STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

In the matter of the Petition of the INLANDBOATMEN'S UNION OF THE PACIFIC for a Declaratory Order.	)	MEC Case No. 3-92
INLANDBOATMEN'S UNION OF THE PACIFIC, Petitioner,	)	DECISION NO. 89 - MEC
	)	PETITION FOR DECLARATORY ORDER DENIED AND DISSENT
WASHINGTON STATE FERRIES and MARRIOTT CORPORATION, Intervenors.	)	

Schwerin, Burns, Campbell and French, attorneys, by John Burns and Bridget O'Rourke, attorneys, appearing for and on behalf of the Inlandboatmens Union of the Pacific.

Joe P. Martin, Law Department, Marriott Corporation, attorney at law, appearing for and on behalf of the Marriott Corporation.

Christine Gregoire, Attorney General, by Robert McIntosh, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

INTRODUCTION AND BACKGROUND

The Inlandboatmen's Union of the Pacific (IBU) has been the recognized sole representative of non-licensed deck personnel on vessels and docks during the entire operation of the Washington State Ferry System (WSF). During at least two regular public meetings of the Marine Employees' Commission (MEC) in 1992, IBU representatives asserted that IBU also represents personnel in the WSF Stewards' Department. At one of these meetings IBU distributed copies of a collective bargaining agreement covering stewards personnel and asked if interpretation of that agreement was within

the jurisdiction of the MEC. Although MEC engaged in brief conversations and asked a few questions about the situation, MEC declined to assert jurisdiction. MEC insisted that said jurisdictional decision could only follow an investigation under chapter 316-02 WAC (Petition for a Declaratory Order), chapter 316-25 WAC (Marine Employees' Representation Rules), and/or chapter 316-35 WAC (Marine Employees' Unit Clarification Rules.)

On May 14, 1992 IBU filed the instant Petition seeking a Declaratory Order that the food service employees on WSF vessels are "ferry employees" for labor relations purposes and are within MEC jurisdiction under chapter 47.64. RCW.

A hearing was held pursuant to RCW 47.64.280 and WAC 316-02-520(b) commencing August 4, 1992 and continued on September 30, 1992 and October 21, 1992.

ISSUES

At issue is whether for labor relations purposes individuals employed in WSF food service concession operations are ferry employees within the meaning of RCW 47.64.011(5) who are subject to the jurisdiction of the Marine Employees' Commission as set forth in RCW 47.64.280.

POSITIONS OF THE PARTIES

Inlandboatmen's Union of the Pacific

IBU states that a Declaratory Order is necessary to clarify whether for labor relations purposes MEC jurisdiction extends to employees performing under the WSF food service concession contract. The union requests a Declaratory Order that MEC jurisdiction extends to the employees working in the WSF food service concession operations

because the WSF acts as their employer by exercising significant control over the terms and conditions of their employment, including but no limited to hiring, firing and regulating employee conduct, assigning duties, conferring wages and benefits and scheduling operating hours. In the alternative, IBU requests a Declaratory Order that WSF and Marriott are dual employers of the employees who work in WSF food service concession operation, and MEC jurisdiction covers these areas in which WSF exercises significant control, including but not limited to hiring, firing and regulating employee conduct, assigning duties, conferring wages and benefits, scheduling operating hours and other terms and conditions of employment.

Washington State Ferries

WSF opposes the IBU's Petition for a Declaratory Order that the employees of WSF's food service concessionaire are subject to the labor relations jurisdiction of the MEC under RCW 47.64. WSF states that Marriott "absolutely" has the power to bargain for terms, wages and conditions of employment with the IBU, and that while the specifications of WSF's contract with Marriott have some impact on wages, hours and working conditions of Marriott employees, such impact is typical of most "independent contractor" situations. The control exercised by WSF does not give it final say with regard to most subjects of bargaining, particularly wages and benefits.

WSF notes that the NLRB has exclusive initial jurisdiction to determine when an employer is subject to its authority, and that WSF does not have the "right of control" over its food service concessionaire employees as that test is applied by National Transportation Service, 240 NLRB 565 (1979) and Tacoma School District, Decision 3314-A (PECB). WSF asks that the MEC find that WSF's food service concession employees are not ferry employees

within the meaning of RCW 47.64.011(5) and are therefore not subject to the jurisdiction of MEC under RCW 47.64.280.

Marriott Management Services Corporation

Marriott submits that the MEC is precluded by law from assuming jurisdiction over its labor relations. It notes that Congress has preempted the area of labor relations between private employers and their union employees regarding interpretation and enforcement of collective bargaining and unfair labor practice matters, and vested exclusive control in the NLRB. Marriott states that the MEC is not permitted to enter the area of exclusive jurisdiction of the NLRB, and that the petition of IBU to the MEC to assume jurisdiction must be dismissed.

DISCUSSION

In May 1991, WSF issued a request for proposals for a new food service concessionaire contract. On October 18, 1991, WSF awarded the WSF 1991-1996 food service concession contact to Marriott.

The food service concession facilities operated by Marriott under the contract are located on WSF property, including WSF vessels and WSF terminals.

The employees who work in the WSF food service concessions are represented by IBU.

IBU argues that the food service employees are supervised in their work in a manner which reflects that WSF exercises pervasive control over significant aspects of the terms and conditions of employment for WSF food service workers.

IBU notes that the NLRB and the courts have looked at the "right to control test" in determining jurisdiction by the NLRB or other bodies. Washington State PERC has used this test to decide whether or not to assert jurisdiction where a private employer is subject to the control of an exempt employer. The "right to control test" is a factual examination based on principles of agency law. The test involves looking at the degree of control exercised by two contracting parties to determine which entity is capable of meaningful collective bargaining. IBU cites Res-Care, Inc., 280 NLRB 670, 122 LRRM 1265 (1986) wherein the Board declined jurisdiction based on the "right to control test" stating

> In applying the test we will examine closely not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employees' labor relations to determine whether employer at issue is capable of engaging in meaningful collective bargaining.
>
> In Res-Care, Inc., 280 NLRB 78 and North Mason, Decision 2428-A at 14 (PERC 1986) the NLRB looked at the public agency's control of basic bargaining subjects such as hiring, firing, supervision, discipline, work assignments and the conferring of benefits. The NLRB considered the contractor's lack of final say concerning the primary economic aspects of its relationship with its employees.

