STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC,	)	MEC CASE NO. 31-97
Complainant,	)	Decision No. 194– MEC
v.	)	
WASHINGTON STATE FERRIES,	)	DECISION AND ORDER
Respondent.	)	

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

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

This matter came on regularly before the Marine Employees' Commission on October 1, 1997 when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice 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) by interfering with, restraining or coercing employees in the exercise of rights. On November 24, 1997, IBU amended its complaint to specifically allege a refusal to bargain on the part of WSF.

IBU alleged that WSF unilaterally assigned Marriott employees (concessionaire employees) to staff certain stations aboard Jumbo Mark II ferries in the event of a drill or actual emergency--work formerly performed by WSF deckhands, pursuant to the IBU/WSF contract. In spite of IBU's opposition, on September 15, 1997, WSF began training Marriott employees to perform the described duties. IBU asserted that WSF's actions endangered the integrity of the bargaining unit.

As a remedy for the alleged unfair labor practice, IBU requested an order requiring WSF to 1) cease the staffing of the described positions with non-bargaining unit employees; 2) compensate bargaining unit employees who should have been assigned to the positions in question, including any payment for training time and seniority, as well as other benefits, that would have accrued to them under the terms of that agreement; and 4) comply with such other relief as the Commission deems just and proper.

Background

The Commission reviewed the charges pursuant to WAC 316-45-110 and determined that the facts, as alleged by the IBU, may constitute an unfair labor practice, if later found to be true and provable. Commissioner David E. Williams was assigned to act as Hearing Examiner.

MEC Director, Janis Lien, conducted a prehearing/settlement conference on November 20, 1997. The hearing was initially scheduled for December 11, 1997, but was later continued to January 6 and 7, 1998. WSF timely filed its answer to the complaint on November 25, 1997. The hearing concluded on January 6. Briefs were timely filed by the parties.

NATURE OF THE CASE

The Inlandboatmen's Union (IBU) represents a unit of Washington State Ferries' (WSF) employees, under chapter 47.64. RCW. This case is grounded essentially on IBU's allegations that WSF, unilaterally, transferred bargaining unit work to non-unit personnel and, in that fashion, refused to bargain in good faith, as required by the governing statute. Responding to IBU's contentions, WSF claims that there was no such transfer, that the questioned work assignments were required and permitted by formalized Coast Guard specifications, that there was no bargainable subject described by the material facts, and in any case, by inaction, the IBU waived whatever bargaining rights that it may have had in the circumstances.

PRELIMINARY STATEMENT

As noted, this case arises under chapter 47.64 RCW, a statute designed to maintain stable labor relations, with respect to the state's vital ferry system, which must operate as a regular and reliable means of day-to-day transportation for large numbers of the citizenry. Thus, in expressing the public policy underlying the statutes, the legislature said:

> The legislature declares that it is the public policy of the state of Washington to: (1) Provide continuous operation of the Washington state ferry system at reasonable cost to users; (2) efficiently provide levels of ferry service consistent with trends and forecasts of ferry usage; (3) promote harmonious and cooperative relationships between the ferry system and its employees by permitting ferry employees to organize and bargain collectively; . . .

(Emphasis added.) RCW 47.64.006.

Here, the Commission must determine whether that important public policy can be avoided effectively by a unilateral change in the perimeters of a bargaining unit established in harmony with the statutes and an authoritative determination of the U.S. Coast Guard.

THE ISSUES

The issue presented herein is as follows:

> Did WSF commit an unfair labor practice, under RCW 47.64.130, in the circumstances of record here and if so, what remedy is appropriate?

DISCUSSION

IBU has been, and now is, the bargaining agency for a unit of employees engaged by WSF. Historically, members of the IBU unit alone have filled all the WSF "deck

department" jobs required by the authoritative Coast Guard specification called the Certificate of Inspection (COI) issued, with respect to emergencies and emergency drills, relative to the particular vessel.

In anticipation of activation of its ferry, in a new class, the TACOMA, then under construction, WSF early on commenced plans to use employees of its subcontractor (Marriott) to fulfill and accommodate some aspects of the "deck department" COI that would be or had been described relative to that vessel. Upon learning of that prospect essentially by chance, as distinguished from clear, purposeful and timely notice from WSF, the IBU voiced its spirited and unmistakable protest at a meeting with WSF executives. That meeting, according to the employer's representative, Gary Baldwin, "was not meant as a bargaining session." Baldwin was "not authorized" to accept IBU's spoken and plainly emphasized position that an employee from the bargaining unit, as distinguished from Marriott employees ought to be assigned exclusively to fulfill the pertinent Coast Guard mandate. Indeed, according to Baldwin, the meeting was held only to explain WSF's position which was "clear internally." Certainly, there were no proposals, counter proposals, arrangements for succeeding negotiations or any other indicia of authentic collective bargaining. Although at the meeting's conclusion it was IBU's understanding that WSF would communicate with it again about the matter within the coming week, that did not happen. The IBU complaint underlying this case ensued.

