STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PACIFIC NW REGIONAL COUNCIL OF CARPENTERS, Complainant, vs. PORT OF LONGVIEW, Respondent.	CASE 129528-U-17 DECISION 12779 - PORT ORDER OF DISMISSAL
PACIFIC NW REGIONAL COUNCIL OF CARPENTERS, Complainant, vs. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 21, Respondent.	CASE 129529-U-17 DECISION 12780 - PORT ORDER OF DISMISSAL

On July 18, 2017, Pacific NW Regional Council of Carpenters (complainant) filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. One complaint named Port of Longview (employer) as respondent, which was assigned case number 129528-U-17. The other complaint named the International Longshore and Warehouse Union, Local 21 (ILWU 21) as respondent, which was assigned case number 129529-U-17. The complaints were jointly processed because they were identical and concerned the same events. The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on August 15, 2017, indicated that it was not possible to conclude that a cause of action existed at

[1] At this stage of the proceedings, all of the facts alleged in the complaints are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaints state a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

that time. The complainant was given a period of 21 days in which to file and serve amended complaints, or face dismissal of the case.

No further information has been filed by the complainant. The Unfair Labor Practice Manager dismisses the complaint for failure to state a cause of action.

ISSUES

The complaint against employer alleges:

> Employer domination or assistance of a union [and if so, derivative interference], since an unspecified date, by allegedly assigning work, which had previously been completed by PNRCC bargaining unit members, to the ILWU 21 bargaining unit.
>
> Employer refusal to bargain [and if so derivative interference] since an unspecified date, by skimming bargaining unit work from employees in the PNRCC bargaining unit and giving the work to employees in the ILWU 21 bargaining unit, without providing the union with an opportunity for bargaining.

The complaint against ILWU 21 alleges:

> Union inducement of employer to commit an unfair labor practice [and if so, derivative interference] since an unspecified date.

The facts alleged in the complaints do not describe actions that could constitute any unfair labor practices under the jurisdiction of the Commission. The complaints do not state a cause of action for further case processing.

BACKGROUND

According to the facts alleged in the complaints, the PNRCC bargaining unit consists of maintenance employees including the piledrivers. Allegedly the piledrivers historically have done the work in connection with ecology-block walls.

The complaints alleged that the employer and ILWU 21 are attempting to remove maintenance work in connection with ecology-block walls from the PNRCC bargaining unit and place it into the ILWU 21 bargaining unit. The complaints did not identify any specific dates of when the skimming allegation took place.

The PNRCC also alleged that the ILWU 21 filed a grievance regarding the ecology-block walls. Additionally, the PNRCC filed a Unit Clarification Petition with the Public Employment Relations Commission regarding this work.

DISCUSSION

Complaints Lack Dates of Events and Names of Participants

The complaints are vague and do not contain dates for or the names of participants in the events described in any of the allegations. The complaints are missing dates of when the work was transferred from the piledrivers to the longshoreman, when events relating to employer domination occurred, and when events relating to union inducement occurred. WAC 391-45-050(2) requires the complainant to submit "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences." Because the complaint lacks specific dates of alleged unfair labor practice violations, it is not possible to conclude whether the complaint is timely filed.

Complaints Lack Numbered Paragraphs

Complainants must number the paragraphs in the attached statement of facts. In this case, the complainant did not number each of the paragraphs in the statement of facts. The requirements for filing a complaint charging unfair labor practices (ULP) are described in WAC 391-45-050. Numbering paragraphs is important to allow the respondent to reference specific allegations within the complaint when filing an answer.

Complaints Include the Incorrect Statutory References

Chapter 53.18 RCW regulates collective bargaining by all employees of port districts except managerial, professional, and administrative personnel, and their confidential assistants. Port

districts and their employees are covered by the provisions of Chapter 41.56 RCW except as provided otherwise in Chapter 53.18 RCW. RCW 53.18.015. Although the complaints alleged violations of Chapter 41.80 RCW, this case involves a bargaining unit of maintenance employees at the Port. Port employees are covered by Chapter 41.56 RCW.

Complaint Against the Employer - Domination

Legal Standard

The complaints allege employer domination or assistance of a union in violation of RCW 41.56.140(2). A cause of action for employer domination is provided for in all statutes administered by the Commission. The origins of the violation are based upon the concerns set forth in the test's second clause, that is, whether an employer has attempted to create, fund, or control a company union. *See Washington State Patrol,* Decision 2900 (PECB, 1988).

Although the Commission has issued few decisions on employer domination, those decisions have generally revolved around whether employers have unlawfully rendered assistance to unions. Examples of such assistance are allowing the free use of employer buildings and resources for union business, providing aid to employees serving as union officers, or favoring one union over another during a representation proceeding. The meaning of the term "domination" is thus directly tied to the term "assistance" and does not imply a cause of action for alleged negative acts directed toward the union or union members.

An employer's actual or attempted control of a union through assistance, ranging from favoritism to a full-fledged company union, is deleterious to the collective bargaining rights of employees; however, those actions are distinct from interference. It's appropriate to file a complaint alleging employer domination or assistance of a union if the facts suggest that the employer is violating the statute through such acts as rendering assistance to a union or union officers, supporting a company union, or showing favoritism to one union over another during an organizing campaign.

Analysis

In this case, the facts alleged do not describe employer domination of the union. Other than referencing the statute, the complaints do not explain or develop this allegation. The complainant states the employer has an active grievance with the ILWU 21 regarding the maintenance work at issue, but this fact alone does not meet the elements necessary to find a cause of action for employer domination. None of the facts alleged in the complaint suggest that the employer involved itself in the internal affairs or finances of the union or that the employer attempted to create, fund, or control a "company union."