IBU notes that under the current concessionaire/WSF contract WSF acts as the employer by exercising significant control over the stewards' employment conditions. It notes that food service employees are crew members subject to the same kinds of employment conditions as other WSF seamen. The food service employees carry seaman's papers issued by the U.S. Coast Guard. The stewards are subject to the Coast Guard's drug testing policy. The Stewards receive seaman's remedies when they are unable to work due to an occupational injury. The stewards report their injury directly to WSF.

As crew members, the stewards perform official, specifically assigned emergency duties in accordance with WSF posted station bills. The stewards and other crew members practice their emergency duties each week in numerous safety drills including fire drills, rescue drills, and abandon ship drills. The stewards perform these duties during an actual emergency. The Captain of the WSF vessel also counts the stewards as ordinary seaman crew members when necessary in order to meet required manning levels set by the Coast Guard.

All seamen on the ferry, including the stewards, are subject to the control of the Captain or Master. The Captain has the power to make the stewards act. This authority includes the ability to order a steward to get off the ship. Whether the Captain's directives are cast as requests or orders, the ultimate result is the same. As seamen, the steward's department employees must comply with the Captain's instructions or be found guilty of insubordination. If steward's employees decline to follow the Captain's instructions, such an act can result in the imposition of discipline, a fine for violation of the contract, and loss of the seaman's certificate.

IBU notes that the evidence showed that the Captain and/or his Mates have occasionally ordered the stewards to clean the kitchen and dining room. The Captain has closed the galley and prohibited the use of certain galley equipment without prior notice to Marriott. The stewards call the Mate directly for assistance when emergencies arise in the galley. The Captain has also exercised his authority to direct Ordinary Seamen to assist the stewards in the galley in an emergency. This evidence demonstrates that the stewards are crew members who are under the control of the Master of the vessel.

IBU states that the transcript will support a finding that Mr. Firth, the WSF Food Service Manager, is involved in a supervisory capacity in the minute details of the galley operations. Firth functions as a supervisor for the steward's department because Marriott does not employ a working manager on the vessels to supervise the concession operation. Firth actively helps Marriott carry out its service plans. Firth regularly appears on the vessels to see how the stewards are doing and to inquire about concession operations, problems and customer complaints. He is also responsible for monitoring and enforcing Marriott's compliance with the concession contract. These activities involve him in minute daily operational details. The stewards tell him their problems and he responds. According to Firth, the stewards most common concerns pertain to the staffing levels, food deliveries and disputes with other employees. He visits the concessions aboard vessels to respond to specific complaints and to conduct general oversight function.

He reviews and investigates customer complaints and talks with Marriott management about how to resolve these complaints. He stated that he expects Marriott to comply with his suggestions. He also makes sure that Marriott resolves the situation to his satisfaction. Firth has issued directives to the stewards. He has occasionally asked the stewards to clean areas of the kitchen or dining room. Firth expects his requests to be followed. In reference to a sanitation incident aboard a vessel which nearly resulted in the imposition by WSF of a fine against Marriott, Firth stated that Marriott had been repeatedly warned orally, and finally "I went down and gave them a written warning and said, you have got to clean the floors."

Such evidence as listed above demonstrates, according to IBU, that Firth is involved in a supervisory capacity in the daily operational details of the steward's department.

IBU argues that WSF intentionally retained more control over the concessionaires under the 1991 contract by reducing the concession fee and adding contractual enforcement mechanisms. Under previous contracts the lack of control over concessionaires was problematic for WSF. Firth had recommended to WSF that the ferry system operate more control under the terms of the 1991 contract. He recommended that WSF hire a Food Service Manager. He further recommended that WSF retain the right to have input into hours of operation and staffing levels. He wanted WSF to have the right to approve steward's department uniforms. He states, "I clearly wanted them to understand that there were going to be requirements that it be acceptable based on appearance."

IBU asserts that WSF controls hiring, firing, operating schedules, staffing levels, the physical work environment and other terms of employment for the stewards. WSF requested that Marriott hire all the existing work force of stewards at the time it was awarded the concessionaire contract, in order to prevent a disruption in service. WSF wrote the contract term as a preferential hiring provision, but the practical effect was that WSF imposed the work force on Marriott.

Also, at WSF's request, Marriott agreed to be bound by the predecessor's collective bargaining agreement. In this way, WSF imposed significant employment terms for the stewards on Marriott, including job classifications, wages and benefits. The stewards seniority rights are also carried over so that seniority was based on the individual's original date of hire in the Steward's Department.

WSF representative Firth, is informed of any new hiring and all firing. He has the ability to make Marriott discipline a steward for failure to obey WSF orders, or for other contract violation, including failure to provide courteous service. Firth can

influence the hiring and firing of stewards through his ability to remove Marriott management personnel from the WSF contract operation.

WSF also controls the hours of operation and staffing levels of the food service concessions. Marriott proposes an operating schedule and a staffing level for each ferry, but WSF, through its representative Firth, has the final say in both of these areas.

WSF also controls the physical work environment in the galley. When emergencies occur, the stewards call the Mate, or Firth if he is available. The Captain has closed the galley or prohibited the use of equipment. In addition, WSF has the right to approve all plans to change the galley.

