BEFORE THE MARINE EMPLOYEES' COMMISSION
STATE OF WASHINGTON

WASHINGTON STATE FERRIES, Complainant, v. DISTRICT NO. 1, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, Respondent.	MEC CASE NO. 53-03 DECISION NO. 410 - MEC DECISION AND ORDER

APPEARANCES

Davies, Roberts and Reid, by *Michael McCarthy*, Attorney, appearing for District No. 1 Marine Engineers' Beneficial Association.

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

NATURE OF THE PROCEEDING

Washington State Ferries (WSF) brought this matter before the Marine Employees' Commission by filing a charge alleging that District No. 1, Marine Engineers' Beneficial Association (MEBA) has illegally refused to bargain for contracts affecting two bargaining units for the 2001-2003 biennium. The Marine Employees' Beneficial Association admits that it refuses to meet and bargain for such contracts for that biennium, except as part of a contract that would cover 2001-2005. However, the union argues that its refusal is justified by the law and is not an unfair labor practice.

RECORD BEFORE THE COMMISSION

This matter was submitted to the Marine Employees' Commission on the following record:

1. Complaint Charging Unfair Labor Practices (Case no. 53-03) filed by Washington State Ferries on June 18, 2003.
2. MEBA's answer filed February 20, 2004.
3. MEC's Notice of Scheduled Hearing dated December 23, 2003.
4. MEC's Notice of Scheduled Settlement Conference dated July 16, 2003
5. MEC's Notice of Continued Settlement Conference dated August 6, 2003.
6. MEC's Notice of Continued Settlement Conference dated September 30, 2003.
7. MEC's Notice of Hearing dated December 23, 2003.
8. Hearing transcript and 19 exhibits introduced and accepted into evidence during the March 4, 2004 hearing.
9. Post-hearing briefs filed by both parties as well as the case copies filed by the Marine Engineers' Beneficial Association.

FINDINGS OF FACTS

On the basis of the above record, the Marine Employees' Commission hereby makes the following Findings of Fact:

1. Washington State Ferries and the Marine Engineers' Beneficial Association are parties to two collective bargaining agreements that are dated 1999 – 2001.
2. The collective bargaining agreements set terms and conditions of employment of two bargaining units of Washington State Ferries employees. The parties use the terms "licensed unit" and "unlicensed unit" to differentiate the two groups.

3. The minutes of the Marine Employees' Commission meeting of January 26, 2001 report that the MEBA had accepted a "rollover" of a previous contract as the contract for the 1999 – 2001 term and that the membership had ratified the contract sometime prior to the MEC meeting.

4. The minutes of he Marine Employees' Commission meeting of March 23, 2001 report that the State's Transportation Commission accepted the 1999 – 2001 MEBA contracts on February 15, 2001.

5. The minutes of the Marine Employees' Commission meeting of July 27, 2001 state that efforts were underway to schedule negotiating dates for the two MEBA contracts for the 2001 – 2003 period.

6. In the meantime, the two 1999 – 2001 contracts were continued past their expiration dates by operation of law. (RCW 47.64.170(7))

7. The September 28, 2001 MEC minutes report that the parties scheduled negotiation dates to begin in October.

8. During this same period, the parties tried to negotiate a settlement to the "respirator issue" – an issue involving mandatory shaving on account of the requirement that certain workers had to be able to don respirators to fight fires. The issue was contentious and it absorbed a great deal of the parties' time.

9. Ultimately, the parties were not able to settle the respirator issue and they submitted it to interest arbitration. The arbitrator issued his ruling in April 2002.

10. From the end of 2001 through 2002, the union tried to get dates set for negotiations. Many dates were set during that period but the time was used instead for discussing the respirator

issue and issues arising from medical information questionnaires, as well as matter concerning the accommodation policy and sick leave policy.

11. During this period of time, neither party filed any charge with the Marine Employees' Commission alleging that the other was refusing to meet and bargain for replacement contracts. In addition, the MEC minutes do not show that any informal complaints were made to the MEC regarding the delay.

12. In early 2003, the parties again scheduled times for negotiations.

13. In late May 2003, the union's attorney wrote a letter to the Washington State Ferries stating that the union would no longer attempt to bargain a contract for the 2001 – 2003 period while asking that the parties proceed to bargain an agreement for the period 2001 – 2005.

14. Washington State Ferries wishes to bargain agreements for the 2001 – 2003 period and is not willing to agree to bargain agreements for a four-year period.

