STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMES D. MORRIS,	)	
	)	
Complainant,	)	CASE NO. 6325-U-86-1222
	)	
vs.	)	DECISION 2796 - PECB
	)	
	)	FINDINGS OF FACT,
PORT OF SEATTLE,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
Respondent.	)	
	)	
	)	

James D. Morris, appeared pro se.

Bogle and Gates, by Peter M. Anderson, Attorney at Law, appeared on behalf of the respondent.

On March 31, 1986, James D. Morris (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC), alleging that the Port of Seattle (respondent) had violated RCW 41.56.140(1) and (2) by engaging in a practice of discriminatory hiring based on union affiliation status. A hearing was held on December 16, 1986, before Frederick J. Rosenberry, Examiner. The parties submitted post-hearing briefs.

BACKGROUND

James Morris has worked for the Port of Seattle from time to time since June, 1981, having been dispatched as a casual warehouseman from a hiring hall operated by International Longshoremen's and Warehousemen's Union, Local 9 (ILWU). During the period from June 20, 1981 to August 9, 1985, Morris worked 542 hours at the port. Morris is not a member of the ILWU.

The Port of Seattle recognizes the ILWU as exclusive bargaining representative of "warehousemen" employed by the port. The employer and union were parties to a collective bargaining agreement signed September 23, 1981 and effective for the period from July 1, 1981 through June 30, 1984. Although no provision is found in that contract requiring the use of hiring hall procedures in

hiring of new employees, the record fairly indicates that the port in fact relied primarily, if not exclusively, on referrals from the hiring hall operated by the ILWU.

Called as a witness in this proceeding, the business manager of ILWU Local 9 testified that, for as much as fifty years prior to September of 1986, the union's hiring hall afforded a preference in job dispatching to ILWU members. Specifically, union members were dispatched to casual employment before non-members. While the union official testified to the union's belief that its dispatch function had been operated in accordance with applicable federal law, he also acknowledged that this long-standing practice had recently been challenged before the National Labor Relations Board (NLRB) as being discriminatory, and that the union, on advice of counsel, had entered into an agreement with the NLRB to resolve the case pending before that agency. The business manager acknowledged in testimony here that the union had changed its dispatch practice in September, 1986, so that union members were thereafter no longer afforded priority standing for dispatch.

Bargaining in 1985 for a successor agreement between the Port of Seattle and the ILWU concluded with a "Revised Supplemental Agreement" executed by the employer and union on September 4, 1985. One of the changes agreed to was an increase in the number of regular seniority employment warehouseman positions at the port from 58 positions to 102 positions, a net increase of 44 seniority positions. This was to be accomplished by the use of two seniority lists, to be known as the "A" list and the "B" list. The "A" list was to consist of the incumbents of the 58 previously existing positions, plus the employees hired for an additional 24 positions, for a total of 82 "A" list seniority positions. The "B" list was to consist of the employees hired for 20 new seniority positions. Section XXII(a) of the new collective bargaining agreement contains a provision entitled "Seniority Lists and Casual Employment". It states:

> "A" List - Seniority employees who are employed as of the signing of this Revised Supplemental Agreement shall be "grandfathered" under the conditions provided for in this section.
>
> The balance of the "A" list shall be comprised of new hires selected on the basis of qualifications and experience with due consideration being given to Affirmative Action.
>
> The Port shall maintain a total of eighty-two (82) seniority employees on the "A" list including the "grandfathered" employees and new hires.
>
> "B" List - After the balance of the "A" list has been selected, the "B" list shall be selected based on qualifications and experience with due consideration being given to Affirmative Action. There shall be a minimum of 20 employees maintained on the "B" list.

> Casual Employment - Casuals may be employed after the additional "A" lists and the "B" list employees have been hired.

Section XXII of the contract states, in relevant part:

> (b) Employment, Layoff, and Break in Seniority
>
> Except for the initial acquisition of new hires to fill the "A" list and the "B" list the following shall apply:
>
> When an employee has completed a forty-five (45) consecutive calendar day probationary period of employment in casual status, he/she shall be placed on the seniority list. Seniority shall prevail both in hiring and layoff. . . . After the initial establishment of the "A" and "B" lists, when vacancies occur on the "A" list they shall be filled on a seniority basis from the "B" list.

In taking steps to recruit additional employees to implement the seniority modifications called for by the new labor agreement, the employer's Director of Labor Relations, Larry Wheeler, determined that a large pool of candidates was needed to obtain the most qualified employees. The employer initially determined that the threshold requirement for candidate eligibility would be at least 160 hours of previous work experience with the port. It was believed that such a threshold would provide candidates with the minimum amount of exposure needed to qualify for consideration. Wheeler directed his administrative assistant, Marie Brumble, to identify those casual warehouse workers who had worked 160 or more hours during the period from January, 1985 to July, 1985.

Brumble inspected the port's master payroll records and determined the names of all of the casual employees who had worked for the port during the January, 1985 to July, 1985 period. She then checked microfiche records to determine how many hours each had worked. It was determined that approximately 70 casual employees had worked 160 or more hours during the period. The complainant was not among those employees.

The employer subsequently determined that it desired to screen a larger number of candidates for employment. Wheeler therefore instructed Brumble to identify those casual warehouse workers who had performed 160 or more hours of work during the period from July 1, 1984 to August 9, 1985. Approximately 103 individuals were identified as having worked 160 or more hours during that qualification period. The expanded eligibility roster included the complainant.

On August 13, 1985, the employer mailed a written announcement and application form to the individuals, including Morris, on the

expanded eligibility roster.[1] The addressees were advised that, as a result of changes in the labor agreement between the port and the ILWU, the number of seniority positions was being increased, that the addressee was eligible to be considered for hire to one of the new seniority positions, and that:

> Selections for seniority positions shall be based on qualifications and experience with due consideration being given to affirmative action. An evaluation panel composed of Port Management Representatives and Local #9 Port Foremen will make the evaluations and final decisions regarding the filling of current Port Seniority vacancies.