WSF directly imposed the stewards' initial wages and benefits on Marriott, and WSF admits that it controls the contract's profitability. The state (WSF) has unlimited control over menu prices. Other aspects of control which shape profitability include the carry over of employment benefits and terms from previous labor contracts and WSF's contractual enforcement mechanisms. The combined effect of WSF's right to control in these areas is significant. The profitability of the concession contract is a determining factor in negotiating stewards' wages and benefits. As a result, Marriott's bargaining position on wage and benefit issues substantially depends on WSF. The union argues that it is WSF, not Marriott which is capable of meaningful collective bargaining with the IBU over wages and benefits.

IBU concludes its argument with the statement that MEC has the express authority to assert jurisdiction over food service employees and that it should assert its jurisdiction in order to implement declared state labor policy regarding the prevention of strikes and other disruptions to ferry operations. It concludes

that MEC jurisdiction is appropriate because WSF acts as the stewards' employer by exercising significant control over their employment conditions.

Marriott Corporation

Marriott, a private employer, states that its union employees are direct employees of Marriott and are not employees of the state of Washington or any other public employer. Marriott submits that the MEC is precluded by law from assuming jurisdiction over its labor relations. Marriott argues that Congress has preempted the area of labor relations between private employers and their union employees regarding interpretation and enforcement of collective bargaining, and unfair labor practices, and has vested exclusive control in the National Labor Relations Board (NLRB). The MEC is not permitted to enter the area of exclusive jurisdiction of the NLRB.

Marriott argues that IBU has engaged in collective bargaining with Marriott on behalf of its employees and also with SAGA, a company acquired by Marriott in 1986. During the collective bargaining process between the union and SAGA, neither the state of Washington or any other public entity of the state participated in the negotiations. At all times, Marriott has had the power to bargain with the union over wages, terms and conditions of employment without the participation or approval of the State.

Marriott argues that any state law which is substantially dependent on analysis of the terms of an agreement between the parties to a labor agreement is preempted by the National Labor Relations Act. Marriott notes that jurisdiction over allegations of unfair labor practices were vested by Congress in the NLRB to the exclusion of jurisdiction of state agencies and courts and by federal courts. Only the NLRB can hear and decide unfair labor practice allegations by a union against a private employer. The Supreme Court has held

that when an activity is arguably subject to §7 or §8 of the NLRA, the states as well as the federal courts must defer to the exclusive competence of the NLRB.

Marriott notes that the NLRB abstains from exercising its exclusive jurisdiction over private employers and their unions only when a private employer cannot effectively bargain with its union over wages and terms and conditions of employment because an exempt state employer effectively controls the bargaining. Marriott argues that in this case, based on this record, it is uncontested that Marriott and its predecessors as concessionaires have been able to effectively bargain with the union over wages and hours and conditions of employment, and for that reason, the union's petition must be dismissed.

Washington State Ferries

WSF argues that the NLRB has exclusive initial jurisdiction to determine when an employer is subject to its authority. The IBU's Petition for a Declaratory Order must therefore be dismissed.

WSF argues further that it does not have the right of control over its food service concessionaire employees as that test is applied by National Transportation Service, 240 NLRB 556 (1979) and Tacoma School District, supra. It does not have final say over "core" subjects of bargaining.

WSF food service employees are not ferry employees within the meaning of RCW 47.64.011(5) and are therefore not subject to the jurisdiction of MEC under RCW 47.64.280.

RCW 47.64.090 does not apply to Marriott's food service operations on board the vessels of WSF.

WSF notes, and the parties agree, that for at least thirty years, food service operations on WSF vessels have been run by private concessionaires.

When Marriott resumed its role as WSF food service concessionaire in November of 1991, it discussed collective bargaining issues with the IBU, both prior to and after its takeover. In those discussions, Marriott never told representatives of the IBU that it lacked the power to effectively bargain with them. Marriott never said to IBU members and negotiating committee participants that it lacked the power effectively to bargain with the IBU. IBU in discussing collective bargaining issues with Marriott never brought WSF into the discussions. During these discussions, IBU never said that it lacked the power to bargain effectively with Marriott.

Marriott "absolutely" has the power to bargain for wages, terms and conditions of employment with the IBU. WSF has never told Marriott what it could and couldn't bargain for.

Compared to other contracts in the food service industry, the current contract between Marriott and WSF is only average or below average in the amount of control it exercises over Marriott's operations. Marriott's IBU member employees are not the only non-WSF employees who work on WSF vessels.

While the specifications of WSF's contract with Marriott have some impact on wages, hours and working conditions, such impact is typical of most independent contractor situations. WSF notes Tacoma School District, Decision 3314-A (PECB, 1990) in support of its position. The control exercised by WSF does not give it final say with regard to most subjects of bargaining, particularly wages and benefits. WSF's requirement that Marriott give preferential hiring status to employees of the former concessionaire is not absolute by its terms, has not been so applied in practice, is

normal in food service and independent contractor agreements, and does not prevent Marriott from bargaining effectively with its employees. Marriott employees listed on vessel station bills and participating in emergency drills consume small amounts of time, are similar to emergency duties of other food service personnel and do not prevent Marriott from bargaining effectively with its employees. The requirements that Marriott employees abide by Coast Guard rules and obtain Coast Guard seaman's documents is irrelevant because these are not WSF requirements and do not interfere with Marriott's ability to bargain effectively with its employees. Furthermore, such requirements (to comply with federal safety agency rules and regulations) are common in food service and other concessionaire contracts.

