STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

DOUG SCHLIEF et al., Complainants, v. INLANDBOATMEN'S UNION OF THE PACIFIC et al., Respondents.	MEC CONSOLIDATED CASES 32-03, 33-03, 35-03, 36-03, 38-03 DECISION NO. 381 - MEC DECISION AND ORDER

APPEARANCES

Doug Schlief, appearing for Doug Schlief et al.

Larry Dunlap, appearing for Larry Dunlap et al.

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries.

Schwerin, Campbell and Barnard, by *Dmitri Iglitzin*, Attorney, appearing for the Inlandboatmen's Union of the Pacific.

Phil Olwell, appearing for Phil Olwell et al.

NATURE OF THE PROCEEDING

The Marine Employees' Commission held a single hearing to take evidence regarding five cases that involved the separation of the terminal agents group from a larger bargaining unit of ferry employees represented by the Inlandboatmen's Union of the Pacific (IBU) and that involved the subsequent bargaining affecting the separate terminal agents' bargaining unit. Through its designated Hearing Examiner, the Marine Employees Commission received testimony during four days of hearing. The five parties to the proceeding also submitted documentary evidence and written arguments. This Decision and Order by the designated

Hearing Examiner decides all five cases. Each party to the proceeding has the right to appeal its portion(s) of the decision to the full Marine Employees' Commission under the terms of the appeal rights described below.

PRIOR DECISIONS IN THE CASE

Prior to the hearing, the Marine Employees' Commission issued five substantive decisions in addition to its routine scheduling orders. Those decisions were as follows:

1. **Order Denying Washington State Ferries' Motion for Partial Summary Judgment.** Commission Chairman John Nelson issued this Order on May 2, 2003 to deny the Washington State Ferries' (WSF) motion that the complaint filed by Larry Dunlap et al (MEC 33-03) regarding the formation of the terminal agents bargaining unit be dismissed as untimely.
2. **Order Denying Complainants' Motion to Bar Inlandboatmen's Union Attorneys from Representing IBU.** Commission Chairman John Nelson issued this Order on May 2, 2003 denying the request by Doug Schlief et al in MEC Case 32-03 that the IBU's law firm as well as one of the members of that firm be precluded from representing the IBU in this proceeding.
3. **Order Denying Union's Partial Summary Judgment Motion in Case 32-03.** The Hearing Examiner, John Byrne, issued this Order May 22, 2003. The Order denied the IBU's request that that portion of the complaint in MEC Case 32-03 alleging an illegal refusal to bargain by the IBU be dismissed.
4. **Order Denying Motion Regarding IBU Funds.** The Hearing Examiner, John Byrne, issued this Order May 24, 2003 denying, as outside the scope of the MEC's jurisdiction, a request by Complainants Schlief et al. that the MEC limit the IBU's

expenditure of IBU funds with respect to the IBU's activities in this consolidated case.

5. **Order Denying Motion for Summary Judgment in MEC 38-03.** The Hearing Examiner, John Byrne, issued this Order on May 28, 2003 denying the motion of MEC Case 32-03 Complainants Schlief et al to eliminate an alleged portion of the complaint filed by Complainants Olwell et al in MEC Case 38-03.

STATUS OF THE EARLIER ORDERS

The Orders identified above were interlocutory Orders and may be appealed to the full Marine Employees' Commission pursuant to the same guidelines and time limitations that affect this overall Order. The time period for appeal of the interlocutory orders is contemporaneous with the time period of appeal of this overall Order.

RECORD BEFORE THE COMMISSION

The Hearing Examiner considered the following record in making the Findings of Fact and Conclusions of Law and Decision and Order in this case:

1. The Notice of Scheduled Settlement Conference and Hearing issued by the Marine Employees Commission on February 7, 2003. This Notice includes a copy of both complaints in Case 32-03.
2. The Notice of Consolidated Hearing issued by the Marine Employees Commission on April 24, 2003. This Notice includes copies of all the six complaints filed in this matter. (Two complaints were filed in Case 32-03.)
3. The Answers filed by all the parties.
4. The pleadings and documents submitted in support of an opposition to the five pre-hearing substantive motions that led to the Orders identified above.

5. The official hearing transcript and the 49 exhibits accepted into evidence.

6. The written post-hearing arguments submitted by all the parties.

7. MEC Decisions 220 and 230 and the official record in MEC Case No. 14-99.

8. The Marine Employees' Commission minutes for its meeting of October 27, 2000.

COMPLAINTS CONSOLIDATED FOR HEARING

Five cases were consolidated for the purposes of the hearing. All the evidence presented during the hearing could be used by any party to any case but the cases are decided separately according to their specific merits. The cases are as follows:

1. **MEC 33-03*, Larry Dunlap et al. v. WSF*:** The Complaint alleges that the employer violated the law by creating an unlawful terminal agents bargaining unit, by bypassing the union to deal directly with employees, by interfering with the union through the acts of a management person, and by creating what amounts to an illegal proposed contract. The employer denies the allegations and affirmatively alleges that the issues regarding the creation of the terminal agents bargaining unit are time-barred.

2. **MEC 32-03*, Doug Schlief et al. v. IBU*:** The two Complaints in this case allege that the Inlandboatmen's Union of the Pacific violated the law by refusing to submit the alleged tentative terminal agents bargaining unit contract to a ratification vote. The Union denies the allegations and affirmatively alleges that the complainants lack standing to pursue the matter insofar as it is alleged to be an illegal refusal-to-bargain. A Union motion to that affect was denied by the Hearing Examiner prior to the beginning of the hearing. That motion was renewed in the post hearing written argument submitted by the Inlandboatmen's Union of the Pacific.

3. **MEC 35-03, *WSF v. IBU*:** In this case, Washington State Ferries alleges that the Inlandboatmen's Union of the Pacific violated the law by refusing to submit the alleged terminal agents bargaining unit contract to ratification without further bargaining. The Union's Answer admits the refusal to submit the alleged agreement to a ratification vote of the affected bargaining unit but the Union denies that its action has in any way violated the law.

4. **MEC 36-03, *IBU v. WSF*:** In this case, the Inlandboatmen's Union of the Pacific alleges that Washington State Ferries violated the law by bypassing the union to deal directly with bargaining unit members, by coercing bargaining unit members through the activities of management persons and through e-mail correspondence, and by coercively interfering with the ratification process. The employer denies the allegations.

5. **MEC 38-03, *Phil Olwell et al. v. WSF*:** The Complaint alleges that Washington State Ferries violated the law by direct bargaining with affected bargaining unit members and by improperly affecting the bargaining through the activities of two management persons. The employer denies that it acted in any way that violates the applicable law.

PREVIOUS MEC DECISIONS REGARDING THE TERMINAL AGENTS BARGAINING UNIT ISSUE

In late 1999, Washington State Ferries filed a unit clarification petition, MEC Case No. 14-99, with the Marine Employees Commission. That petition sought to remove the terminal agents from the then-existing bargaining unit of unlicensed employees of WSF assigned to the Deck, Terminal, Information Departments and Shoreside Maintenance. The Inlandboatmen's Union of the Pacific opposed that unit clarification petition.

Then MEC Chairman Chiles dismissed the petition in a Chairman's Order of Dismissal (Decision 220-MEC) dated November 18, 1999. The Chairman's Order held that the law (RCW 47.64) did not require excluding supervisors from an existing unit and that there was no basis for excluding the terminal agents from the unit to which they had historically belonged. The full Marine Employees Commission then affirmed the Chairman's Order in a decision dated February 25, 2000 (Decision 230-MEC). The essence of that latter decision is that there was no basis for altering the long-standing collective bargaining history.

The matter was not appealed to any Court.

ORGANIZATION OF THE DECISION

This decision divides the matters at issue by general topic. Each topic will have its own Findings of Facts, Discussion of Controlling Law, and Conclusions of Law. While stated with regard to a specific issue, the Findings of Fact and Conclusions of Law apply to all the issues to which they are relevant.

TIMELINESS ISSUE REGARDING THE OBJECTION TO THE CREATION OF THE SEPARATE TERMINAL AGENTS' BARGAINING UNIT

FINDINGS OF FACT

1. Prior to the events at issue in this case, The Marine Employees Commission rejected the petition of Washington State Ferries to carve a terminal agents' bargaining unit out of the then-existing bargaining unit represented by the Inlandboatmen's Union of the Pacific. At the time, the IBU opposed the request.
2. On October 19, 2000, the President of the Inlandboatmen's Union of the Pacific wrote to the Director of Human Resources for Washington State Ferries to confirm the union's agreement that employees working in or holding seniority in the Terminal

Agents classification of the then-existing unit should be taken out of the then-existing unit and placed into a separate unit.