Those eligible for consideration were instructed to submit a completed employment application to the Port of Seattle by 4:00 p.m. on August 22, 1985 if they wished to be considered.

Eighty-four candidates responded with applications. Wheeler determined that additional background information would be required to finalize the selection process, and he directed Brumble to research back to 1980 to determine how many hours each applicant had worked at the port during the five year period. Brumble used payroll records to make this determination. In order to ensure the accuracy of all of the survey data, Brumble directed her staff assistant to independently perform the same research. The results were then compared, and any discrepancies were jointly re-researched to verify the information prior to completion of the survey. The data was obtained from microfiche records, which the management felt were more accurate than computer-stored data, because they contained any final payroll/work hour adjustments.

A nine-member candidate screening panel was then selected by the employer. Six of approximately 14 foremen employed in the warehouse division were selected to serve on the panel. They were representative of the different areas of work that is performed in the complex.[2] The foremen are included in the ILWU bargaining unit. The three remaining panel members were drawn from the port's management: The manager of marine operations (who was also designated as the panel's captain); the warehouse operations

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[1] While testimony at the hearing indicated that there were approximately 103 candidates, review of the employer's records in evidence indicates that the announcement was mailed to 101 potential applicants. The difference is not material to any issue.

[2] Foremen assign work to regular employees who have seniority, as well as to casual employees dispatched by the ILWU. They do not evaluate employee performance, but may be aware of the abilities of employees because of previous exposure to their work performance. Employees are frequently assigned to duties that they have successfully performed in the past, and therefore may not be cross-trained to perform a number of different duties. In the event that a foreman determines that an employee cannot perform a specific assignment, the employee will not be re-assigned to the function.

superintendent; and the supervisor of the warehousing/distribution complex.

The selection panel met for the entire day on September 23 and 24, 1985, and for part of the day on September 25, 1985. Wheeler met with the panel at its convening, and provided the members with extensive orientation and instructions regarding the screening and selection process. Wheeler gave the panel members an instruction sheet entitled "Evaluation Guidelines Memorandum", and directed that no factors other than those set forth in the written instructions were to be taken into consideration. The evaluation guidelines set forth six selection factors that the panel was to use in determining who would be selected for assignment to a seniority position. These factors were: 1) Quality of work; 2) Quantity of work; 3) Dependability; 4) Cooperation; 5) Initiative; and 6) Experience. Points were to be allocated in the rating process for each factor.[3] Final scores were to determine the order in which the employees would be selected and actual seniority standing. Wheeler cautioned the panel that the panel members were to conduct the selection process in a confidential manner to avoid any politicizing of the process. Wheeler admonished that family ties, friendships, race, sex and union affiliation were not to be considered, and that any such consideration would be unlawful and totally inappropriate. The panelists were not provided information concerning the candidates' union affiliation or minority status.

As a further step to avoid the possibility of bias, Wheeler did not initially provide the panel with the candidates' work experience records. That information was held back until the panel members completed a preliminary consensus rating of the candidates, taking the five other factors into consideration. Upon the completion of the initial selection, Wheeler provided the panel with the candidates' work hours.

As the candidates for the 44 available positions were selected by the panelists, they were assigned, in descending order based on their evaluation score, to one of four sub-groups of six employees each for the "A" list or to one of four sub-groups of five employees each for the "B" list. Five alternate candidates were also selected in the event that a finalist declined to accept a position. This completed the initial rating process.

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[3] For each of the first five criteria, the ratings were: "Below expectations" = 1; "Meets expectations" = 2; and "Exceeds expectations" = 3. Therefore the highest rating that an individual could receive for each factor was 3 points and the highest total possible for the first five factors was 15 points. The ratings for the sixth evaluation factor (i.e., previous port experience) ranged from a low of 2 points for less than 500 hours of previous experience to a high of 5 points for in excess of 2500 hours of previous work with the Port of Seattle. Thus, a maximum overall rating of 20 points could be achieved.

Upon the completion of the selection process, Wheeler had the port's Equal Employment Opportunity (EEO) officer review the roster of employees, to determine whether any further adjustments would be needed to ensure that there was no discrimination of affected classes of employees and that there was a proper mixture of employees taking into consideration race, sex and age. It was determined that no EEO adjustments were needed.

Seniority rankings within the "A" list and the "B" list were determined by lot. Because the expansion of the number of seniority positions was the result of collectively bargained changes, the employer invited two union officers to participate in the lottery. The seniority standing for the employees was assigned by use of the previously defined sub-groups, beginning with the highest-rated sub-groups on each list. Taking the sub-groups one at a time, six numbers were placed in a box for each "A" list sub-group and five numbers were placed in a box for each "B" list sub-group. The box was positioned in such a manner that the numbers could not be determined prior to their removal. The name of each applicant was announced, then the president of the union randomly removed a number from the box and that number was assigned as the seniority ranking for the individual within the sub-group. The standings by sub-group were then tallied to provide a single overall roster, such that the first employee on the second "A" list sub-group became the seventh employee on the overall "A" list, etc. For the purpose of administering the seniority lists, the seniority dates for the new positions were consecutively established from October 7 through November 19, 1985.

At the conclusion of the selection process on September 25, 1985, the union's business manager, with the concurrence of the management, visited the work areas and announced to those present (including the complainant), whether they had been selected for a seniority position. The ILWU then posted bulletins setting forth the results of the selection process.

Information submitted as evidence at the hearing[4] discloses the following candidate/applicant statistical data:

Number of positions to be filled	44
Individuals invited to apply	101

[4] Prior to the hearing, the complainant subpoenaed specific background information from the port, demanding that it be compiled in a specific manner under the supervision of a named individual. At the outset of the hearing the employer moved to quash certain aspects of the subpoenas. Arguably, all of the subpoenaed data was received into the record as evidence in the course of the hearing, although it was not all prepared in accordance with the specific mandates of the subpoenas. The parties were afforded the opportunity to argue their respective positions regarding the propriety and relevance of the disputed subpoenas and upon due consideration by the Examiner, the employer's motion was granted.

