STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, ILWU, AFL-CIO,	)	
	)	CASE 17153-U-03-4441
Complainant,	)	
	)	DECISION 8746 - PECB
vs.	)	
	)	
SKAGIT COUNTY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	

Schwerin Campbell Barnard, by *Robert H. Lavitt,* Attorney at Law, for the union.

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On January 29, 2003, the Inlandboatmen's Union of the Pacific, ILWU, AFL-CIO, (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Skagit County (employer) as respondent. A preliminary ruling issued under WAC 391-45-119 on July 11, 2003, found a cause of action existed on allegations summarized as:

> Employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), and refusal to bargain in violation of RCW 41.56.140(4), by subcontracting of passenger-only ferry service to Guemes Island and unilateral change in assignment of work without providing an opportunity for bargaining, and by breach of its good faith bargaining obligations in unilateral implementation of new work schedules before the parties reached an impasse in contract negotiations, in reprisal for union activities protected by Chapter 41.56. RCW.

Examiner Karyl Elinski held a hearing on October 15 and 16, 2003. The parties submitted post-hearing briefs.

The Examiner rules that the employer committed unfair labor practices by failing to bargain in good faith concerning a scheduling change and contracting out bargaining unit work, and by discriminating in reprisal for union activities.

BACKGROUND

The employer operates a single ferry vessel, the *M/V Guemes*, between Guemes Island and Anacortes, Washington. The ferry's crew members belong to a bargaining unit represented by the union. The union represents both regular full-time employees and as needed part-time employees.[1] Prior to November 2002, the bargaining unit consisted of seven full-time employees, one mechanic and five part-time employees.

The ferry operates Monday through Thursday from 6:00 AM to 6:30 PM, with a longer schedule Friday through Sunday which is not at issue here. The employees' shifts generally run longer than the ferry schedule. The schedule was designed to rotate full-time employees from weekdays to weekends and from day shift to night shift on a rotational basis. Part-time employees were scheduled to fill in for open shifts.

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[1] For simplification, the regular full-time employees will be called full-time employees and the as needed part-time employees will be called part-time employees. The parties' collective bargaining agreement describes a third category of employees, regular part-time. At the time of the dispute, no employee in the unit was compensated as a regular part-time employee.

The United States Coast Guard regulates the operation of the ferry and requires it to comply with the terms of its Certificate of Inspection. By modifying the certificate, the Coast Guard can regulate the ferry's staffing practices. In pertinent part, the Coast Guard has a "twelve hour rule" prohibiting employees from working more than twelve hours in a 24-hour period.

Since at least 1988, a single 12.5-hour shift covered all of the *M/V Guemes* sailings each Monday through Thursday. In 1992, the Coast Guard investigated the 12.5-hour shifts to determine whether they violated the 12-hour rule. The Coast Guard determined that because the *Guemes* shifts included the employees' lunch and other breaks, the 12.5-hour shifts were in compliance with Coast Guard regulations.

In the autumn of 2001, some crew members expressed concern to the union that the 12.5-hour shifts were dangerously long. The union brought the concern to the employer. In December 2001, the employer informed the Coast Guard of these concerns. In February or March of 2001, the Coast Guard conducted an endurance study to determine whether it should prohibit the 12.5-hour shifts. In anticipation of a change in the Coast Guard's position on the 12.5-hour shifts, in the fall of 2001 through the early spring of 2002, the employer and the union discussed the possibility of adopting two eight-hour shifts instead of the 12.5-hour shift. The employer asked union member Ray Panzero to draft sample schedules, which were subsequently submitted to the Coast Guard and approved.

On September 12, 2002, the Coast Guard informed the employer by telephone that it would prohibit the 12.5-hour shifts beginning November 1, 2002. The employer did not advise the union about the decision until September 23, 2002. The Coast Guard sent a formal letter on September 24, 2002, confirming that after the November 1

deadline, the *Guemes* crew would not be allowed to work more than 12 hours in a 24-hour period, including lunch and other breaks.

Unilateral Implementation

The employer and union held three negotiation sessions over the effects of the new Coast Guard ruling on October 2, 9, and 31. Before the first meeting, the employer sent the union a proposed schedule that would split the Monday through Thursday schedules into two shifts. In general, the full-time employees would work shifts of eight to ten hours and the part-time employees would cover the sailings at the end of the day with a three-hour shift. That proposed schedule will be referred to as a 10/3 schedule.

During the October 2, 2002 meeting, the employer proposed the 10/3 schedule. The union rejected it, stating that the three-hour shifts were not financially feasible and would cause childcare problems for part-time employees. Under the proposed 10/3 schedule, part-time employees would have little opportunity to fill in on the longer 10 hour shifts because of the prohibition against working more than 12 hours in a twenty-four hour period. The union warned that the part-time employees might reject the proposed shifts. The part-time employees had a right, through past practice, to reject any shifts that the employer offered them.

Initially, the union countered the employer's 10/3 offer by proposing the two eight-hour shifts that had been previously discussed between the union and employer(an 8/8 schedule). The union then moved to a 10-hour and 6-hour shift proposal (a 10/6 schedule). The union also proposed a pay increase for full-time employees, benefits for part-time employees, and changes related to overtime work.

The parties met again on October 9, 2002. The employer rejected the union's 10/6 offer, and asserted that there was not enough work to schedule the part-time employees for six-hour shifts. Additionally, the employer asserted that such a schedule would constitute a gift of public funds. The employer moved to a 10/3.5 proposal that would create a half hour overlap between the two shifts. The union rejected the 10/3.5 offer, and again stated that the part-time employees would not be available to work the short shifts.