3. The Union leader stated that he would seek the approval of the Marine Employees Commission for the change that the union and employer had agreed upon.
4. On October 27, 2000, Mike Manning, WSF's Labor Relations Director, reported during the portion of the regular Marine Employees' Commission meeting devoted to the status of collective bargaining that the union and the employer had agreed to create a new unit for the terminal agents and that they would be seeking MEC sanction of the parties' agreement.
5. Neither the IBU nor Washington State Ferries took any steps to secure the approval of the Marine Employees' Commission for the new unit they had carved out of the existing IBU bargaining unit.
6. In February 2001, the IBU and WSF signed a collective bargaining agreement covering the unit of terminal agents. The contract was made up entirely by those portions of the larger unit's pre-existing contract that applied to the terminal agents.
7. From May to December of 2002, IBU and WSF negotiated for an agreement for the terminal agents unit to replace the one that had been signed in 2001.
8. The parties have not implemented any of the changes in terms and conditions of employment contained in the alleged replacement contract. The terminal agents are currently working under terms and conditions no different from those that were contained in the last contract that covered the bargaining unit as it existed prior to the agreed-upon change.

9. The Complaint alleging that the unit was illegally created was filed on January 31, 2003.

10. Washington State Ferries moved to dismiss that complaint on the basis that it was filed well after the 180-day period for filing an unfair labor practice complaint (WAC 316-45-020).

11. There is no evidence in the record to prove that the complaining parties were actually aware of the creation of the bargaining unit.

12. Washington State Ferries can prevail on its motion to dismiss if the record establishes that the complaining parties "shown have known of the event …" (WAC 316-45-020).

13. Ultimately, neither the union nor the employer sought MEC sanction for their decision to separate out part of the overall bargaining unit. As a consequence, there is no official record of the carving out and creation of the separate bargaining unit for terminal agents.

14. No party presented any evidence of any official announcement of the creation of the separate unit such as newsletters, press releases, posted announcements or any document of that sort. No party presented any evidence of any official announcement of the contract negotiations for the separate unit at least until an alleged tentative agreement was agreed upon.

DISCUSSION OF THE CONTROLLING LAW

There are two indisputable facts in this case – the complaint at issue was filed late and there is no evidence that the complainants were actually aware of the creation of a separate unit until the controversy over the proposed replacement contract arose.

The issue is whether or not the facts created a record on which a finding that "they [the complaining parties] should have known" can be based.

The MEC faced this same issue in *Schlief v. Inlandboatmen's Union of the Pacific*, Decision 156-MEC. In that case, certain complainants filed an unfair labor practice complaint alleging that the union and the employer had violated the law in the manner in which they had settled a certain dispute. The two parties had settled the previous matter more than 180 days before the filing of the complaint.

In that case, as here, there was no showing of actual knowledge. However, the MEC determined that the filing parties "should have" known of the event.

The MEC based this determination on the fact that the settlement had been submitted to the MEC and made part of the public record. The Commission, quoting a Court of Appeals case, held that "When the facts upon which a cause of action 'are contained in a written instrument which is placed on public record, the aggrieved party receives constructive notice of its contents.'"

In this case, the parties chose not to present their decision to carve out a part of the unit to the MEC. As a consequence, the rationale of the cited case lends support to the complaining party. In addition, the decision to carve out of the unit did not create the kind of day-to-day changes that might put an outsider on notice because the separate agreement replicated all the terms and conditions that had been in the contract affecting the overall unit. The decision to carve out the terminal agents' unit had no practical impact on the day-to-day work until the replacement agreement was negotiated and the controversy arose.

There is no basis in this case upon which a case of constructive notice can be based.

CONCLUSIONS OF LAW

1. Washington State Ferries did not meet its burden of proving that the charging parties had actual knowledge of the events at issue so as to block them from filing what would otherwise have been an untimely complaint regarding the creation of the terminal agents' bargaining unit.
2. The absence of any public record of the change to the bargaining unit and the fact that the creation of the separate terminal agents' unit did not have any practical impact on the day-to-day terms and conditions of employment preclude a finding of constructive notice.
3. The complaint at issue was filed in a timely manner from the point in time when the controversy regarding the negotiation of the alleged replacement arose.

THE ALLEGATION THAT WASHINGTON STATE FERRIES VIOLATED THE LAW BY PARTICIPATING IN THE CREATION OF THE TERMINAL AGENTS' BARGAINING UNIT

SCOPE OF THE ISSUE

The complaint which alleges that the bargaining unit was illegally created – MEC 33-03 – basis the allegation in part on the claim that the manner in which the new unit was created violated the union's internal rules and procedures. Prior to the start of the hearing, the Hearing Examiner ruled that "Internal union matters do not fall within the jurisdiction of the Marine Employees' Commission." *Ray Twitty v. District No. 1, Marine Engineers' Beneficial Association,* 275 – MEC and 225 – MEC. That ruling was applied during the course of the hearing to preclude testimony regarding internal union matters except to the extent they might be relevant to the question of the whether or not the complaining parties had notice of the creation

of the unit. That ruling applies to this allegation. Whether or not the Inlandboatmen's Union of the Pacific followed or violated its internal rules in the manner in which it participated in the creation of the terminal agents' bargaining unit is not a matter that is before the Marine Employees' Commission. The only issue before the Marine Employees' Commission is whether or not the creation of the unit violated RCW 47.64 and/or the regulations implementing that law.

(The Complainants in MEC 33-03 also allege that the employer unlawfully dominated or controlled the union through the actions of certain individuals. That allegation, which is similar to that made by another group of complainants, is discussed below and is not part of this section of the decision.)

FINDINGS OF FACT

15. Prior to the creation of the new unit, all terminal agents, on-call or extra agents, and agents on special assignment were part of the larger vessel and dock bargaining unit represented by the Inlandboatmen's Union of the Pacific.
16. Prior to the creation of a separate unit, the terminal agents elected a representative to be part of the committee that bargained for a single contract for the overall unit.
17. The Inlandboatmen's Union of the Pacific and Washington State Ferries agreed among themselves sometime in the year 2000 to carve all the terminal agents out from the pre-existing unit in order to create a separate terminal agents unit.
18. All the positions in the new unit had been a part of the pre-existing unit. No previously unrepresented positions were added to the new unit nor to the pre-existing unit out of which the new unit was created.
19. Neither party asked the Marine Employees' Commission to approve or certify the new unit.

20. There is no evidence that any individual in the new unit complained about the decision to carve out a separate terminal agents' unit. The complaint currently before the Marine Employees Commission was filed by a group of employees outside of the terminal agents' unit.

21. The first real negotiations for a separate contract for the new terminal agents' unit occurred in 2002.

22. Representatives of the terminal agents, a representative of the union and an employer bargaining committee met and bargained during the course of 13 sessions. During those negotiations, they were able to develop a document that they believed was satisfactory to both sides and that they believed was ready to be submitted to the bargaining unit for ratification.

23. No party presented any evidence at the hearing to suggest that the new unit was constructed in such a way as to preclude meaningful collective bargaining.

24. No party presented any evidence at the hearing to suggest that the remainder of the unit from which the terminal agents were removed was adversely affected to the point that it would be impossible for it to conduct meaningful collective bargaining.

DISCUSSION OF THE CONTROLLING LAW

The issue to be decided is whether or not the employer's involvement in the creation of the terminal agents' bargaining unit was an unfair labor practice.

The act of creating a bargaining unit could be an unfair labor practice if that act caused one of the consequences prohibited by the law which bars unfair labor practices. If the parties, for example, shaped a unit to arbitrarily divide similarly situated employees on ethnic or racial grounds, they would be restraining employees in their exercise of their collective bargaining

rights and the act would be an unfair labor practice as well as a violation of other laws. However, in order to prove that the creation of a particular unit was an unfair labor practice, the complaining party must show the connection between the manner in which the unit was made or shaped and how that creation or shape caused one of the consequences banned by the law prohibiting unfair labor practices.

In this case, the complaint identifies the alleged violation of the union's internal rules as the basis for the unfair labor practice. However, as has already been decided in this case, internal union matters are outside the jurisdiction of the Marine Employees' Commission. The allegation that the creation of the terminal agents' unit violated the law must be based on an issue within the scope of the Maine Employees' Commission's jurisdiction.