15. Washington State Ferries filed this charge to force the union back to the bargaining table to bargain agreements for the 2001 – 2003 period.

16. The union argues that the State waived its right to bargain for that period and that, in any event, trying to work out a contract for a time period that has already expired would be a futile waste of time and resources. Washington State Ferries does not agree.

17. In the past, there have been contracts between the parties that applied, by their own terms, for four years.

18. The record is silent as to how that happened.

ANALYSIS

RCW 47.64, the law controlling ferry system collective bargaining, is unusual among labor relations laws in that it dictates that union-ferry system contracts are to begin in the odd-

numbered years and run for two years to match the state's biennium budget cycle. The requirement is not, however, absolute.

The law states the requirement in the second part of subsection 7 of RCW 47.64.170 as follows:

> It is the intent of this section that the collective bargaining agreement or arbitrator's award shall commence on July 1st of each odd-numbered year and shall terminate on June 30th of the next odd-numbered year to coincide with the ensuing biennial budget year, as defined by RCW 43.88.020(7), to the extent practical.

This two-year requirement is implicitly echoed by RCW 47.64.180. That law decrees that "No collective bargaining agreement or arbitrator's award is valid or enforceable if its implementation would be inconsistent with any statutory limitation on the department of transportation's funds, spending, or budget." The limitation would be very difficult to enforce if the budget cycle and the contract's term did not coincide.

The two-year requirement is also implicitly enforced by RCW 47.64.190. That law has two key provisions – the one that no contract may become effective until after all the ferry contracts are worked out (subsection (1)) and the provision allowing review of all the contract to make sure that the financial limits imposed by RCW 47.64.180 (subsection (2)) are met. Failure to line all the contracts up in two-year groupings would undermine the requirements of this portion of the law.

The two-year requirement, however, is limited by its own use of the term "to the extent practical."

In this case before the Marine Employees' Commission, it cannot be concluded that bargaining for the two-year agreement would not be practical. Neither side would have the right to demand changes to terms and conditions of employment that the passage of time have

rendered completely impossible. For example, the parties could not be required to bargain about matters – such as shift assignments for last summer – that cannot be implemented. But there are important issues that remain alive despite the passage of time such as retroactive wages and such as accruals and rights generated by seniority or time at work to name two. In addition, all the changes agreed upon or arbitrated would set the terms and conditions for the period until the parties – and the other unions - completed their bargaining for the 2003 – 2005 term.

But even if it is practical to bargain a contract for the 2001 – 2003 period, there remains the question of whether or not the State waived its right to insist on bargaining for that time period by its activity or inactivity prior to the union's May 2003 refusal to meet and bargain.

The Washington State Courts apply a tough standard to the issue of waiver. In *Jones v. Best, 134 Wn.2d 232, 241 – 242, 950 P.2d 1 (1998)*, by example, the Court stated the controlling rule as follows:

> A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. (citations omitted) To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous facts. (citations omitted) The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver.

In *PUD of Lewis County v. WPPSS, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985),* the Court stated not only that the party said to waiver a right "must intend to relinquish such right" but also that the waiving party's "actions must be inconsistent with any other intention than to waive them."

The Public Employment Relations Commission acknowledges the controlling nature of this standard. See, by example, the discussion at pages PD 2377-16 to PD 2377-17 of the *Spokane County, 2377-PECB (1986)* case submitted by the union along with its brief.

However, the Public Employment Relations Commission appears to follow the National Labor Relations Board's lead in applying the rather looser rule that a union waives the right to bargain if it does not demand bargaining in those instances where the union learns that an employer is intending to implement a change to the terms or conditions of employment that is not barred by contract. Both agencies appear to apply this looser interpretation only to the narrow circumstances where one party wants to make a change that is not barred by the contract and the other party seeks to stymie it by dithering.

There is no case support for the claim that one need not abide by the letter of the Supreme Court's definition of waiver when it comes to the question of whether or not one party or the other has totally abandoned its legal right to bargain new contracts. As a consequence, the Marine Employees' Commission must analyze the facts of this case in light of the rule laid down by the Supreme Court.

In this case, the union has not proven that Washington State Ferries intended to abandon its right to bargain. In addition, the actions of both parties during the 2001 through 2003 time period are as consistent with the notion that both parties implicitly agreed to delay overall bargaining while they addressed particular issue as with the notion that one side or the other wanted to forgo bargaining entirely. In these circumstances, the required legal standard for waiver cannot be met. The Marine Employees Commission cannot rule that Washington State Ferries waived the right to demand bargaining for new contracts.