WSF's requirement that it approve Marriott's proposed changes and hours of galley operations, leave Marriott with discretion in determining hours its employees work, is weaker than most concession contract clauses, and does not prevent Marriott from bargaining effectively with its employees. Except for the WSF vessel master who has overall (and barely exercised) authority over his vessel equivalent to that of a high school principal or other agency administrator over his school or agency employees, WSF has no authority to direct or control Marriott employees. WSF's requirement that Marriott continue the terms and conditions of its predecessors collective bargaining agreement until it could negotiate a new one is common in the food service industry, was limited to the period of time before new terms and conditions of employment could be negotiated and was designed to benefit IBU members and ferry riders by avoiding labor unrest during the period of concessionaire changeover. It did not prevent Marriott from bargaining effectively with its employees. WSF's power to fine Marriott for contract violations is less harsh than the industry standard remedy, has never in actual practice been exercised, and does not interfere with Marriott's ability to bargain collectively

With its employees. WSF's right to approve price changes by Marriott is normal in the industry, is limited to review for comparability with other food service providers and does not effect Marriott's ability to bargain effectively with its employees. In many ways, Marriott has much more control of its employees and its collective bargaining than most food service concessionaires and other independent contractors. It provides its own galley equipment. It does not have to provide free meals to WSF employees. It determines its uniforms and dress code, subject only to WSF approval. Marriott makes all firing and hiring decisions for its employees. WSF's only authority is to request transfer, not firing, of Marriott's management personnel, the power that most contracting agencies exercise over their concessionaires. Furthermore, the power to request transfer of management personnel has never been exercised. As to non-management personnel, WSF has no hiring, firing or transfer powers. WSF exercises no control over Marriott employees' wages, benefits or other terms or conditions of employment.

WSF argues that the case should be dismissed because the NLRB has presumptive jurisdiction and cites Newport News Shipbuilding and Drydock Co. v. Schauffler, 303 U.S. 54, 82 L.Ed. 646, 58 S.Ct. 466 (1938). The IBU in WSF's opinion should have therefore gone first to the NLRB with its petition. It notes this procedure was followed by North Mason School District, PERC Decision No. 2428A (PECB 1986). Before the case came to PERC, the NLRB had already declined to assert jurisdiction over Laidlaw Bus Company. WSF states that in reference to the above, the IBU should have gone first to the NLRB.

WSF argues that rules for determining the true employer for purposes of NLRB or Public Employment Commission (PERC) jurisdiction have been developed by both agencies. PERC has addressed this issue most frequently and definitively in Tacoma

School District and North Mason School District. It notes essentially the right to control analysis used by the NLRB in several of its decisions (see National Transportation Services, 240 NLRB 565 (1979)). The issue before this Commission is whether these reservations of authority made by the purchaser of the services are in keeping with its role as a purchaser of services, or an exercise in control as an employer of the employees rendering the services. In the above cases, PERC noted that contract specifications restricting the private firm's total control or having a severe impact on such control should cause the Commission to invoke its jurisdiction. Such a rule carried to its logical conclusion would make the public entity an employer in every independent contractor situation. According to PERC, "the lode star of our analysis in North Mason was a concept of the final say over core subjects of bargaining. We did not hold that mere impacts on bargaining or restrictions reserved to the public entity and contract specifications, however dire, would be the key factor. It is only such retained control as would be equal to a veto power or a final say that would trigger sufficient control to explode the private contractor's independent status, and target the public entity as the true employer."

WSF states that the NLRB has applied a similar test phrased somewhat differently. According to the NLRB, the single appropriate standard in determining whether it should assert jurisdiction over an employer with ties to an exempt entity is whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization. According to the NLRB

> When an employer lacks the ultimate authority to determine primary terms and conditions of employment, it lacks the ability to engage in the necessary give and take which is a central requirement of good faith bargaining, and which makes bargaining meaningful.

Therefore, in reference to bargaining subject areas, the right to control requires more than just an impact on bargaining.

WSF argues that, if anything, the contracting agency's control in ARA Services, 283 NLRB 602 (1987) was greater than that exercised by WSF over Marriott. It notes that WSF's contract with Marriott has no restrictions in layoffs. Unlike the contracting agency in ARA Services, WSF has not rejected any of Marriott's management personnel. WSF does not require that Marriott's employees adhere to its personnel policies or contract rules, and WSF does not provide Marriott with kitchen appliances and utensils.

It is WSF's position that when the test used by PERC and the NLRB in ARA Services, Long Stretch Youth Home, Inc., 280 NLRB 678 (1986) and Tacoma School District are applied in this case, it is clear that WSF exercises less control over Marriott than was exercised by the purchasers of service in each of those cases.

WSF argues further that Article VIII A.6 of the concession contract merely requires Marriott to give preferential hiring status to non-management of the State's predecessor food service concessionaire. Nor did Marriott interpret it as a requirement to hire. In at least one case, they chose not to do so.

WSF notes that the uncontradicted evidence in this was that granting of such hiring preferences is the rule rather than the exception in the food service industry. Such preferences existed in both the ARA Services and Tacoma School District cases.

WSF notes in reference to the participation of Marriott employees in WSF emergency drills that Marriott employees' participation is not required to make the drills effective or safe. Their participation is not required by the Coast Guard and is frequently not possible at all since some vessels do not carry Marriott

employees, and many vessels do not carry them at certain hours of the day or night.

WSF notes that it is normal for food service employees to participate in fire drills at public schools, and that the Federal Department of Energy at the Hanford Reservation has the equivalent of station bills indicating that various personnel, whether they were employees of Westinghouse or at that point food service employees, what their responsibilities were in the various emergencies, would indicate that it's very common.

WSF argues in reference to its requirement for Marriott employees to comply with some Coast Guard requirements that concessionaire employees have to have Coast Guard seaman's documents, but unlike WSF employees they do not need life boat tickets, and even the seaman documents currently issued to Marriott employees are different from that of most WSF employees. Marriott employees on board WSF vessels also have to abide by all rules and regulations of the United States Coast Guard and they may, in occasional emergencies, be used to meet the crew requirements of the Coast Guard's certificate of inspection for their vessel. But, these Coast Guard certificates do not include any galley personnel by inference, by name, or any other shape. They permit, but do not require a certain number of additional crew members to be carried. But it is only in an emergency that a Marriott employee may be used to fill in for a certificate specified crew member, and in such an emergency that it is not only Marriott employees who may be asked, but that passengers as well have been used for this purpose.