There is nothing in Washington law to bar the creation of the terminal agent's unit. Washington law supports the right of supervisors – even up to such high management ranks as police chief - to organize for collective bargaining purposes and all the more recent cases state a clear preference that supervisory employees organize in groups limited to such employees. *See, by example, Municipality of Metropolitan Seattle v. Department of Labor and Industries,* 88 Wn. 2d 925 (1977); *International Association of Firefighters v. City of Yakima,* 91 Wn. 2d 101 (1978); *International Association of Firefighters v. PERC,* 29 Wn. App. 599 *(1981), rev. den.* 96 Wn.2d 1004; *Yakima County,* 425-PECB (1994); *City of Dupont,* 4959-PECB (1995); *King County,* 5296-PECB (1995); *City of Ferndale,* 6485-A and 6849 – PECB (1999). The terminal agents' unit here is supported by every one of these rulings.

In addition, the record in this case shows that the parties were able to engage in successful collective bargaining over a two-year period and no allegations have arisen that the unit is not capable of fulfilling its duty to bargain in good faith. The union, itself, appears

satisfied with the arrangement and its proposed remedy for what are alleged to have been serious problems with the last round of bargaining is that the parties be directed to bargain again for this, separate unit.

CONCLUSIONS OF LAW

4. The allegation that the creation of the terminal agents' bargaining unit was done in a way that violated the internal rules of the Inlandboatmen's Union is not within the scope of the jurisdiction of the Marine Employees' Commission. That allegation cannot be the basis for the charge that Washington State Ferries violated the law by participating with the Inlandboatmen's Union of the Pacific in the creation of this unit.
5. There is no legal basis for the allegation that Washington State Ferries violated the controlling law by agreeing to the creation of a separate unit for terminal agents.
6. The creation of the terminal agents unit by the Washington State Ferries and the Inlandboatmen's Union of the Pacific was not and is not an unfair labor practice by any party.

THE ALLEGATION THAT THE ACTIVITIES OF MIKE ANDERSON CONSTITUTED AN UNFAIR LABOR PRACTICE ON THE PART OF WASHINGTON STATE FERRIES THAT TAINTED THE BARGAINING

FINDINGS OF FACT

25. The Inlandboatmen's Union of the Pacific bargaining committee for the terminal agents' unit and Washington State Ferries engaged in collaborative bargaining in an attempt to agree upon a new contract for the terminal agents.

26. The parties chose to engage in collaborative bargaining, a process which is more open and less confrontational than traditional styles of bargaining. In collaborative bargaining, the two sides attempt to work together toward solutions to perceived problems.

27. This approach was matched by the informality of the terminal agents' interaction with management officials, some of whom came from the ranks of IBU-represented terminal agents. Terminal agents freely visit management officers and freely used the employer's e-mail system for agent to agent communication regarding collective bargaining issues and often used employer premises for bargaining unit meetings.

28. Washington State Ferries placed three people on its bargaining team – Labor Relations Manager Michael Manning, Director of Operations Michael Anderson, and Steven Rodgers, a terminal agent on special assignment as one of the two regional supervisors ultimately reporting to Mr. Anderson.

29. The appointment of a union member like Steven Rodgers to the management negotiating committee had been a common practice in the past.

30. (A fourth person was present as part of the management team during one of the thirteen negotiating sessions. That person's presence was not raised as an issue in this case.)

31. Mr. Manning testified that he and he alone presented the employer's position during bargaining but that he always had operations people present to make sure that no mistakes were made with respect to the actual operational impact of whatever was under discussion. Anderson and Rodgers were selected for this role.

32. Michael Anderson is a management individual outside the scope of the terminal agents' bargaining unit. He has managerial and supervisory responsibilities over the terminal agents in the bargaining unit.

33. Mr. Anderson participated in a negotiation session on November 22, 2002 that was followed by a bargaining unit meeting in the same room where negotiations had occurred.

34. Mr. Anderson was in the process of collecting his papers and possessions as the terminal agents began arriving for their meeting.

35. Doug Schlief, the elected delegate representing the terminal agents at the negotiations, asked Mr. Anderson to stay in the room because Mr. Schlief believed that some agents had questions that they wanted Mr. Anderson to answer regarding certain bargaining proposals.

36. Mr. Anderson agreed to stay. He would not have stayed in the room had he not been asked to stay.

37. When the terminal agents' meeting began, both Mr. Anderson and Mr. Rodgers were present in the room. (Mr. Rodgers activities are discussed separately, below.)

38. Some terminal agents objected to the presence of Mr. Anderson at the meeting. Some terminal agents welcomed his presence at the meeting.

39. Mr. Anderson stayed at the meeting between five and fifteen minutes to answer some questions and then he left.

40. Mr. Anderson did not attempt to bargain directly with the terminal agents at that time or any other time regarding matters under discussion at the bargaining table.

41. There is no evidence in the record to indicate that Mr. Anderson attempted to persuade anyone regarding anything during the course of that meeting.

42. There is no evidence in the record to indicate that Mr. Anderson was ever asked to spy on the intra-union group discussions or to try to win agents over to any position espoused by management or to take any steps directly with bargaining unit members in order to advance the interests of management. There is no evidence that Mr. Anderson did any of these acts whether requested to or not.

43. The only other relevant occurrence regarding Mr. Anderson involved Dan Ferguson, a terminal agent.

44. Mr. Ferguson testified that he had been told by a co-worker that "the boys" wanted to see him. He understood the phrase to refer to those who worked in the office at Colman Dock such as Mr. Anderson and Mr. Rodgers.

45. Mr. Ferguson went to see "the boys" – Rodgers and Anderson - but they said they had not asked to see him. Ferguson hung around their offices and chatted for a while, as was common in the informal work place. It was Mr. Ferguson who chose to turn the talk toward the negotiations.

46. Mr. Anderson did not initiate the discussion regarding the contract negotiations nor did he attempt to pressure or persuade Mr. Ferguson in any way. Mr. Ferguson testified that he – Mr. Ferguson - wanted to make sure that Mr. Anderson understood Mr. Ferguson's point of view on certain matters that were being discussed in the bargaining.

DISCUSSION OF THE CONTROLLING LAW

Direct contact between an employer and its employees about matters arising out of the workplace is not *per se* barred even where the union is not informed of this contact. *Municipality of Metropolitan Seattle*, 3218-A PECB (1990). The question, as the Public Employment Relations Commission ruled in the cited case, turns on whether or not the meeting is mandatory, and whether or not it is coercive, as well as whether or not wages, hours and/or working conditions are discussed.

In the cited case, Metro held a voluntary meeting to discuss the impact of certain litigation which arose out of unfair labor practice charges that the union had successfully filed. The union was not informed of the meeting. PERC ruled that the meeting was a non-coercive, voluntary meeting that did not violate the law.

The National Labor Relations Board takes the same practical approach of rejecting a *per se* theory while trying to determine whether or not the contact was, in intention, in fact or in effect, coercive. *See, by example, Great Lakes Oriental Products***,** 283 NLRB 99 (1987).

In this case, there is no evidence that Mr. Anderson ever attempted to persuade, much less coerce anyone to do or not to do, to believe or not to believe anything. He did not spy on anyone nor did he report any union activities to management. He did not attempt to directly bargain with anyone. He did not require attendance by anyone at either of the two incidents at issue. All discussion of the contract was initiated by bargaining unit members themselves. In addition, the openness of the communication appears in line with the collaborative nature of the bargaining and the informal nature of the relationship between upper management and the terminal agents. There is no basis for claiming that the employer violated the law on account of any action taken by Mr. Anderson.

CONCLUSIONS OF LAW

7. There is no factual basis for any claim that the employer violated the law through the actions, discussions, or answers to questions by Operations Manager Michael Anderson.

8. There is no evidence of any violation of any law by the employer by way of any of the actions attributed to Mr. Anderson during the course of the events at issue in this case.

THE ALLEGATIONS THAT THE ACTIVITIES OF STEVEN RODGERS CONSTITUTED AN UNFAIR LABOR PRACTICE BY WASHINGTON STATE FERRIES THAT TAINTED THE BARGAINING

FINDINGS OF FACT

47. Steven Rodgers is a senior terminal agent with a great deal of experience in both Washington State Ferries and Inlandboatmen's Union of the Pacific positions.

48. In November 1999, Washington State Ferries appointed Mr. Rodgers to a special project assignment as one of the two assistant terminal managers.

49. A special project assignment is an assignment to a terminal agent that involves work other than supervising a particular terminal. There have been many special project assignments over the years. In most instances, the terminal agents remain in the bargaining unit while on special project assignments. Such assignments are considered a part of the bargaining unit's work, although in some cases in the past, terminal agents assigned to management positions would take a withdrawal card from the union that would place them temporarily outside of the bargaining unit.

