, 1994 from Mark Austin to the members, pointed out that a contribution of $35 – not the $65 that was an offset of the wage increase from the 1985-1987 – would continue to be made to the MEBA Medical and Benefits Plan for the purpose of maintaining medical coverage for MEBA/WSF employees who retired prior to December 1, 1994. Voting took place between September 16 and October 16, 1994. During this time, discussion of this issue also took place at a number of MEBA membership meetings.

10. On October 21, 1994, the union issued a notice that referendum votes had been tallied, and that a majority of MEBA/WSF employees had voted to receive medical benefits under the Washington state employee medical plan. The notice further stated that the union would commence procedures to shift active MEBA/WSF employees to the state plan.

11. By memorandum dated November 14, 1994, Mark Austin notified MEBA/WSF employees that the transfer to the Washington State employees' medical plan, the Public Employees Benefits Board (PEBB) would take effect December1, 1994. The notice also stated that as of December 1, 1994, MEBA/WSF active employees would each continue

to contribute $35 per month to the MEBA Plans for continued medical coverage of those MEBA/WSF employees who had retired prior to December 1, 1994. The balance of $30 would go into their paychecks.

12. Due to the decision by a majority of MEBA/WSF employees to receive medical coverage under the state employee plan, MEBA entered into negotiations with WSF on the issue of continued medical coverage for MEBA/WSF retirees. The parties entered into a "Letter of Agreement." This document was signed by Mark Austin on behalf of MEBA and by Jim Yearby, on behalf of WSF. The agreement provided that MEBA/WSF employees who retired prior to December 1, 1994 would continue to receive medical coverage through MEBA Plans by virtue of a reallocation of the 1985-1987 wage offset: $30 was to be added to the active employees' monthly compensation and $35 was to continue to be contributed to the MEBA Plans monthly to main medical coverage for MEBA/WSF employees who retired from the state ferry prior to December 1, 1994.

13. The Letter of Agreement negotiated and executed by Mark Austin and Jim Yearby was never placed before WSF/MEBA members for a referendum vote.

14. Ray Twitty is an active WSF employee and member of District No. 1, MEBA. He began his employment with WSF as an assistant engineer on October 12, 1993. At that time, the 1991-1993 contract was in effect.

Ray Twitty was dissatisfied with the terms of the agreement between MEBA and WSF which provided that retirees' medical coverage would continue to be paid by a $35.00 wage offset. On February 16, 1995, Mr. Twitty wrote to Jim Yearby asking for the source of the state's authority to deduct $35 from his paycheck for payment to the MEBA Plans' retirees' medical coverage. Mr.

Twitty demanded that no funds be paid to the MEBA Plans for the MEBA/WSF employees who retired prior to December 1, 1994 and asked that the $35 be added to his actual monthly wage. Jim Yearby received telephone calls and correspondence from other MEBA/WSF employees on this issue as well. These inquiries were directed back to MEBA. Yearby did receive correspondence from Mr. Twitty on this issue. However, Mr. Twitty received no response, either by telephone or correspondence, from Mr. Yearby.

15. On April 20, 1995, Twitty wrote MEBA Branch Agent Mark Austin with the same concerns, and requested that the total sum of $65 per month added to his wages.

16. Twitty directed a letter/petition dated April 17, 1995 to Mark Austin protesting the $35 going to payment of medical coverage for MEBA/WSF employees who had retired prior to December 1, 1994. He circulated copies of his letter/petition among the fleet. Approximately 80 MEBA/WSF active employees signed the letter/petition.

17. On April 20, 1995, Ray Twitty filed a grievance with his Union in which he alleged that the MEBA/WSF contract had been violated by WSF in retaining a previously negotiated wage increase from the 1991-1993 contract and earlier. He explained that since he no longer participated in the MEBA Plans, he wanted 100 percent of the $65 deferred pay increase added to his paycheck. Although he was receiving $30 of the $65, he wanted the remaining $35 added to his check also.

18. On May 19, 1995, Branch Agent Austin responded to the concerns expressed by Mr. Twitty over the continued deduction of money from his paycheck and stated they were processing his grievance against the WSF and investigating his claim.

Mr. Austin requested that Mr. Twitty furnish him any and all documents, petitions and correspondence with WSF on this issue. Mr. Austin received no response from Mr. Twitty.