At this point, the case returns to the issue of practicality because the union argues, in essence, that bargaining for the 2001 – 2003 period would not be worth the expense nor the logistical difficulties. There is no real factual record to support the argument. It rests solely on the claim that the creation and maintenance of four separate committees is unduly burdensome.

However, the Commission's decision need not turn on the absence of hard facts because the argument is insufficient to justify excusing the admitted refusal to fulfill the legal obligation.

Carried to its logical end, the union's argument would excuse either party from bargaining where the expense was likely to outweigh whatever it was likely that the party would gain from the bargaining. The proposed exception to the duty to bargain would end up swallowing up the duty to bargain because it can be anticipated that one side or another to every round of collective bargaining will emerge from that bargaining having spent time and money on an agreement that requires that it pay its workers more or an agreement by the workers to work for less. The union's current argument would give the potentially losing side a legal reason for staying home. The statement of the logical consequences of the argument is sufficient to indicate why the argument cannot be allowed to prevail.

In addition, the union's argument requires that the Marine Employees' Commission delve into and evaluate the union's internal affairs – namely the way in which it creates or selects bargainers. The Commission has consistently ruled that such matters are outside its jurisdiction. (See, by example, *Twitty v. MEBA, 255-MEC (2001).*) The same rule that protects unions from having the Commission intrude into their internal matters applies to keep unions from using those internal matters as affirmative arguments for gaining an advantage in a ULP proceeding.

Ultimately where, as here, there are matters to negotiate, the expense of the negotiations is not a defense to a refusal to fulfill the legal obligation to negotiate.

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CONCLUSIONS OF LAW

On the basis of the record in this case, the Marine Employees' Commission hereby makes the following Conclusions of Law:

1. The Marine Employees Commission has jurisdiction of this matter and the parties involved in it.

2. Washington State Ferries did not waive its right to bargain with the Marine Engineers Beneficial Associations for contracts affecting the two bargaining units represented by the MEBA for the 2001 – 2003 period.

3. The legislative scheme requires that the parties bargain contracts for each biennium so long as such bargaining is practical. The Marine Employees' Commission has neither the right nor the authority to alter the law.

4. Bargaining is practical and appropriate in this case because, although the period at issue will be technically over when the bargaining is concluded, there are subjects regarding which the parties can reach effective retroactive agreement and subjects regarding which the parties can reach agreements that will have force and effect until contracts are reached for the 2003 – 2005 period.

5. In addition, it is necessary that there be contracts covering the period in question so that all the contracts may be validated in accordance with the controlling statute (RCW 47.64.190).

6. Neither party to the bargaining can avoid its legal obligations to bargain by arguing that the bargaining will be expensive and that that expense may outweigh the value that that party reasonably expects to receive from the bargaining.

7. The Marine Engineers' Beneficial Association violated the law, namely its duty to bargain, by refusing to bargain at reasonable times and places with Washington State Ferries for contracts for the two bargaining units that it represents for the time period 2001 – 2003.

REMEDIAL ORDER

On the basis of the above Findings of Facts, Analysis and Conclusions of Law, the Marine Engineers' Beneficial Association is hereby ORDERED to cease and desist its refusal to bargain with Washington State Ferries regarding the two bargaining units it represents for the 2001 – 2003 time period at issue. The Marine Engineers Beneficial Association is hereby ordered to offer to bargain the contracts at issue as soon as possible. The Marine Engineers Beneficial Association is specifically ORDERED to meet with representatives of Washington State Ferries within two weeks of the date of this ORDER to choose a reasonable number of dates for negotiation meetings so that the issues affecting both bargaining units, or either of them, may be brought expeditiously to an agreed-upon conclusion or to mediation and, if necessary, binding interest arbitration.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC's unfair labor practice ruling with the Commission within ten days from the date this final order is mailed. Any petition for reconsideration must state the specific grounds for the relief requested. Petitions that merely restate the party's previous arguments are discouraged. A petition for reconsideration does not stay the effectiveness of the Commission's order.

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If no petition for reconsideration is filed in a timely fashion, the Marine Employees' Commission will issue a second Order, which will state that this Order has become final and binding in accordance with RCW 47.64.280. That second Order will start the period running for any appeal to the Washington State Superior Court, pursuant to RCW 34.05.542 and 34.05.514.

DATED this 18th day of May 2004.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN BYRNE, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ JOHN SULLIVAN, Commissioner