50. The assistant terminal manager positions appear to be supervisory positions with respect to the terminal agents because of the authorities those in the positions exercise regarding matters like scheduling and vacation relief. The assistant terminal managers do not, however involved themselves with the discipline of terminal agents.

51. Prior to his appointment to the special project as one of the assistant terminal managers, Mr. Rodgers had been the terminal agents' delegate to the collective bargaining negotiations.

52. Mr. Rodgers resigned that union position when he was appointed assistant terminal manager.

53. The terminal agents then held an election that resulted in the selection of Doug Schlief as the delegate and Mark Roden as the alternate. Mr. Rodgers was sent a ballot as were all other terminal agents.

54. In February 2001, well after Mr. Rodgers had resigned as delegate for the terminal agents, the Inlandboatmen's Union of the Pacific and Washington State Ferries signed the first contract for the separate unit of terminal agents. The record is silent as to whether or not any delegate of the terminal agents was involved in the discussions that preceded agreement to that contract.

55. The elected delegate and alternate along with a union official – usually the then Regional Director Pete Jones – conducted the negotiations on behalf of the terminal agents' bargaining unit for the second terminal agents' unit contract.

56. The elected delegate and alternate and the union official set policy, shaped proposals and accepted or rejected management positions during the course of the bargaining.

57. There is no evidence that Mr. Rodgers influenced or affected the work of the elected delegate, the alternate, and/or the union official in any way.

58. After being appointed assistant terminal manager, Mr. Rodgers approached the President of the entire Inlandboatmen's Union of the Pacific to ask if he – Mr. Rodgers - could or should get a withdrawal card from the Union, as had been done in the past. Mr. Rodgers was told he would have to stay a full book member paying regular dues and subject to the regular rights and obligations of union membership while he was in the assistant terminal manager position.

59. Mr. Rodgers remained a full book member of the union.

60. After the election of the new negotiating team, the terminal agents held a meeting at the home of Vern Rosbach (or the home of a relative of Mr. Rosbach – the testimony varied) to discuss negotiating a new contract. That meeting was held in the early part of 2002.

61. Mr. Rodgers attended that meeting and spoke regarding the past negotiations. He then left the meeting.

62. After it was known that Mr. Rodgers would be on the management team for the then-impending negotiations, the elected negotiator and the alternate met with then-IBU Regional Director Pete Jones to discuss whether or not Rodgers could continue to be active in the union. They consulted an attorney as part of their discussion. They ultimately determined that the situation did not pose the union any problems and that Mr. Rodgers could be active in union affairs if he so chose.

63. The terminal agents in the bargaining unit were aware that Mr. Rodgers was a member of management's negotiating team. No attempt was made to conceal that appointment.

64. Mr. Rodgers attended at least two group meetings regarding the bargaining – in June and November 2002. The final group meeting regarding the negotiations occurred in February 2003.

65. After the November 2002 meeting but before the February 2003 meeting, an IBU official asked Mr. Rodgers not to attend any more group meetings. Mr. Rodgers did not attend the February 2003 meeting.

66. The other assistant terminal manager, Shelley Burnett, participated in at least one of the union meetings without generating any discussion of her presence or her role.

67. With respect to the negotiations, Michael Manning, Washington State Ferries labor relations director testified that he wanted Mr. Rodgers and Mr. Anderson on the team for their knowledge of operational details. Mr. Manning testified that everyone spoke during the course of the negotiations but that he alone formulated and stated management's position.

68. There is no evidence that Mr. Rodgers was ever involved in formulating employer proposals or strategy beyond fulfilling his assigned role as a resource person with respect to how day-to-day operations actually occurred.

69. Mr. Rodgers attended twelve of the thirteen bargaining sessions.

70. There is no evidence in the record of anything that he said during the course of those sessions.

71. During the course of these events, the terminal agents freely communicated to each other by way of the employer's internal e-mail system. Not every message went to every terminal agent.

72. Mr. Rodgers initiated and received some, but not all, of the messages regarding the negotiations.

73. Mr. Rodgers attended at least two of the terminal agents' group meetings that were held during the course of the bargaining. However, the witnesses called to testify were not able to repeat much of what he said. At some point during the November 2002 meeting, he used a board to try to clarify various peoples' positions on an issue or issues. Later in the same meeting, he is quoted as having said there was negative energy in part of the room, that one agent had unusually long hair, and that some agents were performing better than others.

74. There is no evidence that Mr. Rodgers was asked to spy on or report about bargaining group meetings.

75. There is no evidence that Mr. Rodgers was asked to persuade or even talk to others outside of the bargaining table regarding any management positions.

76. There is no evidence in the record to indicate that Mr. Rodgers actually supported management's views of the matters under discussion.

77. There is no evidence in the record to indicate that Mr. Rodgers ever reported anything he learned or heard during the course of the union meeting to his superiors or to anyone else in the ferry system.

78. Mr. Rodgers did not attend any union strategy meeting or caucuses or any other meeting not open to all interested terminal agents. There is no evidence that he ever

talked privately to the elected negotiator or the alternate about the negotiations and there is no evidence that he ever attempted to influence either one nor that he even attempted to influence the union officials who participated in the negotiations.

79. There is no evidence that Mr. Rodgers ever attempted to bargain directly with other bargaining unit members on behalf of the employer apart from anything that he may have said at the bargaining table during the course of the negotiations.

80. There is no evidence to indicate that anyone other than the delegate and alternate and the union official involved were the ones who made the decisions on behalf of the terminal agents bargaining unit during the course of the bargaining.

81. The negotiations were ultimately completed to the satisfaction of all the people directly involved in them. It is, however, evident that the agreement reached at the table did not please all the members of the bargaining unit.

82. There is no evidence that Mr. Rodgers illegitimately or improperly influenced the outcome of those negotiations in any way.

83. The only evidence that Mr. Rodgers directly attempted to persuade anyone of anything regarding the collective bargaining appears in e-mails where he urged other terminal agents to support their elected negotiators.

84. Some agents testified that the presence of Mr. Rodgers' at the group meetings caused them to speak less freely. However, the record is devoid of any indication of any subject that was not thoroughly discussed in the meetings or the e-mails or in face-to-face discussion regarding the contract negotiations. The e-mails that were submitted into the record give evidence of a vigorous and straight forward debate.

85. From the start of these events well over a year before the charges regarding Mr. Rodgers were filed with the Marine Employees Commission until the end, the terminal agents group was divided over the question of whether or not Mr. Rodgers should or shouldn't participate in the union's activities. The elected negotiator and alternate both believed that Mr. Rodgers was an asset to the group. Others believed that his interests lay elsewhere.

86. The discussion was exacerbated by a split in the group between more senior agents and more junior agents. The latter group was concerned that the bargaining favored the more senior agents at their expense. Mr. Rodgers was viewed as an influential member of the senior agents group.

DISCUSSION OF THE CONTROLLING LAW

The law, which grants collective bargaining rights to ferry workers, does not exclude "supervisors" from those rights. RCW 47.64.006(3) affirms the right of "ferry employees to organize and bargain collectively." RCW 47.64.011(5) defines the term "ferry employee" as all employees except "exempt employees pursuant to RCW 41.06.079. (RCW 41.06.079 limits the exemption from the bargaining rights to "one confidential secretary" of certain department heads including "the personnel manager".) The legislature intended to allow all those who work for the ferries the right to organize for collective bargaining purposes and the right to exercise all the rights guaranteed by RCW 47.64 – including the right to speak one's mind about wages, benefits and working conditions. This law affecting ferry workers is not materially different from the other Washington statutes granting collective bargaining rights to public employees.

Washington's approach to collective bargaining differs dramatically from the situation in private employment that is controlled by the National Labor Relations Act. In the private sector,

there is a rigid distinction between workers who can organize for collective bargaining purposes and supervisors who cannot.

The difference renders NLRB decisions regarding the activities of supervisors totally irrelevant to state employment. In public employment, "supervisors" have the same rights as line workers and their actions are not automatically chargeable to the employer. In private employment, "supervisors" have no collective bargaining rights and everything they do becomes the employer's responsibility. As a consequence, NLRB cases finding a violation on account of a supervisor being active in a bargaining unit are irrelevant to our case. By example, in the NLRB case cited at page 8 and17 of the Union's brief – *Bricklayers Local 7***,** 245 NLRB 893 (1979) – the National Labor Relations Board determined that supervisory participation in a union's ratification vote violated the law. In a public employee unit that includes supervisors, no such ruling could be made.