19. In the fall of 1995, WSF Licensed Engineers voted on a contract proposal. The contract was turned down by a majority of voting members. In the meantime, MEBA members had elected a new Branch Agent, Bud Jacque, who took office as of January 1, 1996. As a result of the defeat of the contract proposal, Mr. Jacque held a variety of membership meetings to discuss the members' concerns with the contract proposal. The meetings were well attended. Members were unhappy with the negotiating process, specifically, the lack of representation. Communications between the union hall and the fleet were a major source of their unhappiness. They additional discussed the "$35 issue," and listed what needed to happen before members would ratify the 1993-1995 contract. First, they wanted the $35 to be collected after taxes so that their entire wage would be counted toward future raises (in particular, the 4% cost of living adjustment which had been appropriated by the Washington State Legislature in 1995). Second, they wanted reassurances that as the numbers of retirees needing medical coverage decreased, the funds being sent to MEBA Plans would be added to their wages. Third, they wanted the $35 dollar amount to remain static; the retires would pay future increases. With this input from the members, MEBA went back to the table with WSF.

20. From February 1995 until the ratification of the 1993-1997 contract in December 1996, Ray Twitty campaigned with others to have the entire $65 wage offset added to his monthly paycheck. Twitty encouraged MEBA/WSF active employees to vote down the proposed 1993-1997 contract.

21. On October 7, 1996, Ray Twitty filed unfair labor practice charges against the

MEBA. By December 4, 1996, Mr. Twitty had twice amended his complaint, alleging that Washington State Ferries had also committed acts in violation of RCW 47.64.130.

22. A referendum vote on the proposed MEBA/WSF contract, as renegotiated, was conducted in November and December 1996. The MEBA negotiating committee recommended that members accept the '93-'97 contract proposal, get their pay increase and move the issue of the $35 wage offset payment to the MEBA Plans for payment of retirees' medical coverage to the 1997-1999 contract negotiations, which were scheduled to begin in April 1997.

23. In December 1996, the MEBA/WSF active employees ratified the 1993-1997 Licensed Engineroom Officers and Unlicensed Engineroom Employees contracts. The terms of the agreements provided that WSF would continue to send $35 from the 1985-1987 contract wage offset:

> SECTION 26 – WELFARE
>
> (a) Each eligible employee shall be enrolled under the Public Employee Benefits Board Medical and Dental Plans administered by the Health Care Authority in accordance with the provisions thereof. Provided however, that upon written notice from the Union to the Employer thirty (30) days prior to the annual open enrollment period, the Licensed Engineer Officers bargaining unit may elect to be removed from the Washington State health Plan (PEBB) and transfer to any medical plan of the Union's choosing. If the Licensed Engineer Officers bargaining unit so elects to transfer to another medical plan, the Employer shall pay to the newly chosen medical plan a monthly premium per employee in an amount not to exceed that established by the State Legislature in its biennial budget.
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> * * *
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> (d) Consistent with current practice the Employer shall contribute an amount equivalent, in the aggregate, to $35.00 per active employee per

month to the MEBA Medical and Benefits Plan in order to maintain medical coverage for the Washington State Ferry retirees who have retired from employment with Washington State Ferries before December 1, 1994. If premiums for this retiree coverage increase above this amount, the covered retirees shall pay the increases equally.

(e) The Union and Employer agree to review, on a yearly basis, the payments made to secure health and welfare benefits for individuals who retired prior to December 1, 1994. In the event the MEBA Medical and Benefits Plan's trustees determine that a lesser amount is required to continue such coverage and it is verified by WSF management, the monthly contribution to the MEBA Medical and Benefits Plans will be appropriately decreased, and the employee hourly wage rates will be appropriately adjusted.

The 1993-1997 MEBA/WSF Unlicensed Engineroom Employees' contract, Rule 22 – WELFARE, contains the same language set forth above with references to the Unlicensed Engineroom Employees' bargaining unit.

24. The 1993-97 contracts' provisions for an annual review of the status of the 47 MEBA/WSF retirees, who ranged in age from 70 to 90 years, mean that as their numbers decrease, a lesser amount will be required to continue their medical coverage. The monthly contribution to the MEBA Plans will be decreased, resulting ultimately in an increase in the active MEBA/WSF employees' monthly paycheck.