At the material times, the parties' valid collective bargaining agreement between them prescribed:

> 7.05 In the event vessels or facilities are added or if present units are re-engined the parties shall immediately meet to negotiate the appropriate wages, hours, terms and conditions of employment for any employee(s) assigned to the vessel or facility. In the event the parties fail to agree within (3) working days, or any mutually agreed upon extension either party may invoke the provision of RCW 46.64[1] for final resolution of the matter.

[1] Surely the reference to "RCW 46.64" was intended to cite RCW 47.64, which at all times material here included RCW 47.64.120.

RCW 47.64.120, reads as follows:

> **47.64.120 Scope of negotiations.** Ferry system management and ferry system employee organizations, through their collective bargaining representatives, shall meet at reasonable times, to negotiate in good faith with respect to wages, hours, working conditions, insurance, and health care benefits as limited by RCW 47.64.270, and other matters mutually agreed upon. Employer-funded retirement benefits shall be provided under the public employees retirement system under chapter 41.40 RCW and shall not be included in the scope of collective bargaining. Negotiations shall also include grievance procedures for resolving any questions arising under the agreement, which shall be embodied in a written agreement and signed by the parties.

(Emphasis added.)

The record does not include persuasive evidence that WSF was prepared at anytime to meet and confer with IBU, with an open mind, relative to the union's opposition to management's plan whereby significant work, outside the vessel's galley, which had been done theretofore, throughout the ferry system by members of the IBU bargaining unit would be transferred, on the TACOMA, to non-unit personnel engaged, not by WSF but by a subcontractor to WSF, who, at WSF's insistence, were receiving accelerated and ongoing training for that work. *See Park-Ohio Industries,* 102 LRRM (BNA)1498 (1981).

Under the circumstances summarized above, it is appropriate to refer to an authoritative doctrine developed by the National Labor Relations Board and comparable agencies in the various states known as the "*fait accompli" concept.* Summarized, that concept holds that where an employer is obligated by law to bargain with respect to a change in conditions of employment, it may not evade that duty by effecting the change without according the union concerned (1) adequate notice as to the nature of that proposed and forthcoming alteration and (2) a genuine opportunity to bargain with respect thereto. (e.g., *Joy Recovery and Local 673, Teamsters*, 320 NLRB 45, 97-98 NLRB Dec. (CCH) ¶16,410 (1995). *See also*, 2 Lab. L. Rep. (CCH) 8168-69 (1997).

In this context, reference should also be made to the established rule, in the labor relations community, to the effect that an employer's change of the established "past

practice" at the workplace, without notice to the bargaining agency and a willingness of that employer to bargain therewith, relative to the contemplated modification, is unlawful. (*See* 2 Lab. L. Rep. (CCH) 8172-73 (1997)).

Perhaps note ought to be taken also of the accepted precept whereby the employer is obligated to bargain with the union representing its employees regarding the impact of a decision to subcontract unit work, when that decision is grounded on labor costs rather than "core entrepreneurial concerns." (*See The Developing Labor Law* 335 (Supp. 1996)). Here, the WSF brief (p. 5) is frank to say: "The truth is that WSF sought to save $181,000 per year by receiving Coast Guard permission to recognize that Marriott employees were capable of performing emergency duties." It is appropriate to conclude, then, that such an effort to save labor costs by the employer must be accomplished, if at all, by agreeable negotiations with the union and not by generating a *fait accompli*.

Additionally, and most important, it is a matter of absolute and fundamental principle, that an employer can neither implement change unilaterally, nor bargain to an impasse relative to, its program for a change in the boundaries, borders and scope of the existing unit described clearly by public authority. (*See* 2 Labor L. Rep. (CCH) 7120-21 (1997). *See also*, the exposition at p. 373 *The Developing Labor Law* (3rd ed., Supp 1997).

> **Definition of Bargaining Unit.** The Board has long held that the scope of the bargaining unit is a permissive subject. Thus, an employer cannot insist to impasse on a proposal to modify that description. Employer proposals that attempt to reserve the right to remove employees from the bargaining unit at its discretion are permissive subjects of bargaining, as are proposals to eliminate a position from the parties' recognition clause, proposals to change from a multiple plant unit to separate plant units, and proposals to merge a separate plant unit into a multi-employer unit. An employer also may not change the scope of the unit by unilaterally removing employees from the unit where the employees' work remains the same.

(Citing authorities.)

Certainly fair and concise consideration must be accorded also to the contentions expressed ably by WSF with its brief:

1. "There was no change in the nature of the work as compared with previous vessels." On balance, the evidence of record, including the COIs and the testimony of the witness Dennis Conklin, warrant and necessitate a conclusion to the contrary insofar as the subcontractor's people from the galley are concerned.

2. "Manning aboard the TACOMA is in accordance with U.S. Coast Guard requirements." This conclusion may be essentially true as far as it goes. However, as a basic aspect of the instant dispute, historically and agreeably, the "Coast Guard requirements" (COI), issued by federal authority, served to define the "jurisdiction and scope" of the IBU bargaining unit, which are not subject to unilateral change by the employer.