Complaint Against the Employer - Skimming

Legal Standard

Historically, the Commission has applied the same standard to cases involving the duty to bargain a decision to contract out bargaining unit work or a decision to assign bargaining unit work to non-bargaining unit employees (skimming). Therefore, discussion of Commission precedent involves both contracting out and skimming cases. Contracting out involves an employer contracting with another entity and having the contractor's employees perform the work. Skimming involves other, non-bargaining unit employees of the employer performing bargaining unit work.

The Commission clarified the standard for these types of cases in *Central Washington University*, Decision 12305-A (PSRA, 2016). As the Commission explained, the threshold question is whether the work that was contracted out is bargaining unit work. *See Port of Bellingham*, Decision 12317-A (PORT, 2015). If the work is not bargaining unit work, then the analysis would stop and the employer would not have had an obligation to bargain its decision to contract out work. If the work was bargaining unit work, then the *City of Richland* balancing test should be applied to determine whether the decision to contract out bargaining unit work is a mandatory subject of bargaining.

There must be an actual unilateral change for a cause of action for skimming to exist. *State – Office of the Governor*, Decision 10948-A (PSRA, 2011). Skimming does not occur until work

has actually been assigned to employees outside of the bargaining unit. Therefore, in a skimming case the statute of limitations does not begin to run until bargaining unit work is assigned to non-bargaining unit employees. *Lake Washington School District*, Decision 11913-A (PECB, 2014).

A complainant's prophecy of future events at the preliminary ruling state of proceedings is insufficient to state a cause of action for a unilateral change. *Kitsap County*, Decision 11610-A (PECB, 2013). In order for a cause of action for a unilateral change to exist, there must have been a change. *Kitsap County*, Decision 11610-A.

Analysis

The complaints alleged the piledrivers in the PNRCC bargaining unit had historically performed the maintenance work in connection with ecology-block walls at the port. The complaints alleged that the ILWU 21 bargaining unit wanted the employer to assign this work to the longshoremen. The complaints failed to identify when the work was moved from the PNRCC bargaining unit to the ILWU 21 bargaining unit and who is now completing the work. The complaints failed to identify an actual transfer of bargaining unit work. The complaints do not state a cause of action for an employer unfair labor practice.

Complaint Against the Union - Inducement of Employer to Commit an Unfair Labor Practice

Legal Standard

RCW 41.56.150(2) makes it an unfair labor practice for a union to "induce the public employer to commit an unfair labor practice." To induce an employer to commit an unfair labor practice, a union must be requesting that the employer do something unlawful. For example, a union cannot demand that an employer discharge an employee for non-payment of a union political action fee or based upon the employee's race, sex, religion, or national origin. *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-A (PECB, 1989). A classic scenario occurs when a union induces the employer to discriminate against an employee based upon union membership. *State – Natural Resources*, Decision 8458-B (PSRA, 2005).

In *Municipality of Metropolitan Seattle* the union was seeking limitations on assignments that were made available to part-time drivers. At the bargaining table, the employer could legally agree to restrict part-time drivers' shifts. The Commission explained that the mere designation of "part-time" status does not bring an employee into a classification protected from invidious discrimination.

Analysis

The complaints stated that the ILWU 21 filed and was pursuing a grievance regarding the work in connection with the ecology-block walls at the port. The complaints lacked supporting facts as to how this was union inducement of the employer to commit an unfair labor practice allegation. There were no facts in the complaints indicating the union asked the employer to commit an unlawful act related to the filing of the grievance. The complaints do not state a cause of action for an employer unfair labor practice.

ORDER

The complaints charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 3rd day of October, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

EMILY K. WHITNEY, Acting Unfair Labor Practice Manager

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

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 10/03/2017

DECISION 12779 – PORT and DECISION 12780 - PORT has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBERS: 129528-U-17 and 129529-U-17

EMPLOYER: PORT OF LONGVIEW

REP BY:
NORMAN KREHBIEL
PORT OF LONGVIEW
10 EAST PORT WAY
LONGVIEW, WA 98632
nkrehbiel@portoflongview.com/360-425-3305

CLEMENS H. BARNES
MILLER NASH GRAHAM & DUNN LLP
2801 ALASKAN WAY STE 300, PIER 70
SEATTLE, WA /98121-1128
clem.barnes@millernash.com/(206) 777-7432

PARTY 2: PACIFIC NW REGIONAL COUNCIL OF CARPENTERS

REP BY:
DOUG TWEEDY
PACIFIC NW REGIONAL COUNCIL OF CARPENTERS
25120 PACIFIC HWY S STE 200
KENT, WA 98032
dtweedy@nwcarpenters.org(253) 945-8800

DANIEL M. SHANLEY
DECARLO & SHANLEY, APC
533 S FREMONT AVE 9TH FL
LOS ANGELES, CA 90071-1706
dshanley@deconsel.com/(213) 448-4100

PARTY 3: ILWU LOCAL 21

REP BY:
WILLIAM ROBERTS
ILWU LOCAL 21
617 14TH AVE
LONGVIEW, WA 98632
wjroberts21@yahoo.com(360) 423-0950

ROBERT H. LAVITT
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT LLP
18 W MERCER ST STE 400
SEATTLE, WA 98119-3971
lavitt@workerlaw.com/(206) 285-2828