Immediately after the October 9 meeting, the employer posted a schedule for November 2002 which conformed with its proposal for a 10/3.5 schedule. In mid-October, four of the five part-time employees individually advised the employer in writing that they were unable to work the short shifts listed on the November schedule. They further advised the employer that they would continue to be available for "on call" positions as usual. Another advised the employer by telephone. Subsequently, the employer posted a job announcement to hire more part-time employees, and issued a news release advising the public of its decision to hire new crew members.

The parties met for a third time on October 31, 2002, the eve of the Coast Guard's deadline. The union offered to accept a 10/3.5 schedule temporarily if the employer would submit the dispute to arbitration and pay part-time employees for the lost opportunity to fill vacancies on the 10-hour shift.[2] The employer refused the union's offer, but modified its 10/3.5 proposal slightly: if the part-time employees would work the 3.5-hour shift, then they could also fill in on 10-hour shifts as long as they did not exceed the Coast Guard's 12 hour limit. The parties did not agree on a

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[2] The employer's 10/3.5 proposal offered no relief from the prohibition against working a short schedule on one day, and then filling in on a longer shift the next day.

schedule. The union advised the employer of the part-time employees' unavailability to work the 3.5-hour shifts. Neither party ever announced a "last and final" offer nor declared an impasse.

In the weeks leading up to the November 1 deadline, the employer hired additional part-time employees to work the 3.5-hour shifts. The employer began to operate the ferry under the new 10/3.5 schedule on November 4, 2002, the first Monday following the Coast Guard deadline.

Contracting Out of Unit Work

On November 4, 2002, the employer purchased passenger only ferry service from a third party, Paraclete Charters Inc., to cover the refused 3.5-hour shifts. The *Paraclete* was chartered for the period beginning November 4, 2002, and ending November 19, 2002, to operate the ferry while the newly-hired crew completed mandatory training.[3] At no time prior to outsourcing the work to the *Paraclete* did the employer advise the union about any possible contracting out of the ferry operation.[4]

Discrimination in Reprisal for Union Activities

The incumbent part-time employees suffered a dramatic decrease in hours after the new hires joined the schedule. The primary factor contributing to the shorter hours was that the pool of part-time employees was now larger, and the new hires were scheduled for all

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[3] The original contract with the *Paraclete* specified a duration of November 4, 2002, through November 19, 2002.

[4] An employer attempt to contract out the entire ferry operation was the subject of *Skagit County*, Decision 6348 (PECB, 1998).

of the 3.5-hour shifts as well as other available shifts on a rotating basis. When the incumbent part-time employees requested the 3.5-hour shifts after November 2002, the employer refused to schedule them unless it was absolutely necessary. Several incumbent employees felt that the employer withheld the shifts as retaliation for being disloyal, based on comments they allege were made by the employer's director of public safety.

DISCUSSION

Issue: Unilateral Implementation Violations - Change in Shift Scheduling

The union asserts that the employer committed an unfair labor practice by unilaterally implementing changes to the shift schedule without bargaining to impasse. According to the union, the scheduling of the 3.5-hour shifts was a mandatory subject of bargaining and the parties did not reach an impasse. The Coast Guard's 12-hour rule did not relieve the employer of its obligation to bargain over both the implementation of the new schedule or the effects of the new regulation.

The employer admits to unilaterally implementing changes to the work schedule, but contends that it had no duty to bargain because the changes were consistent with past practices and contractual waivers. The employer also contends that the Coast Guard's deadline to end the 12.5-hour shifts created a business necessity.

Applicable Legal Principles

As codified in RCW 41.56.030(4), parties have a duty to bargain the mandatory subjects of "wages, hours and working conditions." An

employer commits an unfair labor practice if it does not sufficiently bargain before unilaterally changing the wages, hours, or working conditions of its employees. *See City of Pasco v. PERC*, 119 Wn.2d 504 (1992).

Normally, an employer must give notice to the union, provide an opportunity to bargain before making a decision, and bargain in good faith. *See NRLB v. Katz*, 369 U.S. 736 (1962) (cited in *North Franklin School District*, Decision 5945-A (PECB, 1998)).

Mandatory Subject of Bargaining -

Whether a particular subject is mandatory is a question of both law and fact, to be determined by the Commission. WAC 391-45-550; *City of Yakima*, Decision 3564 (PECB, 1990). If a matter *directly* affects employee wages, hours, or working conditions, then it is a mandatory subject of bargaining. *See Lower Snoqualmie Valley School District*, Decision 1602 (PECB, 1983).

Shift scheduling has been found to be a mandatory subject of bargaining because it directly affects employees' hours of work. *City of Moses Lake*, Decision 6328 (PECB, 1988).

Some issues do not fall neatly into the categories of "mandatory," "permissive" and "illegal." In deciding whether a particular matter is a mandatory subject of bargaining, the Commission has traditionally used a balancing test which has been adopted by the Washington Supreme Court. *IAFF, Local 1052 v. PERC*, 113 W.2d 197 (1989). When a subject does not directly affect wages, hours or working conditions, the Commission analyzes the employer's need for entrepreneurial judgment against the employee's interest in the terms and conditions of employment. *Port of Seattle*, Decision 7271-B (PECB, 2003) (Commission found unfair labor practice where the employer unilaterally decided to contract out bargaining unit

work in an effort to comply with Coast Guard recommendations). On the one side of the balance is the relationship the subject bears to "wages, hours and working conditions." On the other side is the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative. "Where a subject both relates to conditions of employment and managerial prerogative, the focus of the inquiry is to determine which of these characteristics predominates." *IAFF Local 1052; Spokane International Airport*, Decision 7899 (PECB, 2002).