Upon the demise of this pre-existing group of retirees, MEBA Plans' coverage and the corresponding wage offset will no longer be necessary. The offset wages contributed by employees to the MEBA Plans will be added to the employees' wages.

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

CONCLUSIONS OF LAW

1. By virtue of his position as the elected union representative, MEBA Branch Agent Mark Austin had the authority to bargain collectively with WSF. Likewise, WSF Human Resources Director Jim Yearby had the authority to bargain collectively on behalf of WSF management with MEBA.

2. Prior to December 1, 1994, the MEBA Plans covered active MEBA/WSF members and WSF/MEBA retirees, including state ferry employees who were MEBA members.

3. In the summer and fall of 1994, MEBA and WSF discussed the interest of some members joining the State Health Plan. Discussion focused on the fact that if WSF engineroom employees left the MEBA Plans, the state medical plan would not cover WSF/MEBA retirees who retired before the date active WSF employees joined the state plan, here, December 1, 1994. Union and management representatives chose to honor the commitments made to those WSF employees who had retired prior to December 1, 1994, by continuing to contribute a sum of money to the MEBA Plans for their medical coverage. MEBA and WSF were both acting responsibly and within their lawful roles as representatives of union members and management in seeking to continue funding of medical coverage on behalf of MEBA/WSF employees who had retired prior to December 1, 1994.

4. The U.S. Supreme Court has concluded that under the National Labor Relations Act, retirees are not "employees" within the meaning of the Act. The

court ruled that the subjects of retirees' pension and health and welfare benefits are permissive, as opposed to mandatory, subjects of bargaining. The Court made it clear that if the union and WSF management agree, they may lawfully enter into negotiations regarding a permissive subject. Here, the parties negotiated language which would continue funding of medical coverage, through the MEBA Plans, for WSF/MEBA retirees who retired prior to December 1, 1994, and who otherwise would no longer have cost-free medical coverage through their union.

The Letter of Agreement executed by Mark Austin and Jim Yearby was in accordance with the U.S. Supreme Court ruling in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 30 L. Ed. 2d 341, (1971). IN 404 US at 171 n. 11, the Court commented that although the subject is not mandatory, ". . .nothing we hold today precludes 'permissive' bargaining over the benefits of already retired employees." Thus, Austin and Yearby legally bargained for, reached agreement and executed an interim agreement on the permissive subject of continued payment of retirees' medical coverage.

Since the Letter of Agreement was reached within guidelines of Allied Chemical, there is no basis for a charge that MEBA or WSF acted arbitrarily or in bad faith or unreasonably by so acting.

5. The Letter of Agreement was not subject to a referendum vote in 1995. In Internat'l Bhd. Of Teamsters, Local 310 v. NLRB, 587 F. 2d 1176, 1182 (D.C. Cir. 1978) the Court stated:

> [4] The Labor Act does not require a union to accord its rank and file members the right to ratify a collective bargaining contract which it has negotiated…"

587 F.2d at 1181 reads:

> [2] In order to constitute an unfair labor practice a union's conduct must be more than merely negligent, it must be "arbitrary, discriminating or in bad faith" or be based on considerations that are "irrelevant, invidious or unfair."

The language and intent of the December 1994 Letter of Agreement, as amended in the contract negotiation process, was subsequently placed in the 1993-1997 contract proposal. MEBA held a referendum vote on the proposal and a majority of members ratified the contract. MEC concludes that MEBA's actions were no arbitrary, discriminatory or in bad faith, and therefore the union is not guilty of conduct that would amount to an unfair labor practice.

8. In MEC Case No. 7-03, Greenwood et al., v. MEBA and WSF, MEC concluded that it should avoid delving into the internal affairs of any labor union involved in any matter before the Commission.

> "Therefore, in both making its findings of fact and conclusions of law, MEC has attempted to take notice only of such internal union activity as directed by the Union's own Constitution, By-Laws, or duly adopted rules, and then only when actions are deemed to be unfair or unreasonable." George Greenwood et. al., v. District NO. 1 MEBA, MEC Case No. 7-93, Decision No. 114 – MEC. (Emphasis added.)

Ray Twitty alleges that by failing to hold a referendum vote on the 1994 Letter of Agreement between MEBA and WSF, and the subsequent decrease in the wage deferral for continued payment of retirees' medical coverage, MEBA violated Article 15, Section 3 of the union's By-Laws. The MEC has concluded herein that the original wage deferral, and subsequent changes made to the deferral by virtue of collective bargaining agreements, was approved when contracts were ratified by a majority of WSF engine department employees.