This distinction was affirmed and underlined a quarter century ago by the Washington Supreme Court decision in *Metro Seattle v. Labor & Industries,* 88 Wn.2d 925 (1977). The principle has been re-affirmed time and again since then with the one modification that there is an evolving preference – although not a necessity – for putting supervisors in units of their own even where they are represented by the same union as represents the non-supervisory workers. *See, by example, International Ass'n of Fire Fighters, Local 1052 v. Public Employment Relations Commission***,** 29 Wn. App. 599, (1981), *rev. den.* 96 Wn.2d 1004 and *Firefighters v. PERC,* 45 Wn. App. 686 (1986).

Supervisors cannot legally be denied any collective bargaining rights. Supervisors cannot be denied the right to speak their mind for or against a proposed contract. Conversely, absent actual evidence of collusion, "a mere supervisor is not in a position to . . . commit the unfair

labor practices [for which their employer would be responsible]." *Metro Seattle v. Labor & Industries*, 88 Wn.2d 925, 932 (1977). (The case referred to the list of unfair labor practices in RCW 41.56.140. The same list appears in RCW 47.64.130 and WAC 316-45-003.) That ruling controls the issue regarding Mr. Rodgers.

The Public Employment Relations Commission routinely places even department heads into bargaining units. The Marine Employees' Commission decisions that refused to remove the terminal agents from the then-overall unit (Cases 220 and 230-MEC) were congruent with these PERC cases.

There is always the possibility that a supervisor may appear to have a conflict of interest. However, as the Public Employment Relations Commission specifically ruled that the possibility that there may be a conflict of interest between the supervised and the supervisor is not and cannot be a basis for denying supervisors collective bargaining rights. *King County*, 5296-PECB (1995). This ruling applies directly to the facts of this case.

Assuming that Mr. Rodgers was a supervisor, and even that he was a supervisor of supervisors, the relevant decisions and the law on which they are based preclude any attempt to deny Mr. Rodgers any of the rights commonly associated with collective bargaining, including the right to speak his mind. At the same time, it cannot be argued that Mr. Rodgers' exercise of his rights was an unfair labor practice chargeable to the employer even if Mr. Rodgers became exuberant in the manner in which he exercised those rights. To deny Mr. Rodgers the right to speak honestly his mind regarding wages and working conditions would have been a violation of the law. To charge the employer with an unfair labor practice because Mr. Rodgers spoke his mind flies in the face of the Supreme Court ruling from a quarter century ago – *Metro Seattle v.*

*Labor & Industries***,** 88 Wn.2d 925, 932 (1977). The supervisor speaks only for himself and the employer cannot be whacked on account of what the supervisor says -----

UNLESS

----- there is evidence that the supervisor was, in fact, acting solely as a front person for the employer, a conduit, so to speak, for the actual power.

If there were evidence that Mr. Rodgers was acting as a conduit for a malign management that was intent on threatening the bargaining unit into submission, his actions could be chargeable to the employer. In this case, however, there is no such evidence. There is no evidence that Mr. Rodgers did anything other than apparently try to explain other people's positions, cheerlead for the elected negotiators, and possibly state his own views in an enthusiastic fashion. There is not a shred of evidence that Mr. Rodgers did any of these at the behest of or even with the knowledge of management officials. There is no evidence that he was speaking on behalf of anyone other than himself regardless of how vigorously he spoke.

Ultimately, there is no evidence that Mr. Rodgers threatened or coerced anyone or improperly influenced anyone. But even if there were evidence that he did, there is no evidence he acted as a management conduit. There is no basis for the charge against the employer insofar as it is built upon the activities of Mr. Rodgers.

But does the fact that Mr. Rodgers was placed on the management negotiating team alter his status as an employee?

The Public Employment Commission appears to answer "No" because it routinely places people into bargaining units even though they appear at the bargaining table for the employer so long as they do not fit the exemption provided for a single confidential assistant noted above.

In *City of Ferndale,* 6485-A and 6849-PECB (1999), the Commission placed the City's police chief, public works director, parks director, and planning director into the bargaining unit although all provided information to the City's negotiators at the table or elsewhere to assist the City's collective bargaining. This bargaining activity on behalf of the employer did not strip away their collective bargaining rights. By contrast, the clerk/treasurer who attended the elected officials executive sessions and was involved in developing the City's negotiating strategy was found to be confidential. Mere participation in collective bargaining does not strip away an individual's right to speak his or her mind.

In the case before the Hearing Examiner, the uncontradicted testimony is that Mr. Manning did the strategy development and the official speaking role. He used both Mr. Anderson and Mr. Rodgers for informational purposes only, much as Ferndale used its department heads.

There is no basis for claiming that Mr. Rodgers was anything other than a "ferry employee" entitled to all the rights of collective bargaining, including the right to speak his mind. Ultimately, there is no basis for claiming that anything Mr. Rodgers said – and there is no evidence he said anything wrong – was chargeable to the employer as an unfair labor practice.

CONCLUSION OF LAW

9. There is no basis in fact or law for charging Washington State Ferries with an unfair labor practice charge on account of any action or any statements by Steven Rodgers.

10. Even if Mr. Rodgers' conduct were chargeable to the employer, the charging parties did not sustain their burden of proof that Mr. Rodgers committed any unfair labor practices.

THE ALLEGATION THAT THE APPOINTMENT OF MR. RODGERS TO THE EMPLOYER'S NEGOTIATING TEAM IMPROPERLY AFFECTED THE BARGAINING TO THE POINT WHERE THE ALLEGED AGREEMENT THAT EMERGED FROM THAT BARGAINING MUST BE REJECTED AS IMPROPER

FINDINGS OF FACT

87. The negotiations at issue in this case were for a contract for the period of 2001 through 2003 for the terminal agents' bargaining unit.

88. The bargaining unit is currently working under a contract that was signed in February 2001 by the Inlandboatmen's Union of the Pacific and Washington State Ferries.

89. Prior to that contract, the terminal agents had been part of the overall vessel and dock bargaining unit represented by the Inlandboatmen's Union of the Pacific.

90. Steven Rodgers had been the elected delegate to the terminal agents to represent their interest in the larger unit prior to the separation of the terminal agents from the overall unit.

91. Mr. Rodgers resigned this position when he was appointed one of the two assistant terminal managers in November 1999. There is no evidence that he was involved in any way in the negotiation of the first contract for the separate unit.

92. After the election of Douglas Schlief to be the delegate for the terminal agents following the resignation of Steven Rodgers, Mr. Rodgers attended the first meeting open to all terminal agents to discuss the then-forthcoming negotiations. Mr. Rodgers made a presentation at that meeting intended to review the past history of the group. He then left the meeting.

93. There is no evidence that Mr. Rodgers was ever involved in union strategy discussions or issue development in preparation for the negotiations for the 2001-2003 contract period.

94. There is no evidence that Mr. Rodgers was ever asked to inform the employer about union plans or strategy. There is no evidence that he did so whether asked or not. There is no evidence that Mr. Rodgers even could have done so if he had wanted to.

95. The employer's negotiating team for the 2001-2003 contract period was Michael Manning, Washington State Ferries Labor Relations Manager, Mr. Anderson and Mr. Rodgers.

96. The Inlandboatmen's Union of the Pacific did not object to the appointment of Mr. Rodgers to the employer's negotiating committee until after the negotiations for the 2001-2003 contract period were over. The objection came in the form of the unfair labor practice charge that was filed with the Marine Employees' Commission on February 18, 2003.

97. Michael Manning testified that Mr. Anderson and Mr. Rodgers were put on the employer's committee to provide him, Mr. Manning, with information and details about actual operations. Mr. Manning said that he alone was the spokesperson who presented the employer's positions. There is no evidence to contradict that testimony.

98. In prior negotiations, union members have been part of the management negotiating teams.

99. Terminal agents are also regularly assigned to special assignments that include matters affecting hiring, evaluations and working conditions.

100. The terminal agents' elected delegate and alternate along with a union agent met with the employer team 13 times between May 1, 2002 and December 5, 2002. Mr. Rodgers attended 12 of those sessions. Union agents were present at seven of them.

101. The parties engaged in "collaborative bargaining" – a process by which the parties attempt to work together to reach solutions that are agreeable to both sides without direct conflict.

102. Representatives of both sides testified that the negotiations were different from any in which they had been involved before.

103. A tentative agreement was reached by the end of the process.

104. Representatives of both parties expressed satisfaction with the manner in which the talks were conducted as well as with the result of the talks.