	ILWU member invitees	52	
	Non-ILWU member invitees	49	
Applicants			84
	ILWU member applicants	40	
	Non-ILWU member applicants	44	

Using the complainant's own work record (i.e., 542 hours worked during the June 21, 1980 to August 9, 1985 period) as a basis for comparison of the complainant to other invitees and applicants produces the following statistical data:

INDIVIDUALS WITH MORE THAN 542 HOURS OF WORK:		
Number of Applicants		42
Number of candidates selected		33
ILWU member applicants	29	
ILWU members selected	28	
ILWU members not selected	1	
Non-ILWU applicants	13	
Non-ILWU selected	5	
Non-ILWU not selected	8	
INDIVIDUALS WITH 542 HOURS OR LESS OF WORK:		
Number of Applicants		42
Number of candidates selected		11
ILWU member applicants	10	
ILWU members selected	7	
ILWU members not selected	3	
Non-ILWU applicants	32	
Non-ILWU members selected	4	
Non-ILWU members not selected	28	

POSITIONS OF THE PARTIES

The Complainant

James Morris claims that his application for a seniority position at the Port of Seattle was rejected because he is not a member of the ILWU, that the selection panel favored ILWU member applicants over non-union applicants, and that such rejection constitutes unlawful employment discrimination, violating his rights as set forth in Chapter 41.56 RCW.

The complainant alleges that the hours of work experience requirement was manipulated by the employer in order to ensure that favored candidates would be eligible to apply. The complainant believes that the employer, in the course of negotiating the current collective bargaining agreement with the ILWU, entered into a confidential agreement with the union that would allow port foremen a free hand in increasing the number of seniority employees, and that the foremen agreed to "take care of" most, if not all, of the union applicants. Thus, in the opinion of the complainant, the selection panelists were predisposed to favor specific individuals because of union membership, and would rate the favored candidate higher, so that rating factors aside from experience were worthless. As support for these contentions, the complainant relies on a statistical analysis that indicates that ILWU members were dominant among those who were selected for hire.

In part, Morris attributes the disproportionate number of ILWU members selected to a discriminatory and unlawful job dispatching practice by the union, which historically gave job preference to union members over non-members. As a result of this practice, union members are alleged to have worked more hours at the port than did non-members, so that they received a higher evaluation rating under the more heavily weighted work experience factor in the port's selection process. Looked at another way, Morris believes that the discriminatory dispatch practice resulted in many casual employees being historically denied an opportunity for employment with the port, because the were not union members.

The complainant maintains that during his service as a casual port warehouseman he developed the various skills needed to perform the job in a workmanlike manner, that he is a skilled forklift operator, order picker, stocker, freight checker, and shipper/receiver, and that he should have been selected for appointment. Morris alleges that the candidate screening process was deficient because the members of the selection panel were not familiar with the job performance of many of the candidates, the management members of the panel did not observe employee performance first-hand, and the foremen on the panel did not have personal knowledge of every candidates work performance or habits because of the different work shifts and work areas that are in operation at the facility.

Responding to the port's defense, Morris maintains that the date of the violation is the October 7, 1985 date the disputed seniority roster was first implemented. Accordingly, he asserts that his complaint was timely filed within six months following the date of the alleged violation.

The Employer

It is the employer's position that Morris knew on September 25, 1985, that he was being passed over for assignment to a seniority position and that, therefore, his complaint filed on March 31, 1986 came more than six months after the revised seniority roster was adopted. The employer urges that the complaint is not timely, and that it should be dismissed on such basis.

The employer denies that it discriminated against James Morris when it passed him over for selection to a seniority position. The port maintains that it had no way of knowing whether or not casual employees, including Morris, who were dispatched by the ILWU were members of the union. The employer contends that there was no discussion of union affiliation during the panelists' deliberations, that union membership was not a factor in the selection process, and that the selection process was conducted fairly, based on overall ratings using the factors set forth in its evaluation instructions. It contends those are legitimate factors designed to serve the needs of the employer, so that the complaint should be dismissed on the merits.

DISCUSSION

The Legal Environment of this Case

The Public Employment Relations Commission has previously dealt with allegations of anti-union discrimination in hiring.[5] This is a case of first impression to the extent that the Commission has not previously been called upon to rule on a complaint charging that an employer has discriminated by its use of a union hiring hall operated in a discriminatory manner.

ILWU Local 9 is not a party to the instant proceeding, but its relationships with the Port of Seattle and its job dispatching practices are

integral elements in determining the merits of Morris' charges, because the port appears to have relied exclusively on the union as the sole source for its casual warehouse employees.

The Public Employees Collective Bargaining Act, Chapter 41.56 RCW, states in relevant part:

> **RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE BARGAINING REPRESENTATIVE.** No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or 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 this chapter. (emphasis supplied)
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> **RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED.** It shall be an unfair labor practice for a public employer:
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> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; . . . .

RCW 41.56.070 and 41.56.080 assure public employees the right to vote against union representation and otherwise refrain from union activity.

Section 8(a)(3) of the National Labor Relations Act (NLRA) more concisely, but to the same effect, prohibits:

> . . . discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . PROVIDED, FURTHER, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; (emphasis supplied)

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[5] Auburn School District, Decision 2291 (PECB, 1986) and Toutle Lake School District, Decision 2659 (PECB, 1987).