Even where an entrepreneurial decision constitutes a permissive subject of bargaining, however, the employer is still required to bargain over the effects of that decision. *City of Anacortes*, Decision 6830-A (2000) (state legislation made contracting out a practical necessity, but this did not eliminate the employer's obligation to bargain the effects of that change).

Permissive Subject of Bargaining -
Until parties reach an impasse, parties may lawfully make proposals that contain permissive subjects. *See Whatcom County*, Decision 7244-A (PECB, 2003).

Existence of a Meaningful Change -
In order to determine that an employer committed a unilateral change without exhausting its bargaining obligations, the employer must have imposed a new term or condition of employment or meaningfully changed an existing term or condition of employment. *City of Pullman*, Decision 8086 (PECB, 2003) (citing *City of Kalama*, Decision 6773-A (PECB, 2000)).

Reaching Impasse -
An employer can make unilateral changes after bargaining in good faith to impasse. *Mason County*, Decision 3706-A (PECB, 1991). The

test is whether the party declaring impasse could reasonably conclude that there was no realistic prospect that continued discussions would be fruitful. *Mason County*, Decision 3706-A; *Pierce County*, Decision 1710 (PECB, 1983).

Contractual Waiver -

An employer does not have to bargain a mandatory subject during the term of a collective bargaining agreement if the parties have negotiated the subject matter and have incorporated the controlling provisions of the subject matter into the terms of the contract; the duty to bargain on that subject matter is suspended for the term of the contract. A waiver of a statutory collective bargaining right must be clear and unmistakable. The party asserting the waiver bears the burden of proving the waiver. *Tacoma-Pierce County Health Department*, Decision 6929-A (PECB, 2001); *City of Moses Lake*, Decision 6328 (PECB, 1998) (citing *Metromedia, Inc v. NLRB*, 232 NRLB 486 (1977), *enforced* 586 F.2d 1182 (8th Cir. 1978)).

Business Necessity -

An employer may be relieved of its obligation to bargain a mandatory subject if faced with a compelling legal or practical need to make a change. However, the obligation is only excused to the extent necessary to deal with the emergency and the parties must still bargain the effects of that decision. *City of Anacortes*, Decision 6830-A (PECB, 2000) (state legislation made contracting out a practical necessity, but this did not eliminate the employer's obligation to bargain the effects of that change).

Application of Standards

The Coast Guard's mandate to eliminate the 12.5-hour shifts was out of the employer's control. Nevertheless, the employer retained its duty to bargain the effects of the mandate, which unquestionably

impacted the part-time employees' wages, hours, and working conditions. *See Tacoma-Pierce County Health Department*, Decision 6929-A (PECB, 2001). The Coast Guard's requirement left significant flexibility and latitude in implementing the steps necessary for compliance with its terms. The employer's decision to replace the shifts with a 10/3.5 schedule failed to comply with its duty.

Mandatory Subject of Bargaining -

The 10/3.5 schedule impacted the part-time employees' wages, hours and working conditions in several ways. Most plainly, the hours changed for all bargaining unit members. Prior to the adoption of the new schedule, part-time employees filled in for the 12.5-hour shifts as needed, and full-time employees worked 12.5-hour shifts on a rotating basis. Part-time employees never worked scheduled 3.5-hour shifts, though they sometimes filled in for shorter shifts. In addition, wages were affected. The 3.5-hour scheduled shifts eliminated the possibility of filling in for one of the scheduled ten-hour shifts on the following day. The practical effect of these changes was to either reduce part-time employees' wages, or require them to work a greater number of days to earn the same amount of money.

Working conditions also changed. Prior to the adoption of the new scheduled 3.5-hour shifts, part-time employees could refuse any shift and could decline shifts for long stretches of time. Under the new schedule, employees who accepted a 3.5-hour schedule were expected to work the shifts regularly. Employees would lose flexibility by accepting 3.5-hour shifts, and would lose the ability to refuse shifts.

As stated above, both the Washington Supreme Court and the Public Employment Relations Commission have adopted a balancing test to determine whether a particular topic is a mandatory subject of

bargaining. The relationship of the topic to wages, hours and working conditions must be balanced against an assessment of the extent to which the subject lies at the "core of entrepreneurial control" or is management prerogative. *IAFF, Local 1052 v. PERC (City of Richland)*, 113 Wn.2d 197 (1989). The employer's argument that the subject lies at the core of entrepreneurial control is unpersuasive.

The 10/3.5 schedule is more closely related to hours than entrepreneurial control and so it is a mandatory subject. While part-time ferry employees' schedules must conform to a sailing schedule and full-time employees' hours, no special public policy reason supports limiting the bargaining rights of ferry employees. Furthermore, the ferry employees lacked a bargaining alternative.[5]

Permissive Subject -

The employer argues that its proposed schedule change was a permissive subject of bargaining because it involved a core

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[5] The employer argues that *Richland School District*, Decision 7367 (PECB, 2001), is controlling. In that case, the union complained that the employer's adoption of a schedule for educational assistants at a new elementary school was in violation of the employer's obligation to bargain the effects of the decision. The Examiner specifically determined that there was no change of schedule at any of the employer's existing elementary schools, and that the employer had merely adopted an existing schedule for a new elementary school based on established past practice. The Examiner found that the union had failed to show a unilateral change of practice, and that the district had the authority to base its scheduling on the educational needs of its students. The Examiner further found that a contractual duty to bargain schedule changes did not convert a non-mandatory subject of bargaining into a mandatory subject, though the Examiner did acknowledge the duty to bargain the effects of the decision on hours of work. Here, both scheduling and the effects of a change in schedule are mandatory subjects. Therefore, the *Richland* analysis is not persuasive.