DISCUSSION OF THE CONTROLLING LAW

Three charging parties are, in essence, asking for a ruling that the employer's appointment of a bargaining unit member to the employer's negotiating team is, in and by itself, a violation that fatally taints any contract the parties reach in the bargaining. However, there is no support for such a position in law or logic. The very cases that the Union's brief cites actually stand for an entirely different proposition – the proposition that each party has the right to bring whomever they chose to the table except in the unusual (one court says "bizarre') case where specific facts show that the presence of a particular individual renders good faith bargaining impossible.

The sole PERC case on point, the case upon which the Inlandboatmen's Union of the Pacific builds its argument – *King County Fire District No. 4*, 1369-PECB (1982) – rejects an across-the-board approach to this issue. Instead, the PERC decision requires an inquiry into the facts of each case to see if the employer's choice of representative has rendered good faith bargaining impossible.

In the cited case, two fire fighters who had been involved in drafting the union's proposals for a new contract and who had bargained for an earlier contract (but not the immediately preceding one) for the union, were promoted by the employer to deputy chiefs and then used at the table along with a professional negotiator. The union filed a complaint before bargaining began but agreed to bargain anyway and reached an agreement without waving its objection. The remedy it sought was a prospective bar on the use of the two. The union did not seek to overturn the contract.

The Public Employment Relations Commission rejected the unpublished opinion of the Whatcom County court that the union cites in its briefs. Instead, the Public Employment Relations Commission followed the lead of the National Labor Relations Board in ruling that the employer's conduct must be measured against a good faith test (page 4). Elsewhere, the decision says that the issue is whether or not the conduct "clearly endangered" the collective bargaining process (page 4).

Ultimately, the PERC decision puts great emphasis on the fact that the parties were able to reach an agreement as proof that the process was not endangered (page 4). PERC then rejected the union's complaints regarding the employer's use of its former members.

This same approach was used by National Labor Relations Board in every case cited by the union. The NLRB and the Courts reviewing NLRB decisions uniformly uphold the right of the parties to choose whomever they please subject only to intervention if the choice renders good faith bargaining impossible.

In the 9th Circuit Court of Appeals case *NLRB v. Teamsters Local 70,* 459 F.2d 694 (1972), by example, the union refused to meet with the employer representative because that person had been the union's president until thrown out by a then-recent election. The individual

had previously represented another employer for two months without incident. The Court ruled that "Only in truly exceptional circumstances should a Union be permitted to refuse to bargain with an employer represented by a former Union official." (459 F.2d at page 696). The Court went on to say that such exceptional circumstances would be "bizarre instances of abuse in the collective bargaining process." (459 F.2d at page 696). The Court then held that "… the burden is upon the Union to demonstrate that the representative in the particular dispute has gained an unethical or overreaching advantage by the misuse of specific confidential information acquired by reason of his former tenure as a Union official." (459 F.2d at page 697).

An exceptional circumstances was present in the case of *NLRB v. International Ladies Garment Workers Union Local,* 274 F.2d 376 (3rd Cir. 1960). The exceptional circumstance was that proven fact that the employer chose to use an ex-union official for the sole purpose of disrupting the bargaining.

An exceptional circumstance also occurred in *Bausch & Lomb Optical Co.,* 108 NLRB 1555 (1954). The exceptional circumstance was that the union operated a competing company and the NLRB believed that it might use the bargaining for the purpose of undercutting the employer rather than for the purpose of getting the best deal for the workers.

(At page 6, the Union's brief suggests that the *Bausch & Lomb,* 108 NLRB 1555 (1954) decision supports the argument that the employer automatically disrupts bargaining by putting a bargaining unit member on the employer's team. In fact, the decision says nothing of the kind.

The union's brief creates this suggestion by linking a quotation – which does not appear on the page cited – to the union's argument – which is not supported by the discussion on the page cited.

To be more specific, the Union's brief states at the end of the carryover paragraph on page 6 that: "Where a negotiator currently serves two masters it makes 'fair dealing with the [party] inherently impossible . . .'(108 NLRB at 1557)." In fact, the NLRB decision at 108 NLRB 1557 contains a paragraph that discusses the NLRB rule that a supervisor cannot appear as part of the union's team. The page ends with this markedly different quote: "[O]ne purpose of the Act [the National Labor Relations Act] was to draw a clear line of demarcation between supervisory representatives of management and employees because of the possible conflicts in allegiance if supervisors were permitted to participate in union activities with employees." (108 NLRB at page 1557). This quote refers to the rule in private employment separating supervisors from bargaining units. The exact opposite prevails in public employment. Nothing at all is stated about bargaining unit people appearing among the employer's team. If the quote quoted by the Union appears elsewhere in the opinion, it refers to the ownership issue, an issue that is not relevant to our case whatsoever.)

The PERC and the NLRB agree that each party can have whomever they chose bargaining for them unless there is proof that the selection of a specific individual renders good faith bargaining impossible.

In the public sector, this rule is backed by common sense as well as the cited PERC case because the law allows virtually everyone to organize. If the employer could not tap the knowledge of bargaining unit people, it could not intelligently bargain. The Public Employment Relations Commission seems to have intuitively grasped this idea because it routinely places supervisory employees who do assist the employer's bargaining into the bargaining unit.

In Ferndale, Washington for example, the Public Employment Relations Commission included the police chief, the parks director, and public works director and the planning director

in the bargaining unit while noting that all were resources for the employer's bargaining. *City of Ferndale***,** 6485-A and 6849 – PECB (1999). In a Yakima County case, the chiefs of the civil and the criminal divisions of the Sheriff's Department were included in the unit as well with the specific holding that "supervisory employees who merely provide input to the employer's labor policy makers or negotiating team concerning the impact of various contract proposals are not regarded as confidential employees." *Yakima County*, 4625-PECB at page 4 (1994).

These decisions are written in terms of whether or not such people are prohibited from being in bargaining units by reason of their past information-giving role. However, the same rationale applies once they are in the unit. They can still be relied upon to supply information necessary to evaluate proposals without compromising the bargaining or their position in the bargaining unit. That is exactly the use to which the employer put Mr. Rodgers during the negotiations according to the uncontradicted testimony of Mr. Manning. There is no basis for claiming that the use of Mr. Rodgers violated the law or tainted the process.

In addition, this state's public policy for ferry collective bargaining anticipates the "effective and orderly operation of the ferry system" as well as "just and fair compensation, benefits, and working conditions …" (RCW 47.64.006). The dual mandate requires that both sides fully inform themselves in order to get the best result possible out of negotiations. An across-the-board prohibition from using bargaining unit members would work against both elements of the policy.

Applying the test endorsed by the Public Employment Relations Commission and the National Labor Relations Board to the facts of this case, it is evident that the collective bargaining process was not endangered by the presence of Mr. Rodgers in the management team. Mr. Rodgers was not involved in the development of the union's strategy or positions. In this

regard, these facts are more innocuous than those of the cited PERC case where the two former line fire fighters had been involved in developing bargaining strategy. There is no evidence that the employer chose Mr. Rodgers in order to secure an illegitimate advantage or in order to "get" the union, as occurred in one of the cited NLRB cases. The use of union members was not unusual in ferry bargaining. (In fact, the Union's elected alternate to the bargaining thought that Mr. Rodgers' presence in the management team could help the Union by moderating the employer's positions.) In addition, the parties' approach to the bargaining for the terminal agents' unit – the collaborative approach – differed from the past so Mr. Rodgers' past negotiating experiences would have been irrelevant had he been asked to draw on that experience to help the employer. (There was no evidence he was ever asked to do so.) The parties were able to work out a contract in a process that everyone agreed had been successful at the time that the talks were completed. The evidence is that the sessions were productive and each side had its share of gains and losses. There is not a scintilla of evidence to suggest that the results would have been different in any way had Mr. Rodgers not been involved. In addition, the union here, as opposed to the one in the cited case, did not object to Mr. Rodgers' role at any time during the bargaining. It raised the issue only after everything was completed. In addition, the Union filed its complaint well after 180 days after the initial appointment of Rodgers to the committee. Even if the continuing nature of the alleged violation eliminates a timeliness issue, the delay speaks eloquently to the absence of a good faith concern for the legitimacy of the process.

Ultimately, there is no factual basis for any claim that the appointment of Mr. Rodgers to the employer's bargaining committee endangered the process one bit.

(One brief raised the argument that Mr. Rodgers' appearance on the management committee violated the appearance of fairness doctrine. That doctrine applies only to judicial or

quasi-judicial proceedings. It does not apply to inter-party labor relations. However, the core of the argument could be made equally under the claim that the appearance of Mr. Rodgers on the management team was a bad faith act by management that endangered the collective bargaining process. The Hearing Examiner has determined that that claim is not supported by the facts – that the appointment of Mr. Rodgers was not in bad faith and did not illegitimately taint the process.)