The non-discrimination protection of the NLRA extends to individuals who may not be members of the union. See, Phelps Dodge Corporation v. NLRB, 313 U.S. 177 (1941), and its progeny. A union-sponsored hiring hall can be lawful, Electrical Workers Local 948 vs. NLRB, 253 NLRB 94 and 697 F.2d 113 (6th Circuit, 1982), but it is well settled under the NLRA that it is unlawful for a union to operate an exclusive hiring hall that discriminates among employees based on union membership or other arbitrary and capricious reasons. Such a practice is addressed in Longshoremen's Local 1408 v. NLRB, 705 F.2d 1549 (11th Circuit, 1983), where it was stated:

> Although an exclusive hiring hall arrangement is clearly lawful, a union violates Sections 8)(b)(1)(A) and 8(b)(2) if it refuses to refer an employee from a hiring hall because of the employee's non-member status or for some other arbitrary or irrelevant reason.

Thus, a union which attempts to operate a hiring hall must do so in an even- handed, non-discriminatory manner, in accordance with objective criteria and standards that avoid the possibility of less favorable treatment for non-members. See, also, Polis Wallcovering Co., 262 NLRB 169 (1982). Non-discriminatory work opportunities must be afforded both union members and non-members, and the enforcement of a collective bargaining agreement to the contrary violates the NLRA. Plasterers, Local 121, 264 NLRB 192 (1982). Even within the union, members are entitled to express political dissent without fear of being refused referral to jobs. International Association of Bridge, Structural and Ornamental Iron Workers, 276 NLRB 1273 (1985).

The Public Employment Relations Commission considers the precedents of the NLRB and the federal courts in interpreting Chapter 41.56 RCW.

> When interpreting the provisions of Chapter 41.56 RCW, the Public Employment Relations Commission will give due consideration to decisions of the NLRB and federal courts which enforce generally similar provisions of the NLRA. Clallam County, Decision 1405-A (1982).
> Pullman School District, Decision 2632 (PECB, 1987).

The subject of union security addressed in Section 8(a)(3) of the NLRA is also addressed in both of the state collective bargaining statutes applicable to this case.

Chapter 41.56 RCW, the state statute generally applicable to "municipal corporations and political subdivisions", including port districts under RCW 53.18.015, contains the following language:

> **RCW 41.56.122 COLLECTIVE BARGAINING AGREEMENTS--AUTHORIZED PROVISIONS.** A collective bargaining agreement may:
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> (1) Contain union security provisions: PROVIDED, That nothing in this agreement shall authorize a closed shop[6] provision: PROVIDED FURTHER, That agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member. . . .

Chapter 53.18 RCW, the state statute specifically applicable to relations between port districts and their employees, contains the following language:

> **RCW 53.18.050 AGREEMENTS--AUTHORIZED PROVISIONS.** A labor agreement signed by a port district may contain:
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> . . .
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> (2) Maintenance of membership[7] provisions including dues check-off arrangements; . . . .

It thus appears that a violation of state law could be found in this case if it were to be established that the complainant was adversely affected by the employer's cooperation in, or even acquiescence in, the operation of a discriminatory hiring hall.

The Commission does not administer Chapter 42.23 RCW, and so is not generally interested in allegations concerning a public employer's hiring of relatives and friends of employer officials. Unfair labor practice violations could be found under Chapter 41.56 RCW, however, if an employer and a union agreed, thereby mis-using the union's status and authority as exclusive bargaining representative, to benefit relatives or friends of employer or union officials, and in so doing discriminated against other employees or applicants lacking such connections.

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[6] The term is not defined in the statute but is defined in Roberts' Dictionary of Industrial Relations, BNA Books, 1966, as:

> A collective bargaining agreement which provides that only members in good standing are permitted to work. Membership in good standing is a condition of continued employment. The closed shop agreement is outlawed under the Taft-Hartley Act.

[7] The term is not defined in the statute but is defined in Roberts' Dictionary of Industrial Relations, BNA Books, 1966, as:

> A form of union security devised by the public members of the National War Labor Board to resolve the conflict between the opposing positions of the labor and industry members of the Board. . . . The compromise was designed to protect the security of the union by providing that individuals who were members of the union or who subsequently joined the union would continue to maintain their membership for the duration of the contract. . . .
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> Following the passage of the Taft-Hartley Act and the outlawing of the closed shop, the union shop became much more frequent for companies engaged in interstate commerce. Maintenance-of-membership clauses also were popular. In actual practice, however, the provisos frequently resulted in the maintenance of union dues because of the language of Section 8(a)(3)(B) of the Taft-Hartley Act.

This proceeding cannot, however, implement Morris' allegation that many qualified individuals were passed over for selection to a seniority position, because, like the complainant, they are not members of the ILWU. In Brewster School District, Decisions 2779-2782 (EDUC, 1987), it was stated:

> The rules of the Public Employment Relations Commission make no provision for "class actions" or the like. The "on behalf of similarly situated employees" language of the complaint thus cannot be implemented. Any such employees would need to timely file and process their own unfair labor practice charges with the Commission. In the absence of any provision to create a class, it is not necessary to rule on the union's motion to strike a class action.

Although the Brewster case arose under the Educational Employment Relations Act, Chapter 41.59 RCW, that statute closely parallels the Public Employees Collective Bargaining Act, and the rules for processing unfair labor practice complaints found in Chapter 391-45 WAC are common to both statutes. Morris acts only on behalf of himself in this proceeding.

The Practical Environment of this Case

The record is not precise on the question, but it appears that the collective bargaining relationship between the Port of Seattle and the ILWU is of long standing. There was reference in testimony to the ILWU having operated its hiring hall for 50 years, but it falls short of establishing the port and the union have had dealings for that entire period.

The collective bargaining agreement between the port and the ILWU contains a union security clause which states:

> Union Membership - All present employees who are members of the Union as of the date of the execution of this agreement shall remain members during the life of this agreement as a condition of continued employment. Present employees who are not members of the Union at the date of the execution of this agreement and elect in the future to become members shall remain members thereafter during the life of this agreement as a condition of continued employment. All employees hired after the execution of this agreement shall become members of the Union within sixty (60) days following the beginning of their employment and shall remain members during the life of this agreement as a condition of continued employment. No employee will be terminated under this sub-section if the Port has reasonable grounds for believing:
>
> 1. That membership was not available to the employee on the same terms and conditions generally applicable to other members, or

> 2. That membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The foregoing clause arguably goes beyond the "maintenance of membership" form of union security permitted by RCW 53.18.050, but appears to be a relatively common modified "union shop" which would be permitted by RCW 41.56.122(1) if it contained the "religious" right of nonassociation found in that provision of law.