From the facts in evidence in this case, MEC concludes that MEBA's actions were neither unfair nor reasonable.

9. In Young v. UAW-LETC, 95 F. 3d 992, 997 (10th Cir. 1996), the Court quoted with approval:

> The Supreme Court recently stated that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a "wide range of reasonableness as to be irrational."

Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130, 113 L. Ed. 2d 51 (1991).

By negotiating the December, 1994 Letter of Agreement following the referendum vote by active employees to leave the MEBA Plans, MEC concludes that Mark Austin was acting, within a wide range of reasonableness, to continue providing medical coverage, under MEBA Plans, for WSF/MEBA retirees who retired from the ferry system prior to December 1, 1994.

10. American Postal Workers v. American Postal Workers, 665 F.2d 1096, 1105 (D.C. Cir. 1981) sets the standards for a union's duty of fair representation. It considered situations where, as in this case, union members were dissatisfied by the actions of their union. American Postal Workers at 1105 states:

> [4] Initially, we note generally that a union must be given a wide range of discretion in representing its members, particularly in the give-and take process of negotiation. Individual dissatisfaction with the outcome of bargaining is to some extent unavoidable and does not necessarily indicate any breach of duty by the union. As the Supreme Court recognized in Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Court then explained in Vaca v. Sipes, 386 U.S. 171, 177 190, 87 S. Ct. 908, 909-916, 17 L. Ed. 2d 842 (1967), that the duty of fair representation, which is implicit in a union's authority to serve as the exclusive representative of a unit. See NLRA § 9(a), 29 U.S.C. § 159(a) (1976), is violated only when the union's conduct toward one of its members is arbitrary, discriminatory, or in bad faith.

Here, Mark Austin's actions did not breach the duty of fair representation. Although Mr. Twitty and other MEBA members were dissatisfied with the December, 1994 Letter of Agreement, MEC concludes that the conduct of the MEBA Branch Agent alleged in the complaint was not arbitrary, discriminatory or in bad faith, and was done with honesty of purpose.

11. The 1993-1997 contract language which states that "consistent with current practice the Employer shall contribute . . . "and which was ratified in December 1996 by a majority of MEBA members, does not bind the WSF with the responsibility for payment of the amounts described therein. Rather, as is currently the practice, WSF has agreed to continue to administratively pay the equivalent sum of $35 per employee, per month out of funds appropriated by the legislature for ferry system employees' wages, to the MEBA Plans for retirees' medical coverage.

12. By virtue of the status of District No. 1 MEBA as the exclusive bargaining

representative of WSF engineroom employees, WSF is required to deal exclusively with MEBA representatives in conducting bargaining negotiations. By referring individual employees back to MEBA to discuss the agreement between MEBA and WSF to continue funding retirees' medical coverage, WSF acting properly and within the law. Indeed, if WSF bargained directly with employees, it would have exposed the ferry system to a violation of RCW 47.64.130(1). See, Developing Labor Law, Hardin, 3rd Ed., (1992) pages 601-602.

13. There was no evidence presented that indicated that WSF engaged in unfair labor practices within the meaning of RCW 47.64.130(1)(a), to-wit, interfering with, restraining or coercing Mr. Twitty in the exercise of rights guaranteed by chapter 47.64 RCW.

14. There was no evidence presented that indicated that MEBA engaged in unfair labor practices within the meaning of RCW 47.64.130(2)(a), to-wit, interfering with, restraining or coercing Mr. Twitty in the exercise of rights guaranteed by chapter 47.64 RCW.

ORDER

1. The complaint of unfair labor practices filed by Ray Twitty against the Washington State Ferries, as amended on October 10, 1996 and again on December 4, 1996, is hereby dismissed

2. The complaint of unfair labor practices filed by Ray Twitty against the Marine Engineers Beneficial Association filed on October 7, 1996, amended on October 10, 1996 and on December 4, 1996, should be and is

hereby dismissed.

3. The Commission does not find an award of attorney fees to be warranted in the interest of justice based on the facts.

DATED this 20th day of February 1998.

MARINE EMPLOYEES' COMMISSION

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

/s/ JOHN P. SULLIVAN, Commissioner