The law supports the right of each party to select whomever it wants to represent it at the bargaining table unless the selection makes good faith bargaining impossible. In this case, the selection of Mr. Rodgers was in accordance with the controlling law. There is no evidence that that selection endangered the bargaining process to the point where the exception to the general rule should be applied.

CONCLUSIONS OF LAW

11. The employer did not violate the law by utilizing Mr. Rodgers as a member of the employer's bargaining committee.
12. The employer did not taint the collective bargaining process by utilizing Mr. Rodgers as a member of the employer's bargaining committee.
13. The appearance of fairness doctrine does not apply to this situation because that is a doctrine which applies to judicial and quasi-judicial proceedings and is irrelevant to the manner in which parties conduct themselves in collective bargaining.
14. There is no legal basis for rendering the agreement that the parties reached void on account of the employer's appointment of Mr. Rodgers to its negotiating team.

DOES THE INLANDBOATMEN'S UNION OF THE PACIFIC HAVE A LEGAL OBLIGATION TO SUBMIT THE TENTATIVE TERMINAL AGENTS' CONTRACT TO A RATIFICATION VOTE

FINDINGS OF FACT

105. The parties to the bargaining did not discuss the process that would be followed once a tentative agreement was reached.

106. Both sides at the table anticipated that a tentative agreement would be submitted to the bargaining unit for a ratification vote.

107. The Inlandboatmen's Union's prior practice was to submit tentative agreements to ratification votes by the bargaining unit.

108. The former Regional Director of the Inlandboatmen's Union participated in the negotiations and agreed that the parties had reached a tentative agreement by the time of the last negotiation. He indicated that the agreement would be submitted to a ratification vote once a proper final draft was prepared.

109. Prior to beginning bargaining, the Inlandboatmen's Union did not assert that the tentative agreement would have to meet the personal approval of the newly-elected Regional Director.

110. The printed version of the tentative agreement matches the parties' agreement at the table.

111. The objections raised by the present Regional Director of the Union go to the merits of portions of the agreement.

DISCUSSION OF THE CONTROLLING LAW

Where, as here, the minds have met, the pen is supposed to follow. That was the ruling of the Marine Employees Commission in *Inlandboatmen's Union of the Pacific v. Washington*

State Ferries, Dec. 123-MEC (1994). That is the rule applied by the Public Employment Relations Commission. *See, by example, Naches Valley School District*, 2516-EDUC (1986). That is the rule uniformly applied by the National Labor Relations Board. See the summary in Morris, *The Developing Labor Law*, Chapter 13.II.C and 13.III.B.4.

There is no question but that the minds met at the table in this case.

The usual remedy is a forced signing because the usual culprit is the employer. In this case, the employer asks only that the Union fulfill the step that both parties anticipated it would take and that the Union's former Regional Director said would occur at the point at which an agreement was reached – a ratification vote of bargaining unit members.

Under the controlling law, the Union has no valid defense to the employer's demand. The Union must fulfill its portion of the bargain and submit the matter to ratification.

The arguments regarding the Union's internal rules are not relevant to this case. Labor law assumes – and requires – that a party can fulfill the commitments that it makes at the bargaining table. A party cannot escape those commitments by claiming that its internal rules somehow affect the bargaining. If a legal and proper special arrangement is needed or wanted, it must be specified at the time bargaining begins.

(Bargaining unit members have also filed a charge seeking the same remedy on a theory that the Marine Employees' Commission has accepted on the understanding that it is in the nature of duty of fair representation claim. The individuals' arguments are addressed below. The analysis at hand deals with the employer's charge.)

CONCLUSIONS OF LAW

15. There is no factual or legal basis for the Union's refusal to submit the tentative agreement to a ratification vote by the members of the bargaining unit.

16. The Inlandboatmen's Union of the Pacific violated the law, specifically the duty to bargain (RCW 47.64.130 (2)(c)) by refusing to submit the tentative collective bargaining agreement to a ratification vote by the members of the bargaining unit.

17. The question of whether or not the Union's constitution and/or bylaws empower or prohibit the Regional Director from doing what he did is irrelevant to the Union's obligations under the controlling law.

DID THE STATE'S PASSAGE OF SUBSTITUTE HOUSE BILL 1829 ALTER THE SITUATION SUFFICIENTLY TO MAKE IT INAPPROPRIATE FOR THE TENTATIVE AGREEMENT TO BE SUBMITTED TO RATIFICATION

FINDINGS OF FACT

112. The parties' tentative agreement enables certain terminal agents to apply for certain amounts of work as part of a reserve pool of retired employees. According to the tentative agreement, the retired individual has the right to apply for a position with the reserve pool within a specified amount of time after retirement. There is no guarantee that he or she will be accepted.

113. Prior to the negotiation of the tentative agreement, state law placed certain limitations on how much work retired persons could perform for the State after retirement – limitations that led to the reduction of retirement benefits once they were exceeded.

114. The new law altered those limitations. They new law also made it a violation for an employee to claim retirement if " [that] employee and [the] employer have a written or oral agreement to resume employment with the same employer following termination."

115. The new law does not proscribe post-retirement employment.

116. The new law does not prohibit a retired employee from getting his/her retirement benefits and working for up to a specified amount of time provided that such employee has not made a deal with the employer prior to "retirement" that gives him/her the right to resume employment following termination.

117. The brief filed by the Inlandboatmen's Union of the Pacific argues that the proposed collective bargaining agreement that the IBU negotiated for the terminal agents constitutes a written agreement to resume employment and thus would bar terminal agents from ever retiring with retirement benefits.

118. The brief does not cite any support for the argument.

119. The argument in the brief at page 30 says that the prohibition occurs when "they" – i.e. employees - "and the employer have a written or oral agreement to resume employment".

120. The law does not state the prohibition in the manner in which the Union's brief states it. The law does not use the word "they" but rather uses the phrase "an employee" to define the prohibited conduct: "when an employee and employer have a written or oral agreement to resume employment". (Section 4(42) of Chapter 412, Laws of 2003.

121. The law makes no reference to union contracts that may enable a retiree to apply for work.

DISCUSSION

On the basis of cases where the National Labor Relations Board refused to enter the remedy the National Labor Relations Board considers extraordinary – a bargaining order – because of changed circumstances, the Union argues that the Marine Employees' Commission

should not impose the rather ordinary remedy of requiring a party to fulfill the commitments it made at the bargaining table. Protecting the integrity of the bargaining process by preventing a party from turning its back on thirteen negotiating sessions and the ensuing tentative agreement it is quite different from imposing a duty to bargain in circumstances where the evidence is that the union has lost its majority among the employees it purports to represent. The National Labor Relations Board is manifestly reluctant to impose the bargaining duty. No such reluctance can be seen in the orders that the employer sign and implement the actual agreement to which it has agreed – that being the usual scenario of the cases relevant to the one at hand. The principle remains the same in this case where it is the union that is balking.

There is no case support for the position that the Union is arguing.

It is even difficult to imagine that there could ever be case support applicable to our facts because all that is sought is a vote by the affected workers and it cannot be presumed that the workers are incapable of deciding whether or not the tentative agreement is good or bad. Indeed, the decision of whether or not the tentative agreement is good or bad is up to the workers and is not up to the Marine Employees' Commission.

(It is theoretically possible for parties to reach an agreement that is flat illegal. However, no argument has been presented here that the agreement itself – aside from the charges that focus on how it was bargained – is illegal.)

Assuming, however, for the sake of argument that a case could occur where intervening facts so altered the situation that the parties' tentative agreement no longer made sense, the situation in the case before the Hearing Examiner comes nowhere near such a theoretical situation.

The only thing that is evident from a careful reading of the new law is that a retired terminal agent accepted into the reserve pool after retirement may not be able to work as many hours without loss of some retirement pay as the negotiating parties anticipated during the talks. There has always been a limitation – the numbers have been changed. The apparent change is one of scope rather than nature and it does not alter the core of the idea that the parties agreed upon.

In addition, the argument that the parties' agreement inadvertently may keep terminal agents from retiring with benefits appears based on a misreading of the actual wording of the law. Admittedly, the Marine Employees' Commission is not the body that will ultimately interpret and apply the law but it seems inconceivable that a law that penalizes an individual for having his/her own pre-retirement agreement with the employer to resume employment after retirement would be triggered by the presence of a union contract that entitles the terminal agents to nothing more than the right to apply – with limited recourse if they are rejected – for extra work once they have already retired.