Allegations of agreement to give a preference -

There is no evidence here to support Morris' contention that the agreement between the port and the union to create new "seniority" provisions was based on a purpose of assisting friends or relatives, or was implemented to such an effect. Accordingly, there is no basis to conclude that the employer violated the collective bargaining law in this regard.

Similarly, there is no evidence that directly supports Morris' contention that there was a secret agreement between the port and the ILWU designed to give preference to ILWU members.

Allegations concerning the hiring hall -

The collective bargaining agreement between the port and the ILWU addresses hiring to the following extent:

> The Port shall have the right to hire employees and shall have the right to suspend, terminate, or discipline any employee for just cause or for incompetency, insubordination, or failure to perform work as directed by the Port within the provisions of this or any supplemental agreements.

The collective bargaining agreement thus appears to be in conformity with RCW 53.18.060(1), which imposes specific conditions on port district labor agreements.[8] Nevertheless, the record reflects that the port has a history of obtaining its employees from the ILWU job dispatch facility. The reason for this exclusive practice was not addressed in the proceeding. The collective bargaining agreement

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[8] On the other hand, there is evidence in the record that indicates that the parties to the "Revised Supplemental Agreement" may have strained or contravened the law by placing limitations on the port's ability to hire whomever it desires.

makes no reference to the ILWU hiring hall, and so sets no standards for the registration and ranking of casual workers.[9] We now know from the testimony of its own official that the union's hiring hall practice prior to September, 1986, was to dispatch members first.[10] It follows logically that ILWU members would have tended to receive more hours of work at the port than non-members, because they were the first to be dispatched. Such a practice would impact the results of the port's evaluation rating process for the new "seniority" positions, because hours of work at the port significantly improved the candidates' final ratings.

The allegation of manipulation of the list -

The facts do not bear out the complainant's claim that the employer has unlawfully tampered with the pool of individuals invited to apply for the "seniority" positions created as the result of collective bargaining in 1985. The employer's first attempt yielded the names of some 70 employees who had recently had a high number of hours worked. If there is any logic to the claim that a discriminatory hiring hall tended to increase the hours of union members, the employer's action to enlarge the list to 101 or 103 persons would have tended to counteract any recent discrimination. Discriminatees with a lower average hours per month could only have gained increased access to the applicant pool by the enlargement of the period in which to have accumulated a fixed number of hours. The statistics show that those invited to apply were almost evenly divided between union members and non-members.

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[9] The close relationship between the port and the ILWU can also be inferred from a provision in the "working rules" section of the collective bargaining agreement, which states:

> Work under Local 9 jurisdiction performed in a warehouse will be done by Local 9 members within the scope of their expertise. If the Port is requested by a user of the Foreign Trade Zone to perform work for them, then Local 9 warehousemen will be employed to perform work for which they are qualified. (Emphasis supplied)

There was no testimony regarding the application of the foregoing provision. On its face, it goes beyond a restriction that the work be performed by members of the ILWU bargaining unit. A literal interpretation of "work . . . will be done by Local 9 members" is that the clause amounts to a closed shop prohibited by RCW 41.56.122. Under such an interpretation, non-members would be precluded from performing the work. Even if only an inarticulate reference to practice, such language can give rise to a cause of action for unfair labor practice proceedings. Spokane County, Decision 2674 (PECB, 1987). On the other hand, the provision is inconsistent with other sections of the collective bargaining agreement and local practice, as it does not take into consideration that current employees may be "grandfathered" (i.e., those who were not members of the union at the time of the execution of the current labor agreement and chose to remain non-members), that new employees have 60 days in which to become members of the union or that some casual employees (such as Morris) are not ILWU members.

[10] The record does not reflect precisely why the NLRB interposed itself into the manner in which the ILWU dispatched individuals for work opportunities, but it can be safely presumed that the action came as the result of an investigation of unfair labor practice charges filed against the ILWU. The union's admission that it modified its procedures, on advice of counsel, in response to the NLRB proceeding is deemed to be an admission that the separately admitted practice of giving a dispatching preference to union members would have been found unlawful under federal law.

Further, the complainant is hardly in a position to object, since he was the beneficiary of the employer's action to enlarge the qualification period. The complainant, who seems to argue for an even broader qualification period, would, in fact, have been adversely affected by any further enlargement of the list, since there were only a finite number of positions to be filled.

The 84 individuals who applied for the "seniority" positions were nearly evenly divided between union members and non-members. Forty applicants (48%) were ILWU members, while 44 of the applicants (52%) were not ILWU members.

Morris, it turns out, was in the middle of the group who applied. Of the 84 applicants, 50% had accumulated more hours of previous work experience at the port that had Morris, and 50% had accumulated the same or less work hours at the port than Morris.

The Results of the Selection Process Suggest Discrimination

The allegation of a preference in the standards used -

The possibility of a taint of preferential hiring in relation to union membership begins to appear in the statistics relating the work experience of the applicants to their union affiliation. Of those applicants with more work hours at the Port than Morris, 29 of them (69%) were ILWU members. Of those with less hours of work at the Port than Morris, only 10 applicants (24%) were ILWU members. Although there is testimony that membership may have been acquired due to employment elsewhere, the statistics show a correlation of some note in the context of this case.

The effect of the heavier weighting accorded to work experience in the hiring process also appears in the statistics concerning applicant success. Of the 44 positions that were filled, 33 of the individuals selected (75%) had more hours of service than Morris, while only 11 of the new "seniority" employees (25%) had less service than Morris.