WSF refers to Food Service Manager Firth's statement that concessionaire employees are frequently subject to governmental regulations of a scope and severity comparable to those of the Coast Guard. It argues that the crucial effect about all Coast Guard requirements is that they are requirements of the Coast

Guard, not WSF. Since they are imposed by a third party, they are not relevant to the right to control test in Tacoma School District and Long Stretch Youth Home.

WSF argues that WSF does not direct, determine or approve the hours that any Marriott employee works, except for specifying the initial hours of galley operation, WSF therefore merely approves galley operation hours proposed by Marriott. Nor does it tell Marriott how many people it should employ. It can only make recommendations to Marriott management. It argues that control of hours of operation is nearly universal in the concessionaire industry and that WSF's clause is actually much weaker than many clauses you would find. It argues further that PERC and NLRB have refused to recognize this sort of control as an indicator of employment. See Tacoma School District, ARA Services and Old Dominion Security, 289 NLRB 81, 83 (1988).

Mr. Firth or any other WSF representative can only recommend changes in food deliveries, cleaning of dirty galleys, and particular responses to customer complaint cards. Firth testified that when he makes a recommendation to Marriott, "they may or may not do it." Firth further stated, "I have never told a Marriott or a Restaura employee to do anything."

WSF notes that the employment requirement inserted in its contract with Marriott was to prevent labor unrest during the difficult period of transition between concessionaires. It was intended to prevent Marriott from unilaterally changing wages or working conditions. Nothing in the clause required Marriott to abide by the existing collective bargaining agreement until its expiration. Nor apparently did Marriott interpret it this way since both before and soon after its takeover it met with IBU to discuss labor issues. The concessionaire contract would not have prevented Marriott, had it chosen to do so, to open new collective bargaining

negotiations as soon as it began work on WSF's vessels. All that the section prohibited Marriott form doing was changing wages, hours and working conditions without first bargaining with the union about such changes.

According to WSF, the clause in reference to its power to fine Marriott for contract violations, came about when legal considerations deprived WSF representative Firth of his desired opportunity to reward good performance with cash payments. It has never been exercised; it is limited to instances of material contract breach by Marriott.

WSF states in reference to its right to approve price changes by the concessionaire that it does have an effect on Marriott's profitability, but its price approval authority is tied to an objective standard, that Marriott's prices be competitive with comparable concession operations near appropriate ferry system terminals. If Marriott's prices are comparable to those of comparable vendors, the IBU's ability to bargain with Marriott should be equal to those of the employees of such vendors. It agrees that the contract provision restricts Marriott's total control of its operations. Such an argument was specifically rejected by PERC in Tacoma School District. PERC concluded in its case that "only such retained control as would be equal to a veto power or a final say would trigger a transfer of employment status to the contracting agency." WSF notes that no such retained control exists in this case. Marriott cannot gouge its customers on prices, but it can fully negotiate wages and working conditions with its employees, as long as it doesn't use price gouging to pay for its wage settlement. It would be unreasonable not to expect WSF to impose such a restriction, and in fact, most food service clients retain the right to approve price changes. It notes that if a contracting agency cannot set maximum prices according to

objective standards, why do the above referred to cases permit setting minimum or maximum wages.

WSF states the reasons for its position in this matter, that IBU's alleged instances of WSF control are merely "those reservations of authority which PERC in Tacoma School District found to be in keeping with the District's role as purchaser of services. It would argue further that WSF does not treat Marriott's employees as if they were its own employees. It plays no role in the setting of wages and benefits for Marriott employees. It has no role in the discipline of Marriott employees, despite the fact that Tacoma School District allowed a contracting agency to play a disciplinary role without becoming an employer. Further, WSF has no role in the hiring or firing of Marriott's non-management personnel, despite the fact that Tacoma School District allowed the school district to require a union member's dismissal from district service without becoming an employer. The record reveals that WSF does not treat Marriott as it treats its own. WSF's employees get half price meals at its expense. Marriott employees get free meals at Marriott's expense. WSF employees get full ferry passes. Marriott workers get work-only passes.

WSF argues that RCW 47.64.090 does not apply to Marriott or its employees. Marriott assumes certain limited rights to certain galley spaces on some ferry vessels. Its concession is not a rent, lease or charter under RCW 47.64.090; instead it is a concession referred to and entered into under the specific provisions of another statute—RCW 47.60.140. The statute, by its own terms, applies only to situations where any party assumes the operation and maintenance of any ferry or ferry system by rent, lease or charter. (Emphasis added.)

WSF argues that IBU's request to grant MEC jurisdiction to non-employees of WSF would usurp NLRB federal jurisdiction in a manner

prohibited by the supremacy clause of the United States Constitution. That clause, article 6 requires that where a federal statute or agency has occupied a field, either expressly or by implication, a state statute or entity may not trespass upon the federal jurisdiction. See Rose v. Arkansas State Police, 479 U.S. 1, 107 S.Ct. 334, 93 L.Ed. 2d 183 (1986).

In summary, WSF states that the IBU bargained, negotiated and signed contracts with Restaura, Marriott and WSF, all without even suggesting that it was doing so with a party lacking authority to enter into such contracts. Acting in reliance on these IBU actions, Marriott and WSF signed a concession agreement that created long term obligations for both, based on the assumption that the IBU member employees were what the IBU has acted as if they were, employees of Marriott. It notes that if IBU is allowed to repudiate its course of conduct, both WSF and Marriott will be injured. Marriott will lose its right to negotiate under NLRB jurisdiction, without compulsory interest arbitration, and WSF will incur the expense and time of a new round of collective bargaining negotiations.

WSF concludes, in reference to the above, that the doctrine of estoppel was made to prevent such a rude and shocking about-face, that the only proper and legal way for the IBU to raise such an issue is to do it as part of the bargaining process. Then, if it cannot obtain agreement to its proposals, to take its theories about the proper employer to the NLRB.