management function regarding services to be provided to the public. It contends that once the employer accepted that portion of the union's proposal calling for 10-hour shifts for full-time employees, the remaining 3.5-hour shifts were directly related to the level of ferry services to be provided by the employer. The employer argues that under the balancing test set forth in *IAFF Local 1052*, the 3.5-hour shifts are tied directly to the existing ferry sailing schedule. It further argues that the union had "unclean hands" for proposing permissive subjects of bargaining during negotiations of the schedule change. These arguments are specious. The union's 10/6 proposal would not have required the employer to change its scheduled operation, although that was one of many possible outcomes of its proposal.[6] Moreover, the union's proposal with respect to other aspects of the collective bargaining agreement was a legitimate effort to bargain the "effects" of the scheduled change. There is no evidence that the union bargained these ancillary proposals to impasse.

Meaningful Change of a Term or Condition of Employment -
The employer argues that its implemented 10/3.5 schedule was not a meaningful change to the relevant status quo. It argued that prior to November 2002, union members frequently worked short shifts of less than six hours. In support of its position, it points to employer payroll records. Analysis of the posted schedules during the same time period reveal that no employees were *scheduled* for these short shifts. As discussed above, the 10/3.5 schedule made at least two changes for the employees. First, the employees would have had to work more days for the same amount of pay because they could no longer work 12.5-hour shifts. Second, the part-time employees were expected to work a fixed shift each evening which

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[6] The parties already had an established contractual practice of paying full-time employees for hours not worked.

removed their ability to have a flexible schedule. Both of these changes are meaningful.

The employer argues that the 10/3.5 schedule was not a meaningful change because part-time employees would continue to work hours that could not be filled by full-time employees. The parties' collective bargaining agreement provides that part-time employees work hours that cannot be filled by full-time employees. Although each of the parties exchanged proposals containing 10-hour shifts during the October 2002 negotiation sessions, this does not mean that parties ultimately agreed that the full-time employees would work the 10-hour shifts. In bargaining, the full-time and part-time employee's shifts are naturally linked. If negotiations had continued, the union or employer might have proposed changing the full-timers' shifts in order to reach a mutually agreeable solution for the entire bargaining unit. Since there was no agreement about full-time employees, the employer was not forced to give the part-time employees the 3.5-hour shifts. There was no agreement with regard to the 10-hour shifts and the changes to all bargaining unit employees was "meaningful."

The employer also argues that the 10/3.5 schedule was not a meaningful change because the part-time employees had often worked partial shifts before November 2002. With the 10/3.5 schedule, the part-time employees would have no opportunity to work 12.5-hour shifts, a regular opportunity to work afternoon 3.5-hour shifts, and an irregular, sporadic, opportunity to work all or part of the morning 10 hour shifts. This is significantly different from when the part-time employees had an irregular and sporadic opportunity to work all or part of the 12.5-hour shifts. The past practice of partial shifts does not negate the meaningful changes brought by the 10/3.5 schedule.

Reaching Impasse -

The employer contends that the parties were at impasse, so it was within its purview to unilaterally implement the 10/3.5 schedule. The test for impasse is whether the employer could have reasonably concluded that there was no prospect that continued discussions would be fruitful. *See Mason County*, Decision 3706-A (PECB, 1991); *Pierce County*, Decision 1710 (PECB, 1983). The employer adopted a 10/3.5 schedule for November 2002 which it drafted immediately after the October 9 meeting. The October 9 meeting was the parties' second of three negotiation sessions.

At the meetings, the parties made significant movement. The employer moved from a 3-hour shift to a 3.5-hour shift. The union became willing to accept the 10/3.5 schedule temporarily if the employer would agree to binding arbitration and to pay the employees for the lost opportunity to fill vacancies on the 10-hour shift. Also at the October 31 meeting, the employer then became willing to allow the part-time employees to fill in on the 10-hour shift up until they reached the 12-hour maximum. Neither party ever announced a best or final offer or the arrival of an impasse. While such announcements are not requirements for an impasse, an announcement would have indicated that a party believed that the negotiations were fruitless. Most significantly, the employer's ferry manager, Steve Cox, who participated in negotiations, testified credibly that he did not believe the parties were at impasse at the end of the October 31 session. Doug Flude, Assistant County Engineer, wrote a letter to the union on November 5, 2002, reiterating that "[a]s we have indicated to you on several occasions, Skagit County remains willing to meet and negotiate with IBU about work schedules." Witnesses for the union also testified that the parties were not at impasse at the close of negotiations on October 31, 2002.

While the duty to bargain does not include the duty to agree to a proposal advanced by either side, neither is collective bargaining a mechanistic exercise. Instead, bargaining depends on the creativity and good faith of both parties to succeed. *Whatcom County*, Decision 7727 (PECB, 2002). In light of the progress made in so few sessions, the employer could not have reasonably concluded that further discussion would be fruitless. The parties were not at impasse.