The allegation of a preference in the "panel" process -

More startling are the statistics correlating the success of applicants with their union membership status. Of those applicants with more service than Morris, 28 of 29 ILWU members were selected, yielding a 97% success rate and garnering 85% of the positions in the group. Among the individuals with less hours of work than Morris, seven of ten ILWU members were selected, yielding a 70% success rate and constituting 64% of those selected in that group.

Looking at the process as a whole, 35 out of 40 ILWU member applicants (87.5%) were successful, while only nine out of 44 non-member applicants (20%) were successful.

From the perspective of the 44 positions available, 35 of those selected (80%) were ILWU members, while only nine of those selected (20%) were non-members. None of the non-members were placed on the preferred "A" list created by the collective bargaining agreement.

The statistical analysis thus indicates that a disproportionate percentage of ILWU members were selected for the seniority positions. The Examiner cannot attribute this outcome to any technical factor. The Examiner thus concludes that the burden must be shifted to the employer under City of Olympia, Decision 1208-A (PECB, 1981) and Wright Lines, 251 NLRB 150 (1980), and that its affirmative defenses must be considered.

The Statute of Limitations and its Application

The employer's "statute of limitations" defenses dispose of some of the remaining issues. RCW 41.56.160 establishes a time limit for the filing of a complaint charging unfair labor practices, stating, in relevant part:

> . . . a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

Morris filed his complaint with the Commission on March 31, 1986, so that September 30, 1985 is the first day as to which the complaint is clearly timely. A cause of action would exist as to earlier conduct only if it can be fit within exceptions recognized for concealed facts and continuing violations.

PERC decisions have held that the six month time limit may be disregarded where it can be demonstrated that the complainant did not have actual or constructive knowledge of the acts or events which are the basis of the charge. Spokane County, Decision 2377 (PECB, 1986); City Of Dayton, Decision 2111-A (PECB, 1986). Such holdings are consistent with NLRB precedent on the subject. Metromedia, Inc., 232 NLRB 76 (1977) and 586 F.2d 1182 (8th Circuit, 1978) and ACF Industries, Inc., 231 NLRB 83 (1977) and 592 F.2d 422 (8th Circuit, 1979). There is no indication in this record, however, that the port attempted to conceal its actions.

The notice and selection processes -

As early as August 13, 1985, the port notified prospective applicants (including the complainant), that it was going to increase the number of seniority employee positions in accordance with the terms of its revised collective bargaining agreement with the ILWU. The same notice indicated that foremen would be used in the selection process, and that qualifications and experience would be considered in the determination of who would be selected. The complainant received and responded to that notice. The complaint is untimely as to those matters.

To the extent that the complainant contends, or would contend, that the invitation to apply was an "interference" violation in the nature of Spokane County, supra, because of the history and its reference to the use of union-represented foremen on the selection panel, the facts were also known to the complainant well in advance of September 30, 1985. The Examiner concludes that he is without authority to determine or remedy such a claim.

The hiring decision and its implementation -

The NLRB ruled in U.S. Postal Service, 271 NLRB 397 (1984), that the six month statute of limitations begins to run at the time that the affected employee is advised of the decision that is allegedly offensive. The NLRB's holding is consistent with the U.S. Supreme Court's decisions on statute of limitations defenses in civil rights cases arising under the Civil Rights Act of 1871 and under Title VII of the Civil Rights Act of 1964. In Plymouth Locomotive Works, Inc., 261 NLRB 595 (1982), the NLRB stated:

> It is well settled that the 6 months period does not begin to run until the party adversely affected has received actual or constructive notice of the conduct constituting the alleged unfair labor practice. (emphasis supplied).

Morris was notified on September 25, 1985, of the adoption of the disputed seniority roster, and was advised at the same time that he was not among those selected. When the port completed the selection process on September 25, 1985, the seniority expansion process was concluded. There were no additional steps to be taken.

Within five days thereafter, Morris had consulted with legal counsel concerning his complaint. The attorney who was representing Morris at that time[11] sent a letter to the port on October 1, 1986, protesting Morris' rejection as a seniority employee, citing Chapter 41.56 RCW, and raising an allegation of discriminatory hiring in favor of union members. This prompt reaction on the part of the

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[11] The attorney never appeared as counsel of record in this proceeding, in which Morris appeared pro se.

complainant is evidence of actual notice of the port's decision, thus making September 25, 1985, the threshold date for application of the statute of limitations. The record therefore demonstrates there was no actual concealment. To the contrary, the complainant was aware of and actually reacted to the objectionable conduct on the part of the port. Morris could have timely filed his complaint at any time within the period of six months after having notice of the conduct. City of Seattle, Decision 2230 (PECB, 1985); Spokane County, Decision 2377 (PECB, 1986).

Although seniority dates were implemented for the new seniority employees on and after October 7, 1985 (i.e., within the six months prior to the filing of the complaint), the Examiner is persuaded that the selection process was not ongoing, and that the implementation did not constitute a continuing violation. The collective bargaining agreement called for a one-time expansion of the seniority roster. The circumstances of selection, notification and implementation were inter-related. Thus, the statute of limitations commenced to run with the date of notification, and utilization of the revised seniority roster on a daily basis does not amount to a new repetitive violation. U.S. Postal Service, supra. See, also, Olympic Steamship Co., 233 NLRB 1178 (1977); NLRB v. Auto Warehousers, Inc., 227 NLRB 628 (1976) and 571 F.2d 860 (5th Circuit, 1978).

The ongoing use of the ILWU hiring hall -

The port's continued use of the ILWU job dispatch facility stands as a separate matter from the filling of the 44 seniority positions. As indicated above, an employer is prohibited from engaging in conduct that grants favor to either union or non-union individuals in considering them for hire. Just as discrimination against union members or supporters is unlawful, City of Olympia, supra, a preference for union members cannot be a factor in selecting candidates for employment. Each hiring transaction conducted on a discriminatory basis is a separate violation. The record establishes that the port participated in and acquiesced to the ILWU's discriminatory dispatching practices over a long period of time, and continued to do so into the period within six months prior to the filing of the complaint. The Examiner concludes that Morris' complaint is timely with respect to the employer's continued use of the ILWU hiring hall after September 30, 1985.