Ultimately, the Union has not presented a case of a change drastic enough to impel the Marine Employees' Commission to take the decision of whether or not they want this contract, out of the hands of the terminal agents affected by the contract.

CONCLUSION OF LAW

18. Washington State's passage of Substitute House Bill 1829 (Chapter 412, Laws of 2003) does not provide a factual basis for relieving the Inlandboatmen's Union of the Pacific of the requirement that it submit the tentative agreement at issue in this case to a prompt ratification vote by bargaining unit members.

19. Washington State's passage of Substitute House Bill 1829 (Chapter 412, Laws of 2003) does not provide a legal basis for relieving the Inlandboatmen's Union of the Pacific of the requirement that it submit the tentative agreement at issue in this case to a prompt ratification vote by bargaining unit members.

THE ISSUE OF WHETHER OR NOT THE UNION'S UNLAWFUL REFUSAL TO SUBMIT THE TENTATIVE AGREEMENT TO A RATIFICATION VOTE VIOLATED THE UNION'S DUTY TO FAIRLY REPRESENT THE BARGAINING UNIT MEMBERS

FINDINGS OF FACT

122. One of the charges before the Hearing Examiner was filed by certain bargaining unit members who allege a refusal-to-bargain violation by the Inlandboatmen's Union of the Pacific as regards them.

123. The Inlandboatmen's Union of the Pacific moved prior to the hearing for the dismissal of that allegation.

124. The Hearing Examiner denied the motion in an Order entitled "Order Denying Union's Partial Summary Judgment Motion In Case 32-03."

125. The core of the Hearing Examiner's ruling is that the law imposes a duty to fairly represent the bargaining unit in collective bargaining, the breach of which could be an illegal refusal to bargain as regards bargaining unit members.

126. The Union has renewed its motion to dismiss in its brief.

127. The charging parties allege that the record contains sufficient evidence of actual malice and hostility to warrant a finding in their favor.

128. The Inlandboatmen's Union's current Regional Director refused to submit the tentative agreement to a ratification vote because the tentative agreement contains terms and conditions that the current Regional Director believes are antithetical to the interests of the employees the IBU represents – both in and outside of the bargaining unit. Some of the provisions to which the Regional Director took exception were markedly different from contract language appearing in other Inlandboatmen's Union of the Pacific contracts.

129. The Regional Director's views are strongly supported by some persons in the bargaining unit and strongly opposed by other persons in the bargaining unit.

130. The Regional Director promptly sought to reopen negotiations with Washington State Ferries after becoming concerned about some of the provisions of the tentative agreement.

131. Washington State Ferries refused to reopen negotiations.

132. The Regional Director met privately with the elected delegate and alternate of the terminal agents to discuss the tentative agreement.

133. The Regional Director also sought an attorney's input and candidly shared that input with the entire bargaining unit.

134. The Regional Director assisted with the distribution of a letter from the employer that allegedly refuted at least some of the attorney's comments.

135. The Regional Director scheduled an all-unit meeting to discuss the matter.

136. The language used during the course of that meeting by many attendees was vigorous and could reasonably have been considered offensive.

DISCUSSION OF THE CONTROLLING LAW

The earlier order regarding whether or not a bargaining unit member can pursue a refusal-to-bargain complaint contains five pages of legal analysis. The Union's renewal of the motion says only that the Hearing Examiner was wrong the first time. The Union did not make any attempt to refute the actual legal analysis upon which the earlier decision was based.

The Washington Supreme Court case of *Allen v. Seattle Police Guild,* 100 Wn.2d 361 (1983), a case which was not mentioned in the earlier decision, provides additional support for the ruling that the Hearing Examiner has already made. In that case, the Court made it clear that the duty to fairly represent the bargaining unit applies to all aspects of the Union's activities on behalf of bargaining unit members. The breadth of this ruling echoes the breadth of the responsibility placed on the union by the ferry employee bargaining law to "represent all such employees fairly" (RCW 47.64.170). That duty to employees includes the duty to bargain when "to represent fairly" requires that matters be bargained.

But not every action that displeases some of the members of the bargaining unit is a violation of the duty to fairly represent. Equally, not every refusal-to-bargain that violates the employer's right will be a refusal-to-bargain that adds up to a violation of the duty to fairly represent.

The cited Washington case of *Allen v. Seattle Police Guild,* 100 Wn.2d 361 (1983) provides the standards by which the Union's conduct is to be judged. The case arose when the police guild spent union money to pursue litigation that opposed an affirmative action program that was favored by a lot of the guild's members. The Court noted that the interests of different groups in the guild differed and that any guild action or inaction in this matter would have offended some of its members (100 Wn.2d at 376).

Ultimately, the Court held that the Union must take into consideration the views of all the sides to a dispute and must reach a decision that is not arbitrary and that is devoid of hostility or discrimination (100 Wn.2d at pages 375 through 378). Those are the standards which control our case.

In this instance, the Regional Director made a thorough and good faith attempt to inform himself of the facts of the dispute. He sought and received legal counsel. He gave the parties an opportunity to discuss the matter both privately and publicly. He made a decision that pleased some and offended others.

The fact that strong language may have been used from time to time does not undercut the fact that the Regional Director's decision – albeit incorrect – was made in a way that considered the interests of all parties and was motivated by sincere beliefs about the propriety of some of the contract language.

CONCLUSIONS OF LAW

20. The Regional Director's decision not to submit the tentative agreement to a ratification vote was based upon a careful consideration of the views of the opposing groups in the bargaining unit and upon a sincere concern about some of the provisions in the tentative agreement.

21. The Regional Director did not violate his duty to bargaining unit members in the way in which he made the decision nor in the decision itself even though the decision was a violation of the duty to bargain vis-à-vis the employer.

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DISPOSITION OF THE CHARGES

On the basis of the above Findings of Fact and Conclusions of Law, the Hearing Examiner hereby makes the following disposition of the cases before him:

1. MEC Case 32-02 and 32-02 Amended (Schlief et al.) – denied and dismissed
2. MEC Case 33-03 (Dunlap et al.) – denied and dismissed
3. MEC Case 35-03 (WSF) – granted
4. MEC Case 36-03 (IBU) – denied and dismissed
5. MEC Case 38-03 (Olwell et al.) – denied and dismissed

ORDER AND REMEDY

The Marine Employees' Commission hereby determines that the Inlandboatmen's Union of the Pacific is in violation of its statutory duty to bargain in good faith (RCW 47.64.130(2)(c)) by reason of its refusal to submit the tentative agreement reached for the terminal agents' bargaining unit to a ratification vote of bargaining unit members.

The Marine Employees' Commission hereby Orders that the Inlandboatmen's Union of the Pacific remedy the violation by taking the following affirmative steps:

1. Within 14 days of the date of this Order, in good faith, conduct a ratification vote among the members of the terminal agents' bargaining unit asking the question of whether or not the terminal agents want to accept or reject the tentative agreement (Hearing Exhibit 42). If there is an appeal, the ratification vote will proceed, but the ballots will be held unopened, until the outcome of the appeal.
2. Immediately upon the conclusion of the vote, report the results of the vote to the employer and to the office of the Marine Employees' Commission. The report would be delayed in the event of an appeal.

3. Post a notice stating the results in all the terminals operated by the Washington State Ferries, in a place designated by the terminal's on-duty terminal agent.

4. Retain all records relevant to the ratification vote until the Marine Employees' Commission rules that the records can be destroyed.

5. Immediately act appropriately with respect to the vote whether it be to sign the tentative agreement in the event of ratification or make dates available for further negotiation in the event of rejection.

Except as stated above, all other requests for remedy are hereby rejected. All parties are to bear their own costs and attorney fees. To the extent that there was or may be a request that bargaining unit members be awarded damages for alleged loses arising from the delay, all such requests are denied as inappropriate in light of RCW 47.64.190's affect on the implementation date of new agreements.

PETITION FOR REVIEW OF EXAMINER'S DECISION

Any party may request review by the Commission of the examiner's findings of fact, conclusions of law and order. Such request must be made within twenty days following the date of the order issued by the examiner by filing the original petition with the Commission at its offices in Olympia and by serving a copy on each of the other parties to the proceedings. Additional requirements regarding the petition are set forth in WAC 316-45-350 (a copy of which is attached). In the event no timely petition for review is filed and no action is taken by the Commission on its own motion within thirty days following the examiner's final order, the

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findings of fact, conclusions of law and order of the examiner shall automatically become the findings of fact, conclusions of law and order of the Commission and shall have the same force and effect as if issued by the Commission.

DATED this _____ day of October 2003.

MARINE EMPLOYEES' COMMISSION

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JOHN BYRNE
Hearing Examiner