The employer also claims that the Coast Guard's November 1, 2002, deadline played a role in creating impasse. While the deadline is relevant in the analysis, the employer's actions must be considered. An employer is obligated to provide the union enough notice to bargain the effects of a change. *Tacoma-Pierce County Health Department,* Decision 6929 (PECB, 2001). The union raised the issue of the 12.5-hour shifts in the fall of 2001, yet the employer failed to begin negotiations until it was faced with a firm deadline. The Coast Guard informed the employer of the November 1 deadline by telephone on September 12, 2002. The employer failed to notify to the union about the deadline until September 23. The employer met with the union only three times. If the employer truly had felt pressure from the deadline, it would have notified the union immediately and scheduled sessions as early as possible. No impasse existed, despite the deadline.

By the terms of the collective bargaining agreement, the employer also faced an October 21, 2002, deadline to create the November 2002 schedule. The October 21 deadline stems from the parties' collective bargaining agreement which said the "monthly schedule will be posted for the employees to review ten (10) days prior to the month it is for." Bargaining unit member Ron Panzero would have normally started the drafting process 20 days before November 2002. He would have normally posted it 10 to 15 days before

November. The schedule would not have been finalized until after October 20. In October 2002, the employer expedited this process. The ferry manager instructed Mr. Panzero to draft the November 2002 schedule immediately after the October 9 meeting. The ferry manager finalized the schedule the next day, about 11 days prematurely. However, given the status of ongoing negotiations, the parties could have mutually agreed to modify the schedule at any point, so the October 21 deadline did not lead to an impasse.

Contractual Waiver -

The employer argued that four clauses in the collective bargaining agreement constituted contractual waivers of the right to bargain the 10/3.5 schedule. A contractual waiver exists when parties negotiate a matter and include it in their collective bargaining agreement. Once the parties have met their obligation to bargain as to matters set forth in the contract, these matters become permissive subjects of bargaining for the life of the contract, and parties are relieved of the duty to bargain them during the contractual term. *City of Kalama*, Decision 6739 (PECB, 1999).

Rule 7.01 of the agreement provides that the ferry would be manned to conform to the Coast Guard certificate of inspection. Rule 23.01(1) gave the employer the exclusive right to determine the specific programs and services offered and how such programs are offered. Rule 14.05 provides that shift scheduling would be governed by the sailing schedule. Rule 23.01 provides that the employer had the right to unilaterally modify any employment agreement not covered by the terms and conditions of the collective bargaining agreement without bargaining the decision or its impact on the bargaining unit.

A waiver of a statutory collective bargaining right must be clear and unmistakable. *City of Moses Lake*, Decision 6328 (PECB, 1998)

(citing *Metromedia, Inc v. NLRB*, 232 NRLB 486 (1977), *enforced* 586 F.2d. 1182 (8th Cir. 1978)). None of these four clauses show a specific agreement regarding the creation of a specific schedule so none of the clauses are contractual waivers that excused the employer from bargaining the shift changes.

Business Necessity -

The employer claims that it was forced by business necessity to adopt the 10/3.5-hour schedule. An employer may be relieved of its bargaining obligation if it is faced with a compelling legal or practical need to make a change affecting a mandatory subject of bargaining, however, the business necessity rationale only excuses the bargaining obligation to the extent necessary to deal with the emergency.

In *Western Washington University*, Decision 8256-A (PECB, 2004), the Commission stated:

> Even if legal requirement imposed by others limit an employer's ability to agree to some proposals that might be advanced by a union in collective bargaining, that does not preclude the employer and union from coming to agreements in the general subject area.

The employer did not face an emergency when it created the November 2002 schedule. The employer did not need a solution to its scheduling problem until November 4, the first day that the 12.5-hour shifts had to be replaced. With the cooperation of the union, a schedule could have been implemented without the usual notice requirement.[7] Even on November 4, the employer did not face an emergency. The employer could have offered the part-time employees a six-hour shift while the negotiations continued. The employer

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[7] The union's continued attempt to negotiate implies its willingness to waive the ten day schedule posting requirement.

did not face an emergency of such significant proportion that excused its duty to bargain. Thus, there was no business necessity.

Issue: Unilateral Implementation Violations - Contracting Out of Work

The union asserted that the employer violated its duty to bargain by failing to bargain the contracting out of bargaining unit work. The employer admitted that it contracted out work but asserted that it had no duty to bargain because the part-time employees had refused the shifts and created an emergency.

Applicable Legal Principles

Contracting Out -

Employers are generally obligated to bargain decisions to contract out bargaining unit work. *Skagit County*, Decision 6348 (PECB, 1998).

The Public Employment Relations Commission determined that United States Coast Guard recommendations do not absolve the employer of its obligations to bargain the decision to contract out bargaining unit work. "Where an employer has and exercises discretion in a matter, there may be room for the duty to bargain to operate." *Port of Seattle*, Decision 7271-B (PECB, 2003). In applying a five-factor test, the Commission in *Port of Seattle* found while the Coast Guard's recommendations established a minimum staffing level, the employer retained the discretion to assign more and/or different personnel than that minimum.

Business Necessity -

As discussed above, an emergency may relieve an employer's obligation to bargain a mandatory subject but only to the extent

necessary to deal with the emergency and the parties must still bargain the effects of that decision.

Application of the Standard

Throughout October 2002, the employer was aware that the part-time employees would be unavailable to work the November 3.5-hour shifts. Despite this prior knowledge, the employer failed to bargain or even mention that it was considering contracting out work. Employers are generally obligated to bargain decisions to contract out bargaining unit work. *Skagit County,* Decision 6348 (PECB, 1998). The employer might have lawfully hired the *Paraclete* in the event of an impasse after notice and bargaining on the contracting out, but the employer never started that process.