Defenses of Lack of Knowledge or Intent

The employer's defense of lack of knowledge is not persuasive. The employer's right to hire is secured by RCW 53.18.060(1). Its right to hire from the local community is specifically secured by RCW 53.18.060(2). The union may have induced the port to make use of the facilities of the union's hiring hall, but that does not relieve the port of responsibility. Because an employer will ultimately

be held responsible for any discriminatory action, it is obligated to investigate the circumstances of any hiring practices that it is a party to and that may be subject to abuse or violate the PECBA. The employer was thus under a duty to know or discover what it was getting into when it made the union its agent in hiring. If the employer knew or should have known that the union was operating unlawfully in making referrals, then the employer engaged in unlawful discrimination when it became a party to or continued to utilize a hiring procedure by which it employs only employees who are dispatched by the union. Panscape, 231 NLRB 693 (1977) and 607 F.2d 198 (7th Circuit, 1979). The employer was entitled to information regarding a union's hiring hall practices in Printing and Graphics Communications 233 NLRB 994 and 598 F.2d 267 (DC Circuit, 1979), so as to ensure that it was operated in a non-discriminatory manner. The port is entitled to take the steps necessary to ensure that a hiring hall that it has a relationship with is operated in a non discriminatory manner. Macaulay Foundry, 223 NLRB 815 (1976) and 553 F.2d 1198 (9th Circuit, 1977).

The matter of intent is addressed in Pierce County, Decision 1840-A (PECB, 1985), as follows:

> The union argued that discrimination cannot be found against it since there is no evidence of intent. Without commenting on whether or not there is evidence of intent, this decision merely needs to reiterate that the fluctuating dues collection procedure had an impact on union members which interfered with, restrained or coerced public employees in the exercise of their rights guaranteed in the Public Employees Collective Bargaining Act, Chapter 41.56 RCW.

The NLRB has found that an employer discriminates in violation of Section 8(a)(3) where it acquiesces in the maintenance and enforcement of a discriminatory hiring hall arrangement. Pacific Maritime Assoc., 209 NLRB 519 (1974). The employer's use of the hiring hall in the instant case was of long standing, as was the union's practice of giving preference to union members. The Examiner concludes that the employer should have taken steps to assure that it was not a party to discrimination and that, by its participation in and acquiescence to the ILWU discriminatory dispatch practice, it had an adverse impact on individual employees, including the complainant, who were not members of the union. Such impact tended to encourage union membership as a means of obtaining employment at the port, and was discriminatory. The port is the employer and is therefore obligated to comply with the Public Employees Collective Bargaining Act. It cannot pass off its legal responsibilities to Local 9, a third party, and relieve itself of liability under the law. Although an employer may contract out it's employee recruiting function, it remains obligated to see to it that all lawful employment standards are met and that all hiring and job dispatch is performed in a non-discriminatory manner in compliance with applicable law.

Would Morris Have Been Assigned to a Seniority Position?

Recognizing that the issue of "statute of limitations" is debatable, the Examiner has chosen to address the merits of the discrimination-in-hiring claim. Notwithstanding the timeliness of his complaint, Morris failed to demonstrate that he would have been selected for assignment to one of the seniority positions were it not for the unlawful manner in which employees were selected, or that he was individually singled out for discriminatory treatment when he was passed over for assignment to a seniority position.

Called as a witness by Morris, night foreman Dalton Lawson, for whom Morris frequently worked, described Morris' performance as, "fair on the shipping floor, he was a good worker and performed his job". Lawson rated Morris' quality and quantity of work as "meets expectations", and that he rated Morris' dependability, cooperation and initiative as "below expectations". Lawson did not serve on the candidate screening committee, because members of his family were included among the candidates. Lawson testified that he would have recommended Morris for selection had he been on the selection committee. Lawson also testified, however, that he provided the selection committee with a list of ten employees whom he highly recommended as being worthy of selection, and that Morris' name was not included on that list.

Interference With the Internal Affairs of the Union

Although Morris alleges in his complaint that the port violated RCW 41.56.140(2), he presented no evidence or argument supporting such a contention. The record does not reflect that the Port of Seattle attempted to control, dominate or interfere with Local 9, ILWU.

REMEDY

In Olympic Steamship Co., 233 NLRB 1178 (1977), an employer and the same local union that is involved in the instant proceeding were named as co-respondents in a complaint of violation of the NLRA.[12] Discriminatory layoffs which occurred more that six months prior to the filing of the complaint were dismissed as not timely, even though the layoffs continued in effect up to and beyond the date of filing, but the employer's acquiescence to discriminatory practices initiated by the union involving the employment and assignment of female and casual employees were nevertheless found to be violative of the NLRA. In the instant case, the Port of

[12] Olympic addresses issues regarding statute of limitations, discrimination and employer acquiescence to discriminatory practices regarding the use of casual employees.

Seattle's acquiescence to the ILWU dispatch facility is found to be contrary to state law, and is coercive with regard to prospective employees to the extent that it bestows favor on union membership as a requisite to hiring. Such disparate treatment interferes with and restrains public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW, creates a "closed shop" in violation of RCW 41.56.122, and is an unfair labor practice pursuant to RCW 41.56.140(1).

Remedies in unfair labor practice cases are designed to re-create a lawful situation, rather than to be punitive. Pierce County, Decision 1840-A (PECB, 1985). In hiring hall and referral cases, the relief typically granted by the NLRB is an order to cease and desist and affirmative relief, where appropriate.