3. "Manning of vessels is not a mandatory subject of bargaining." As noted hereinabove, the IBU was not obliged to bargain at all with WSF relative to the latter's desire to redefine and reform the "jurisdiction and scope" of the established bargaining unit as determined by the official and binding COI promulgated by a governmental authority, i.e. the Coast Guard. Such protection for the unit's integrity is not dependent on an employer's unilateral "second thought" as to balance.

4. "The IBU never requested or even agreed to participate in collective bargaining on the manning of the TACOMA." The evidence adduced makes it clear that, without notice to IBU, assignment of some of the work on the TACOMA which had been done historically by those IBU "deck department" people within the COI to subcontractor employees had been planned, in substantial measure, before the representatives of the union knew about it. On such evidence, there is no basis, in the facts or

> sound labor policy, for concluding that the questioned assignments were resultant from anything other than a *fait accompli*. In any case, as a matter of the material and dispositive fundamentals, here the union was not obliged to bargain with respect to a plan of WSF to alter the scope of the unit from the officially declared perimeters and the extensive, undisputed and sustained practice developed by the parties in intended voluntary and consistent reliance on those declarations from the Coast Guard. Section 7.05 of the parties' agreement, quoted hereinabove, does not purport to describe the bargaining unit nor does it lay ground work for a finding that there was an IBU waiver of some kind or another that is controlling here. In this connection, material mention can be made also of the fact that when the IBU/WSF collective bargaining contract was agreed to, it included a recognition clause (Rule 2) which, without an objection from any source, covered all the employees, who were subject to the emergency and drill assignments, of the nature here in question and, amounted, therefore, to an agreeable component of the unit description.

By way of summary and conclusions as to the substance of this matter, even if it is assumed arguendo, that alteration of a bargaining unit determined historically, with precision, by official expressions from the U.S. Coast Guard and the parties' agreeable and sustained practice over the years, is a bargainable subject, such bargaining was frustrated here by a *fait accompli*, attributable to WSF, which involved the unilateral conception and development of a plan to change the borders of the unit in a manner and form not ordained by the Coast Guard's prescription nor by the referenced practice.

On the facts of record and for the reasons outlined above, the Commission now makes the following:

FINDINGS OF FACT

1. The Inlandboatmen's Union and the Washington State Ferries are entities covered by RCW 47.64. Complainant IBU is, and at all material times was, the exclusive collective bargaining agency for a unit of WSF's employees, under the cited statutes.

2. With respect to its ferry, TACOMA, without timely notice to complainant, respondent instituted and developed plans, including those for requisite training, to use employees of its subcontractor, Marriott in an effort to fulfill the U.S. Coast Guard's formal specifications as to the complement of personnel required absolutely for performance of functions aboard the vessel in drills and emergencies.

3. In so proceeding, WSF attempted to change substantially the boundaries and borders of the bargaining unit composed of its employees represented by IBU, as such unit was established, relative to personnel and scope, by the parties' invariable practice over the years in keeping with and complimentary to the governing Certificate of Inspection (COI) issued by the U.S. Coast Guard. In the instant matter, the authoritative COI regarding the TACOMA does not prescribe that it may or shall be staffed by employees of the subcontractor Marriott, instead of WSF's deck department personnel represented by complainant. (Appendix I.)

4. When the TACOMA was placed in active service, WSF effected its unilateral intent to change the perimeters of the bargaining unit represented by the complainant without bargaining with complainant and without complainant's consent or waiver of its pertinent rights under the law, or any of them.

5. The filing of IBU's formal charge of unfair labor practice, against WSF with this Commission, and WSF's answer thereto were timely and otherwise in order

under the cited statutes and the applicable sections of the Washington Administrative Code.

And, on such findings of fact, the Commission now reaches the following:

CONCLUSIONS OF LAW

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

2. By *fait accompli*, respondent WSF attempted to alter and modify the borders of the bargaining unit of its employees represented historically by IBU under RCW 47.64 in accord with the governing Coast Guard COI, without the IBU's consent or waiver, and thereby departed from its lawful duty to bargain in good faith as required by such statutes.

3. By way of remedy for such violation, WSF should be required forthwith to cease and desist in the assignment of employees of the subcontractor, Marriott, to performance of bargaining unit work on the TACOMA, i.e., work of the position described by the official COI as "emergency evacuation person" and should forthwith and henceforth assign such work to an employee of WSF represented by the IBU.

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ORDER

Now, therefore, it is hereby ordered that the complaint of unfair labor practice by IBU against WSF should be and hereby is affirmed and granted. By way of remedy therefor, WSF is directed to forthwith cease and desist in the assignment of subcontractor personnel to performance of deck department (bargaining unit) work on the TACOMA, i.e., the work of the position described officially as "emergency evacuation person" and henceforth, to assign such work and all of it to employees of WSF represented by IBU.

DATED this 1st day of April 1998.

HENRY L. CHILES, JR., Chairman

JOHN L. SULLIVAN, Commissioner

DAVID E. WILLIAMS, Commissioner