Also, the employer was not faced with an emergency that would make prior notice to the union impossible. The evidence established that the employer could have adopted the proposed 6-hour schedule on a temporary basis at less cost than the services of the *Paraclete.* The union did not learn of the contracting out until after the fact.

The employer also argued that Paraclete was not hired for bargaining unit work because the part-time employees refused the work. The employer illegally implemented the 10/3.5 shift schedule, which caused the employees' refusal to work. The employer's self-created emergency and unilateral change of the schedule does not excuse the employer's failure to bargain the contracting out of unit work.

Eliminating the employer's obligation to bargain over contracting out in this case would undermine the statutory purpose of peaceful labor relations. It would encourage an employer to contract out work whenever it wanted to avoid its bargaining obligation, creating uncertainty and damaging labor management relations.

Under these circumstances, the employees' interests clearly predominate over the employer's interests.

Issue: Discrimination Violation

The union argues that the employer unlawfully retaliated against the incumbent part-time employees when it refused to schedule them for the 3.5-hour shifts after they requested the shifts. The employer denies retaliation and claims a legitimate business reason for not scheduling the incumbent part-timers for the 3.5-hour shifts.

Applicable Legal Principle

Chapter 41.56 RCW prohibits employers from discriminating against the exercise of rights secured by the collective bargaining statute. *Oroville School District*, Decision 6209-A (PECB-1998). As described in RCW 41.56.040, no public employer shall discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under Chapter 41.56 RCW. Enforcement of these rights is through the unfair labor practice provisions of Chapter 41.56 RCW. *King County*, Decision 7506-A (PECB, 2003); *City of Renton*, Decision 7476-A (PECB, 2002).

The Supreme Court of the State of Washington established a "substantial motivating factor test" for determining discrimination cases. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). This test has been incorporated into the Commission's analysis of unfair labor practice cases alleging discrimination against employees because

they have exercised their collective bargaining rights. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The test was described in *King County*, Decision 7506-A (PECB, 2003), as follows:

> 1. A complainant has the burden to establish a prima facie case of discrimination, including that:
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>   a. The employee has participated in protected activity or communicated to the employer an intent to do so;
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>   b. The employee has been deprived of some ascertainable right, benefit or status; and
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>   c. There is a causal connection between those events.
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> 2. If a prima facie case is made out, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.
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> 3. The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that:
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>   a. The reasons given by the employer were pretextual; or
>
>   b. Union animus was nevertheless a substantial motivating factor behind the employer's action.

Direct Dealings -

The prohibition against circumventing a union and directly dealing with employees has been spelled out by the Commission in *City of Seattle*, Decision 3566-A (PECB, 1991):

> Where the employees have exercised their right to organize for the purposes of collective bargaining, their employer is obligated to deal only with the designated exclusive bargaining representative on matters of wages, hours and working conditions. RCW 41.56.100; RCW 41.56.030(4). Under such circumstances, an employer may

> not seek to circumvent the exclusive bargaining representative of its employees through direct communications with bargaining unit employees.

Derivative Interference Violations-

A "derivative" interference violation under RCW 41.56.140(1) is found whenever a violation under of RCW 41.56.140(4) is found.

Application of the Standards

The union has proven a prima facie case of discrimination against part-time employee Jane Favors. Favors attended at least one of the October 2002 meetings and thus she participated in protected activities concerning the dispute over the schedule. The employer knew of Favors' participation. During the negotiations, Favors gave the ferry manager a note saying that she could not work the 3.5-hour shifts. She later retracted this position in conversations with Ron Panzero, the bargaining unit member who drafted the ferry's schedule. Panzero told the ferry manager that Favors was interested and available to work the shifts. Nevertheless, the ferry manager told Panzero not to schedule her unless it was absolutely necessary. By refusing to give her the shifts, the employer deprived her of an ascertainable right, benefit or status.

Favors' union activity and the employer's denial of shifts are connected. The denial occurred mere months after the battle over the shifts. The timing of the union activity and denial further demonstrates the causal connection. The denial of shifts was related to her protected activity of participating in negotiation sessions.

The employer articulated a reason for its actions; it could not allow incumbent part-time employees to be regularly scheduled for the shifts because it had specifically hired new part-time

employees to work the shifts. Since the employer had no lawful right to directly deal with the new hires, this activity cannot constitute a legitimate non-retaliatory reason for the employer's actions.[8]

Finally, the union proved by a preponderance of the evidence that the disputed action was in retaliation for Favors' exercise of her statutory rights. Not only does the timing and the employer's lack of legitimate reasons for its actions further demonstrate retaliation, but also an agent of the employer made comments which show union animus. The union provided credible testimony that an employer's director of public safety, Chal Martin, said that the employer would not be loyal to employees who were not loyal to the employer. Two employer witnesses denied the comments but their self-serving denial was not as credible given the refusal to schedule incumbent part-time employees for the 3.5-hour shifts. Martin's loyalty comments demonstrate that union animus was a substantial motivating factor behind the employer's action limiting Favor's access to the 3.5-hour shifts.

The union argued that the other part-time employees, including Kathleen Faulkner, also faced retaliation. However, the union failed to provide enough evidence to meet the strict test for discrimination for the other employees. Faulkner told the employer that she would be unavailable to work the 3.5-hour shifts but she did not expressly tell the employer that she changed her mind.

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[8] Exhibit 36, which the Examiner accepted into evidence for the limited purpose of comparing its author's experiences with the testifying witness', is a resignation letter from one of the new hires. The author of the letter complained that he could not "in good conscience take work away from long-term employees . . ." After considering the entire record, the Examiner concludes that the document does not provide reliable and relevant information. This document was given no weight in rendering this decision.