The employer will be ordered to cease and desist from use or acquiescence in discriminatory hiring hall procedures. The inherent discrimination that has been a part of accepting employees from the ILWU job dispatch facility must be discontinued. It is incumbent on the port to take the steps necessary to ensure that it obtains individuals for employment in a manner that does not discriminate for or against union members. There is no apparent reason why the port could not perform its own hiring, independent of the ILWU, and still comply with its labor agreement with that union. The record indicates that Local 9 may now be dispatching individuals to employment in a non-discriminatory manner. The port may continue to use the Local 9 hiring hall as a source for employees, provided that it at all times meets the port's requirement that it operate in a non-discriminatory manner.

The potential affirmative remedies are huge in a hiring discrimination case. In the instant case, however, it is impossible to determine whether Morris, or for that matter any other individual, has been a victim of discrimination during the period for which this complaint is timely. The record does not reflect any objective standard to make such an identification. Accordingly, no reinstatement or back pay is ordered based on this record.

FINDINGS OF FACT

1. The Port of Seattle is a port district operated under Title 53 RCW and is an employer within the meaning of Chapter 53.18 RCW and Chapter 41.56 RCW.

2. James Morris is a public employee within the meaning of RCW 41.56- .030(2) who has from time to time been employed as a casual worker by the Port of Seattle. Morris was an applicant for employment for one of 44 new "seniority" positions filled by the Port of Seattle in August and September of 1985.

3. The Port of Seattle has recognized International Longshoremen's and Warehousemen's Union, Local 9 as the exclusive bargaining representative of regular and casual warehouse employees of the Port of Seattle.

4. The Port of Seattle has a historical and ongoing practice of using the hiring hall operated by ILWU Local 9 as the source of its employees. Prior to and at the time of the filing of the instant complaint charging unfair labor practices and continuing until at least September, 1986, ILWU Local 9 engaged in a practice of giving a preference to union members through its hiring hall, dispatching its members prior to dispatching non-members for work at the Port of Seattle.

5. The Port of Seattle and International Longshoremen's and Warehousemen's Union, Local 9 are parties to a collective bargaining agreement effective from September 4, 1985 to June 30, 1986. During negotiations for said agreement, the port agreed to expand its seniority list by an additional 44 positions.

6. Notice of the vacancies and of the procedure for selection was mailed to prospective candidates in August of 1985. The complainant was one of 84 applicants for the 44 positions.

7. The selection process for assignment to the 44 new seniority positions took place on September 23, 24, and 25, 1985. The complainant was notified on September 25, 1985, that he was not selected.

8. Evaluation of data indicates that a disproportionate number of ILWU members were selected for assignment to the 44 new seniority positions.

9. James Morris filed the complaint charging unfair labor practices to initiate these proceeding on March 31, 1986.

10. The complainant has furnished no evidence to establish that the Port of Seattle and the ILWU Local 9 entered into a confidential agreement to give priority status for hiring to Local 9 members.

11. The complainant has furnished no evidence to establish that, were it not for the employer's consideration of previous work hours with the Port of Seattle, he would have been selected for assignment to a seniority position.

12. The complainant has furnished no evidence to establish that the Port of Seattle has unlawfully controlled, dominated or interfered with ILWU Local 9.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.

2. The complaint charging unfair labor practices filed by James Morris on March 31, 1986, is beyond the six month statute of limitations set forth in RCW 41.56.160 and is not timely filed with respect to allegations that the notice and procedures for selection of employees to the 44 new seniority positions were unlawful; with respect to allegations that union members were afforded priority status for selection as the result of previous discrimination in hiring hall referrals; and with respect to allegations of actual discrimination in the selection process concluded on September 25, 1985.

3. By its ongoing use of and acquiescence in the conduct of discriminatory job dispatch practices of the hiring hall operated by the ILWU Local 9, the Port of Seattle has discriminated in hiring and has committed unfair labor practices in violation of RCW 41.56.140(1).

4. The complainant has failed to sustain his burden of proof with respect to allegations that the Port of Seattle has controlled, dominated or assisted ILWU Local 9.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that the Port of Seattle, it officers and agents shall immediately:

1. Cease and desist from:

   (a) Discriminating in regard to hiring based on membership or non-membership in any employee or labor organization.

   (b) Using, acquiescing to or participating in any hiring hall operated by ILWU Local 9 or any other labor or employee

organization where such hiring hall operates under a policy that grants any preference or priority standing to members of the union, to the detriment of other individuals.

(c) Making future employment decisions based on relative work experience of applicants which includes any period during which the work opportunities and referrals were affected by discriminatory referral practices of the hiring hall operated by ILWU Local 9.

(d) Interfering with, restraining, or coercing public employees in the exercise of their rights secured by RCW 41.56.

2. Take the following affirmative action to remedy the unfair labor practice and effectuate the policies of the Act.

(a) Take all steps necessary to ensure that all employees regardless of the source, shall be hired in a non-discriminatory manner.

(b) Post, in conspicuous places on the employers premises where notices to employees are normally posted, copies of the notice attached hereto and marked "Appendix". Such notices shall, after being duly signed by an authorized representative of the Port of Seattle be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Port of Seattle to ensure that said notices are not removed, altered, defaced, or covered by other material.

(c) Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 23rd day of October, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

FREDERICK J. ROSENBERRY, Examiner

This Order may be appealed
by filing a petition for
review with the Commission
pursuant to WAC 391-45-350.

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE PURPOSES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, RCW 41.56, THE PORT OF SEATTLE NOTIFIES ITS EMPLOYEES THAT:

WE WILL NOT acquiesce to or participate in an illegal employment policy of accepting priority referral status for members of the ILWU, Local 9 or any other labor organization, to the detriment of non-member individuals.

WE WILL, in the event that we use the job dispatch hiring hall facilities of Local 9, ILWU, or any other source for casual or regular employees, require that all job dispatching be performed in a non-discriminatory manner, so that union members do not receive preference over individuals who are not union members.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Public Employees Collective Bargaining Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by RCW 41.56.122.

DATED:_____

PORT OF SEATTLE

BY:_____
AUTHORIZED REPRESENTATIVE

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

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This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.