Finally, the WSF asks the MEC to find that the NLRB has exclusive initial jurisdiction to determine when an employer is subject to its authority, and that WSF does not have the right of control over its food service concessionaire employees as that test is applied by National Transportation Services and Tacoma School District in that it does not have the final say over core subjects of

bargaining. WSF requests that IBU's Petition for a Declaratory Order should be denied.

CONCLUSIONS

After a careful review of the record in this matter, the briefs cited and the pertinent law, the MEC reaches the following conclusions:

Based on the record (Food Service Manager Firth's testimony) we conclude that in the absence of a first- line Marriott supervisor on the job, Firth performed some of the duties of a first-line supervisor for the concessionaire. Firth regularly appears on the vessels to see how the stewards are doing, to inquire about concession operations, customers' complaints and other problems. He is also responsible for monitoring and enforcing Marriott's compliance with the concession contract. These activities involve him in the daily operational details. The stewards tell him their problems and he responds. He reviews and investigates customer complaints and talks with Marriott management about how to resolve the complaints. He also makes sure that Marriott resolves the situation to WSF's satisfaction. He issues directives to employees in the Steward's Department. He has asked employees to clean areas in the galley and dining room.

In the area of direct supervision in this instance, we conclude that WSF exercises some supervisory control of the employees in the Steward's Department.

We conclude that the supervision of food service personnel by a Master or Mate during the weekly fire and emergency drills is part of the obligation to abide by USCG rules and regulations.

In ARA Services 283 NLRB 602 (1987), the NLRB in its decision noted that the agency required the concessionaire to offer employment to all then current university food service employees at salaries equal to or greater than those they were receiving. The agency required the concessionaire to attempt to accomplish any reduction in current staff by attrition. The agency required the concessionaire to offer current employees a benefit package specified by the university. The agency specified the hours of operation for the cafeteria. The agency required that certain types and quality of food be served. The agency reserved the right to approve or disapprove the food service manager, and rejected three applicants for the position. The agency offered offices, telephones, appliances, and kitchen utensils. The concessionaire's employees were required to abide by the agency's employment and personnel contract rules. Despite all these elements of agency control over concessionaire employees, the Board found that these employees remained those of the concessionaire, not the contracting agency.

We note tat the NLRB follows a single appropriate standard in determining whether it should assert jurisdiction over an employer with ties to an exempt entity. The standard is whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization.

FINDINGS OF FACT

1. WSF has provided food service to passengers on some of its vessels throughout its operation vis a vis several concessionaires. Currently that concessionaire is Marriott Management Services Corp. pursuant to a Food Service Concession Contract, effectively November 16, 1991 through November 15, 1996.

2. The Concession Contract specifies that "the STATE (WSF) hereby leases to the CONCESSIONAIRE (Marriott) and the CONCESSIONAIRE hereby hires and leases from the STATE certain concession space at STATE-approved locations and in terminals owned and/or operated by the Ferry System . . ."

3. The Concession Contract specifies that Marriott acts as an independent contract, as follows:

III.

INDEPENDENT CONTRACTOR

> The parties declare that the CONCESSIONAIRE and any employees of the CONCESSIONAIRE, in the performance of this Contract, are acting as independent contractors and not in any manner as officers or employees of the STATE. Any and all claims that might arise under any Workmen's Compensation Act on behalf of the CONCESSIONAIRE'S employees or other persons under the CONCESSIONAIRE'S direction or control, while performing any of the CONCESSIONAIRE'S work or services described herein, shall be the sole obligation and responsibility of the CONCESSIONAIRE.

4. Section VI, A., 1. of the Concession Contract requires Marriott to "develop and submit . . . operating schedules to the STATE . . .and the STATE shall have sole discretion to approved the schedules as submitted . . [t]he STATE reserves the right, without any liability whatsoever, to require further adjustments to an operating schedule at any time after its implementation. . . ." The contract is silent regarding authority for the shift or watch assignments of individual or classifications of food service personnel.

5. Section VI, A., 3. governs food service employees' compliance with USCG regulations and orders from "authorized personnel," as follows:

> Require [Marriott] employees working aboard a Ferry System vessel to abide by (i) all rules and regulations of the State of Washington and the United States Coast Guard governing the CONCESSIONAIRE'S employees while on duty aboard such vessel; and (ii) all proper orders by authorized personnel issued pursuant to such rules and regulations. (Emphasis added.)

6. Section VI, A, 5 and 6 required Marriott to comply with the then existing agreement between the predecessor concessionaire (Restaura) and IBU until Marriott had opportunity to negotiate new agreements, and to give preferential hiring status to non-management Restaura employees. Marriott did negotiate a "Labor Agreement" with IBU, effective July 1, 1991 through June 30, 1994, executed on August 5, 1991. IBU currently represents 156 food service personnel working on WSF ferries.

7. Rule 3.01 of the Marriott/IBU Agreement recognizes the preferential hiring requirement cited in FF 6, above, and establishes a modified "hiring hall" procedure for subsequent hiring, as follows:

> The employer (Marriott)recognizes that the Union is a source of obtaining new employees. The Employer shall, before hiring applicants without previous employment in the Maritime Food Service Industry, check with the Union as to the availability of personnel. The Employer may reject any applicant who is deemed unsatisfactory. The Employer may otherwise hire from any source he chooses. Before a new, re-employed or reinstated employee reports to work on a vessel, they must first present a signed statement from the Union to the employer stating that they acknowledge their understanding of obligation to pay initiation fees and monthly dues.

8. The Marriott/IBU Agreement is silent regarding direct supervision of food service employees, except that "management rights" are retained by Marriott in Rule 28. While WSF shares some first line supervisory controls with

Marriott, we find that such control is not sufficient to override Marriott's final say in reference to core bargaining issues with IBU.