Since the employer was unaware that Faulkner had changed her mind, the employer had a non-discrimatory reason for its action. Several other part-time employees told Panzero that they also changed their position on refusing the shifts. However, aside from Favors, the union did not present precise evidence about which other employees requested the shifts and were refused. The evidence presented did not support a finding for retaliation for any employee other than Favors.

Issue: The Remedial Order

The authority of the Public Employment Relations Commission to prevent and remedy unfair labor practices is derived from 41.56.160 RCW, which has been broadly construed by the Supreme Court of the State of Washington. *METRO v. Public Employment Relations Commission,* 118 Wn.2d 621 (1992). In that case, the Supreme Court interpreted the phrase "appropriate remedial orders" contained in 41.56.160 RCW to be those necessary to effectuate the purposes of the collective bargaining statute to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d at 634.

The conventional remedy for a unilateral change violation is to order the restoration of the status quo ante. *City of Kalama*, Decision 6853-A (PECB, 2000). The Commission can award back pay to make the affected employees whole for losses they suffered as a result of the unlawful actions. *Spokane County*, Decision 5698 (PECB, 1996).

While back pay is appropriate in this case, it alone will not restore the status quo. Typically, in an effort to determine the status quo, we look to where the parties were in the bargaining process at the time the unfair labor practice was committed. The change in the Coast Guard rules make it difficult to discern the exact moment from which to determine the status quo. Moreover, the

employer's conduct during negotiations over the schedule change and its ensuing actions showed a gross disregard for its good faith obligation and bordered on the egregious. The Coast Guard regulations did not excuse the employer from its good faith obligations, nor did they provide the employer with carte blanche to disregard its bargaining obligations.

Given the circumstances presented here, the best analysis of how to restore the status quo ante is to order the employer to negotiate the schedule change subject to the following conditions:

- During the pendency of negotiations, the union's last offer made during the course of the October 31, 2002, negotiation session shall be adopted;
- If no agreement is reached through bilateral negotiations within sixty (60) days, either party may request the Public Employment Relations Commission to provide the services of a mediator to assist the parties;
- If no agreement is reached using the mediation process, and the Executive Director, on the request of either of the parties and the recommendation of the assigned mediator, concludes that the parties are at impasse following a reasonable period of negotiation and mediation, the parties shall submit the remaining issues to interest arbitration using the procedures of 41.56.450 - .490 RCW. The decision of the neutral arbitration panel shall be final and binding upon both of the parties.[9]

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[9] The remedy of interest arbitration, while seemingly out of the ordinary, has been awarded in the past. *Clark County PUD No. 1,* Decision 4563 (PECB, 1993). The parties should be aware that interest arbitration is imposed as a remedy under the authority of RCW 41.45.160, not under any interpretation that the parties fall under RCW 41.56.492 (providing interest arbitration for employees of public passenger transportation systems).

FINDINGS OF FACT

1. Skagit County is a "public employer" within the meaning of RCW 41.56.030(1). Among other services, the employer operates a single vessel ferry service from Guemes Island to Anacortes, Washington.

2. Inlandboatmen's Union of the Pacific, ILWU, AFL-CIO, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of the employees that operate the employer's ferry.

3. In October 2002, the part-time employees in the bargaining unit were Jane Favors, Kathleen Faulkner, Mike Straub, Carol Ballsmider, Mark Antoncich and Jeremy Pinson.

4. During the relevant time, the union and employer were parties to a collective bargaining agreement. Rule 7.01 of the agreement provides that the ferry must be manned to conform to the Coast Guard's certificate of inspection. Rule 23.01(1) gives the employer the exclusive right to determine the specific programs and services offered and how such programs are offered. Rule 14.05 states that shift scheduling will be governed by the sailing schedule. Rule 23.01 states that the employer has the right to unilaterally modify any employment conditions not covered by the terms of the agreement without bargaining the decision or its impact on the bargaining unit.

5. Prior to November 2002, the employer used a 12.5-hour shift for the ferry workers every Monday through Thursday. The employees sometimes worked partial shifts. The part-time employees had an irregular and sporadic opportunity to work

all or part of the 12.5-hour shifts. The part-time employees also did not have a set shift, and they were allowed to refuse shifts.

6. On September 12, 2002, the United States Coast Guard informed the employer that it would no longer permit employees to work more than twelve hours, including breaks, in a 24-hour period. The Coast Guard demanded that the new scheduling requirement be implemented by November 1, 2002.

7. The employer first notified the union of the Coast Guard's decision on September 23, 2002.

8. The employer and the union met on October 2, 9 and 31, 2002, to discuss the effects of the Coast Guard's impending November 1 deadline. During these three meetings, the parties made significant movement. The employer advanced a shift proposal calling for 10-hour and 3.5-hour shifts. The union rejected the employer's proposal and proposed ten and 6-hour shifts.

9. Although the employer was not obligated by the collective bargaining agreement to post a final November schedule until approximately October 20, 2002, the employer created the schedule immediately after the parties met on October 9, 2002, and posted it on October 10.

10. The employer knew that part-time employee Jane Favors participated in at least one of the negotiation sessions. The employer received a note from Favors stating she was unable to work the 3.5-hour shifts on the November schedule.

11. During the October 31, 2002, meeting, the union proposed to provide on-call employees to work 3.5-hour shifts subject to

the following conditions: (1) If the parties could not reach agreement on the revised schedule, the matter would submitted to binding arbitration; and (2) On-call employees would be paid for any lost opportunities resulting from their having worked a part-time schedule.