9. Resolution of disputes between/among food service employees, IBU and Marriott are substantially equivalent to those in the IBU/WSF Agreement covering deck employees:

> Rule 12 prohibits strikes, lockouts or stoppage of work.
>
> Rule 13 creates a "Joint Labor Relations Panel" to "enhance employer-employee communications.
>
> Rule 14 describes the steps in the grievance procedure.
>
> Rule 15 governs arbitration following unsuccessful "in-house grievance procedures." Unless the parties agree upon the selection of an arbitrator, the Federal Mediation and Conciliation Service is specified as the source of arbitrators, similar to the specifications in the IBU/WSF Agreement covering deckhands.

10. Food service personnel working in WSF terminals are members of and represented by the Hotel, Motel and Restaurant Workers Union, Local 8, and are not involved in the present matter.

11. RCW 47.64.011(5) defines <u>ferry employee</u> as follows:

> 47.64.011 Definitions.
> …
> (5)"Ferry employee" means any employee of the marine transportation division of the department of transportation who is a member of a collective bargaining unit represented by a ferry employee organization and does not include an exempt employee pursuant to RCW 41.06.079.

(NOTE: The exemption pursuant to RCW 41.06.079 refers to Washington State merit system employees and is not considered relevant to the instant matter.)

12. Black's Law Dictionary, 5th Ed., (1979) defines the word employee as follows:

> **Employee**. A person in the service of another under any contract of hire, express or implied, oral or written where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed. Riverbend Country Club v. Patterson, Tex. Civ. App., 399 S.W.2d 382, 383. One who works for an employer; a person working for salary or wages.
>
> Generally, when a person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee."
>
> "Servant" is synonymous with "employee". Gibson v. Gillette Motor Transport, Tex. Civ. App., 138 S.W.2d 293, 294; Tennessee Valley Appliances v. Rowden, 24 Tenn. App. 487, 146 S.W.2d 845, 848. However, "employee" must be distinguished from "independent contractor," "officer," "vice-principal," "agent," etc.
>
> The term is often specially defined by statutes (e.g. workers' compensation acts; Fair Labor Standards Act), and whether one is an employee or not within a particular statute will depend upon facts and circumstances. (Emphasis added.)

13. We find, however, that in order to assert jurisdiction in this case, MEC must find that WSF retains control of the core bargaining subjects in its contract with the concessionaire (Marriott). We find to the contrary that with the exception of some first line supervision, of the steward's department (shared with Marriott), Marriott has the final say with regard

to most subjects of bargaining and particularly wages and benefits.

We rely on the test as cited in Res-Care, Inc., 280 NLRB 670, in which the NLRB looked at the public agency's control of basic bargaining subjects such as hiring, firing, supervision, discipline, work assignments and the conferring of benefits.

14. We find that with the exception noted in reference to first-line supervision of the steward's department employees, the control exercised by WSF does not give it final say with regard to most subjects of bargaining, particularly wages and benefits. Accordingly, we find that Marriott Corporation retains control of the core subjects of bargaining between itself and IBU. (Emphasis added.)

Having made the foregoing findings of fact, the MEC now enters the following conclusions of law:

CONCLUSIONS OF LAW

1. MEC has general jurisdiction over the labor/management relations between and among the employees' labor unions of Washington State Ferries pursuant to Chapter 47.64 RCW, particularly RCW 47.64.006, 47.64.011 and 47.64.280; also, RCW 34.05.500 and WAC 316-02-300.

2. MEC does not have jurisdiction over labor relations matters between Marriott Corporation and IBU.

3. Marriott Corporation has and continues to exercise control over core subjects of bargaining concerning its steward department employees with IBU.

The MEC having reached the foregoing findings of fact and conclusions of law, now enters the following order:

ORDER

The petition of IBU for a declaratory judgment, filed on May 14, 1992, is hereby denied.

DONE this 16th day of March, 1993.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

DISSENTING OPINION

Although I agree with most of the majority's discussion of the parties' positions and findings of fact, I disagree with their exclusion of certain material facts, their failure to discuss those facts and/or reach conclusions of law concerning those facts, and with their final decision which, in my opinion, results from said failure. Therefore, the following dissent from their resulting dismissal of the Petition for a Declaratory Order is necessary.

I agree with the majority that IBU has not proven by a preponderance of evidence that the food service employees employed by the Marriott Corporation are "ferry employees" pursuant to a strictly literal interpretation of RCW 47.64.011, namely that those food service employees are not "employees of the marine transportation division of the department of transportation…."

I also agree that IBU and Marriott have successfully reached a collective bargaining agreement without interference or hindrance from WSF.

The majority have obviously stopped their findings and reasoning with those two sets of facts. Their failure to consider anything else has led them to the conclusion of law that the Marriott food service employees do not enjoy the protection of chapter 47.64 RCW.

However, the majority has completely ignored two other sets of material facts.

ADDITIONAL FINDINGS OF FACTS

First, it is a fact, and it is material to the IBU Petition, that Marriott Management Services Corporation is a lessee, as stated in the Washington State Ferries 1991-1996 Food Service Concession Contract as follows:

> **NOW, THEREFORE**, in consideration of the terms, conditions, covenants, and performances contained herein or attached, incorporated and made a part hereof, the parties hereto agree as follows:
>
> I.
>
> DESCRIPTION AND USE OF PREMISES
>
> A. The STATE [WSF] hereby leases to the CONCESSIONAIRE [MARRIOTT] and the CONCESSIONAIRE hereby hires and leases from the STATE, certain concession space at STATE-approved locations aboard vessels and in terminals owned and/or operated by the Ferry System as more specifically described below. The amount of concession space allocated to the CONCESSIONAIRE will vary from location to location depending on available space and market conditions. All such concession space is subject to the pre-approval of an authorized STATE representative. The actual concession spaces approved by the STATE at all such Ferry System locations, both individually and collectively, are hereinafter referred to as the "Concession Premises." (Emphasis added.)

. . .

Second, it is a fact, and it is material to the IBU Petition, that RCW 47.64.090 extends the coverage of chapter 47.64 RCW and the responsibilities of this Commission to certain employees who are not employed by WSF, as follows:

> **47.64.090 Other party operating ferry by rent, lease or charter subject to chapter - Working conditions - Adjudication of labor disputes.** If any party assumes the operation and maintenance of any ferry or ferry system by rent, lease or charter from the department of transportation, such party shall assume and be bound by all the provisions herein and any agreement or contract for such operation of any ferry or ferry system entered into by the department shall provide that the wages to be paid, hours of employment, working conditions and seniority rights of employees will be established by the marine employees' commission in accordance with the terms and provisions of this chapter and it shall further provide that all labor disputes shall be adjudicated in accordance with chapter 47.64 RCW. [1983 c 15 sect. 46.64.090. Prior: 1949 c 148 sect. 8; Rem. Supp. 1949 sect. 6524-29].

Having entered the foregoing additional findings of fact, I now submit certain conclusions of law in opposition to those of the majority as follows:

CONCLUSIONS OF LAW

1. The Marine Employees Commission (MEC) has authority to enter a declaratory ruling in this matter. Chapter 47.64 RCW; particularly RCW 47.64.006, 47.64.011, 47.64.090 and 47.64.280; also RCW 34.05.500 and WAC 316-02-300.
2. MEC must conclude that WSF is a lessor and Marriott is a lessee of the food services system aboard twenty-two (22) ferries and several ferry terminals, a substantial and integral part of ferry operations. WFS/Marriott Contract, cited in the First Finding of Fact, supra. The references to labor relations continued in RCW 47.64.090

are requirements for inclusion in an agreement between WSF and a lessee. MEC must recognize, of course, that it has no authority to dictate contractual language to WSF and Marriott. However, MEC must analyze all the relevant provisions of chapter 47.64 RCW in reaching a decision on the instant Petition. RCW 47.64.090 does provide a very clear expression of the rights of employees of WSF lessees. Even though Marriott has not leased an entire ferry nor an entire terminal, basing a refusal to consider RCW 47.64.090 on that fact constitutes a shallow reading of chapter 47.64 RCW. RCW 47.64.090 requires that MEC recognize and order that "the wages to be paid, hours of employment, working conditions and seniority rights of employees" be established in the same manner as if said employees were WSF "ferry employees" pursuant to RCW 47.64.011(5).

3. RCW 47.64.090 also puts an additional burden on the Marine Employees' Commission. The proviso therein that "all labor disputes shall be adjudicated in accordance with chapter 47.64 RCW" demands that MEC assume jurisdiction of such labor disputes. RCW 47.64.280(2) and (3). To ignore that responsibility would fly in the face of Washington's statutory policy since 1949. RCW 47.64.090.

4. MEC must turn aside the argument that MEC must deny the IBU Petition on the grounds that the National Labor Relations Board, not MEC, has jurisdiction over privately employed persons. The duties of this Commission are specified in both RCW 47.64.090 and 47.64.280. Even though the requirement "that all labor disputes shall be adjudicated in accordance with chapter 47.64 RCW" (RCW 47.64.090) pertains to the contract and lease between WSF and Marriott, the duty of MEC is so clear that it cannot be denied. The highest ranking duty of this Commission

is to comply with the statute which created and empowered the Commission in the first place, until and unless a court or other higher authority relieves the Commission of that duty.

5. IBU v. WSF, MEC Case No. 4-85, Decision No. 22, does not provide a precedent in the present matter. MEC Decision No. 22 was entered by an outside examiner pursuant to 1985 law and rule. Neither party to that case filed a petition for review by MEC pursuant to 316-45-350; therefore, no cause arose to prompt Commission review of that examiner's decision.

6. MEC should not acknowledge that the expressed WSF fear of unintended consequences has any merit. WSF Food Service Concession Contract; see XX, Taxes and Assessment; XXI, Contract Security; XXII, Insurance; XXIII, Indemnification. Whether MEC or the National Labor Relations Board oversees the labor relations of these food service personnel has no bearing on whether Marriott or WSF pays taxes based on salaries. Ibid; XXII, Insurance.

7. Res-Care, Inc., 28 NLRB 760, and other citations on which the majority relied pertain only to direct, first-hand control of employees. None of them direct a state labor relations agency in the circumstance where the private contractor is a lessee of the state facilities it is operating. MEC should reject those citations and comply with its own statute. RCW 47.64.090.

8. In my opinion MEC must reject the WSF argument that its contract/lease with Marriott was made under RCW 47.60.140 and not 47.64.090. Even a casual reading of RCW 47.60.140 shows that it enables WSF to lease real property. RCW 47.64.090, on the other hand, applies to the agreement between WSF and its lessee if and when a lease is executed.

9. Because MEC has only considered evidence involving Marriott employees in this matter, the resulting declaratory order shall have no force and effect on other privately employed persons working on ferries or in the terminals.

Having read the entire record, heard the oral evidence and arguments, and carefully considered the majority decisions, I now enter the declaratory order which I believe MEC is required to reach, as follows:

DECISION AND DECLARATORY ORDER (MINORITY OPINION)

I. The Marine Employees' Commission hereby declares that the food service workers employed by the Marriott Management Services Corporation and working on vessels and in terminals owned and operated by Washington State Ferries are entitled to the same rights in labor-management affairs as are enjoyed by "ferry employees" as defined by RCW 47.64.011(5); PROVIDED that the foregoing declaration does not and is not intended to extend retirement, sick leave or other benefits provided specifically to and for State of Washington employees; and PROVIDED FURTHER that Commission review for compliance with fiscal limitations pursuant to RCW 47.64.190 is not appropriate for Marriott/IBU agreements.

II. The Marine Employees' Commission further declares that all labor disputes between the Marriott Management Services Corporation and the non-management food service employees working aboard Washington State ferry vessels

and in ferry terminals and their representative union shall be adjudicated in accordance with chapter 47.64 RCW.

DONE this 16th day of March, 1993.

MARINE EMPLOYEES' COMMISSION

/s/ LOUIS O. STEWART, Commissioner