12. On November 4, 2002, the employer unilaterally implemented the 10/3.5 schedule. Under the new schedule, the part-time employees had no opportunity to work the 12.5-hour shifts, and an irregular, sporadic, opportunity to work all or part of the morning 10 hour shifts.

13. The employer hired more part-time employees who agreed to work the disputed 3.5-hour shifts. In conversations before hiring, the employer told the new employees that they would be regularly assigned the 3.5-hour shifts.

14. On November 4, 2002, the employer engaged the services of an outside contractor, the *Paraclete*, to operate passenger only ferry service from November 4, 2002, to November 19, 2002, during the period of the refused shifts.

15. Although the employer knew for approximately a month that the part-time employees were unavailable to work the 3.5-hour shifts, the employer did not notify the union that it was considering contracting out bargaining unit work. The union did not learn of the outsourcing until after the employer hired the third party to perform the work.

16. After the new hires completed training, Favors notified the employer that she was now available to work the 3.5-hour shifts. Other part-timers told bargaining union member Panzero that they also wanted to withdraw their refusals, but

the employer may not have known which other part-time employees had requested the shifts. Although the employer knew that Favors wanted to be scheduled for the shifts, it refused to schedule her unless it was absolutely necessary.

17. The employer's director of public safety, Chal Martin, said that the employer would not be loyal to employees who were not loyal to the employer.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and 391-45 WAC.

2. Rules 7.01, 23.01(1), 14.05 and 23.01 of the parties' collective bargaining agreement are not contractual waivers that excused the employer from its RCW 41.56.030(5) bargaining obligation for the unilateral change.

3. The employer did not face a business necessity that excused the employer from it RCW 41.56.030(5) bargaining obligation for the unilateral change.

4. By implementing changes to a mandatory subject of bargaining before reaching an impasse and without a business necessity or contractual waiver, specifically by finalizing a shift schedule that significantly changed the wages, hours, and working condition of the part-time employees because it assigned regular 3.5-hour shifts and by implementing this schedule after only three meetings, and where there was no impasse, the employer has refused to bargain in good faith in conformity to RCW 41.56.030(5) and has committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

5. By contracting out bargaining unit work to a third party without bargaining to an impasse and without a business necessity, the employer has not bargained in good faith in conformity to RCW 41.56.030(5) and has committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

6. By unlawfully discriminating against Jane Favors in retaliation for the exercising of her right to participate in collective bargaining, the employer has discriminated in violation of RCW 41.56.140(1), and has committed an unfair labor practice. The employer did not present a legitimate reason for its action because its agreement with the new hires that they would work the shift was unlawful direct dealings.

7. The union failed to sustain its burden of proof to show which part-timers, besides Favors, were refused the 3.5-hour shifts after requesting the shifts.

ORDER

Skagit County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from interfering with, restraining, discriminating against or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Make Jane Favors, Kathleen Faulkner, Mike Straub, Carol Ballsmider, Mark Antoncich and Jeremy Pinson whole by payment of back pay and benefits in the amounts they

would have earned or received from the date of the unlawful change of schedule and contracting out of work. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

b. Negotiate the schedule change subject to the following conditions:

i. During the pendency of negotiations, the union's last offer made during the course of the October 31, 2002, as referred to in Finding of Fact 11, above, shall be adopted;

ii. If no agreement is reached through bilateral negotiations within sixty (60) days, either party may request the Public Employment Relations Commission provide the services of a mediator to assist the parties;

iii. If no agreement is reached using the mediation process, and the Executive Director, on the request of either of the parties and the recommendation of the assigned mediator, concludes that the parties are at impasse following a reasonable period of negotiation and mediation, the parties shall submit the remaining issues to interest arbitration using the procedures of 41.56.450 - .490 RCW. The decision of the neutral arbitration panel shall be final and binding upon both of the parties.

c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix."

Such notices shall be duly signed by an authorized representative of the employer, and shall remain posted for 60 days. Reasonable steps shall be taken by the employer to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice attached to this order into the record at a regular public meeting of the Board of Commissioners of Skagit County, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify the union, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the union with a signed copy of the notice attached to this order.

f. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

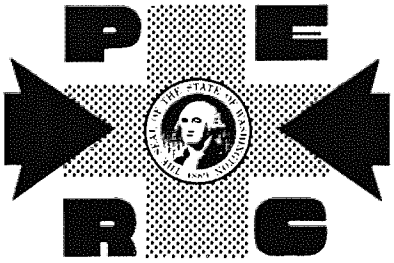
Issued at Olympia, Washington, on the 4th day of October, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL make Jane Favors, Kathleen Faulkner, Mike Straub, Carol Ballsmider, Mark Antoncich and Jeremy Pinson whole by payment of back pay and benefits in the amounts they would have earned or received from the date of the unlawful change of schedule and contracting out of work. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

WE WILL bargain collectively in good faith with Inlandboatmen's Union of the Pacific concerning the schedule and effects of the Coast Guard's twelve hour rule.

WE WILL NOT refuse to bargain collectively in good faith with the Inlandboatmen's Union of the Pacific concerning the schedule and effects of the Coast Guard's twelve hour rule.

WE WILL submit to interest arbitration any issues remaining unresolved after a reasonable period of negotiations and mediation, as determined by the Public Employment Relations Commission.

WE WILL NOT in any other manner, interfere with, restrain, coerce or discriminate against employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

SKAGIT COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone (360) 570-7300.